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[Weekly Reporter, Oct. 25, 1890.]

THE

WEEKLY REPORTER,

1889-90

(THIRTY-EIGHTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1889, TO THE 12TH OF AUGUST, 1890.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

DIGESTED INDEX AND A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XXXVIII.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the thirty-eighth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains, as usual, a summary of all the cases published during the past year in the WEEKLY REPORTER and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides those given in the Irish Law Reports.

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OF

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———. *Ex parte* Hepburn	C.A.	744	19	
———, *Ex parte*. *In re* Smith & Sons	Q.B.D.	719	14	
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———, *In re*. Keeling v Smith	CH.D. STI. J.	380	212	44 Ch. D. 654; 59 L. J. Ch. 284; 62 L. T. 181
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Wood v Burgess	Q.B.D.	331	129	24 Q. B. D. 46; 59 L. J. M. C. 11; 61 L. T. 398
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——— v Hooper	CH.D. KEK. J.	—	125	61 L. T. 197
——— v Jones	CH.D. KEK. J.	—	116	61 L. T. 551
——— v Wood and White	P.D. & A.D.	208	87	14 P. D. 157; 58 L. J. P. D. & A. 68
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WEEKLY REPORTER,

1889-90.

Court of Appeal.

From Chan. Div. Oct. 29.

CANNOT *v.* OPPENHEIM (*a*).

Practice—Appeal—Papers required for the use of the judges of the Court of Appeal—Costs—R. S. C., 1883, ord. 58, r. 8.

It is the duty of an appellant on the hearing of an appeal involving the construction of documents to supply the Court of Appeal with three copies of each material document, and it is the practice to allow the costs of such copies on taxation.

Where an appellant in such case failed to supply three copies of such documents, the appeal was ordered to stand over, and the costs of the adjournment were directed to be borne by the appellant.

Appeal from Kekewich, J.

The plaintiff in this action claimed to be entitled to some interest in certain mining property, and, *inter alia*, sought an injunction to restrain the defendants from selling the same.

At the trial of the action Kekewich, J., made a declaration in favour of the plaintiff.

One of the defendants appealed.

Bramwell Davis, for the appellant.

S. Hall, Q.C., and *Cannot*, for the respondent.

On the appeal being opened it appeared that the case turned on the construction of a large number of documents, the originals of which only were supplied.

FRY, L.J.—How is it we have not been supplied with copies of these material documents?

Bramwell Davis.—Owing to a change of solicitors my clients have only recently had the management of the case, and the documents in question are numerous.

FRY, L.J.—The fact of the change of solicitors does not help us, and if the material documents are numerous that is all the more reason why we should be supplied with copies of them.

COTTON, L.J.—This appeal must stand over in order that three copies of all material documents may be supplied to the court. It has on more than one occasion been stated by me that on the hearing of an appeal turning on the construction of documents, the appellant must procure for the use of the court three copies of all the material documents. It was argued on a former occasion* that the costs of procuring such copies would not be allowed on taxation, but I then caused inquiries to be made, and was informed by the taxing masters that such was not the case. It must in future be understood to be the rule—and the sooner solicitors acting for appellants become aware of it, the better—that on the hearing of an appeal which turns on the construction of documents, three copies of all the material documents must be supplied for the use of this court.

The appellant must pay the costs occasioned by the adjournment of the appeal.

Solicitors for the appellant, *Stretton & Hilliard.*

Solicitor for the respondent, *J. D. B. Lewis.*

(*a*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

From Chan. Div. July 30, 1889.

In re 163RD STARR-BOWKETT BUILDING SOCIETY'S CONTRACT. (*a.*)

Vendor and purchaser—Condition of sale—Purchaser making any requisition—Inability or unwillingness of vendor to comply—Vendor's right of rescission.

A condition in a contract of sale, that the vendor "be at liberty, by giving notice in writing, to rescind the contract in case the purchaser make any requisition which the vendor is unable or unwilling to comply with," gives the vendor the right—arising immediately upon any requisition being made which the vendor is unable or unwilling to comply with—to rescind the contract: the right to rescind arising under such a condition may be validly exercised by the vendor, without specifying in his notice of rescission the requisitions which he is unable or unwilling to comply with, and without communicating to the purchaser any reason for the inability or unwillingness, or allowing the purchaser any opportunity to withdraw his requisitions; the only qualification to which the vendor's right of rescission arising under such a condition is subject, is the implied qualification that the right must not be exercised by the vendor capriciously or unreasonably.

Decision of Chitty, J., *affirmed.*

Appeal from Chitty, J.

The question raised by this appeal was as to the effect of a condition in a contract of sale, that in case the purchaser should make any requisition which the vendor

* See 33 SOLICITORS' JOURNAL, 621.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

should be unable or unwilling to comply with, the vendor might annul the contract.

The trustees of the 163rd Starr-Bowkett Building Society had contracted to sell certain leasehold houses to Charles Sibun.

The 7th condition of sale, so far as material, was as follows:—"And in case the purchaser shall, within the time aforesaid, make any objection to or requisition on the title which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty at any time thereafter, notwithstanding any attempt to remove or comply with such objection or requisition, by notice in writing to be given to the purchaser or his solicitor, to annul the contract and to return the purchaser his deposit money without interest, costs, or other compensation."

The contract also contained a condition that the production by the vendors of the last receipts of rent was to be sufficient evidence that all the rents of the houses had been paid by the vendors.

The vendors duly delivered an abstract of title, and the purchaser sent in various requisitions thereon on August 14, 1888. Many of the requisitions only asked for general information—viz., as to the names of the offices in which the houses had been insured, the amount of the premiums payable, and whether notice to repair the houses had or had not been received. A copy of the rules of the society was also required; the 7th requisition required that the execution of a certain deed should be duly attested, and the 8th requisition required evidence of the registration of the deed in Middlesex; another requisition required the production by the vendors of their last receipts for rent.

The requisitions came before the vendors at a meeting of the trustees of the society held on August 20, when a resolution was passed that "as some of the requisitions could not be complied with, and as great trouble and expense would be incurred in complying with others, notice to rescind the contract should be given under the 7th condition of sale."

On August 23 the vendors' solicitors wrote to the solicitors of the purchaser, giving a formal notice in writing that the vendors were "unwilling to remove or comply with the objections or requisitions on title or any of them, and thereby gave notice of their intention to annul the contract." The solicitors for the purchaser, in reply, wrote that the purchaser was entitled to have an opportunity of waiving his objections, and that the vendors had no right to rescind the contract capriciously or unreasonably; the vendors' solicitors replied that the vendors, in annulling the contract, avoided further expense and delay, as they were unable to comply with many of the requisitions, and that they had acted in a *bonâ fide* manner.

The purchaser took out a summons under the Vendor and Purchaser Act asking for a declaration that the notice delivered by the vendors was not effectual to annul the contract, and that the vendors were not entitled to annul the same.

Chitty, J., held that the vendors had a right to annul the contract, and that they had only acted in pursuance of that right.

It appeared from the evidence of two of the trustees of the society that the resolution of August 20 was passed *bonâ fide*, and with the sole object of avoiding further expense, the society being in an insolvent state. This evidence was uncontradicted.

The purchaser appealed from the decision of Chitty, J.

Byrne, Q.C., and *G. T. Millar*, for the appellant.—The vendors were bound, at all events, to point out which of the requisitions they were able, and which of them they were unable, to answer, so as to give the purchaser an opportunity of waiving them: *In re Dames and Wood*, 33 W. R. 685, 29 Ch. D. 626. [FAY, L.J., referred to *Duddell* v. *Simpson*, 15 W. R. 115, L. R. 2 Ch. App. 102.] The right to rescind must be reasonably exercised, and it lies on the vendors to prove that it was reasonably exercised: *In re Glenton and Saunders to Haden*, 53 L. T. N. S. 434, 34 W. R. Dig. 209. In a contract such as this for the sale of real estate an investigation of the abstract of title and the making of requisitions thereon by the purchaser is necessarily implied, and therefore, having regard to the whole nature of the contract, the expression "make any requisition," in condition 7, must be construed as equivalent to "insist on any requisition."

They also referred to *Greaves* v. *Wilson*, 25 Beav. 290, 7 W. R. Ch. Dig. 45.

Romer, Q.C., and *Geo. Henderson*, *contrà*, were not called on.

COTTON, L.J.—This is an appeal from a decision of Chitty, J., by which he held that a contract for sale had been duly annulled by the vendors. The sale was by public auction, subject to certain conditions of sale, one of which, the 7th, after providing for the time within which requisitions and objections to title were to be sent in, continued:—"And in case the purchaser shall, within the time aforesaid, make any objection or requisition on the title which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty at any time thereafter, notwithstanding any attempt to remove or comply with such objection or requisition, by notice in writing to be given to the purchaser or his solicitor, to annul the contract and to return the purchaser his deposit." The purchaser had signed the contract and paid the deposit, and within the time fixed by the contract had delivered certain requisitions, some of them relating to the payment of rent and premiums for insurance, some of them to the attestation and registration of particular deeds, and others to land tax, easements, and rights of way. The vendors then sent notice in writing to the purchaser annulling the contract, and the question we have to determine is whether the act of the vendors was a good exercise of their power to rescind.

Now it has been said that the time to exercise the power of rescinding had not arisen, and that the word "make" in the condition must be taken to mean "insist," and that the "making of a requisition" referred to in the condition was equivalent to "insisting on a requisition," and that no requisition had been insisted on. But I am not one to twist the words used so as to make them fit in with what might be considered to be the proper construction. The word "make" means something different from "insist on," and that this is so is evident by the words used in the clause after the word "make."

Then it was said that the purchaser was entitled to a *locus penitentiæ;* that he was entitled to have a time to consider whether he should withdraw his requisition before the power to rescind the contract was exercised. That was disposed of by the case of *Duddell* v. *Simpson*, where it was decided that the notice need not give the purchaser time to withdraw his objections, and that to give the purchaser such a right would be to make a different contract between the parties and to add to the contract what was not to be found in the words of it. In that case Turner, L.J., said: "Another ground relied upon was that the notice ought to have given time to the purchaser to determine whether he would or would not waive the objection which he had taken, and that the contract could not well be determined by a notice without such time being allowed. But I do not find any such stipulation in the conditions of sale. To lay down a rule that the vendor must give notice before he determined the contract would be, in effect, to introduce into the condition a new term that the vendor may annul the contract by a notice in writing allowing

so many days to the purchaser to determine whether he will waive the requisition." So to say that the purchaser must have a *locus penitentiæ*, would be to add something to the contract which is not in it, and, construing the contract as it stands, it cannot be said that there is any necessity for the vendor to give the purchaser an opportunity of withdrawing the requisition or requisitions after he knows that the vendor intends to exercise the power of rescinding.

Again, it has been said that the vendors could have answered a great number of the requisitions, and that there was only one requisition that would put them to any expense; and it was also said that the vendors do not intimate what requisitions they are unable or unwilling to answer, and that the *onus* of proving that the unwillingness is reasonable lies on the vendors and not on the purchaser, and that some reasonable ground of unwillingness must be shown. It has been laid down that the vendor is not bound, in a case like this, to state his reasons for rescinding, though there must be some reasonable ground for his doing so. When the matter comes before the court, it is a question of fact whether the vendor has acted capriciously or arbitrarily in determining the contract. It is even a straining of the terms of the contract to say that the power to rescind cannot be exercised capriciously or unreasonably, but the ground on which the court interferes in such a case is that the contract ought not to be made a nullity by the vendor acting capriciously and arbitrarily. The question we have to determine, then, is whether the vendors here have acted capriciously or arbitrarily, or whether they were reasonably unwilling to remove or comply with the requisitions. We have before us the notice given by the vendors, and the correspondence, and an affidavit by two of the vendors stating that the matter was considered before the resolution was passed, and that, as some of the requisitions could not be complied with, and as great trouble and expense would be incurred in complying with others, notice should be given to rescind the contract, and that the resolution was *bonâ fide* passed with the sole object of avoiding further expense owing to the society being insolvent. If we had only the notice to rescind before us, we should have some little difficulty in determining the question; but there is the affidavit, which has not been answered, and the deponents have not been cross-examined, and we cannot hold that the vendors have acted capriciously or arbitrarily. It is said that, as to some of the requisitions, the vendors only have to answer Yes or No, and that, as to the other requisitions, the expense would have to be borne by the purchaser by the terms of the contract; but two of the requisitions do not come within the provision throwing the expense on the purchaser—viz., the requisitions requiring the attestation and registration of the deeds therein mentioned.

In my opinion, without deciding on whom the burden of proving that the unwillingness of the vendors is reasonable lies, upon the evidence before us, there is nothing to satisfy us that the vendors capriciously or arbitrarily came to the conclusion to determine the contract, and the appeal must, therefore, be dismissed.

FEY, L.J.—In this case the relevant condition provides:—[His lordship read condition 7, and continued:—] No doubt this condition is a very stringent condition, and one against which I can well understand that a struggle may be made, and a struggle has been made in this case, to construe the condition in a different way from that which the words import. Counsel have, as I understand the arguments, sought to import three terms—first, that the purchaser was entitled to be told which requisition the vendors were unwilling or unable to answer; secondly, that the vendors must allege a reasonable ground for annulling the contract, if they do annul it; and, in the third place, that the purchaser is entitled to a reasonable time in which to withdraw his requisition, and that it is not till after a reasonable time that this power to annul the contract is to be exercised by the vendors. I am not going to say that those three things were not reasonable things to be inserted in such a contract. But not one of them is to be found in the contract that has been made; therefore I reject all those three glosses. I do not think that the notice need state the particular requisition the vendors were unwilling or unable to answer, or a reasonable ground for withdrawing from the contract, or give the purchaser a time to withdraw the requisition. Then it has been pressed upon us that the word "make" with respect to a requisition meant to "insist upon" a requisition. That is a remarkable construction of the word. Every solicitor, every barrister, everyone else conversant with the sale of real property, knows perfectly well what it is to "make" a requisition, and that "insisting" on it is a totally different thing; and I cannot alter the words of the contract to make it more susceptible of the gloss it has been sought to put upon it. The courts, it is true, have qualified the construction of such contracts by introducing the question of unreasonableness—namely, that the power to rescind must be exercised reasonably and not capriciously or arbitrarily; and even if I desire so to do, which I do not, I could not, when there has been such a mass of *dicta* and authority on that point, depart from that construction. The only question is whether the vendors had acted reasonably. The affidavit says that expense would be incurred by the insolvent company in answering the requisitions, and that the expense of answering some of them would not have been paid by the purchaser. The deponents to that affidavit have not been cross-examined; and on whoever the burder of proof lies it has been amply proved that the vendors acted reasonably, and I consider the appeal ought to be dismissed.

LOPES, L.J.—The question we have to consider is, What is the true meaning of the 7th condition? In my opinion it gives the vendors the right to rescind the contract, provided they do not act capriciously or arbitrarily. The unwillingness or inability must be reasonable. The reason, however, need not be communicated to the purchaser. The right to rescind arises immediately the requisition is made. It is said that "make any requisition" must mean "insist on any requisition." That is a bold contention, to which I cannot accede. The meaning of the words "make any requisition" is well understood. There is no evidence here that the vendors have acted capriciously or arbitrarily. The affidavit gives the reasons for their conduct. The deponents have not been cross-examined, and the evidence is therefore uncontradicted.

In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Birt & Follett.*

Solicitors for the respondents, *Burgoyne, Watts, & Co.*

From Q. B. Div. July 25, 26, 29, 1889.

COMMISSIONERS OF INLAND REVENUE *v.* ANGUS & CO.

COMMISSIONERS OF INLAND REVENUE *v.* LEWIS & SONS. (*a.*)

Inland revenue—Agreement for sale of goodwill—Instrument of transfer—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 70—"*Conveyance or transfer on sale*"—Ad valorem *duty.*

An agreement to sell a business and the goodwill

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

*thereof, on certain conditions precedent being fulfilled, is not chargeable, under section 70 of the Stamp Act, 1870, as a "conveyance or transfer on sale," with an ad valorem duty for the goodwill.**

Appeal by the Commissioners of Inland Revenue from the judgment of a divisional court (Lord Coleridge, C.J., and Hawkins, J.) on cases stated by the Commissioners of Inland Revenue under 33 & 34 Vict. c. 97, s. 19.

The questions stated by the commissioners were—

(1) Whether the instrument in question was chargeable with stamp duty according to the assessment of the commissioners—namely, at 5*s.* for every £50 as "a conveyance or transfer on sale"?

(2) If not, what amount of stamp duty was chargeable?

The cases as stated are fully set out in the report in the Divisional Court (37 W. R. 510), together with the cases cited.

Sir E. Clarke, S.G., and *Dicey*, for the appellants.

Phipson Beale, Q.C., and *Joseph Walton*, for the respondents, Lewis & Sons.

Meadows White, Q.C., and *Warrington*, for the respondents, Angus & Co.

The respondents were not called upon to argue.

July 29.—Lord ESHER, M.R.—In this case the Commissioners of Inland Revenue decided that an *ad valorem* stamp should be attached to the instrument in question. On appeal to the Divisional Court their decision was overruled, and the appeal now before us is on behalf of the commissioners.

I may say at once that when the Legislature assumes to impose a tax on the subject it must do so in clear terms, and if there is any doubt implied the subject is entitled to judgment. Subject to that proposition the question for us is whether the instrument before us is an instrument within the construction of section 70 of the Stamp Act, 1870?

Now by section 70 "the term 'conveyance on sale' includes every instrument, &c., whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser." "A conveyance" is one subject of taxation and "an agreement" generally is another subject of taxation under the statute. Now the thing to be stamped is "an instrument." If a contract of sale, or a conveyance by way of purchase and sale, is effected without an instrument, such a transaction is not within the section. A transaction is not struck at at all, but only an instrument by which a purchase and sale is effectuated. If a purchase and sale can be effected without an instrument the Legislature has not reached such a transaction.

Next it must be noted that not every instrument is affected by the statute which may be dealt with in the course of purchase and sale, but only "instruments whereby property is legally or equitably transferred." Now I take the meaning of legal and equitable to be this: Legal means that which is known to and can be dealt with by the common law, and equitable that which is known to and can be dealt with according to equity. Can there be a common law conveyance of an equitable interest? No. The common law knows nothing about such a transaction. There cannot be a common law conveyance of an equitable interest. If "legally" only had been inserted in the section it might have been argued that an instrument by which any equitable interest had been transferred was omitted from the section. For that reason "equitably" is added. The real meaning of the section is that where property known to the common law is the subject of any conveyance by any instrument, and where any equitable interest is the subject of any conveyance by any instrument, such instrument is to be the subject of taxation. It does not mean an equitable conveyance of common law property or *vice versâ*, but a common law or equitable conveyance of property known to the common law or equity by which such respective property or interest may be legally or equitably conveyed. With such a meaning applied to the section the difficulty of construction is mainly got rid of. Here the property in question is legal property. Goodwill is legal property well known to the common law. It is clearly within the section as legal property.

The only question, then, is, Was this instrument before us one whereby—*i.e.*, by the instrument itself—legal or equitable property is conveyed? For the purpose of founding their argument that this is a conveyance, the appellants are obliged to take out one subject-matter only of the matters dealt with by the instrument—namely, the goodwill, which they allege to be actually conveyed by the instrument, although the premises dealt with in the instrument are not so actually conveyed. But the instrument does not apply to the goodwill alone—it refers to "the premises and the goodwill of those premises." It is admitted by the appellants that, at any rate in terms, the instrument is not a conveyance. Everything undertaken is by way of agreement, but it is urged that the agreement is such as equity would, in case of non-fulfilment, decree specific performance; and it is said that when the agreement is of such a nature that a court of equity would, without more ado, grant specific performance, that is an equitable conveyance within the statute. If so, this would amount to an equitable conveyance of legal property. But if the instrument is in itself a conveyance of such property, where is the need for specific performance to be granted? The very fact of saying that the instrument is one upon which a court of equity would decree specific performance fixes it at once as an agreement and not as a conveyance. To call such an instrument a conveyance would be a contradiction in terms. If the property had been conveyed by the instrument, but had not been handed over, an action for trover or ejectment would probably lie. However, it is clear that the instrument here is an agreement such as a court of equity would decree specific performance for, and that being so it is not a conveyance on sale, but only an agreement. But if it is an agreement it is not within section 70 of the Stamp Act. More than that, this is only an agreement that something shall pass after something else shall have been done. The appellants have attempted skilfully to dislocate the subject-matter of the instrument and to separate "the goodwill" of the business from the other matters, but even as to that it is only said that "the old company shall sell and the new company shall purchase." But the matters actually dealt with are "the goods, chattels, &c., and the undertaking, business, and goodwill thereof, and all the real and personal property." Clearly the real subject-matter of the instrument is the tannery business with its premises. The buildings where such a business is carried on are an important part of the undertaking—specially fitted for carrying it on. The actual place where the business is carried on is the first thing agreed to be sold, and, secondly, the goodwill of the business at that particular place. Can it be said that the premises of the business have been actually conveyed when the words of the instrument are that the

* After the decision of the Divisional Court had been given in this case, the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), was passed, and section 18 of that Act now provides that "Every instrument containing a contract, whether executed or executory, for the sale or purchase of any property save such as passes by delivery, or must be conveyed by deed, shall, so far as relates to stamp duty thereon, be deemed to be a conveyance on sale of such property. . . ."

one party "shall sell" and the other "shall purchase"? Is the new company to accept the property without any investigation of title? Does the instrument anticipate, further, any conveyance without any investigation of title? I hope, indeed, some day to see the transfer of land made possible without any such investigation of title as is now common owing to such title being secured by some form of registration, but if any agreement upon which specific performance may be decreed is to be taken as a sufficient conveyance of property an easy form of transfer would seem to have been already devised. That can hardly be maintained.

But it is said that goodwill can be conveyed without any instrument. If so there would be a means of transfer not subject to the stamp duty. If people can by any means convey any property or interest without an instrument, then such means of transfer are not within the section, and are therefore not subject to any duty under it. The subject can escape such taxation if he can transfer property without any instrument, and it is absurd to say that there would be any fraud in evading the duty by such means if the Legislature has not chosen to include other means of sale than by an instrument. If that is to be called fraud, every sensible man will commit a fraud. I say, then, that if this instrument in question is an agreement upon which specific performance would immediately be granted, yet it is only an agreement, and my statement in itself implies that, and prevents it being an actual instrument of conveyance. Secondly, I doubt if this is an agreement upon which specific performance would be decreed as regards the goodwill. For the goodwill will only pass when the property to which the goodwill is attached is conveyed contemporaneously with the conveyance of the subject-matter of the agreement. Thirdly, if the parties choose to rest on the agreement, and though the possession of the premises and the business and the goodwill be not conveyed for thirty years, that will make no difference, because it is only when the parties choose to execute a conveyance properly so called that they make themselves liable to the duty under the statute. I think the Divisional Court was right, that this appeal must be dismissed, and that a clear meaning may be attached to the terms "legally or equitably transferred," such as I have already referred to.

Lindley, L.J.—I agree. The appellants have attempted to do that against which we have frequently protested, namely, to destroy the distinction between a contract and a conveyance. They have urged that the instrument here is a conveyance within section 70 of the Stamp Act, 1870. If so, then every agreement for the conveyance of any property whatever is within the section. The real question before us is—what is this instrument? I do not think the question is whether the construction of the effect of this document need be similar to that held in the case of the document in *Glasgow and South-Western Railway Co.* v. *Mackinnon*, per Lord Fitzgerald, 11 App. Cas. 392, 34 W. R. Dig. 158, but whether the particular instrument ought to be stamped with the *ad valorem* stamp as if it were a conveyance on sale and purchase. It is impossible not to see that the words "conveyance on sale" in the statute will not cover any instrument which is not a conveyance at all, but merely an agreement. Lord Coleridge long ago laid down that it is a popular fallacy to suppose that an agreement is equal to a conveyance, and the rule that an agreement is only an agreement and distinct from a conveyance is a well-known one to the profession. The most familiar example is the case of an estate subject to a mortgage. Is there no difference between an agreement for purchase and the ultimate conveyance? There is as much difference as between an agreement for marriage and marriage itself. As to the passing of the goodwill, that does not pass differently to any other form of property. Of course goodwill is partly a matter of real property and partly of personal property. Its value mainly depends on the vendor. It may be next to nothing if the vendor continues to carry on a similar business, but his omission to do so cannot be said to be property exactly. We have not to go against the decision of *Potter* v. *The Commissioners of Inland Revenue*, 2 W. R. 561, L. R. 10 Ex. 147. There it was held that if people chose to convey property in the premises by one means and goodwill by another, the assignment of the goodwill separately would be subject to an *ad valorem* duty, but such cases do not by any means destroy the distinction between a contract and a conveyance. An agreement does not transfer property. That is obvious if specific performance is considered necessary, because the action on such agreement is one *in personam* and is in order to compel a transfer. It is quite impossible for us to reverse the decisions which have long established the distinction between agreement and conveyance. The instrument before us is, according to the statute, to be stamped for what it is—*i.e.*, as an agreement. As to the goodwill being conveyed by such an instrument, I have nothing to add to what the Master of the Rolls has said.

Lord Esher, M.R., stated that the Lord Chancellor concurred in the judgments given.

Appeals dismissed.

Solicitor for the appellants, *Solicitor to Inland Revenue.*

Solicitors for the respondents, *Crossman & Prichard; Sharpe, Parkers, & Co.*

High Court of Justice.

Chan. Div. Kay, J. — July 11, 15, 1889.

Whitby v. Mitchell. (a.)

Perpetuity—Remoteness—Limitation to unborn person for life, with remainder to her children—Restraint on anticipation — Testamentary power of appointment given to unborn person.

By a marriage settlement lands were limited to the use of the husband and wife successively for life, with remainder to the use of a child, grandchild, or more remote issue of the husband and wife (such child, grandchild, or more remote issue being born before any such appointment, as thereinafter mentioned, should be made to him, her, or them) in such manner as the husband and wife should jointly appoint.

The husband and wife, in exercise of the power, appointed one moiety of the lands to the use of a married daughter for her life for her separate use, without power of anticipation, with remainder to the use of such persons as she should by will appoint, and, in default of appointment, to the use of her children living at the date of the deed of appointment.

Held, that the only part of the appointment which was good was the limitation to the daughter for her life for her separate use. The ulterior limitations were void according to the rule stated in Williams on Real Property, 13th ed., p. 276, and the restraint on anticipation annexed to the real estate must be rejected according to Fry v. Capper, 2 *W. R.* 136, *Kay*, 163.

Trial of action.

(a.) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

By a post-nuptial settlement dated the 7th of May, 1840, certain lands were settled to the use of Charles Dennis, the husband, for life, then of M. E. Dennis, the wife, for life, and after the decease of the survivor "to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the" husband "by the said" wife, "such child, grandchildren, or more remote issue being born before any such appointment as hereinafter is mentioned shall be made to him, her, or them respectively," in such shares and in such manner as the husband and wife "at any time or times during their joint lives, and as to the" wife "notwithstanding her coverture," should by deed jointly appoint, and in default of appointment to the use of the child or children equally as tenants in common.

Mr. and Mrs. Dennis had two children only, of whom Mrs. Burlton was one.

By an indenture dated the 15th of March, 1865, Mr. and Mrs. Dennis appointed one moiety of the lands comprised in the settlement, or the proceeds of sale thereof, after their own life interests, to Mrs. Burlton for life for her separate use without power of anticipation, with remainder to the use of such persons as she should by will or codicil appoint, and in default of appointment to the use of her children living at the date of that indenture as tenants in common.

Part of the proceeds of sale of the property contained in the settlement was lent by the trustees to one of themselves, the defendant Mitchell.

In an action for an account of what was due on the loan, it became necessary to consider the validity of the deed of 1865.

Robinson, Q.C., and *Alexander Young*, for the plaintiff.

Farwell, for Mrs. Burlton.—The appointment of 1865 was invalid except so far as it gave to Mrs. Burlton a life estate for her separate use, according to the rule of law that an estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person. She is therefore absolutely entitled to the proceeds of sale of the appointed property.

Marten, Q.C., and *W. Baker*, for children of Mrs. Burlton.—That rule is only an application of the rule against perpetuities, or is, at all events, confined strictly to legal limitations, and does not extend to limitations by way of use, nor to a case like the present, where the limitation to the children of the unborn person is confined to children *in esse* at the date of the deed.

Renshaw, Q.C., and *Swinfen Eady*, for the defendant Mitchell.—The power of appointment given to Mrs. Burlton by the deed of 1865 was void for remoteness, so the limitation in default of appointment is also void.

They cited *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq. 165; Lewis on Perpetuities, p. 408 *et seq.*; *Hockley* v. *Mawbey*, 1 Ves. jun., at p. 150; *Mogg* v. *Mogg*, 1 Mer. 654, at p. 664; *Cattlin* v. *Brown*, 1 W. R. 533, 11 Ha. 372; *Cadell* v. *Palmer*, 1 Cl. & Fin. 372.

Farwell replied.

July 15.—KAY, J., stated the facts and the appointment of 1865, and continued:—The question is whether those limitations were good or whether that appointment was entirely bad, except so far as it gave an estate for life to Mrs. Burlton. This property is really land, and the law as to land has always been that one could not limit to an unborn person for life, with remainder to the issue of that unborn person. Stated broadly, none would dispute that proposition for a single moment, but it is said if you do so limit, with a proviso that the unborn child of the unborn child who is to take shall be a person who comes into existence within the limits of perpetuity, that is good. But no decision to that effect has been cited. I do not know of any; and I do not know any authority whatever for that construction of the law. You may limit for life to an unborn person, but you cannot limit for life to an unborn person so as to tie it up till the death of that unborn person; that is to say, any remainder limited after that life estate must be to a person *in esse* at the time it is made. A marriage settlement made on the marriage of A. with B., limiting the estate to A. for life, remainder to B. for life, remainder to the first child of A. by B., remainder to the children of that first child would, *primâ facie*, be utterly bad as far as the limit is concerned. Can you make that good by saying, "Provided that such child shall be born within a life now in being or twenty-one years after"? No. If you could, it is obvious that the following limitation would be good:—To A. for life, remainder to the unborn children of A. for life, remainder to the unborn children of that unborn child for life, and so on through a dozen, or any number, successively to the unborn children of the unborn child. If you can make the limitation which is here attempted good, then you might make a series of successive limitations of that kind good by merely inserting a proviso that these persons shall come into existence within a life or lives in being, or twenty-one years after a life or lives in being. That is at present a mode of dealing with real estate which is not sanctioned by the law of real property in this country; and I do not at all agree with the attempt that has been made to make out that it is only an application of the law against perpetuities. It is not only an application of the law against perpetuities, it is something more. It is the law of real property in this country which prevents elaborate limitations over of that kind, and whether they offend against the law of perpetuity or not, or whether that is so ingeniously framed as not to offend against the law of perpetuity, still I hold it to be the law of this country that you cannot limit real estate to an unborn person for life, with remainder to the children of that unborn person.

I do not need any higher authority than that of the late Mr. Joshua Williams. He, in his book on Real Property, in the 13th edition, discusses the whole subject at pages 274—276. He refers to the foundation of the rule being the objection which the law had to a possibility upon a possibility, and criticizes that. Then he sums up the law after that criticism on page 276 thus:—[His lordship read the passage.] That is Mr. Williams' opinion—that, if you might make successive limitations of this kind within the rule against perpetuities, you might, of course, tie it up for a generation longer than is now possible. He says that that is not the foundation of the rule; but it is an absolute rule independent of the rule against perpetuities. With that I entirely agree. I have always understood that to be the case, and I do not believe that any authority to the contrary could be found. Therefore, I hold that this attempt to limit to the unborn children of Mrs. Burlton is void, and so is the attempt to restrain her from anticipating her share. That was decided in *Fry* v. *Capper* by Lord Hatherley, who declined to tie up the life interest of an unborn person in that way by an attempt to restrain that unborn person, if a married woman, from anticipation. Accordingly, the only part of this appointment that is good is the appointment to Mrs. Burlton for life for her separate use.

Judgment for plaintiff.

The order, so far as material to this report, was as follows:—Declare that the appointment was invalid so far as it affected to give a power of appointment by will to Emily Hyde Burlton, and to appoint property in

default for the children of Emily Hyde Burlton then living, and also so far as it restrains anticipation.

Solicitors for the plaintiff, *Sanderson, Holland, & Adkin.*

Solicitors for the various defendants, *W. Montgomery White; Cowdell & Son.*

Wood v Gregory 43 Ch D. 83

Chan. Div. Chitty, J. July 27, 1889.

WILLIS *v.* WILLIS. (*a.*)

Practice—Partition—Sale in lieu of partition—Title—No inquiry—Sale out of court—Infants—Form of order—Evidence—R. S. C., 1883, *ord.* 51, *r.* 1a—*Rules of December,* 1888, *r.* 9.

Upon motion for judgment in an action for sale in lieu of partition, where all persons interested (some being infants) asked that an inquiry as to title might be dispensed with and for an immediate sale by auction and out of court, an order was made for an immediate sale and out of court, subject to directions for fixing a reserve price and the auctioneer's remuneration in chambers, and for the conditions of sale to require the purchaser to pay into court his purchase-moneys.

Having regard to the fact that infants were interested, and to rule 9 *of the Rules of December,* 1888, *which modifies ord.* 51, *r.* 1a, *the court required the allegations in the claim to be verified by affidavit, notwithstanding that such allegations were admitted by the defendant in his pleading.*

This was an action for the sale (in lieu of partition) of real estate, to part of which infants were interested, and is a case in which the court dispensed with the usual inquiry and allowed the sale to take place out of court.

By his will John Willis devised the real estate whereof he died seised in fee simple as follows:—As to one undivided fourth to his son, the plaintiff Edward Willis; as to one other undivided fourth to his son, the defendant Frederick Willis; as to one other undivided fourth to his daughter, the plaintiff Julia Ann Stanton, a widow; and as to the remaining fourth to such of the children of the testator's son, William Willis (who died in testator's lifetime), as should attain the age of twenty-one years or die under that age leaving issue, and, if more than one, as tenants in common. And after certain pecuniary bequests he bequeathed the residue of his personal estate upon certain trusts, which included payment of his debts, funeral and testamentary expenses, and the said legacies. William Willis had seven children, who were living at the death of the testator, in May, 1888.

In July, 1889, this action was commenced, and at that date all the children of William Willis were alive but were infants, the eldest having been born in 1874. Edward Willis was the testator's heir-at-law, and on the happening of the contingency mentioned in the testator's will as to the share of the children of William Willis, Edward Willis would be entitled to their share. The children of William Willis, Edward Willis, and Julia Ann Stanton were the plaintiffs in the action, and Frederick Willis was the defendant. A statement of claim was delivered alleging the facts as to the title of the property and that a sale and division of the proceeds would be more beneficial than the division of the property. All these allegations were admitted by the defendant in his statement of defence. The property consisted of numerous small pieces of land let to various persons on various terms, and the aggregate rentals amounted to rather more than £120 per annum. The action came on upon motion for judgment, and was set down to be heard as a short cause.

H. Greenwood, for the plaintiffs, asked for an order for an immediate sale by auction and out of court, and submitted that, the title being admitted, no affidavit verifying the title was necessary: *Burnell* v. *Burnell,* 27 W. R. 749, 11 Ch. D. 213.

E. W. Hansell, for the defendant, also asked for an immediate sale and out of court.

CHITTY, J.—In view of the fact that infants are interested, and that by the new rule adding to ord. 51, r. 1a, the order must be prefaced by a declaration that the judge is satisfied that all persons interested are before the court, or bound by the order, and a statement of the evidence upon which such declaration is made, I think there should be an affidavit (which may be produced to the registrar) verifying the statement of claim. The order will be for an immediate sale by auction, subject to a reserve price and the auctioneer's remuneration being fixed in chambers, and to a direction that the purchase-money must be paid into court.

The minutes of the order as settled were as follows:—

And it appearing that the said James Willis died seised of the freehold hereditaments specified, &c., and that by virtue of his said will the plaintiff Edward Willis, the plaintiff Julia Ann Stanton, and the defendant Frederick Willis are absolutely entitled to three equal fourth parts thereof, and that subject to the interests of the testator's heir-at-law in the event of all the seven infant plaintiffs dying under the age of twenty-one years without leaving issue, the seven infant plaintiffs are entitled to the remaining one equal fourth part of the same hereditaments as tenants in common in fee simple. And it appearing that the plaintiff Edward Willis is the testator's heir-at-law, and the court being satisfied that the plaintiffs and defendant are the only persons being interested in the said hereditaments, and the infant plaintiffs by their next friend and their counsel and the plaintiffs Edward Willis and Julia Ann Stanton and the defendant by their counsel requesting a sale thereof and a distribution of the proceeds thereof instead of a partition of the said hereditaments among the persons interested.

And this court being of opinion that, by reason of the nature of the property and the number of persons interested, such a sale and distribution will be more beneficial for such persons than a division of the said hereditaments among them.

Let the said freehold hereditaments be sold by the plaintiffs Edward Willis and Julia Ann Stanton and the defendant Frederick Willis by public auction, subject to such reserve biddings as shall be fixed in chambers, and subject, as to the hereditaments comprised therein respectively, to the two leases for ninety-nine and twenty-one years respectively in the claim mentioned, and let the remuneration of the auctioneer be fixed in chambers, and let the said auctioneer receive the deposits on such sale and pay the same into court to the credit of this action, and let the said real estate be sold under conditions that the several purchasers shall pay the residue of the purchase-money into court to the credit of this action, subject to further order.

Declaration that infant plaintiffs were trustees for the purchaser within the meaning of the Trustee Act, 1850, and appointment of persons to convey the estates of the infant plaintiffs.

Solicitors, *Howard & Shelton.*

(*a.*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Chan. Div. North, J. } July 20, 1889.

In re BARTON-UPON-HUMBER AND DISTRICT WATER CO. (*a.*)

Company—Winding up—Jurisdiction—Undertaking for public benefit—Sale of undertaking.

The court has jurisdiction to wind up a company whose undertaking is constituted for the public benefit, and will make a winding-up order in such a case on the petition of a shareholder who makes out a case for such an order, although it may possibly be necessary to obtain an Act of Parliament to authorize a sale of the company's undertaking.

Blaker *v.* Herts and Essex Waterworks Co., 37 *W. R.* 601, 41 *Ch. D.* 399, *discussed.*

Petition.

This was a shareholder's petition for the winding up of the above company.

The company was incorporated by registration under the Companies Acts on the 27th of May, 1885. The objects of the company, as stated in the memorandum of association, were "to construct and maintain waterworks with all necessary machinery and appliances, and to supply water to the parish of Barton-upon-Humber, and other parishes adjoining."

On the 16th of July, 1885, an Act was passed to confirm a provisional order previously made by the Board of Trade, under the powers conferred by the Gas and Waterworks Facilities Act, 1870, conferring certain powers on the company, who were described as the "undertakers." Out of 25,000 £10 shares, of which the nominal capital of the company consisted, only 919 had been issued in the ordinary way, and on those shares only £1,536 had been paid. Some other shares had been issued as fully paid up to the contractors. The company had power to borrow £6,250 by means of debentures. Debentures had been issued to this amount, and the petitioner alleged that the directors had also issued other duplicate debentures in excess of the authorized amount, and had applied the proceeds improperly. The petitioner also alleged that the works of the company had, to a great extent, been constructed, but that they had been suspended for want of funds, that the directors had committed certain acts of misfeasance, and that if some transfers of shares which had been improperly made to one of the directors were set aside there would be funds sufficient for the completion of the works.

This was the hearing of the petition. The company did not appear.

Emden, for the petitioner, asked for a winding-up order, and referred to *In re Bradford Navigation Co.*, 18 W. R. 592, L. R. 10 Eq. 331, as showing that the court had jurisdiction to make an order, although the court might not be able to direct the undertaking to be sold.

He also referred to *Blaker* v. *Herts and Essex Waterworks Co.*, 37 W. R. 601, 41 Ch. D. 399.

NORTH, J.—I see no difficulty in making a winding-up order in the present case. A suggestion has very properly been made by the petitioner's counsel that there might be a difficulty in making an order, because, as the company's undertaking could not be sold, no profitable result would accrue if a winding-up order were made, and he referred to *Blaker* v. *Herts and Essex Waterworks Co.* In that case Kay, J., held that he could not, at the instance of a debenture-holder of a company, which stood in a similar position to that of the present company, order the undertaking of the company to be sold or appoint a manager of the undertaking. Kay, J., apparently acted on the authority of *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201. He did not, however, dismiss the action, but he made a declaration that the plaintiff was entitled to a charge on the undertaking, and directed accounts and inquiries. In the present case I think a winding-up order ought certainly to be made, unless the fact that this is a company for working a public undertaking is a reason for not making the order. In my opinion that is not a valid reason. If a winding-up order were not made nothing could be done, and the persons who were alleged to have acted improperly could not be made accountable. I am not going to make an order for sale of the undertaking now. If a sale ultimately becomes necessary an Act of Parliament may possibly have to be obtained to authorize a sale. The winding-up order which I am now asked to make will be exactly equivalent to the judgment Kay, J., pronounced in *Blaker* v. *Herts and Essex Waterworks Co.* By appointing an official liquidator I shall not be taking the management of the affairs of the company out of its hands. The liquidator will be appointed as an officer of the court to carry on the business for the company, and in the interest of the shareholders. I therefore see no difficulty in making a winding-up order. Such an order was made in *In re Bradford Navigation Co.* and *In re Isle of Wight Ferry Co.*, 2 H. & M. 597, 13 W. R. Ch. Dig. 44, and in several other cases.

I do not forget that in *In re The Company of Free Fishermen of Faversham*, 36 Ch. D. 329, 35 W. R. Dig. 107, the Court of Appeal refused to make a winding-up order. But in that case the company was very peculiar, there was an individual right of fishery in the members of the company. The ground of the decision was that the court thought no good would result from a winding-up order. I do not forget the observations then made by Fry, L., when he said (at page 347): "I should pause long before I was a party to the destruction, by winding up, of an undertaking which the Legislature had" (by a recital in an Act relating to the company) "declared to be of great benefit to the public as well as to the company itself." In the present case, assuming that the paramount intention of the provisional order is for the public benefit, the public cannot derive any benefit as matters now stand. It will be most for the public benefit that the company be wound up with a view to carrying on its undertaking in the future either by itself or by means of some other company. In making a winding-up order I do not think I am going contrary to the view of Kay, J., and he was following other similar cases in which such an order had been made.

Solicitors, *Hughes, Hooker, & Co.*

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div. North, J. } May, 7, 8, 9, 13, 14, 1889.

EDEVAIN *v.* COHEN. (*a.*)

Practice—Pleadings—Amendment at trial—Rules of Court, ord. 28, r. 1.

An action was brought, for a tort committed by several persons, against some of the tort-feasors, and judgment had been recovered against them. The same plaintiffs afterwards brought another action for the same tort against the remaining tortfeasors, M. and C., who had not been defendants in the first action. M. and C. put in their defences with knowledge of the former action and judgment, but did not plead merger of the cause

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

of action in the judgment. The action against M. and C. came on for trial, at which evidence was given which proved acts done by the defendants since the writ in the former action was issued which gave rise to a fresh cause of action. After the evidence for the plaintiffs and for the defendant M. had been given, the defendants M. and C. asked for leave to amend their pleadings and plead merger of the cause of action in the judgment in the former action.

Held, that the defendants M. and C. could not be allowed to amend their pleadings and plead merger of the cause of action in the judgment in the former action, because it would then be necessary to allow the plaintiffs to amend their pleadings and new assign, and to give further evidence in support of the new assignment; and the plaintiffs could not be put in as good a position as if the trial had not proceeded so far.

Action.

This was an action by Eaton Edevain and Margaret Edevain for the delivery up of certain furniture wrongfully taken away by the defendants, Morris Cohen and F. W. Cook, and for damages and costs.

The defendant Morris Cohen, in his statement of defence, pleaded that he had nothing to do with the acts complained of.

The defendant F. W. Cook, in his statement of defence, pleaded that he had acted *bonâ fide* as an agent, and without notice of any claim by the plaintiffs.

It appeared from the evidence given at the trial on behalf of the plaintiffs and on behalf of the defendant Morris Cohen, that the plaintiffs had already brought an action (*Edevain* v. *Watmore*) and recovered judgment against certain other persons who had been engaged with the defendants in the removal of the furniture in respect of the matters sued upon in the present action; but it also appeared that since the former action certain acts had been done by the defendants which might give rise to a fresh cause of action.

After this evidence had been given the counsel for the defendants applied for leave to amend their statements of defence by pleading that the cause of the present action had been merged in the judgment obtained in the action of *Edevain* v. *Watmore*.

The solicitor of the defendant Morris Cohen had acted as solicitor for the defendants in the action of *Edevain* v. *Watmore;* and he had also acted as solicitor for the defendant F. W. Cook in the present action up to a certain point.

Oswald, for the defendant F. W. Cook.—The rule is that any party will be permitted to amend his pleadings at any stage of the proceedings, so as to be in the position he would have been if he had pleaded rightly at first: Rules of Court, 1883, ord. 28, r. 1. [NORTH, J., referred to *Collette* v. *Goode*, 7 Ch. D. 842, 26 W. R. Dig. 177.] That case is no longer binding, as a narrower view of the construction of the Rules of Court was taken in the earlier cases than is now adopted: *Tildesley* v. *Harper*, 27 W. R. 249, 10 Ch. D. 393; *Steward* v. *North Metropolitan Tramways Co.*, 34 W. R. 316, 16 Q. B. D. 556; *Riding* v. *Hawkins*, 37 W. R. 575, 14 P. D. 56.

Everitt, Q.C., and *Harper*, for the defendant Morris Cohen.—If the defendant F. W. Cook obtains leave to amend his pleadings, the defendant Cohen ought to be permitted to amend his also.

Coxon-Hardy, Q.C., *A. Cock, Q.C.*, and *George Henderson*, for the plaintiffs.—The court will not assist defendants to set up a technical defence without merits similar to that of the Statute of Frauds or the Statute of Limitations, either of which defences must be pleaded, by allowing the defendants to amend their pleadings for the purpose of setting up a technical defence without merits. The defendant Cook admittedly knew of the former action and judgment when he pleaded; and there is no doubt that the defendant Cohen was aware of them also. If the amendment were allowed the plaintiffs would be prejudiced. They would have to new assign by pleading a cause of action arising out of the acts of the defendants since the writ in the former action, and to produce further evidence. The plaintiffs would not now be put in the same position as if this case had not been heard.

Everitt, Q.C., replied.

NORTH, J.—In this case I do not propose to allow the amendment in question. The facts are, very shortly, these:—A tort was committed—I assume for the purpose of dealing with this question that a tort was committed by several persons, of whom the defendants are two. A tort was committed, an action was brought by the plaintiffs against some of those persons, the present defendants not being either of them, and judgment was recovered against some of those other defendants. These defendants afterwards put in their defences with knowledge of the existence of the other action, because it is clear that Morris Cohen's solicitor, at any rate, knew all about it, which was his knowledge in the matter; and I am not going to believe for a moment that Cook did not know all about it. Therefore, these defendants, with knowledge of the existence of the other action, and what had been done in it, put in their defences at a subsequent date without raising this defence. The defence is not suggested by the counsel for Morris Cohen until he has shortly stated his points, has gone into all his evidence, and has only not addressed me because I suggested that it would be convenient that the other defendant's evidence should be given before I heard the counsel for the first defendant. Then the counsel for the second defendant mentioned this point, and said he would ask for leave to amend, and then, for the first time, the counsel for Morris Cohen said he should like to be in the same position as regards amendment; and the question is whether now, at this stage, the amendment should be allowed.

Now the case of *Collette* v. *Goode*, I think, is a very doubtful precedent; there is at all events this difference, that in that case the defendant did not know what I hold that the defendants in this case did know—of the existence of the matter as to which they wished to amend; and I confess that in *Collette* v. *Goode* I thought it was very hard upon my client that leave to amend was refused; and very possibly if that case had not been settled before it was concluded the opinion of the Court of Appeal might have been taken upon it. But in refusing leave I am not acting upon that case. I think that the course of decisions since has been such that if a case exactly similar to that came before the court again the learned judge who decided the case would now decide differently, and I should not have adopted the same line at the present day in a case exactly in point. I think the tendency of the later cases, some of which have been referred to, is to show that amendments must be made for the purpose of doing justice. For instance, adopting the language of Bowen, L.J., in the earlier case cited in *Steward* v. *North Metropolitan Tramways Co.*, Lord Esher, M.R., says:—"The same principle was expressed, I think, perhaps somewhat more clearly, by Bowen, L.J., who says that an amendment is to be allowed whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."

Under the circumstances I should have thought in the present case that it would not be right to preclude the defendants from setting up now the judgment recovered in another action, by virtue of which the

present defendants were all released from damages which otherwise they would have been liable to pay. But it is clear from the authority that has been referred to, that I ought not to allow the amendment now if the other side would be prejudiced by it, and prejudiced by it I mean in other ways than in matters of costs, which I could deal with now. If, for instance, I thought that allowing this amendment would merely cause certain costs to be thrown away, I should feel bound to allow the amendment, taking care that the plaintiffs were not prejudiced, but were in as good a position as regards costs, as if the amendment had not been allowed. But my reason for not allowing it is this: It is quite clear that if I allowed it to be made now I should have to allow the plaintiffs to amend their pleadings, and to new assign. It is quite clear to me that to some extent they could new assign effectively; therefore, I cannot simply allow it now without either putting the plaintiffs in a position in which I ought not to allow them to be put by such amendment being made at the last moment, or I should have to direct the matter to stand over in order that they may amend their pleadings and go into further evidence which would have to be taken before the court for the purpose of giving definite information on definite points to which, although all the evidence has been taken with the knowledge that this amendment would be asked, the attention of the parties and the counsel on the other side has not been drawn; and without going into which evidence it would be impossible to do justice to the plaintiffs, because, at any rate, if the defence were held and allowed to be good, I could not, without such evidence, give them the benefit of the new assignment, upon which I see clearly they must, to some extent, succeed. Under these circumstances I could not, in fairness to the parties, allow the amendment proposed at the present time, and although I could have granted it, if I thought it should be allowed, even at the last moment, putting the parties right as to costs, I find that I cannot, by any order I might make as to costs, put the plaintiffs right, and therefore I refuse the defendants leave to amend.

Solicitors, *Morris & Rickards; Maurice Nordon; Frederick Bradley.*

Chan. Div. Kekewich, J. } July 22—24; Aug. 2, 1889.

Reinhardt v. Mentasti. (a.)

Nuisance — Trespass — Injunction—Reasonable use of property—Sic utere tuo ut alieno non lædas.

It is not a sufficient defence to an action for an injunction to restrain a nuisance to prove that the nuisance is caused by a perfectly reasonable use of defendant's property.

The defendant, who was a hotel proprietor, placed in his kitchen and used in the course of his business a large cooking range, with a shaft for hot air, which interfered with the comfort of the plaintiff's house by overheating his wine cellar.

Held, that, although the use by the defendant of the range and shaft was perfectly reasonable, the plaintiff was entitled to an injunction to restrain the nuisance caused thereby to him.

Bamford *v.* Turnley, 10 *W. R.* 803, 3 *B. & S.* 62, *and* Gaunt *v.* Fynney, 21 *W. R.* 129, *L. R.* 8 *Ch.* 8, *distinguished.*

Broder *v.* Saillard, 24 *W. R.* 1011, 2 *Ch. D.* 692, *followed.*

(a.) Reported by T. R. Colquhoun Dill, Esq., Barrister-at-Law.

The plaintiff in this case was the lessee and occupier of a house in Coventry-street, and the defendant the owner of an hotel which was immediately adjacent to the plaintiff's house. The facts which gave rise to this action were for the most part admitted. The defendant had recently enlarged his hotel, and had placed in a kitchen on the basement a large "close range" with a shaft for carrying off the hot air. In consequence of the heat caused by the large fires which were kept up in this range for culinary purposes, and of the hot air shaft, the plaintiff's house became heated to an uncomfortable degree, and in particular his wine cellar had become unfit for use.

The plaintiff claimed an injunction and damages.

The arguments and cases relied upon appear sufficiently in the judgment.

Neville, Q.C., and *Wurtzburg*, for the plaintiff.

Warmington, Q.C., and *Farwell*, for the defendant.

Cur. adv. vult.

Aug. 2.—Kekewich, J.—For obvious reasons, the result of this case may affect many localities and many persons. I, therefore, thought fit to reserve my judgment, and, although the conclusion which I am about to express is the same as that which I entertained at the close of the trial, I confess to some fluctuation of opinion since that time, as well as during the argument. I thought it possible, and indeed probable, that by studying some of the cases on this branch of law I should find a line of demarcation between those nuisances which may be said to partake of the character of trespass and those of which this cannot be averred, and a disposition on the part of the court to grant injunctions more readily against the former than the latter. My examination of the authorities has not justified this anticipation. There are, no doubt, expressions in some judgments which point to stronger protection being given where rights of property are invaded than where they are not; but, on the other hand, there are many cases in which a private nuisance, not affecting rights of property, except so far as to prevent a man from personally using his own with reasonable comfort, may be so regarded as having been equally condemned. The principle applied in either class of cases is that a man must not use his own so as to injure his neighbour, and, in substance, the only question discussed in any given case is, whether that principle is applicable to the particular circumstances there occurring. Here there is really no dispute about the material facts. The defendant in adding to his hotel has recently converted what, it seems, was formerly an unused chamber into a supplemental kitchen, and has there placed a stove which is used for supplying hot water and cooking pastry. Not only is the stove one of an ordinary character and well constructed, but the defendant has taken divers precautions to prevent its being obnoxious, and the only thing to be said against him in this respect is that the stove does not occupy the site of the fireplace, which must be taken to have existed since the house was first built, and that thus far he has departed from the original plan of the building. And this use of his own house, alleged to be in all respects—and, subject to the one remark just made, apparently—reasonable, has nevertheless proved exceedingly inconvenient to his neighbour, the plaintiff, whose cellar was situate right against the stove on the other side of the wall. It was reasonable for the plaintiff to have a cellar, and it cannot be said that it was otherwise than of a reasonable character, or was in an inconvenient place. The heat occasioned by the stove passing through the wall has injured the cellar. It has so injured the cellar that, according to the evidence, the plaintiff is unable any longer to store his wine there, and although he might keep there what is required for daily use, one

ordinary and reasonable purpose of a cellar in a private dwelling-house has gone. The plaintiff says that such interference with his reasonable use of his own property ought not to be allowed, and in answer it is said that the defendant, who on his part has only used his own property reasonably, is not to blame.

The question which I have to decide is, Which of them is right? The injury to the plaintiff being clear, and clearly arising from the stove, it lay on the defendant to establish that he was not culpable. In support of this position reference was made to several judgments, and more particularly to those of Lord Bramwell in *Bamford* v. *Turnley*, 10 W. R. 806, 3 B. & S. 82, and Lord Selborne in *Gaunt* v. *Fynney*, 21 W. R. 129, L. R. 8 Ch. 8, which, with many others to be found in the books, contain passages insisting on the right of every man to act reasonably in the enjoyment and use of his own property, the regard which must be had in every case to the special circumstances attending it, including the distinction between dwellings in crowded cities and those in the open country, and the unwillingness of the court to interfere at the instance of a plaintiff who, from ill health or other cause engendering fastidiousness, complains of that to which his neighbours, however reluctantly, find themselves compelled to submit. Such passages must, of course, be read in connection with the circumstances of the particular case under consideration, and, what is even more important, they must be read as not intentionally departing from, or rather, in the absence of proof to the contrary, as intentionally adhering to, those principles and rules of law which a judge must be credited with bearing in mind, although he does not think it worth while to repeat or even expressly to refer to them. Thus read the judgment of Lord Bramwell, who concurred with the majority of the court in reversing the decision of the Court of Queen's Bench, and also in overruling *Hole* v. *Barlow*, 6 W. R. 619, 4 C. B. N. S. 334, loses much of the weight which, in reliance on certain selected passages, was sought to be attributed to it by the defendant, and it is to be observed that in a recent case in the House of Lords *Fleming* v. *Hislop*, 11 App. Cas., at p. 697, the present Lord Chancellor epitomized Lord Bramwell's judgment with approval, as saying, "that what makes life less comfortable, and causes sensible discomfort and annoyance, is a proper subject of injunction." What fell from Lord Selborne in *Gaunt* v. *Fynney* may be explained in like manner, and must rather be understood as illustrating the convenience of what Lord Bramwell calls "the rule of give and take; live and let live" than as having established —which I am sure he did not intend to do—any new guide to the decision of cases where a legal nuisance has been proved to exist.

I may pass by without further remark to the cases of *Ball* v. *Ray*, 21 W. R. 282, L. R. 8 Ch. 467, *Sturges* v. *Bridgman*, 28 W. R. 200, 11 Ch. D. 852, and *Attorney-General* v. *The Sheffield Gas Consumers' Co.*, 1 W. R. 185, 3 De G. M. & G. 304, the judgments in all of which, and especially those in the last case, are instructive on this branch of law and on the points which were argued before me. But it is right to say a word on *Broder* v. *Saillard*, 24 W. R. 1011, 2 Ch. D. 692, because that was eminently a case in which the defendant had behaved reasonably, and yet was enjoined from continuing a nuisance by a judge, who thought the injunction such a hardship that he allowed it to influence the costs. After an argument, in which both *Ball* v. *Ray* and *Gaunt* v. *Fynney* were cited, Sir George Jessel states the general law in terms equivalent to those used by Knight-Bruce, L.J., in *Walter* v. *Selfe*, 4 De G. & Sm. 315, which has long been treated as giving the rule of distinction between those nuisances of a personal character which do, and those which do not, merit an injunction. He says:—"I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." He proceeds to explain why it is no answer to say that the defendant is only making a reasonable use of his property, stating that that cannot be the test, and lower down, on page 702, he says what the test, as applied to the case which he had under consideration, is—namely, "Whether the stables are unluckily so situate as that the noise from the horses, not being uncommon horses, in any way materially disturbs the comfort of the plaintiff's dwelling-house, and prevents the people sleeping at nights." If for "horses" you read "stove," and for "sleep" "use of cellar," which, though of course is less necessary, and in that sense less entitled to protection, is yet, in my judgment, a reasonable requirement on the part of the plaintiff, you have a test exactly applicable to the case in hand. Agreeable to this is the opinion of Lord Blackburn, worthy of selection from numerous authorities, as expressed in *Scott* v. *Firth*, 4 F. & F. 349. That was a case of nuisance by vibration caused by steel hammers used in defendant's workshops, which, besides interfering with the comfort of the plaintiff, had, it was alleged, cracked the walls of his adjoining cottages. The learned judge, in summing up the case to the jury, stated the question to be whether it was one of nuisance—that is, of actionable wrong; and after calling attention to the evidence of injury, added this:—"A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and proper exercise of his trade in a reasonable and proper place. My opinion is that in law that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complains of."

It seems to me, therefore, that, notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, Does he injure his neighbour? I recognize some hardships in an injunction to restrain the defendant from doing that which I am obliged to regard as a reasonable use of his property—the better adapting to the purposes of an hotel a house situate in a neighbourhood where hotels are conveniently built; but the hardship is not so great as that in *Broder* v. *Saillard*, nor do the facts allow me to regard the defendant as so entirely passive as the Master of the Rolls considered the defendant to be. Therefore, while granting the relief asked by the plaintiff, I am bound to do so with the usual consequences. I may, however, properly give the defendant some time to consider and do what is best under the circumstances, and I shall therefore make an injunction not enforceable for three months.

His lordship gave the plaintiff the costs of the action, but ordered him to pay the defendant the costs of certain minor issues on which he had failed.

Solicitor for the plaintiff, *N. Sutton*.

Solicitors for the defendant, *Fladgates*.

Chan. Div. Kekewich, J. } Jan. 14—16; Feb. 8, 1889.

Hoblyn v. Hoblyn. (a.)

A son being tenant in tail in remainder expectant on the decease of his father to an estate of some 3,000 acres, the income of which was about £1,450, executed, shortly after he came of age, a deed of resettlement of the property, including an adjoining farm of about 116 acres, and by the resettlement, after certain trusts in his favour, £200 per annum was settled on his mother, and subject thereto a trust was created for raising any sum not exceeding £2,000 as the father should appoint, with the usual remainders. The father in exercise of this power raised sums of £500 and £400, the former of which, was admittedly applied for the benefit of the son, and the latter for the benefit of the father himself.

The son having brought an action to set aside the settlement, on the ground of undue influence, and that it was executed without independent advice; and the father having offered to release his right to charge the estate further, and to indemnify the estate against the £400 already raised, and the mother having offered to release her right to the £200 a year,

Held, that the action must be dismissed;

Held, also, that the court, in questions regarding the upsetting of resettlements, has regard to various considerations not admissible in other cases, and the court will not minutely inquire whether the father exerted his influence more or less, or insist that the son have independent advice. If, however, the father obtains a benefit, the suspicion of the court is aroused, and where it is unfair, the settlement, if otherwise unobjectionable, may be reformed in this particular, the rest being allowed to stand good.

Trial of action.

This was an action for rescission of a deed of settlement, brought by the tenant in tail in remainder, William Ernest Page Hoblyn, against the tenant for life, William Paget Hoblyn, and Jane Hoblyn, his wife, and the other beneficiaries under the deed in question, the trustees and two mortgagees.

The estate consisted of 3,000 acres in Cornwall, and was settled upon W. P. Hoblyn for life, with remainder to W. E. P. Hoblyn in tail; W. P. Hoblyn came into possession in 1846, at which time the income from the property was about £800. W. P. Hoblyn purchased an adjoining property of 116 acres for £4,500, leaving £4,000 on mortgage, and spent a considerable sum on the settled estate, the income from which was now about £1,400.

The plaintiff came of age on the 3rd of March, 1879, and on the 25th of June, 1879, a disentailing deed of the property was duly executed by him and his father; and on the 20th of October, 1879, an indenture of resettlement was made, whereby the settled estate and the subsequently purchased property were granted unto and to the use of R. H. Paget and T. H. Britton for the term of ninety-nine years upon certain trusts therein set out, and subject thereto to the use of W. P. Hoblyn for life, and thereafter upon trust to secure £200 to Jane Hoblyn for life, with remainder to the use of the defendants, Joseph Thurston and George Colman, for a term of 1,000 years upon the trusts therein declared, with remainder to the plaintiff for life, remainder to the issue of the plaintiff as he should appoint, in default to his first and other sons in tail male respectively, with remainders over to the first and other daughters of the plaintiff successively in tail male, with remainder to the four sisters of the plaintiff and their issue, with remainder to the plaintiff. It was also agreed that the trustees should, during the life of W. P. Hoblyn, raise and pay an annual allowance of £100 to the plaintiff for the first two years, and £200 for the next four years, and thereafter the annual sum of £50; and also four annual sums of £75, and pay one of such annual sums of £75 to the four sisters of the plaintiff during their respective lives, and it was also agreed that the hereditaments comprised in the term of 1,000 years should be charged with the payment after the decease of W. P. Hoblyn of such sum not exceeding £2,000 to such person or persons as he should by deed or will appoint; and also with the payment after the decease of W. P. Hoblyn of £500 to each of the four sisters of the plaintiff as and for their respective portions to vest in them at twenty-one. There were also subsidiary provisions which it is not necessary to set out.

By two indentures, dated respectively the 2nd of May, 1883, and the 2nd of May, 1884, to which the plaintiff and his father were parties, W. P. Hoblyn (the father), in exercise of the power given him by the settlement, appointed the sum of £2,000 to one E. A. Thomas, by way of mortgage, to secure two sums of £500 and £400 with interest. The former sum was applied for the benefit of the plaintiff, the latter for that of W. P. Hoblyn. The plaintiff further charged his interest in the estates by deeds of the 25th of March, 1885, the 14th of September, 1885, and the 25th of March, 1886, with repayment of the sums of £400, £300, and £500. By his statement of claim the plaintiff alleged that he had had no independent advice with regard to the preparation or execution of the settlement of the 20th of October, 1879, and did not understand it; that it was an unfair and improper one, and induced by the undue influence of W. P. Hoblyn. He claimed that the settlement should be cancelled and set aside, without prejudice to the rights and interests of the mortgagees, and that W. P. Hoblyn ought to be decreed to indemnify the plaintiff and his estate against any claims under the indenture of the 2nd of May, 1884.

W. P. Hoblyn, by his defence, offered to release his right to charge the estate further than with the £500 and the £400 raised for himself, and indemnified the estate against the £400, and his wife offered to release her right to the £200 a year. Such releases were executed before judgment was delivered.

The other facts appear from the judgment.

Barber, Q.C., and *T. T. Methold*, for the plaintiff.—The resettlement is unusual and unreasonable, and as the father obtained a direct pecuniary benefit thereunder he must show that his son executed it without any undue influence on his part, and thoroughly understood it: *Hoghton* v. *Hoghton*, 15 Beav. 278; *Savery* v. *King*, 4 W. R. 571, 5 H. L. Cas. 627; *Bellamy* v. *Sabine*, 2 Ph. 425.

Stock, for W. P. Hoblyn, Mrs. Hoblyn, and daughters, referred to *Jarratt* v. *Aldam*, 18 W. R. 511, L. R. 9 Eq. 463.

Warmington, Q.C., and *Clydesdale*, for children of the only married sister.—The father gave consideration, and in any case such transactions are not viewed by the court as if they took place between strangers. It is not necessary that the plaintiff should understand minutely all the provisions of the deed. The substantial ground of complaint is that the father ought not to have power to raise £2,000; as a matter of fact, he only raised £400, and has released the rest of his power and indemnified the estate.

Ingle Joyce, for the mortgagees.

Whitaker, for other parties.

Barber, Q.C., in reply.—The plaintiff was, of course, not wholly ignorant of what he was doing, but he was

(a.) Reported by J. W. Geree, Esq., Barrister-at-Law.

not sufficiently informed, and, if he had been, he would never have executed such a deed.

Kekewich, J.—Is the plaintiff entitled to set aside the settlement of the 20th of October, 1879? That is the question before me. The solution depends on—(1) the character of the settlement; (2) the contents; (3) the circumstances under which it was prepared and executed. Let me treat these matters separately, and in connection with each of them consider the legal principles affecting it.

1. The character of the settlement.

It is not a simple disposition by the plaintiff of his own property without the intervention of any other contracting party; in other words, it is not a voluntary settlement. It may still be important to inquire how far the plaintiff knew what he was doing, but that cannot be the sole test of his right to relief. The rule of *Dutton* v. *Thompson*, 31 W. R. 596, 23 Ch. D. 278, is inapplicable. This settlement belongs to that class of settlements usually styled family arrangements, which might properly be said to be made for value, and yet are not generally so described, because they more often than not want the distinctive features of purchase and sale; and beyond the give and take which invariably enters into them there is something else which of itself prevents their being voluntary.

In regarding settlements of this character, claims to upset them, and the rights of parties thereunder, the court gives weight to considerations which on other occasions would scarcely be allowed in the scale. The duty to preserve in the family, property held by it, is recognized, so is also the duty of providing for those members of the family who are intended to succeed to the property, and the harmony which may thus be expected to be established is respected. There are frequently other considerations, such as the preservation of the honour of the family, but they more often concern arrangements different from that now under investigation, which is what is called a resettlement—that is, a renewal on a fitting occasion, as the majority of the eldest son, of the ties which the father and son or other successive owners are by law enabled to dissolve. It is not uncommon on such an occasion to take out of settlement some property convenient to be sold or to be diverted to other uses—it is at least as common for one of the parties to bring in some property convenient to be included which he has acquired as his own. Such circumstances must not be forgotten in considering when it is necessary, as here, to consider a claim to set the settlement aside, and strictly they may be said to destroy the renewable character of the settlement; but none the less I think that this would properly be described as a resettlement, and for the purpose of ascertaining rights connected therewith would be regarded from that point of view. Again, in such documents one generally finds provision for the wives and younger children of the successive owners or some of them, an immediate provision for the next owner, powers to raise money for defined purposes connected with the property, and other powers of a cognate character, the extent of which, as regards the amounts charged and otherwise, necessarily depends on a variety of circumstances which never can affect two families or two properties in the same manner. Therefore the court would not regard the presence or absence of any such power as an indication of impropriety in the preparation of the settlement, nor the largeness or smallness of an amount charged, or liable to be charged, as an indication of unfair dealing between the parties, unless, indeed, there were such extravagance as to justify the suggestion that it could not have obtained the consent of a reasonable man.

On what does this presumption in favour of the propriety and reasonableness of a resettlement rest? Take the frequent case, illustrated here, of such a settlement made by father tenant for life in possession, and son tenant in tail in remainder, shortly after the latter attains his majority. Does the court presume that the son has had independent advice, or insist that he ought to have had it? I think not. Where proper precautions are taken the position of the son as tenant in tail is fully explained to him, as are also the proposed limitations of, and burthens on, property which would otherwise, in the ordinary course of nature, become absolutely his own. And if this duty is often, and in simple cases sufficiently, discharged by the father's solicitor, it is sometimes with advantage handed over to another solicitor called in for the particular purpose, or, according to a commendable practice familiar to me through an eminent conveyancer, referred to counsel instructed to advise the young man independently. To omit all these precautions is to incur risk. I shall have hereafter to refer to the circumstances under which the settlement in question was prepared and executed, but I may at once say that though I acquit Mr. Whitefield of impropriety of conduct, and, indeed, I am sure that he intended to act for the best according to his view of the situation and of his duty to the parties, yet it is obvious that his conduct provoked the attack on the settlement. If like conduct were the practice of the profession no settlement would be safe from litigation.

A resettlement is generally the father's work. He more often than not proposes it, and, though perhaps largely assisted by his solicitor or man of business, his is almost always and necessarily the guiding hand throughout. This necessity flows not merely from the parental influence which is probably its main source. In the ordinary case, such as occurs here, the intelligence and information of the son, whether great or small, are overshadowed by the experience of the father, who, in addition to general knowledge of the world, is well acquainted with the capacities and wants of the estate, the needs of different branches or members of the family, and the obligations which the family history has imposed on those in possession of its honours and property. The court has always recognized this necessity, and, conceiving it to be for the benefit of families that such influence should be exerted to effect a proper resettlement on a fitting occasion, has declined to inquire whether, in any particular instance, it was exerted with more or less force. This is the result of many authorities, to some of which reference is made in *Hoghton* v. *Hoghton*. Lord Romilly himself adopts it there and elsewhere, and it is neatly stated by Hall, V.C., in *Fane* v. *Fane*, L. R. 20 Eq. 698, 24 W. R. Dig. 266, where he says, "The parental influence in reference to such resettlements, where there is no other consideration or element in the case, is, I conceive, to be disregarded." The parental influence here intended, is that which the experience of mankind has proved to be both natural and good, the influence begot by affection rather than fear: see Lord Hatherley's remarks, *Turner* v. *Collins*, 20 W. R. 305, 7 Ch. 329. When it can be traced to less worthy causes, and especially if, being so traced, it seems to have had an excessive operation, it is styled undue, and is differently treated: see *Wycherley* v. *Wycherley*, 2 Eden, 175.

The rule thus stated is applicable in its integrity only to cases of an ordinary character where there has been no large departure from the practice usually followed in the settlement of family estates. One circumstance which justifies an exception from, or at least a modification of, the rule is a benefit acquired by the father to the detriment of the son. The character of the resettlement is then somewhat changed. It imports a bargain between the contracting parties, and the jealousy of the court is aroused to inquire whether one of them unduly influenced the other in effecting it. But note two things — first, such a bargain is not presumably unfair; secondly, if unfair, or unfairly

effected, it is not necessarily fatal to the entire arrangement. On the first point it is sufficient to say that many circumstances of common occurrence would justify a father in demanding a benefit direct or indirect for himself; and as regards the second I need only refer to *Hoghton* v. *Hoghton*, where the court was satisfied that there was a benefit to the father obtained without due protection to the son, and yet took pains to explain that in addition there were unreasonable provisions in the deed which assisted the court to interfere. This is stated in a passage on p. 314, and is also, I think, a fair conclusion from the rest of the judgment, though it is sometimes difficult to determine whether the particular language should be more properly referred to the subject of resettlements generally or exclusively to those in which the father gains a benefit. Lord Campbell read the judgment as I do: see *Jenner* v. *Jenner*, 9 W. R. 109, 2 De G. F. & J. 359. *Hoghton* v. *Hoghton* was relied on in *Turner* v. *Collins* as an authority that a transaction between father and son must be set aside wholly if at all, and could not be rectified by striking out an improper provision. That was not a case of resettlement, but the Lord Chancellor (Lord Hatherley) accepted the analogy, and held that rectification was possible as against a party admitting it to be proper, notwithstanding that the transaction stood as a whole. I cannot myself discover any satisfactory reasons for destruction where the settlement is generally good, the intention of the parties ascertainable, and reform possible, that is, when one can preserve what is substantially right by expunging what is substantially wrong. In *Jenner* v. *Jenner* the plaintiff asked for reform only, and no objection was taken to his suit on that ground.

2. Contents of the settlement.

The general scope of the deed is plain enough, and open to no objection. The father adds to the property an estate (in mortgage) contiguous and intermixed therewith, the father and son have successive life estates, and the remainders are in favour of the son's issue, his sisters and their issue, the ultimate remainder being properly limited to him. A pittance is secured to him during his father's life. There are jointures and portions charged or empowered, there is a power to charge for permanent improvements, and there are divers other provisions, which, speaking generally, are commonly found in such instruments. I do not specify any, because I must refer again to those worthy of mention, and for the moment I omit all notice of one special provision which has created the real difficulty in this case. Omitting that, what, then, is there unreasonable in such a settlement? "Reasonable and usual" are not, nor are "unreasonable and unusual," convertible terms. An unreasonable provision in a resettlement is one which it is inconceivable that prudent men well advised would, having regard to all the circumstances, have inserted.

And in order that a party complaining of the settlement may take advantage of this, it must also be prejudicial to his interest, or to that of some person—*e.g.*, child for whom he presumably intends to provide. Extraordinary or unusual provisions falling short of this may be evidence of want of care, as may also omissions of what is usual, and these may provoke inquiry or be otherwise suggestive, but they are not unreasonable so as on that account to support an allegation that the son was not adequately protected in the terms of the bargain.

There are many unusual provisions in the settlement before me, but I cannot, however, treat any of these provisions as unreasonable in the sense above mentioned. It is not necessary to say another word about bad drafting. There was certainly nothing improper in providing for expenditure on future improvements, and though the sum of £10,000 seems to have been carelessly fixed, and the clause is inconsistent with the recital, yet there are safeguards which, if difficult to construe, must operate to the protection of the inheritance. I cannot suppose that reservation of a nominal rent will be largely adopted by a tenant in possession, young or old, and the investments in leaseholds is fettered by the trustees' discretion. On the whole, therefore, I think that this strange settlement cannot be upset on the ground that these provisions, or some others which I have not thought it worth while to specify, are unreasonable.

There is one provision remaining to be considered. I pointed out in the course of the argument that clause 4 is not strictly a power to the father to charge the property with £2,000, but is a power given to him to appoint a sum of £2,000 charged by the settlement itself through the term of 1,000 years. The distinction might be important from at least one point of view, but the clause may be conveniently considered to confer, as in substance it does, a power to charge. It is a direct benefit to the father, and imposes on him the burden of proving that the bargain with his son was fair and fairly made. No presumption in favour of the propriety or honesty of the paternal influence has ever been allowed, or ought to be allowed, to relieve him of that obligation. I am far from saying that such a power to charge a moderate amount may not reasonably be inserted in a resettlement, and where the father is bringing new property into settlement, and has expended large sums in improvements, it is neither unusual nor objectionable, but it can only be done with the consent of the son, duly informed and protected. It is for this reason, and not because the amount charged is excessive, that the particular clause has occasioned and justified the litigation.

There must here be noticed the jointure of £200 given to Mrs. Hoblyn, the plaintiff's mother. There is some authority for holding that a charge of this kind ought not to be regarded as a benefit to the father within the rule just mentioned, and I should so hold if necessary in the present case, but it must not, in my judgment, be considered that under no circumstances a charge of that character would be such a benefit.

3. The circumstances under which the settlement was prepared and executed.

The settlement bears date the 20th of October, 1879, and may be taken to have been executed on that date, but it was prepared and finally settled much earlier in the year, and the inquiry need not extend beyond the 26th of July, when it appears to have been engrossed.

The earliest date of which one need think is not accurately ascertained, but it was before, and not much before, the 3rd of March, the plaintiff's birthday, and may be taken to be in the last few days of February or the first day or two of March. The plaintiff was living at home with his father, mother, and sisters, and it seems on affectionate terms with all of them. I do not gather that his education or habits gave him special facilities for understanding such a matter as the resettlement of the family property, but, on the other hand, I must give him credit for average intelligence. While living at home he had been accustomed to go about the estate, including the property which his father had purchased. He had seen the buildings erected and other improvements, and knew that this had been done at his father's cost. He was on friendly terms with Mr. Hancock, the estate agent, with whom he seems to have had occasional conversations. He says that his mother first introduced the subject of a resettlement, but she does not appear to have said much beyond expressing the father's anxious desire. This was before he attained twenty-one. The father also mentioned it to him before that date. He likewise said little. I cannot make out why he thought it better to say a little, but he did, and preferred that the matter should be mentioned to his son by Mr. Hancock. For that purpose Mr. Hancock made a note in two parts, one

containing briefly what was proposed, the other stating the rental of the estate, with deductions for interest on the mortgage and the amount required to pay off charges to be made in favour of the sisters. Of the first part of this note he communicated the substance to the plaintiff, but of the second he gave him a copy. Mr. Hancock has been called, and has explained that, this not being a matter of his ordinary business, he has not recorded what took place, nor can he remember with accuracy what passed between him and the plaintiff. I think that either he or the father must have told the plaintiff more than either of them thinks was now told him. But, at any rate, the plaintiff had the advantage of conversations with a gentleman of intelligence who, if not profoundly versed in legal matters, was at least well acquainted with the estate, its capacities and needs, and was able to give him sound practical advice.

I see no reason to doubt that he sufficiently understood the general outline of what was proposed. Of course, he did not understand the mysteries of entail, and probably even now would be puzzled to define his position as tenant in remainder under Robert Hoblyn's will, but he did know that if he survived his father he would become master of the family estate, which if he did not (omitting the uncontemplated event of marriage and issue) would then go to a collateral branch of the family. And he further knew that the property purchased by his father was not included in the family settlement, and might with advantage be included therein. He was also aware that his sisters were unprovided for, and thought it reasonable (as it was) that they should be provided for out of the settled property. Probably he also knew that his mother had no jointure, and was willing she should have one. The general terms of the resettlement were discussed at this interview. They were afterwards varied in many particulars, but with one exception these variations were made on the instructions of the father only, and no communication, direct or indirect, with the son is proved. I can hardly believe that there was not some communication between the father and son respecting them as there certainly was about the excepted variation, but I repeat there is no evidence of it. The excepted variation is important. It had been arranged on the 4th that a lump sum (£8,000) should be charged for the sisters. It was afterwards suggested by the father or the son, it is impossible to say which, but probably the father, that for this should be substituted a charge of annuities and a less sum of £2,000, and this was communicated to Mr. Whitefield by the son on the 10th of March. Mr. Whitefield enters it as the son's proposal, but says that he regarded him as the father's messenger. I think that neither view can be accepted as correct, and that really the instructions must be taken to have been those of the father and son jointly. Ultimately the deed was settled on the basis of the original instructions thus varied, and it is the resettlement whose contents I have already sufficiently summarized. There had crept into it (no one knows how) the charge of £2,000 in favour of the father, which I will deal with presently.

The necessary disentailing deed was executed long before the resettlement. There apparently was no explanation to the son why two deeds were required, nor was it explained to him what the effect of the disentailing deed standing alone would have been. He regarded the two as being what in truth they were, parts of one transaction, and I am not disposed to attribute weight to any other view of them. It is a matter of regret that greater care was not taken throughout the business, and that what took place was not more accurately recorded. But though I regard the case as one of extreme difficulty, and lying on the border-line which divides settlements supportable, notwithstanding the exercise of parental influence, and those which the court set aside because the son has not been sufficiently protected; yet on the whole, after the best consideration I can give to the facts, including, of course, many details which I have not thought it worth while to specify here, and the authorities on this branch of law, including, of course, many not separately cited, I have come to the conclusion that, except as regards the charge for the father's benefit, the resettlement of the 20th of October, 1879, is a reasonable embodiment of what was in substance intended by the son, as well as by the father, and, therefore, cannot be set aside.

But this charge—how came it to be there? There it is, and there it ought not to have been. It stands so completely alone, and might, if not exercised, be so easily removed without affecting the rest of the deed that, arguments to the contrary notwithstanding, I think it might properly be expunged, and the settlement as a whole preserved. But the father has saved me all trouble on this score. He has executed a deed releasing his power and indemnifying the inheritance against the charge of £400 raised for his own occasions. That indemnity is not equivalent to a release, the inheritance still remaining charged, and no security being given; but I think it would be adherence rather to the letter than the spirit of authorities to say that anything remains obnoxious to the rule which precludes a father from taking a benefit without due protection to the son. The £500 which was raised for the son's benefit continues a charge. He cannot complain of that. Mrs. Hoblyn offered at the trial to release her jointure, and this has been done. I have, therefore, been relieved from considering this part of the settlement as carefully as others, and I need say no more about it. The result is, the plaintiff's claim to set aside the settlement fails. He and the estate will be exonerated from the charge in favour of the father, except so far as it has been utilized for the plaintiff's own benefit, and also from the jointure to the mother. There will, therefore, be judgment for the defendants. The father, of course, can have no costs. He must be held responsible for the charge in his favour, and he has admitted the responsibility by releasing it. Indeed, I take it that he would not in any case have asked for costs. This last remark applies to the mother also, who has released her jointure. The plaintiff must pay the costs of all the other parties.

Solicitors for the plaintiff, *Emmet, Son, & Stubbs*, for *H. F. Whitefield*, St Columb.

Solicitors for the defendant, *Coode, Kingdon, & Cotton*, for *Coode & Shilson*, St. Austell; *Whitakers & Woolbert*, for *G. M. Mackay*, Shepton Mallet.

Q. B. Div. (Denman and Charles, JJ.) } June 18, 19, 1889.

TANCRED *v.* DELAGOA BAY AND EAST AFRICA RAILWAY CO. (*a.*)

Mortgage — "Absolute assignment" — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

A mortgage of debts due to the mortgagor, and containing the usual proviso for redemption and reconveyance, is an absolute assignment (not purporting to be by way of charge only) within the Judicature Act, 1873, *s.* 25, *sub-section* 6, *and the mortgagee is entitled to sue in his own name for the debts.*

Burlinson *v.* Hall, 32 *W. R.* 492, 12 *Q. B. D.* 347, *followed.*

National Provincial Bank *v.* Harle, 29 *W. R.* 564, 6 *Q. B. D.* 626, *disapproved.*

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

This was an appeal from an order of a master, and referred to the court by Denman, J., at chambers.

It was an action brought by Sir Thomas Tancred, Goslings & Sharpe, and C. W. Kingdon to recover a sum due from defendants to Tancred under an award.

The plaintiff Tancred had assigned the debt in question by a deed of mortgage to Goslings & Sharpe to secure an advance. He had likewise assigned the same debt, subject to the mortgage to Goslings & Sharpe, to the plaintiff Kingdon. Both these mortgages contained a proviso for redemption and reassignment, and express notice of these mortgages had been given to the defendants.

In their defence the defendants pleaded, amongst other things, that they did not admit that Goslings & Sharpe and Kingdon were respectively assignees of the debt. The master at chambers struck out the defence as being frivolous and vexatious, and upon the appeal Denman, J., referred the matter to the court.

At the hearing it was agreed that the court should decide whether Goslings & Sharpe were assignees within the Judicature Act, 1873, s. 25, sub-section 6, and as such entitled to sue in their own names.

R. O. B. Lane, for the defendants.—This defence is neither frivolous nor vexatious. This case is governed by *National Provincial Bank* v. *Harle*, 29 W. R. 564, 6 Q. B. D. 626. A mortgage in equity is merely a charge upon the mortgaged property, and therefore an assignment by way of mortgage necessarily purports "to be by way of charge only." This assignment is, therefore, not an absolute assignment within the Judicature Act, 1873, s. 25, sub-section 6.

Bigham, Q.C. (*H. Tindal Atkinson* with him), for the plaintiffs Goslings & Sharpe.—This is an absolute assignment within the Act. The case of *Burlinson* v. *Hall*, 32 W. R. 492, 12 Q. B. D. 347, governs this case. The case of *National Provincial Bank* v. *Harle* is inconsistent with *Burlinson* v. *Hall*, for in that case it was argued that there was an implied condition for reconveyance. A charge—which is an undertaking to pay out of a particular fund—is very different from a complete assignment by way of mortgage.

Lane, in reply.—*Burlinson* v. *Hall* was the case of an absolute assignment to a trustee, and there was no right of foreclosure or redemption, as there is in a mortgage.

DENMAN, J.—In this case a master at chambers made an order striking out the whole of the defence, and the defendants appealed against that order so far as it related to the paragraph of the defence which denied the assignment to the plaintiffs Messrs. Goslings & Sharpe and C. W. Kingdon. The appeal came before me at chambers, and I referred the matter to the court.

The parties have now agreed that we shall decide the question whether the assignment to Messrs. Goslings & Sharpe is one upon which they are entitled to sue in their own names. That depends upon whether this assignment comes within the provisions of section 25, sub-section 6, of the Judicature Act, 1873, which enacts that "any absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action* of which express notice in writing should have been given to the debtor . . . shall be and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." The assignment in the present case clearly includes the whole of the amount due under the award for which the present action is brought. The difficulty in the case is raised by the contention of the defendants that, according to the decision in *National Provincial Bank* v. *Harle*, this assignment is not an absolute assignment (not purporting to be by way of charge only) within section 25, sub-section 6, of the Judicature Act, 1873. There is no doubt very great difficulty in attempting to reconcile that case, which was decided by Pollock, B., on demurrer, with the case of *Burlinson* v. *Hall*, which was subsequently decided by Day and A. L. Smith, JJ., sitting as a divisional court.

Now the document in this case does not appear to us to purport to be "by way of charge only," either expressly, or by necessary inference from its provisions, within the meaning of the section; it is an absolute assignment of the debt; a document given "by way of charge" is not one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property. If it is necessary for us to decide whether the cases of *National Provincial Bank* v. *Harle* and *Burlinson* v. *Hall* are in conflict—and I cannot see any valid distinction between them—I think that the latter case is right, and that we must follow that case. The very point raised in this case was raised, argued, and decided in *Burlinson* v. *Hall*. It is true that Day, J., does, in his judgment in the latter case, point out what he thinks might have been the turning point in *National Provincial Bank* v. *Harle*, but I do not think that that makes any distinction in principle. When the decision of a single judge, whether hearing demurrers or sitting at *Nisi Prius* without a jury, conflicts with the decision of a divisional court, as in these two cases, I think that we, sitting as a divisional court, ought to follow the decision of another divisional court in preference to that of a single judge. We therefore decide that this assignment is an absolute assignment within sub-section 6, and does not purport "to be by way of charge only," and that the proviso for reconveyance does not prevent it from being absolute, or make it purport to be by way of charge only. Messrs. Goslings & Sharpe, therefore, being assignees of the whole fund within the terms of sub-section 6 of section 25, are entitled to sue in their own names, and to have judgment for the whole amount.

CHARLES, J.—I am of the same opinion, and do not desire to add anything to the reasons given by my brother Denman, in which I entirely concur. I will only make this observation, that I feel the same difficulty in endeavouring to distinguish between the cases of *National Provincial Bank* v. *Harle* and *Burlinson* v. *Hall*, and that I think those cases are not reconcilable. I have no hesitation in following the latter case, for the same reasons as given by my brother Denman.

Judgment for the plaintiffs Goslings & Sharpe.

Solicitors for the plaintiffs Goslings & Sharpe, *Woodroffe & Burgess.*

Solicitors for the defendants, *Slaughter & May.*

Court of Appeal.

From Chan. Div. Nov. 1.

In re ROYLE.
ROYLE *v.* HAYES. (*a.*)

Practice — Originating summons — Jurisdiction — R. S. C., 1883, *ord.* 55, *r.* 3 (*g*).

The court has no jurisdiction, on an originating summons under ord. 55, *r.* 3, *to determine any question or matter which could not have been determined in an action for administration of the estate or trust.*

An originating summons was issued by an executor as plaintiff, to have it determined whether or no a particular sum of money formed part of the testator's estate at the time of his death. The summons was served on the testator's widow as defendant, she taking under the will a life interest in the testator's estate.

The defendant filed an affidavit, in which she claimed the sum in question, not under the will, but as a gift made to her by the testator in his lifetime, and she appeared on the hearing of the summons, but then took the objection that the court had no jurisdiction, in such proceedings, to determine her claim. The judge who heard the summons considered he had jurisdiction, and, after hearing the evidence adduced by the plaintiff and the defendant respectively, he held that there had been no gift of the sum in question made to the defendant by the testator in his lifetime.

Held, on appeal, that the court had no jurisdiction on originating summons to determine the question raised by the claim of the defendant.

In re Davies, Davies *v.* Davies, 36 *W. R.* 587, 38 *Ch. D.* 210, *approved.*

In re Turcan, 37 *W. R.* 70, *distinguished.*

Decision of Kekewich, J., *reversed.*

Appeal from Kekewich, J.

The chief point dealt with on this appeal was whether the court, on an originating summons taken out by an executor under ord. 55, r. 3, had jurisdiction to determine the validity of a claim raised adversely to the will, by a person who also occupied the position of a beneficiary under the will.

The testator, Wm. Royle, who was a farmer, devised and bequeathed his real and personal estate to his executors, Alfred Royle and Geo. Hayes, on trust, to permit the testator's widow to carry on the testator's farming business, and for that purpose to use and employ such part of the testator's personal estate as might be necessary therefor.

An originating summons was issued by one of the executors, Alfred Royle, as plaintiff, the defendants being Geo. Hayes, the other executor, and the testator's widow, Sarah Royle, as a person "entitled under the will of the testator to the income of his real and personal estate." The summons asked that the court might determine, under ord. 55, r. 3 (*a*) (*c*) (*g*), "the following questions or matters arising in the administration of the estate of Wm. Royle:—(1) Whether or no the sum of £171 15s. received by the testator in part payment of the purchase-money of a plot of freehold land from the purchaser thereof, or any part of the said sum, belonged to the testator, and formed part of his estate at the time of his death; (2) whether, if the said sum of £171 15s., or any part thereof, belonged to the testator at his death, the use of the same was, or is, necessary for carrying on his farming business; (3) whether the defendant Sarah Royle ought to render any, and if so what, accounts to the executors and trustees of the testator in respect of the farming business of the testator; (4) consequential relief."

(*a*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

The defendant Sarah Royle, on being served with this summons, made an affidavit, in which she claimed that the said sum of £171 15s. had been given to her as a gift by the testator in his lifetime. The affidavit, however, raised no objection on the point of jurisdiction.

The defendant Sarah Royle appeared on the hearing of the summons, and counsel on her behalf then took the objection that the court had no jurisdiction to deal with the matter on originating summons. Kekewich, J., however, considered he had jurisdiction, and, after hearing the evidence filed by the plaintiff and the defendants respectively, he decided that there had been no gift of the £171 15s. in question, by the testator in his lifetime, to the defendant Sarah Royle.

The defendant Sarah Royle appealed.

Levett, for the appellant.—The court had no jurisdiction on an originating summons to try and determine a claim such as that of the defendant's—viz., a claim hostile and adverse to the will of the testator—such a claim could not be determined in an action for administration of the testator's estate, and, therefore, cannot be determined on an originating summons: *In re Davies, Davies* v. *Davies*, 36 W. R. 587, 38 Ch. D. 210. [He was stopped by the court.]

Ford, contrà.—The question raised by the summons is really a question of account, and the defendant Sarah Royle, the widow, is a beneficiary under the will. [COTTON, L.J.—But the widow claims this sum as having been given to her by the testator in his lifetime, and not as forming part of his estate at the time of his death.] The point as to the jurisdiction was not taken until the summons came on for hearing before the judge below, and the submission of the defendant was sufficient to give the court jurisdiction: *In re Turcan*, 37 W. R. 70, Annual Practice, 1888-9, p. 728. The case of *In re Davies* was a question arising between two beneficiaries, and not a question raised between an executor and a beneficiary, as this is.

COTTON, L.J.—On the question of jurisdiction Kekewich, J., considered he had jurisdiction to deal with the question raised, on an originating summons under ord. 55, r. 3, but in my opinion that view is erroneous. Under ord. 55, r. 3, questions between executors and legatees, as legatees, may be determined on an originating summons, but the claim dealt with on this summons is not a claim by the widow as legatee, but is a claim raised by her in respect of a sum of money alleged by her to have been given to her by her husband in his lifetime. It is therefore a question arising between executors and a person who says she is entitled to the sum of money in question, not as a legacy, but as a gift *inter vivos*. That is not a question which could be properly decided in an administration action. In an administration action it would have been proper to direct an inquiry as to what sums of money formed part of the testator's estate, but on such inquiry there could not have been any decision against the claim of the widow, who does not claim this money as part of the testator's estate. I therefore think that Mr. Levett's objection must prevail.

BOWEN, L.J.—With regard to the point as to jurisdiction, I agree that the question arising for determination on this originating summons is one which cannot, adversely to the wish and without the consent of the defendant, be decided or dealt with by the court, and that it does not come within ord. 55, r. 3 (*g*). It was contended that the defendant had submitted to the jurisdiction by filing evidence and appearing on the hearing of the summons, and the case of *In re Turcan* was relied on as an authority for that contention. But that case only decided that if a person who claimed adversely to the trusts declared by an instrument, appeared on the hearing of proceedings taken for the

administration of the trusts, and took no objection to the jurisdiction in the court below, it was not open to him on appeal to raise the question of jurisdiction. That is an entirely different case from the present one. In my opinion in the present case the court had no jurisdiction to deal, as it did deal, with this matter on an originating summons.

FRY, L.J.—I am of entirely the same opinion. I think that ord. 55, r. 3 (*g*), is not intended to give jurisdiction except in matters which might have been determined in an administration action. The words "determination of any question arising in the administration of the estate or trust" are emphatic. I entirely concur with the views expressed by North, J., in the case of *In re Davies*, on this point.

Subsequently counsel for the respondent, the defendant Sarah Royle, agreed to waive the objection as to jurisdiction, and submitted the claim raised by her for the determination of the court in the present proceedings, and the court, after hearing the evidence, decided that there had been a gift of the £171 15s. made by the testator in his lifetime to the defendant Sarah Royle.

Appeal allowed.

Solicitors for the appellant, *Yielding, Barlow, & Piper*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

Solicitors for the respondent, *Bower, Cotton, & Bower*, for *W. H. Vaughan*, Cheadle.

From Chan. Div. Aug. 5, 1889.

In re POUND, SON, & HUTCHINS.

Ex parte DEBENTURE CORPORATION. (*a*.)

Company—Winding up—Debenture—Mortgage—Receiver—Right of debenture-holders to take possession of mortgaged property after winding-up order—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 24.

Where a limited company, which has mortgaged property to debenture-holders, is being wound up, a receiver appointed by the debenture-holders under their deed, has a right to possession of the mortgaged property, though it is necessary, in order to avoid committing a contempt of court, to apply for the permission of the court for him to take possession.

A limited company charged all its present and future property and undertaking with payment of debentures, which provided that, at any time after a winding-up petition against the company had been presented, the debenture-holders might appoint a receiver of all the property charged, as if they were mortgagees within the Conveyancing Act, 1881, *and that such receiver should have power to take possession of the property, carry on the business of the company, sell or let the property, and call up capital. After a petition had been presented, and an order made to wind up the company, the debenture-holders appointed a receiver, and applied to the court for leave for him, notwithstanding the appointment of an official liquidator, to take possession of the assets.*

Held, that leave to the receiver to take possession ought to be given, the applicants consenting that it should be without prejudice to any question as to the receiver's powers other than the powers to take possession of and sell the property.

Judgment of Kay, J., 37 *W. R.* 726, *reversed.*

Appeal from Kay, J.

This was an appeal by the Debenture Corporation (Limited), from an order of Kay, J., appointing the liquidator of Henry Pound, Son, & Hutchins (Limited) to be receiver of the assets comprised in the security given to the debenture-holders, with liberty to the Debenture Corporation, who were the holders of all the debentures, to attend the proceedings till they were paid off.

The company (Henry Pound, Son, & Hutchins (Limited)) had in 1888 issued first mortgage debentures to the amount of £20,000, which were all taken by the Debenture Corporation, and all the present and future capital, property, and undertaking of the company were, by the debentures, charged with payment of the amounts owing on them. An express power was also given for the corporation, at any time after a petition for winding up the company should have been presented (and in certain other events), to appoint a receiver of all the property charged, as if the corporation were mortgagees within the meaning of the Conveyancing and Law of Property Act, 1881, and had become entitled under that Act to exercise the power of sale thereby conferred, and such receiver was to have power to take possession of the property charged, carry on the business of the company, sell or let the property, call up uncalled capital of the company, and do other specified acts.

In 1889 a winding-up order was made on a creditor's petition, and an official liquidator was appointed. A few days after the winding-up order, the Debenture Corporation, under the powers given by the debentures, appointed a receiver of the company's property, and served notice of the appointment on the official liquidator. The liquidator considered the assets were worth considerably more than the amount due on the debentures, so as to leave something for the unsecured creditors.

The corporation then took out a summons that, notwithstanding the appointment of an official liquidator, the receiver appointed by the corporation might be at liberty forthwith to take possession of all the undertaking and property, both real and personal, of the company.

The case is reported below at 37 W. R. 726, where the facts, and the provisions of the debentures, are more fully stated.

Kay, J., held that the court had power to impose terms on debenture-holders who apply in a winding up for leave to take possession of all the assets of the company under the powers of their debentures, and that, under the circumstances, leave to take possession should not be given in the present case, but that the official liquidator should be appointed receiver on behalf of the debenture-holders, with liberty to them to attend the proceedings until their claims were satisfied.

The corporation appealed.

Rigby, Q.C., Renshaw, Q.C., and *H. S. Theobald*, for the appellants.—We come to the court to ask for directions merely because it would be a contempt to disregard the winding-up order and take possession without the leave of the court. It is a matter of course to give first mortgagees leave to take possession. That is so even when a *puisne* incumbrancer has obtained the appointment of a receiver: *Langton* v. *Langton*, 3 W. R. 222, 7 De G. M. & G. 30. When an action is brought by debenture holders it has been laid down frequently that, though the court has jurisdiction to stop the action, it will not do so. But where the action is for a receiver, then the receiver is appointed by the court, which accordingly appoints the official liquidator as receiver. The court, being asked for a receiver, grants it *ex debito justitiæ*, but finding one, in the shape of the official liquidator, already in possession for another party, appoints him, if a fit and proper person, as a matter of course. But for

(*a*.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

section 87 of the Companies Act, 1862, we could take possession of our own motion and give effect to our rights. If the liquidator, as he swears in his affidavit, can make more of the property than the amount owing to us, let him redeem us. It is said we ought to have applied before the liquidator was appointed. There is no authority for that, and, moreover, if we had done so, we should have been told we must wait till he was appointed. There has been, in fact, no delay. The property is our own, and we only come here out of respect for the court. We rely on *In re David Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339. [They were stopped.]

Marten, Q.C., and *John Chester*, for the official liquidator.—As soon as the winding up begins the rights of the creditors intervene, and it becomes the duty of the court to conduct the winding up. Section 87 says no proceedings are to be commenced against the company without the leave of the court. Under these debentures, the holder may take immediate possession of the property of the company, sell, let, make calls, carry on the business, and do everything that can be done by the official liquidator. The cases show that, if it is a mere question of protecting the mortgagees' rights, the liquidator is the proper person. As soon as the winding up has begun, the only person who can be appointed is the liquidator. Under the terms of the debentures, the holders can make calls on the shareholders and act inconsistently with the winding up so as to interfere with it. Such powers can only apply where the company is a going concern. [FAY, L.J.—Is there any case in which the court has appointed a receiver for a man who has not asked for one?] *Perry* v. *Oriental Hotels Co.*, 18 W. R. 779, L. R. 5 Ch. 420; *Campbell* v. *Compagnie Générale de Bellegarde*, 24 W. R. 573, 2 Ch. D. 181. In *In re Brown, Bayley, & Dixon, Ex parte Roberts*, 30 W. R. 5, 18 Ch. D. 649, which was a debenture-holders' case, liberty to distrain under their contract was refused to trustees for debenture-holders. Here there is only a floating security—there is no assignment or definite charge on any specific property. *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716, is another case. It would be totally inconsistent with the Acts to allow all these powers to be exercised. A mortgagee cannot appoint a receiver under the Conveyancing Act after commencement of winding up proceedings. It would be inconsistent with the Companies Acts to allow an agent of the company nominated after the winding-up order to call up fresh capital and exhaust the remaining means of the company and involve it in fresh liabilities. Then if the receiver cannot be appointed to act according to the terms of the deed, there must be a discretion in the court whether to appoint him or not. [COTTON, L.J.—Assuming we are against you on the main point, we think at present that we ought to limit the powers of this receiver to taking possession, receiving the rents and profits, and perhaps selling.] The order of Kay, J., ought to be maintained in its entirety. If not, it can only be discharged. The judgment is twofold. [COTTON, L.J.—Taking possession under a mortgage is not a "proceeding" within section 87.] The fact that an officer of the court is in possession is sufficient ground to give the court a discretion. If the court has not a discretion it cannot interfere to limit the powers given by the contract. They also referred to *Bartlett* v. *Northumberland-avenue Hotel Co.*, 53 L. T. N. S. 611, 34 W. R. Dig. 36; *Willmott* v. *London Celluloid Co.*, 52 L. T. N. S. 642, 33 W. R. Dig. 45. [COTTON, L.J.—Mr. Rigby, we think there are a good many powers which this proviso purports to give to the receiver which cannot be exercised by him, or, at any rate, it is questionable whether they can be; but what we propose (and if you are satisfied with it we need not hear you in reply) is this—to give the receiver liberty to take immediate possession of all the undertaking and property, real and personal, of the company, without prejudice to any question to be raised by the company as to the powers of the receiver other than the power to take possession of the property and to sell all or any part of it. *Rigby, Q.C.*—We cannot object to that. The court has a certain amount of control over this property. We submit to what your lordship proposes.]

COTTON, L.J.—This is an appeal from an order of Kay, J., and it is one of a somewhat extraordinary nature. The debenture-holders, under their debentures, had, by contract with the company, a right to appoint a receiver, who represented them for the purpose of taking possession of the property and selling it, if it should be deemed advisable to sell it. It also gave him various other powers. I think that the winding up does prevent the exercise of many of those powers, but I do not see that that can interfere with the mortgagees' receiver's right to take possession. There is no dispute that the whole property of the company was subject to this mortgage—which was a charge (not exactly a legal mortgage)—and as a part of this security a receiver was to be appointed with power to take possession and to sell. It is said that if this receiver is only to have the powers of a receiver appointed by the court, he must, for the purposes of this application, be treated as if he were a receiver so appointed. That argument seems to me entirely to miss the point. If the court is applied to by a mortgagee to appoint a receiver, the mortgagee not having, without the assistance of the court, power to appoint a receiver, then the court exercises its discretion as to who shall be appointed receiver, and appoints the person whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor; and when a company is being wound up, whether there is a winding up at the time the receiver is appointed or afterwards, then the court says it is quite useless to incur the expense of having two receivers, the liquidator, who is in fact in some senses a receiver, and another receiver appointed in this action. There the court exercises its discretion as to whom it shall appoint. But those cases do not at all apply, in my opinion, where a receiver who is asking to be let into possession has not been appointed by the court, but is appointed by the mortgagees under and in exercise of the power given them by the mortgage deed. In such a case it is not left to the court to determine who shall be the receiver best for the interest of all parties, but the mortgagee comes and says, "My deed enables me to appoint A. B., and I have appointed him: let him into possession." Then it is said, If that is so why do the debenture-holders apply to the court in respect of their receiver at all? That is an admission that the court has a discretion. No, it is not that—it is this: a person having security on a property which is in the possession of an officer of the court, cannot, if he would otherwise take possession, take possession without the leave of the court, so as to dispossess the officer of the court who is in possession.

It has been argued by Mr. Chester (and he wished to thrust that argument on the other side) that this was an application under section 87, which says "No suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court." Certainly nothing has been said here, either by Mr. Rigby or by Mr. Renshaw, to lead to the suggestion that they were applying with reference to that section; but it is this—that they would be guilty of contempt of court if the receiver appointed under this deed, after the appointment of the liquidator, and after the liquidator was in possession, had taken possession of that which the liquidator, the officer of the court, held. This is why they apply to ask the court to enable them, notwithstanding the possession of the officer of

the court, to exercise the rights which they have under their own deed. But it is said that this will entirely put an end to the winding up, and that it will entirely withdraw the winding up from the control of the court. To some extent no doubt it would, where the company which is being wound up has entirely parted with all its property, and where it has given a simple mortgage of all its property. That would paralyze the winding up, and would paralyze the action of the liquidator, and would certainly take away any provision for the costs of the liquidation, or anything with which the liquidator could deal, if the property mortgaged were the entire property of the company. But I do not think at all that here the receiver appointed under this deed, who is under some necessity to be called a receiver, which raises the presumption that he is like a receiver appointed by the court, can do all the things which are mentioned in this provision contained in the debentures. For he certainly cannot carry on the business of the company after the winding up; he cannot make calls; he cannot use the name of the company in any proceedings. There are a vast variety of things which we do not interfere with by any exercise of discretion by the court as to allowing the receiver to take possession, for this reason, that, so far as my present information goes, the altered position of the company is such as to prevent various things, which this debenture authorizes the receiver to do, being done. Therefore, I think it is the right of the mortgagees or the debenture-holders (I treat them as mortgagees) to take possession of the mortgaged property, the winding up not in any way interfering with that, or with the selling of the property, nor enabling the liquidator to employ and use in carrying on the business of this company (as he may do for the purpose of the winding up) that which is not the property of the company, but which is the property of the debenture-holders—that is to say, the mortgagees.

I cannot understand, I must say with great respect, how Kay, J., could appoint the liquidator receiver, because there was no action in which any receiver could be appointed by the court, and if he did not give to the receiver appointed under this deed what I think it was the right of the debenture-holders to take possession of, I cannot see how he could appoint the liquidator to be a receiver on behalf of the debenture-holders. What I think we ought to do, will be to discharge the order, and to make an order for liberty for the receiver to take possession, adding that saving clause which Fry, L.J., has sketched out, and which I have already read.

FRY, L.J.—Substantially this is an application by a mortgagee for leave to take possession of property which is in the custody of the officer of the court. There is a difference, which I will refer to presently, between such an application and the present one, but in substance it seems to me to be of the same nature.

Where the property is in the possession of an officer of the court and there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the court, and such legal or equitable rights are not the subject of the administration then going on—then the court requires that the person who claims to enforce those rights shall apply for leave to enforce them. Those rights may be rights to take possession, bring an action, or do various other things, but the court requires an application to be made to it. Now, on what principle would the court proceed in considering whether that application should be granted? I conceive that it proceeds on the principle of paying the utmost respect to the legal or equitable rights of the persons whose interests are not being administered before it. If it were to do otherwise the result would be that the rights of a stranger to the litigation would be diminished by the pendency of that litigation, and that the rights of the parties to the litigation would be increased and improved by the pendency of that litigation—a result which is obviously unjust, and which the court ought never to arrive at, and one at which, in my opinion, it never yet has arrived.

That principle, as expounded by James, L.J., in the case of *In re David Lloyd & Co.*, is that the anxiety of the court must be, though requiring the application to be made to it, not to interfere with the rights of strangers. That being the general principle, it appears to me that this was primarily an application for leave to take possession by a person who has a right to possession, and I do not think the court has any ground for interfering with that right.

The discretion which the court exercises when asked to appoint a receiver differs *toto cœlo* from the discretion the court is asked to exercise here. In the former case the court has before it, assuming it to be an application by a mortgagee, both mortgagee and mortgagor, and it has regard to the rights of all the litigant parties before it. In that way, where the mortgagor happens to be a limited company which is in course of winding up, the court has, on the ground of convenience and on the ground of saving expense, frequently appointed the liquidator to be the receiver, and in that case there is an application made by the mortgagee to the discretion of the court, and he cannot object to the discretion of the court being exercised.

The main argument in this case seems to me to be based merely upon a confusion of two kinds of application—between an application to enforce the rights of a stranger and an application to the discretion of the court by a litigant asking to be appointed receiver.

But this is not a simple case of a mortgagee applying for leave to take possession; because in the debentures under which the applicants claim, power is given, not to take possession themselves, but to appoint a receiver for the purpose. That is, probably, merely for the sake of convenience. Being a corporation they can only act by an agent. The receiver appointed to take possession is a mere agent for the mortgagees. I can see no reason why we should not give possession to the agent of the mortgagees as well as to the mortgagees directly. It is equivalent to the debenture-holders taking possession under their mortgage, and the application is merely necessitated in order to avoid a contempt, owing to the winding up having placed the affairs of the company under the control of the court. But then it is said "The powers of the receiver are very large, and some of them necessarily come to an end on the happening of a winding-up order." That may or may not be the true construction of the deed. I incline to think that it is so, and that some of the powers will not continue after the winding up of the company, but it is not necessary to decide the point. No argument has been addressed to us to show that the power to take possession is one which necessarily comes to an end on the winding up of the mortgagor. The deed, therefore, stands as a valid one, although, according to its true construction, it may be that some of the powers cannot be exercised. I think, therefore, that the order which Cotton, L.J., has suggested is the right one.

LOPES, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellants, *Linklater & Co.*

Solicitors for the respondent, *Bonner, Wright, Thompson, & Co.*

From Chan. Div. June 7, 1889.

In re CALLAO BIS CO. (a.)

Company—Voluntary winding up—Sale and transfer of assets to new company — Special resolution — Sanction of court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 161.

The sanction of the court to a special resolution for the transfer, under section 161 *of the Companies Act,* 1862, *of the business or property of a company to another company (without which sanction the special resolution, in the event of an order being made within a year for winding up the old company by, or under the supervision of, the court, will be of no validity), cannot be obtained under section* 138 *in a voluntary winding up, but must be obtained in the matter of the winding up, either at the time of the making of an order for winding up by, or under the supervision of, the court, or at the time of the making of any order subsequent thereto.*

Judgment of North, J., *affirmed.*

Appeal from North, J.

The Callao Bis Co. was incorporated in 1885 with a nominal capital of £200,000 in £1 shares, nearly all of which were allotted and fully paid up. An extraordinary general meeting of the shareholders was held in March, 1889, when the following resolutions were passed:—(1) That the Callao Bis Co. (Limited) be wound up voluntarily under the provisions of the Companies Acts, 1862—1867. (2) That pursuant to section 161 of the Companies Act, 1862, the liquidator be and he is hereby authorized to sell and transfer (subject to due provision being made for dissentient shareholders, if any) all the property and assets of the company to a new company, upon the terms of the scheme of reconstruction now submitted to the meeting and identified by the chairman.

The scheme referred to, contemplated the formation of a new company, which was to take over the assets and liabilities of the old company, and, by way of payment, was to allot the bulk of its ordinary £1 shares credited with 15s. paid up, and a certain number of its preference shares fully paid up, to the liquidator for distribution to the shareholders in the old company in proportion to their holdings therein. The above resolutions were duly confirmed as special resolutions at another extraordinary general meeting held sixteen days afterwards.

The new company having been formed, and an agreement for sale of the assets to them in accordance with the terms of the second resolution executed, the old company and its liquidator applied to the court by motion that the sale might be sanctioned by the court, in order to avoid the risk of the resolution being invalidated under section 161 of the Companies Act, 1862, in case of a compulsory winding-up order, or a supervision order, being made within a year.

North, J., held that the sanction of the court referred to at the end of section 161 was intended to be obtained in the compulsory winding up or winding up under supervision, and not in the voluntary winding up, and he also expressed a doubt whether the court had jurisdiction to entertain such an application in a voluntary winding up, though he thought section 138 might possibly cover it.

The company appealed.

Cozens-Hardy, Q.C., and *Grosvenor Woods,* for the appellant company.—The dissentient shareholders are insignificant in number. It would be extremely inconvenient that the validity of a scheme like this should remain in suspense for a year. There is nothing to prevent the court giving its sanction now. That can be done under section 138 in the voluntary winding up just the same as if the company were being wound up compulsorily by the court. No time is specified in section 161 within which the court is to give its sanction. Though Parliament says this can be done in a voluntary winding up, the learned judge considered that all the expense of getting a supervision order from the court must be incurred. There is nothing in the section which prevents the court exercising its jurisdiction at the present time. Every protection has been given to the dissentient shareholders. Section 138 has certainly been held applicable to a case arising under a scheme of this description: *In re Union Bank of Kingston-upon-Hull,* 28 W. R. 808, 13 Ch. D. 808; *Ex parte Fox,* L. R. 6 Ch. App. 176, at p. 186, 19 W. R. Ch. Dig. 54.

G. F. Hart, for a dissentient shareholder.—First, as to the grammatical wording of the section, the words are not "such resolution shall not be of any validity unless it 'shall be' sanctioned by the court," but the word used is "is"—"unless it is sanctioned by the court." Unless such an event as a winding-up or supervision order happens, the question of going to the court for its sanction does not arise at all. Such an order is a condition precedent. There is no machinery in section 161. The last part of that section was not intended to give anyone the power of any fresh machinery for obtaining the opinion of the court. "Such resolution" means, not a resolution for transferring or selling the property of the company, but a resolution to enable the liquidator to accept the consideration in a particular way. The sentence "and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up" only applies between the company and its members. It is admitted there may be creditors of whom nothing is known yet, and the policy of the Act was to let them have a year to come in. The power is to sell the whole or a portion of the company's property. Can it be said a company can pass a resolution giving the liquidator power to sell any part; and then the liquidator can come to the court with the resolution to make any arrangement, and ask the court to sanction it? No winding-up order to be made would in any way affect the members of the company. Though the argument *ab inconvenienti* is very strong, the words of the section are very strong also, and there are arguments of convenience on the other side. As to the question of jurisdiction, everyone interested in the scheme must be represented or served. If done in a winding up, the liquidator will represent everyone except a particular creditor who may be prejudiced by the scheme. The court will require a thorough discussion and investigation of the scheme in all its branches, and therefore all shareholders, creditors, &c., must be represented. Nothing in the nature of this application has ever been granted under section 138. Only orders determining a question, not orders sanctioning a scheme, have been so granted. That was the case in the *Union Bank case,* and in *Ex parte Fox* there was merely a suggestion as to the jurisdiction under section 138. The winding-up jurisdiction is not the remedy for a contributory to invoke in such a case—he must bring an action. Such an application as the present ought not to be granted for the first time twenty-seven years after the passing of the statute. He referred to *In re The Taurine Co.,* 32 W. R. 129, 25 Ch. D. 118.

Cozens-Hardy, Q.C., replied.

COTTON, L.J.—This is an application by way of appeal from an order of North, J., who decided that, when a resolution has been passed under section 161 of the Companies Act, 1862, the sanction of the court cannot be given to it, under that section, when no compulsory or supervision order has been made.

The first question is whether section 138 gives the

(a.) Reported by R. H. DRAKE, Esq., Barrister-at-Law.

court power to entertain this application. If it does not, there is no power to do so. In my opinion that section does give power to the court to entertain the question, as one arising in the winding up, because this is a question how the winding up is to be conducted, and how the shareholders are to get the value of their shares; but then it applies only unless the Act points out a different mode of procedure. It is clear the sanction of the court could be given if a compulsory order or supervision order were made. Then it is said it is inconvenient to have recourse to such an order. But it often happens that the Legislature does not provide against the inconveniences which may arise in any particular case in resorting to a remedy which it has provided.

In my opinion the view of North, J., is unfortunately the correct one. Section 161 enables a resolution to be passed in a voluntary winding up authorising the liquidator, either generally or in carrying out a particular scheme, to sell the assets and make payment to the shareholders by giving them shares in another company; and it provides that this shall be binding on all the members of the company which is being wound up, subject to this proviso: that dissenting members can require the liquidator either to abstain from carrying the resolution into effect, or to pay them the value of their shares. No provision is made there for creditors.

When we look back to section 146 we find that, where a company is being voluntarily wound up, and then an order for compulsory winding up is made, the court may, if it thinks fit, provide in such order or any other order, for the adoption of all or any of the proceedings taken in the course of the voluntary winding up. That does not apply to the case of the supervision order. But the proviso at the end of section 161 applies to both supervision and compulsory orders. In my opinion, what is intended by the proviso is the carrying out more fully, with reference to such sales as are contemplated by that section (and whether a winding-up order or a supervision order is made), of that which is provided for generally as regards a compulsory winding-up order in section 146. As there is not in section 161 anything which points to the sanction being given in the voluntary winding up, I think the fair construction is, that this resolution would be binding on the shareholders, but that, as possibly there are other creditors who may not know of the resolution or see how it will affect their interests, their rights are reserved; and so if within a year proceedings are taken which lead to an order for compulsory winding up, or continuing the winding up under supervision, then the resolution, and consequently the sale made under it, are to be of no validity, unless the court, either by the order directing the winding up or supervision, or by a subsequent order, directs that the resolution shall be a good resolution. In my opinion that is the correct construction of section 161. It may be inconvenient, but I think this is the course which must be adopted, notwithstanding the inconvenience. Generally speaking, the creditors would be the only persons who could raise this question and ask for an order to invalidate the resolution. I am not prepared to say that the court will never interfere by making a supervision order at the instance of a shareholder, but the court is very unwilling to do it, and, practically, the only difficulty is as regards the creditors who are not treated by section 161 as intended to be bound by any resolution made under it. The appeal must be dismissed.

FRY, L.J.—I am of the same opinion. I am thoroughly impressed with the inconveniences of the conclusion we have arrived at, because I cannot help seeing that the sale, though made perfectly *bonâ fide*, may be impeached at any time within a year, and after various things have been done under it. Still, I think North, J., has put the true construction on the clause. First, the words at the end of section 161 seem rather to import a sanction in a winding up, compulsorily or under supervision, than a sanction independently of it. The concluding words are to the effect that, if an order for winding up by, or under the supervision of, the court be made, the resolution is to be of no validity unless sanctioned by the court, the natural meaning of which is, unless the court at the time of making the order, or by subsequent order, sanctions the resolution. That conclusion, as pointed out by Cotton, L.J., fits in well with section 146, which, in the case of a compulsory winding up being ordered after the voluntary winding up has been going on, provides for the adoption, if the court thinks fit, of the proceedings in the voluntary winding up. The effect, therefore, appears to me to be that strong pressure is put on all persons concerned in making and carrying out these resolutions to make such a resolution as shall be sure of receiving the sanction of the court. If that is done the purchaser will have very little to fear of the court refusing its sanction. The appeal must be dismissed, with costs, and the appellants must pay the respondents' costs of the appeal, though the question is a proper one to be brought before the court.

Appeal dismissed.

Solicitors for the appellant company, *Snell, Son, & Greenip.*

Solicitors for the respondent, *Gresham, Davies, & Dallas.*

From Chan. Div. May 20—22, 1889.

TURTON *v.* TURTON. (*a.*)

Trade name—Use of similar name—Defendant having same name as plaintiff—Injunction.

The plaintiffs had for many years carried on the business of steel plate manufacturers at Sheffield under the corporate name of "Thomas Turton & Sons (Limited)," and that name had obtained a prestige in the trade. The defendant, John Turton, had also for many years carried on at Sheffield a similar business under the name of "John Turton & Co." In 1888 John Turton took two of his sons into partnership with him, and they adopted the name of "John Turton & Sons" as their firm name.

The plaintiffs sought to have the defendants, John Turton and his sons, restrained from carrying on business under the name of "John Turton & Sons," or any other name so closely resembling the name of the plaintiffs as to be calculated to deceive. The evidence showed that the defendants had done nothing—apart from the adoption of the name of "John Turton & Sons"—to represent their goods or the business carried on by them as being the same as, or in any way connected with, the goods or business of the plaintiffs; there was, however, some evidence to show that, owing to the similarity of the names of the two firms, letters intended for the plaintiffs had been sent to the defendants.

Held, that the plaintiffs were not entitled to an injunction against the defendants.

Hendriks *v.* Montague, 30 *W. R.* 168, 17 *Ch. D.* 638, *discussed.*

Decision of North, J., *reversed.*

Appeal from North, J.

The plaintiffs in this action were a limited company carrying on at Sheffield the business of steel plate manufacturers under the corporate name of "Thomas Turton

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

& Sons (Limited)." The plaintiffs were the successors in business of a firm who had for many years carried on the same business at Sheffield under the name of "Thomas Turton & Sons," and that name had become well known in the market and carried prestige with it. The defendants were John Turton and his two sons. The defendant John Turton had for many years carried on at Sheffield a business similar to that of the plaintiffs under the name "John Turton & Co." In June, 1888, John Turton took his two sons into partnership with him, and they then adopted as the name of their firm "John Turton & Sons."

The plaintiffs by this action claimed an injunction to restrain the defendants from carrying on their business under the firm name of "John Turton & Sons," or any other firm name so closely resembling the plaintiffs' name as to be calculated to deceive.

The evidence showed that, apart from the adoption of the name of "John Turton & Sons," the defendants had done nothing to represent their goods, or the business carried on by them, as being the same as, or in any way connected with, the goods or business of the plaintiffs. The evidence also showed that the defendant John Turton's sons had entered into a *bonâ fide* partnership with their father.

There was some evidence to show that since the defendants had adopted the name of "John Turton & Sons" letters intended for the plaintiffs had been delivered to the defendants, and that the similarity of the names was calculated to cause mistakes and blunders.

North, J., granted the injunction the plaintiffs claimed.

The defendants appealed.

Rigby, Q.C., *Everitt, Q.C.*, and *Chadwyck Healey*, for the appellants.

Cozens-Hardy, Q.C., *Moulton, Q.C.*, and *J. Cutler*, for the respondents.

The arguments used and the material cases relied on are fully dealt with in the judgments.

Lord ESHER, M.R.—In this case an action was brought for an injunction against the defendants, not for using any trade-mark of the plaintiffs, but for carrying on business under the name in which they have carried on business and in which they propose to carry on business, and to which they claim to have a right.

The plaintiffs had carried on business under the firm name of Thomas Turton & Sons. That business had been carried on by the plaintiffs and their predecessors for a long series of years at the same manufactory, and their business had been carried on in such an excellent manner that the name of Thomas Turton & Sons had become known in the steel or iron trade, and carried with it the prestige of the name, as signifying that if steel was bought from them it would be of the excellent quality that had always been maintained by the manufactory. It was not only that they had used the name, but that the name had come to be a name which would give a prestige to goods in the market. As regards the defendants, it has been proved John Turton, the father of the other defendants, first of all set up in the same town a business, a considerable part of which was the same kind of manufacture of steel as the plaintiffs. After a time he took into partnership his two sons, the other defendants. He had first of all carried on business in his own name of John Turton, and when he took his sons in as partners he took as his business description "John Turton & Sons." Now, it is not alleged—certainly it is not proved—against him, that he did anything in the way of his trade which tended to give any other meaning to the name in which he carried on his business, or which could give any other meaning to it, than merely the fact that he did carry on business and was in partnership with his sons. He had not done anything with the intent or for the purpose of making the use of his simple name look as if his name were the name of the plaintiffs. In some cases, besides using the name, parties have, to use what I think is a happy phrase of Cotton, L.J.'s, "garnished" that use—that is, they have done things besides using the name, in order that the use of that name might look as if it were being used by the old firm. There is nothing of that kind here. The defendants have carried on a business a great part of which is the same as the plaintiffs, but they have carried it on in the name of John Turton & Sons, the name of the principal being John Turton, and, it being true that he has taken his sons in as partners; the defendants have done nothing but that. That is all the defendants propose to do, and, as has been pointed out by Mr. Rigby, although at one time there seems to have been an allegation that the defendants were doing something more than that, in order to make people believe that the manufactory was the manufactory of the plaintiffs, that allegation is withdrawn, and therefore it is clear that there is no charge that the defendants have done anything but simply used it as their business name, and simply carried on their business with a statement that the father is carrying on his business himself as John Turton and with his sons as partners, which is the accurate and exact truth.

Therefore the first question of law in this case is this: Supposing that, and that only, is done by the defendants, but, nevertheless, some people, or, if you please, many people, in the market do from time to time give orders intending them for the plaintiffs' firm, which, on account of the similarity of name, go to the defendants' firm, are the plaintiffs entitled to an injunction? If there had been anything more than the mere use of the name by the defendants in the way I have stated, that there might have been a necessity for an injunction, I think, cannot be denied. Here are two firms: Thomas Turton & Sons and John Turton & Sons; well, careless people may not notice the difference of Christian name, and may look more to the name of "Turton & Sons," which are the same in both. That might be so. Therefore, for this purpose, I assume that the names are sufficiently alike to cause those blunders in trade; but they are blunders of the people who make the blunders. Has the defendant John Turton done anything to so far cause that blunder, even though he did not intend it, which entitles the court to stop him from doing what he is doing. He is simply stating that he is carrying on business with his two sons as partners. I say that is the accurate and exact truth of what he is doing. I will assume for the moment that it is pointed out to him that, he doing that, blunders will occur in the business, and that the results which are complained of will happen. Is there anything dishonest—is there anything wrong morally in any, even in the strictest sense—in a man using his own name, or stating that he is carrying on business exactly as he is carrying it on? Is there anything wrong in his continuing to do so because people make blunders, and even, if you please, because they make probable blunders? What is there wrong in what he is doing?

Now it is said that the plaintiffs have a trade name and a property in their name. I doubt about property, though they have this right: That no man shall wrongfully interfere with their name. But they have no right to say that a man may not rightly use his own name. I cannot conceive that the law is such. If the law were such, the law would be most extraordinary, and, to my mind, most unjust to prevent a man's using his own name. And I must say this, that all the arguments which have been used in this case would have been equally applicable if there had been nothing about sons, and if one man were carrying on business as Thomas Turton under the circumstances in which Thomas

Turton & Sons were carrying on their business, and another man named John Turton were to come and carry on his business simply in his own name. Therefore, the proposition goes to this length: that if one man is in business, and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business, he must discard his own name and take a false name. The proposition seems to me so monstrous that the statement of it carries its own refutation. Therefore, upon principle, I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names, he is doing no wrong. He is doing what he has an absolute right by the law of England to do, and he cannot be restrained from doing that.

Now let me see if there is authority for what I am saying. I am not going to read what is called the epigrammatic judgment of Knight Bruce, L.J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896. I do not think that a truthful proposition is a bit worse because it is put in an epigrammatic form. It fixes the proposition on one's memory; and when I look at the judgment of Knight Bruce, L.J., I can see no difference in the smallest respect between that judgment and the judgment of Turner, L.J., which immediately follows it, except in the form of expression. But as something which will not give rise to cavil I will take the judgment of Turner, L.J., in *Burgess* v. *Burgess*: "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." That, he says, is the fundamental proposition "where a person is selling goods under a particular name, and another person, not having that name"—that is, where it is not his real name—"is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses." It looks to me rather as if that would be a *primâ facie* case. One name is stamped with peculiar value which is given to it, another man who has not that name comes and takes that name. I think *primâ facie* that would look as if he were doing it for the purpose of interfering, and for the purpose of representing his goods to be the goods of the other. "But where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff." That is to say, if only those two facts are established, that does not make a *primâ facie* case. The first does make a *primâ facie* case, but the second does not. Then Turner, L.J., goes into the second case. He does not say so, but the next sentence is, "It is a question of evidence in each case." The first is a *primâ facie* case, but it may be answered by evidence. In the second case, although that is not a *primâ facie* case, there may be other circumstances. "It is a question of evidence in each case whether there is false representation or not." He does not say whether there is "representation" or not, but "false representation." That is, he goes back to his fundamental proposition: No man can have the right to represent his goods as the goods of another person. Therefore, if a man uses his own name, that is no *primâ facie* case, but if, besides using his own name, he does other things so as to produce other circumstances which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another person, then he is to be prohibited, but not otherwise.

I take that to be a perfectly correct representation of what I think the law is, and I think that when you look at the judgment of Lord Blackburn in the case of *The "Singer" Machine Manufactures* v. *Wilson*, 26 W. R. 664, 3 App. Cas. 376, you will see that he really comes to the same conclusion. At page 400 Lord Blackburn says, "This is not an action to recover damages for a wrong already committed, but an application for an injunction to prevent the continuance of a wrong which has been committed, and is threatened to be repeated, and I think that if it were proved that if the course pursued would really produce the effect of passing off the defendant's goods as and for the plaintiff's" he is speaking of the particular case in which a man had taken a name not his own—"the injunction should be granted (whatever might be the case as to the account) whether the defendant heretofore meant it to produce that effect or not." There he had the case of a business carried on by one man in such a way that the name had become valuable to him, and there was another man not using his own name, but taking a name which was not his, but closely resembling the plaintiff's name. That is the first case mentioned by Turner, L.J. Lord Blackburn seems to me, by what I am next going to read, to say that might be innocent up to that time because the defendant might not know and might not intend any interference. If a plaintiff were asking for damages for what was past he would have to prove more than the fact that the defendant had taken the name and had injured the plaintiff—the plaintiff would have to prove that the defendant intended it, that what the defendant was doing was fraudulent. That is clear. But Lord Blackburn says if the defendant had not that intent, what he had done, although injurious to the plaintiff up to that time, might be innocent, and if it were innocent the law cannot interfere. But Lord Blackburn goes on to say that under those circumstances the plaintiff, having shown the facts and what was done before, would not be called upon to prove the fraud in order to get an injunction. Why? Because after the matter had been made clear to the defendant and the injury he had been doing, not by taking his own name but by taking another name, if he had persevered as he threatened to do after learning that what he was doing produced these effects, he would, unless in very exceptional cases, do a wrong. Therefore it seems clear to me that you cannot grant an injunction on the ground that a man is doing an innocent or proposes to do an innocent thing. But Lord Blackburn says an injunction must be granted in such a case as that although the damages might not be recoverable from the past, because if the defendant went on as he threatened to do after the matter is pointed out to him, he would be doing a wrong thing. That seems to me to adopt the principle which Turner, L.J., laid down. It comes to this, that you cannot recover damages against a man if he has only done that which he has a perfect right to do; you cannot recover damages against a man unless he has done something which is a wrong against the plaintiff. You can grant an injunction against a man if he is proposing to do, and insisting that he has a right to do, that which if he does it in the future will be a wrong act against the plaintiff. Therefore it is not necessary to show a past wrong. It is sufficient in order to support a claim for an injunction that a man is proposing to do that which will be wrong in future. But if all that you are proposing to do in the future is simply that which by the law of this country you have a right to do, no injunction can go.

Therefore if you take the case before us and try it by those principles, the defendants have done no wrong in the past and even though that which is alleged to be the result, and which for this purpose I will assume to be the result, follows, and will take place in the future, nevertheless that result is not the result of any act of the defendants which can be said to be a wrong act even against the plaintiffs. The defendants have done no-

thing but carry on business and state to the world that they carry on that business in the exact accurate way in which they carry it on; John Turton has done nothing more than to carry on business under this statement, "I carry on my business as the father, John Turton, with my two sons as partners." That is strictly accurate and he has done nothing more. And I desire to say that if the name of the plaintiffs' business which they had carried on had been Thomas Turton & Co. and that name had become valuable, and if the defendants had *bonâ fide* and honestly formed a company themselves and had carried on business merely stating that their business was carried on by John Turton & Co., if that were an accurate description of a *bonâ fide* company constituted by themselves the same result would have followed if they had done nothing more than that, because that statement also would be only simply and perfectly accurate.

Therefore on these grounds I think that, even though the defendants had done damage to the plaintiffs, there would have been no ground for an injunction against the defendants.

I therefore think it unnecessary to determine—although I do not mean to determine it the other way—what the exact result of the evidence is with regard to the business of the plaintiffs.

I am of opinion in this case, both on principle and authority, that the appeal must succeed.

As to the case of *Hendriks* v. *Montague*, 30 W. R. 168, 17 Ch. D. 638, which has been cited as against myself and Cotton, L.J., in order, I suppose, to frighten us by something which we had said in that case, I can only say, speaking for myself, that if I have said something in a former case not necessary to the decision of the case, and I have found now that what I have said was wrong, I should nevertheless go home with a quiet mind, believing that when the point came to be material I decided it rightly, although when it was immaterial I had said something wrong about it.

COTTON, L.J.—This case is one of considerable importance, and I think the judgment that has been given by the Master of the Rolls is a right one. It would lead to most serious consequences if people having acquired a business reputation with a name could prevent any man of the same name from carrying on the same business. That is clear and simple.

As to the facts, I agree with what was stated by the Master of the Rolls, but I think it right to state them again shortly. The defendant John Turton, the father, had carried on business as steel roller only originally, but afterwards, and before he formed the present partnership, he carried on that business and added to it the business of steel manufacturer, and a year ago he took two sons, who had been brought up in the business, into partnership. Now it is not for one moment suggested that those sons had not a substantial interest in that partnership; it is not suggested that they were brought in simply for the purpose of adding their names to the firm name under which the father carried on business, but it was assumed that they were fairly and honestly partners in the business. Then the father having taken his two sons in and made them partners, takes the name of John Turton & Sons. In my opinion he does that in the ordinary way of expressing to the mercantile world the fact that his two sons were taken into the business with him in order to introduce them and to put them before the world as persons who were interested as partners in this business. He sends round a circular to all his customers, including the present plaintiffs, announcing that fact in terms to which no objection is made, except as applies to the use of the name John Turton & Sons.

The plaintiffs were a company who had been carrying on a business which in many respects is similar to the business carried on by the defendants, under the name of Thomas Turton & Sons, to which they add the word Limited wherever they express their name in various documents—invoices, &c. That is their name. No bills or billheads have been produced by the respondents.

I assume—because the plaintiffs have not shown anything to the contrary, and it would have been an important thing—that there is nothing in the plaintiffs' billheads which it can be said the defendants are imitating so as to make any false representation as to the name of the firm which they are carrying on. There is no trade-mark—no goods of the plaintiffs have been produced with any marks upon them which it is said the defendants are imitating or have upon their goods.

Therefore it simply comes to this, that there is the name of the defendants, taken under the circumstances which I have mentioned, John Turton & Sons. North, J., has restrained them from using that name in the business which they carry on, though there is nothing at all to represent in any way that the business which they are carrying on as John Turton & Sons is in any way connected with or is the same business as that carried on by the limited company, Thomas Turton & Sons.

We had laid down to us various ingenious propositions by Mr. Moulton which I will not discuss *seriatim*. What is the principle of these things? It is expressed in what was said by Turner, L.J., in *Burgess* v. *Burgess*. That has been read by the Master of the Rolls, and I will not read it again. But the principle is this—No man must pass off his goods as the goods of another. That is the principle upon which it goes. Of course, that may be done unintentionally, but where there is a manifest and natural meaning in the words used that the goods are the goods of somebody else, and the man who uses those terms uses, not his own name, but somebody else's, he would be stopped from doing so as soon as he is aware of the facts which make the *primâ facie* intention and result of what he is doing, passing off his goods as the goods of somebody else. It was formerly said that no action could be maintained unless a man had done so fraudulently and intentionally, but when he finds out that the natural and *primâ facie* meaning and the construction of what he is doing, when the facts are known, is to represent his goods to be somebody else's, then he would be stopped, even though he had done that originally, unintentionally, and innocently.

I may say here that the cases as to the trade-marks which were a great deal relied upon by Mr. Moulton are very different from the case of a name, because a trade-mark is a thing which is assumed and invented by a man for the purpose of his goods, and there is no necessity for anybody else putting that mark upon the goods unless the mark is meant to identify them in such a way as to represent that they are the goods of somebody else whose goods are identified in the same way. Of course, if a man takes a mark for his goods, the same as that of another man, if he has not done it intentionally, it is wrong to go on with that representation on his goods when *primâ facie* it would be taken to mean, not that they are his, but those of some other well-known manufacturer. But here there is no question of trade-mark. As I said before, it is simply a question of name. Here, in my opinion, what has been done by the defendants is simply in the ordinary mercantile way to indicate to the world and to the customers of his firm that the sons have been taken into the business and are carrying on the business with their father. North, J., said—and I think it was one of the foundations of his judgment—that this was a firm name, or a fancy name, and that was argued by Mr. Moulton. But what does this argument come to? I will put it in a syllogistic form. He says, some part of firm names are fancy names, therefore all may be so, therefore all are. It comes to this: that all are fancy names because some are, and all

may be. That is entirely wrong. It is very true that a firm name may be a mere fancy name not indicating any members of the firm, but only indicating that the firm continued to carry on the business, where originally the firm name was a mere short description of those partners who carried on the firm. Further, it may not be even any description at all of the partners who carry on the business, but some name which has been adopted for some reason or other; then it can perhaps be called a fancy name. Here, if I am right in the conclusion at which I have arrived as to matters of fact, that without any fraudulent intention, but merely in the ordinary mercantile way of indicating the fact that the sons are partners, the defendants have taken the name that they have taken, it would be wrong to hold that this was a fancy name, or anything but a short convenient way of indicating that the sons are in the business, and have been taken in as partners. That once established, we ought not to deal with it on the footing upon which North, J., dealt with it—that it was a fancy name assumed by the defendants—but it is a mere statement in ordinary language, an honest statement of the persons who carry on the business, and it must be dealt with, it is suggested, in the same way as if it was not the name of the firm describing those members who make up the firm, but the name of an individual carrying on business in his own name. In my opinion the court cannot stop a man from carrying on his business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer. If that were to be so, there would be at once a monopoly obtained in the use of names by any persons who by carrying on business in one name got a reputation; and it would be a very convenient way of enabling traders to prevent any competition with them by any persons who had the same name in the same trade. Of course necessarily, in my opinion, there must be some confusion when a person who has the same name as another carries on the same business in the same town or place, because, unless people are careful to see that it is Thomas or John they may easily go to one, when probably they intend to go to the other, and the Post-office may very frequently make mistakes, even although one has been established for a long time, if both carry on business together. If one man has been established a year before the other, could the court properly be asked successfully to prevent another man of the same name from coming into the town and carrying on the same business in the same goods simply because the Post-office would be likely to make mistakes and deliver letters to the wrong person? Of course, if anything were done by the second man to hold out or represent that his shop was the shop of the other, or that he was connected with the other when he was not, if there were something added to the name which would enable the court to interfere on the ground that he was trying to represent his business to be the business of the other man, then the court would interfere properly.

Then it was said that the authorities are in favour of the plaintiffs in this case, and various cases were referred to. They are well-known cases and do not require, therefore, any consideration for the purpose of supporting that view. One case that was mentioned was the case of *Croft* v. *Day*, 7 Beav. 84. There Croft was the executor of Day, who had owned the business of Day & Martin. The defendant was a man of the name of Day. I think a relation of the last Day. He was restrained, not from carrying on business in the name of Day & Martin, but from representing that his goods were goods manufactured by the old firm of Day & Martin. What had he done? He had got somebody of the name of Martin who was no connection in business with him to agree to come in and be his partner so as to get the benefit of the name of Day & Martin. Getting a man who is not interested in the business to come in and join him for the purpose of saying he has the name of Day & Martin would be very strong evidence indeed to show that he was trying to represent his goods as those of the old firm of Day & Martin, to which the executors had a right. When we come to the judgment of Lord Langdale he goes through the instances that were given for the purpose of showing that the defendant had made those representations. There was such a similarity in the advertisements of the defendant as to show an intention on his part to pass off his goods as the goods of another. I do not in any way say that fraud is necessary to induce the court to interfere. When a man knows that the natural consequence of what he is doing is to represent his goods as the goods of somebody else, then it is wrong on his part to continue that act. Mr. Moulton pressed in argument this: that the court ought to interfere and stop anything which may be injurious to another person. Yes, if the act done is a wrong one; but whenever a man sets up in business in a town, although it would be interfering with, and to a certain extent injuring, those who were carrying on business before under the same name, in my opinion it would be a wrongful act on the part of the court on those grounds to stop that man from carrying on his business.

Then there was a case quoted which I was rather surprised to hear cited; that was the case of *The Merchant Banking Co. of London* v. *The Merchants' Joint-Stock Bank*, 26 W. R. 847, 9 Ch. D. 560. In that case there was a judgment of the late Master of the Rolls. I shall refer to it because it gave a short, and therefore not complete or accurate, statement of *Croft* v. *Day*. What the Master of the Rolls said was this: "As the law originally stood I think that any person might use his own name for the purpose of trade. He might use any fancy name for the purpose of trade. If a man's name was Brown or Jones he was not compelled according to the common law to carry on trade under the name of Brown or Jones. He might carry it on under any fancy name he choose, and the mere fact of somebody else having the same name and carrying on trade under that name does not prevent another person from doing the same. If John Brown sells coals, another John Brown may sell potatoes," and I should add he may also sell coals. "There is no law that I know of to prevent his selling his potatoes under the name of John Brown, and the first John Brown could not in such a case restrain the second John Brown from carrying on trade under his own name." Then he goes on in a similar way to show that where there is the mere fact that one man of a particular name carries on a particular business, the court will not interfere to prevent a man who honestly does it from carrying on under the same name a similar trade or the same trade.

Now I come to another case which was referred to both by Mr. Cozens-Hardy and Mr. Moulton—*Hendriks* v. *Montagu*—on which North, J., founds his judgment, and founds it, I think, without considering what was the subject the learned judges were dealing with in their judgment when they used the expression on which he relies. That, I say, has always to be considered, because judges do not always guard themselves carefully when they are addressing people whom they suppose to have a knowledge of the law, so as to prevent their judgments being applied to all the possible cases which might arise under entirely dissimilar circumstances. In *Hendriks* v. *Montagu* there was a question between two companies. One was called the Universal Life Assurance Society—that was the plaintiff company—and the defendants chose to call themselves the Universe Life Assurance Association. That name of the defendants was in no way a statement of the facts, or of the persons who were going to carry on the business. It was there really a fancy name which they adopted—a name which

they had manufactured themselves—and the court thought they ought not to be allowed to do that, having regard to the fact that there was a then existing company carrying on the business which the defendants proposed to carry on under that name—the Universal Life Assurance Society. It could not but be according to the ordinary course in the understanding of the people who had to deal with them, a representation that the business carried on by the defendants was the business, in fact, carried on by the plaintiffs. Therefore the court stopped that, and prevented it from being done. In that case, also, this fact was not immaterial, that, although it was not a case under the Companies Act, they were governed by a provision there that no name should be registered like a name already registered. In my opinion that case cannot in any way be relied upon in the present case.

A man takes a fancy name not to express real facts, but he takes a name which for some reason or other he chooses. If that had been the case here it would have been a different thing. In my opinion it would be wrong to come to the conclusion here that there was any passing off of the goods of the defendants as the goods of the plaintiffs. It must be a question of fact, as indicated by Turner, L.J., in the case of *Burgess* v. *Burgess*. The mere fact that the name is the same as that of another person, in my opinion, will not justify the court in assuming that they are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be; but, in my opinion, when a man fairly states the business which is carried on in his own name or in the names of his partners, it is not that his goods may be passed off as the goods of some other person; it is only a representation that they are made by himself.

In my opinion, therefore, this judgment is wrong, and the appeal succeeds.

FRY, L.J.—I also find myself unable to agree with the decision of the learned judge who first tried this case. The facts of the case seem to me shortly to amount to this, that the defendants have made a statement of a fact—namely, that John Turton and his sons are partners. They made that statement simply, and without any varnish or colour. They made it honestly, and in the usual manner in which such statements are made in the course of business. Furthermore, they made it without any misrepresentation, either fraudulent or innocent; and they made it equally without any design or intention to injure the plaintiffs. The statement which they thus made was one which they had a *primâ facie* right to make, and it was one which they were interested in making. Those are the facts of the case according to my apprehension of them.

Now the legal question which emerges is this: Is the putting forth of such a statement by the defendants actionable by the fact that it will be misapprehended by some persons, and that the plaintiffs will, by reason of such misapprehension, suffer loss. In my opinion that question must decisively be answered in the negative. It appears to me that to answer it in any other way is to interfere with the undoubted right of her Majesty's subjects to use their own names and to make statements of fact which they are interested in making, and which they commit no wrong in making. If we were to hold that a cause of action arose from the misapprehension of the plaintiffs' customers, we should be doing this, we should be creating a cause of action against the defendants by reason of the carelessness or stupidity of the plaintiffs' customers. Now I know of no principle of law or equity which creates such a cause of action as that. I invited Mr. Moulton to tell me whether the cause of action was equitable or legal. He said it was equitable. I know of no such equity as the one which I have just stated. We must regard, again, the results of the affirmative of the proposition I have stated. It would be perpetually to interfere with the legitimate and honest use by a man of his own name, and to interfere with it in a manner which I think is entirely novel to the law of England.

Now, with regard to the authorities, I shall say very little, it appears to me that the plaintiff's contention is diametrically opposed to the well-known case of *Burgess* v. *Burgess*. It can stand neither with the judgment of Knight-Bruce, L.J., nor with the judgment of Turner, L.J., and further, I am of opinion that the cases which have been cited in support of the proposition are not relevant. The assumption and use of a trade-mark is not the statement of an existing fact. And again, the creation and assumption of a fancy title for a new company is not the stating of a fact, and it may well be, especially having regard to the section of the Companies' Act which prohibits the registration of companies with similar names, that the court may interfere to prevent promoters of a company assuming a name which is sure to result in deception. I think, therefore, that there is no authority in favour of the plaintiff's contention, and there is distinct authority against it. I think, therefore, that on the question of law which has been raised and discussed the plaintiffs are plainly wrong.

But to my mind they are scarcely, if at all, less wrong in point of fact, because, to my mind at any rate, it has not been proved in the way in which it ought to be proved to justify the granting of such an injunction, that in the present case the use by the defendants of their firm name will be so misapprehended by any considerable number of persons as to result in any substantial or considerable loss, or any loss by the plaintiffs which ought to be regarded at all by the court.

The evidence, to my mind, is of the most unsatisfactory description, a large number of gentlemen, no doubt of eminence and high position in their trades, come forward and swear one as much like the other as is conceivable. There are slight variations no doubt, in the affidavits, but substantially they come and swear the same words. I think the case ought to have been approached with totally different evidence if we were to find the point of fact in favour of the plaintiffs. We should have been shown to what extent the two trades were identical. We should have been shown in what way the deception would operate. We have to bear in mind in this case that it is not a new firm which has started into existence. We have not to measure the use of the word "Turton" but we have only to measure the effect of the change from "Turton & Co." to "Turton & Sons." Much of the evidence goes to show that the confusion arises from the name of "Turton," because sometimes one and sometimes the other was addressed as "Turton & Co."

And, further than that, it is in evidence that they have distinct trade-marks. To what extent are those trade-marks used in the orders which are given? I have no doubt they are extensively used. To what extent is it conceivable that the engineers who know all about the different firms will either ultimately be deluded or for any length of time be deluded by the likeness of the two names.

I think, therefore, that the case breaks down entirely upon the evidence, and I repeat that if the plaintiffs desired to maintain their case they should have produced a very different kind of evidence from that which they have produced. They have endeavoured rather to support this case by a large body of compurgators than by evidence revelant to the issue which was to be decided. I think, therefore, that the appeal should be allowed, and the action dismissed, with costs.

Everitt, Q.C.—I ask that the costs should be on the

higher scale? My friends persuaded the learned judge below that the case was of the greatest importance, and that the costs should be on the higher scale, and he gave them. Therefore I ask that your lordships will do the same.

FRY, L.J.—Mr. Hardy will hardly resist that, I think.

Solicitors for the plaintiffs, *Johnson, Weatherall, & Sturt*, for *Burdekin & Co.*, Sheffield.

Solicitors for the defendants, *Pattison, Wigg, & King*, for *Broomhead & Co.*, Sheffield.

From Q. B. Div. [and Q. B. Div.] May 2; Aug. 8, 1889.

BRACKLEY *v.* VESTRY OF ST. MARY, BATTERSEA. (*a.*)

Metropolis—Regulation of streets—Hand-barrow placed in street—Power of vestry to seize and detain—57 Geo. 3, c. xxix., s. 65 (local and personal).

The local authority, having the control of the streets and public places in the metropolis, has power, under section 65 of 57 Geo. 3, c. xxix., after giving due notice, to seize and detain the articles therein enumerated which are placed by any person in any street or public place within the district of the local authority, even though the person so offending may not have been convicted of the offence before a magistrate.

Action to recover damages for the alleged wrongful seizure and detention by the defendants of a hand-barrow belonging to the plaintiff, with certain articles thereon.

The defence was that the defendants were justified in the seizure and detention under 57 Geo. 3, c. xxix., s. 65 (local and personal).

The plaintiff sent out a hand-barrow with certain goods thereon for the purposes of sale into one of the public streets within the defendants' district, and the barrow remained in the street in charge of one of the plaintiff's servants. The streetkeeper employed by the defendants served a written notice upon the plaintiff's servant that if he did not remove the barrow from the street, or if he placed it there again, the barrow would be seized and removed to the parish yard, to be there dealt with in accordance with the statute. After service of the above notice the plaintiff again placed his barrow in the street in charge of one of his servants, and the barrow and goods thereon were accordingly seized by the streetkeeper, and upon the plaintiff demanding them back the defendants refused to deliver them up until their charges were paid.

The plaintiff thereupon brought this action, contending that section 65 of the statute only gave power to seize and detain after conviction of the offender before a magistrate. In the present case the plaintiff had not been charged or convicted of the offence before a magistrate.

The action was tried by Charles, J., without a jury.

May 2.—*Lumley Smith, Q.C.*, and *Tindal Atkinson*, for the plaintiff.

Channell, Q.C., and *J. C. Earle*, for the defendants.

CHARLES, J.—In this case the plaintiff seeks to recover from the defendants a sum which it is agreed between the parties is to be £15 as compensation for the seizure by the defendants of a hand-barrow belonging to the plaintiff, while the barrow was upon the evening of July 14 in one of the public streets over which the defendants exercise supervision and control. The defendants justify the seizure of the barrow under section 65 of 57 Geo. 3, c. xxix., and the question I have to decide is this, whether that section authorizes the defendants to seize any hand-barrow in the streets within their jurisdiction after having given the owner of the hand-barrow notice to remove it from the street. In this case, upon three occasions, notice had been given to servants of the plaintiff that he must not keep his hand-barrow in the street, and in particular a written notice was given on the 14th of July to one Tyler, who then had the hand-barrow under his control, to this effect:—"Unless you do immediately remove and keep removed all goods, stalls, barrows, and any other matter or thing as hereunto required, or if, having removed the same, you shall at any time hereafter replace, or cause to be replaced, any of them or any other goods, stalls, barrows, matters, or things in or over any part of the said carriage or footway, I shall seize and remove such goods, stalls, barrows, or any other matter or thing to the parish yard, to be there dealt with in accordance with the statute in that case made and provided." That is signed by the streetkeeper to the defendant vestry. The contention on the part of the plaintiff is that this power of seizure is ancillary to the power which the section gives to the vestry to bring a person who disobeys a notice of that kind before a justice with a view to his being convicted of the offence. I do not say that there are not words in the section which warrant such a construction of it, because the section provides, in the first part of it, that if a person disobeys a notice of the description I have just read, it shall and may be lawful for any justice of the peace, on complaint being made to him, to issue a summons requiring a person accused of such an offence to appear before him. It is then provided that if it be found that such person has kept his barrow in the street in defiance of the notice of the vestry, the justices can inflict a fine of 40s. for the first offence, and for the second and every subsequent offence a sum not exceeding £5. Then there follows this clause:—"And also, not only shall such penalties become payable and be recovered, but it shall and may be lawful to and for any person or persons appointed, or to be appointed, by the said commissioners, or trustees, or other persons as aforesaid for that purpose, without any warrant or other authority than this Act, to seize any such stall, board, . . . hand-barrow," &c., and any material upon it. I own that I feel the force of what has been contended on the part of the plaintiff, that if that does give an out and out power of seizure, it has this effect, that before any judicial investigation has been made as to whether or not the owner of the barrow has been guilty of any offence pointed out by the Act the vestry may actually seize a barrow in the street. I think, however, that the words of the statute are too strong. I should like to have been able to take another view of the section, but I cannot help feeling that this is in terms an absolute statutory authority to seize the hand-barrow of a person who disobeys such a notice as was served in this case. On looking further into the section, my view of the statute is much strengthened by the directions as to what is to be done in case the goods seized are of a perishable nature.

The section goes on to provide:—"And in case any of the wares, goods, and merchandises so seized shall be perishable, or shall be articles of food, then the same shall be immediately forfeited, and such person or persons who shall seize the same shall deliver the same, or cause the same to be delivered, to the churchwardens or overseers of the poor, or to some of them, or to the master of any workhouse situate in the said parochial or other district, or of the parish whereunto such district shall belong." That clause indicates to me that the power to seize is not simply a power to seize in order to enforce a penalty that has been already imposed, but is a power to seize in order to remove obstructions from the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

street. There is nothing in the preamble of the statute that helps me very much, but without the preamble it is obvious that, from the terms of section 65, the object of this portion of the section of the statute is to keep the streets clear; and, having regard to the fact that the power to seize is immediately followed by an enactment that if the goods seized are perishable they are to be instantly sold, it seems to be that it would be wrong to construe the clause as contended for by the plaintiff—namely, that it confers simply a power to seize in order to enforce payment of a penalty which has already been imposed.

Then there are words in the latter part of the section which are relied upon by the plaintiff, and to which I must refer. The section proceeds to provide for what is to be done with the goods if they are not perishable. If they are not perishable they are to be removed to some place named for the reception of them, and notice of that place is to be given to the owner of the goods, "and the same shall be there kept and detained until such owner, driver, or other person interested therein as aforesaid shall cause to be paid the said penalty, together with the charges for taking or removing the same and of keeping such horse or horses, asses or mules, if any." Now, it is said that that indicates clearly that the seizure is not to take place until the penalty is imposed, otherwise what would be the sense of saying that the goods are to be detained until the said penalty, together with the charges, shall be paid? It seems to me that the true answer to that is, that the enactment with reference to the disposition of the goods must be read in connection with what has been done before the goods are seized, and that these words must mean that the goods are to be detained until the owner shall cause to be paid the penalty and the charges if the vestry have thought fit to proceed to the enforcement of the penalty, or, if not, until the charges of taking or removing the goods have been paid. In other words, that, the power to seize being unlimited, the goods are to be detained, if the vestry do not think fit to proceed before the magistrate, until the charges are paid, and, if they have thought fit to proceed before the magistrate, until the penalty as well as the charges have been paid. Then the section proceeds to use other language, which at first sight undoubtedly supports the view of the plaintiff, for it directs in its closing words that "the overplus of the money arising by such sale shall be returned to the owner or owners thereof if he or they shall have given such notice as aforesaid, after deducting the said penalty and such costs, charges, and expenses" as have been incurred. There, again, I think that must mean, after deducting in the one case the penalty, with the costs and charges, and in the other case the costs and charges only. That is the conclusion I have come to in this case. It is, no doubt, a strong thing that the vestry should have power to seize before any judicial investigation has taken place, but the language of the Act seems to me to give that power, and in doing so the Legislature have given them credit for not exercising it improperly. The defendants, therefore, are entitled to judgment.

Judgment for the defendants.

The plaintiff appealed.

Aug. 8.—The same counsel appeared as before.

LORD ESHER, M.R.—The only judgment that we need give in this case is to say that we entirely agree with the judgment of Charles, J., and with the reasons given by him.

LINDLEY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *F. J. Perks.*

Solicitor for the defendants, *W. W. Young.*

From Q. B. Div. June 27; July 13, 1889.

BECK v. PIERCE. (*a*.)

Husband—Wife—Liability of husband for wife's ante-nuptial debt—Judgment against separate estate of wife—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 14, 15—*Statute of Limitations.*

The plaintiff having recovered judgment against a married woman for a debt incurred by her before her marriage, and such judgment being unsatisfied because she had no separate estate, sued her husband, who had received property from his wife, for the amount of the debt.

Held, that the action was not barred by the prior judgment against the wife.

A husband who is sued for the ante-nuptial debts of his wife is entitled to the benefit of the Statute of Limitations from the time when such debts first accrued against her.

Appeal from the decision of Grantham, J.

The action was brought by a solicitor for work done for the defendant's wife previous to his marriage with her. The defendant pleaded a prior judgment for the same debt subsequent to the marriage against the separate estate of his wife, and relied, as to part of the debt, on the Statute of Limitations.

It appeared that the whole of the work was done by the plaintiff for the wife within six years before her marriage with the defendant. The judgment against her was wholly unsatisfied, she having no separate estate, but the defendant admitted that he had received from his wife assets more than sufficient to satisfy the plaintiff's debt.

Grantham, J., on the authority of *King* v. *Hoare*, 13 M. & W. 494, gave judgment for the defendant, and the plaintiff appealed.

Henn Collins, Q.C., and *Clare*, for the appellant.—The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) creates two separate liabilities for the ante-nuptial debts of the wife. The wife is liable by section 13 to the extent of her separate property; the husband, by section 14, is liable to the extent of all property which he has acquired through or from his wife. The husband and wife are not, therefore, joint contractors, and judgment against the one cannot be a bar to an action against the other. The judgment against the wife was a judgment against property, and not against the person. [They cited *Axford* v. *Reid*, 37 W. R. 291, 22 Q. B. D. 548; *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; *Draycott* v. *Harrison*, 34 W. R. 546, 17 Q. B. D. 147; *King* v. *Hoare; Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; and *Hallett* v. *Hastings*, 35 W. R. 135, 35 Ch. D. 94.] The husband's liability commenced with his marriage, so the Statute of Limitations only begins to run from then. The plaintiff's employment was a continuous employment, and the Statute of Limitations does not apply if any part of their debt accrued within the six years.

Bigham, Q.C., and *Carver*, for the respondent.—Judgment was recovered against the defendant's wife for the whole amount of the debt. That therefore satisfied the debt, and no further action can be brought for it. The only liability of the husband is a joint liability with his wife: Married Women's Property Act, 1882, s. 15. There is no power to sue the husband alone, and section 14 only refers to his being sued jointly with his wife. Judgment against one of two persons jointly liable is an answer to any action against the other: *King* v. *Hoare*. The husband would be able to have his wife joined as a co-defendant if he was

(*a*.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

sued alone: *Kendall* v. *Hamilton*. As to the Statute of Limitations, the husband may avail himself of any defence open to the wife. The statute began to run in her favour from the moment the debt accrued.

Henn Collins, Q.C., replied.

Cur. adv. vult.

July 13.—The judgment of the court was read by

LINDLEY, L.J.—The plaintiff is a solicitor, and he sues for payment of a bill of costs incurred by the defendant's wife before her marriage. About one-half of the bill is for work done more than six years before the commencement of the action, the other half is for work done since; and all the work was done within six years before the defendant's marriage.

After the marriage the plaintiff sued the wife and obtained judgment against her for the full amount of the bill, but payable out of her separate estate. She has none, and the judgment is wholly unsatisfied. The defendant was not made a party to these proceedings.

Two defences are relied upon—viz., first, the judgment recovered against the wife is said to be a defence to the whole action; second, the Statute of Limitations is pleaded to so much of the plaintiff's claim as became due more than six years before the writ was issued. Both these defences require attention.

The Married Women's Property Act has materially altered the position of husbands and wives towards the creditors of wives. The rights of creditors of women who marry before they have paid their debts are totally different from what they were at common law. At common law a husband was liable for such debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or none. But he could not be sued alone for such debts if his wife was alive; and he could not be sued at all for them after his wife's death: Co. Lit. 351b, Com. Dig. Baron & Feme, 1 and 2c. Nor was a promise by him to pay such debts of any avail if the only consideration for the promise was his pre-existing liability to pay them: *Mitchinson* v. *Hewson*, 7 T. R. 348, where such a promise was averred. Nor would a court of equity assist his wife's creditors against him even if he had acquired property through her: *Heard* v. *Stanford*, 2 Eq. Cas. Abr. 134, pt. 5. If he and she were both sued, and judgment was recovered against both, such judgment could be enforced against the survivor. If judgment was recovered against her before her marriage, *sci. fa.* lay against him and her after marriage, and if judgment was obtained against them both on such *sci. fa.*, and then she died, such judgment bound him: *Obrian* v. *Ram*, 3 Mod. 186, cited in 1 Salk. 116. But a judgment against her alone did not affect him after her death, except, of course, in his character of administrator.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has entirely altered the law as regards the liabilities of husbands for their wives' ante-nuptial debts. (1) He can now be sued without her, and whether she be alive or dead (see section 14, and the expression in section 15, "if in any action brought against the husband alone"). (2) He can be sued with her under section 15 if the plaintiff seeks to establish his claim wholly or in part against both husband and wife; but in this case the judgments may be separate, although to the extent to which they are both liable the judgment may be "a joint judgment against the husband personally and against the wife as to her separate property." What the word "joint" means in this sentence is not clear. Having regard to sections 13 and 14, it would be strange if, on the death of husband or wife, the survivor should alone be liable if judgment against them both were obtained under section 15. (3) The husband's liability is no longer unlimited, as at common law; it is limited to the value of his wife's property which he may have acquired (section 14). (4) As between him and her he is entitled to be indemnified out of her separate property (section 13).

The husband's liability since the Married Women's Property Act is, as it was before, a liability in respect of his wife's contracts and torts, and not a liability in respect of his own contracts or torts; and although he is not a surety, any defence open to her appears to be open to him also; for otherwise the creditor, by suing the husband first, would be able to obtain judgment against him, and then he would be able to obtain indemnity against his wife, and in that way she could be made liable indirectly to a greater extent than she could be made liable directly. Such a result does not seem consistent with the Act, nor with ordinary principles of justice.

Such being the husband's liability, it cannot be regarded as a joint liability only; if sued alone he cannot require his wife to be joined; and if she is sued alone in respect of her separate estate, she cannot require her husband to be joined (see section 1, cl. 2, and section 13).

The cases, therefore, of *King* v. *Hoare* and *Kendall* v. *Hamilton* have no application to actions against husbands for their wives' ante-nuptial debt; and notwithstanding the judgment obtained by the present plaintiff against the defendant's wife, as that judgment is wholly unsatisfied, this action is clearly maintainable, except so far as it may be barred by the Statute of Limitations. The husband's liability for his wife's ante-nuptial contracts first accrues on his marriage, unless he has previously done some act making him responsible for them. This proposition is self-evident, and is equally true whether his liability is imposed by common law or by statute. Perhaps, therefore, it might have been originally held that, as no right of action against him existed until marriage, the Statute of Limitations did not begin to run against him until the happening of the same event. But the cause of action in respect of which he is liable is his wife's contract, not his own; and the Statute of Limitations has always been regarded as beginning to run in his favour, as well as his wife's, from the time when the cause of action accrued against her, and any acknowledgment or part payment by her before marriage kept her debt alive both as against her and her after-taken husband; but similar acts by her after marriage were of no avail either against herself or as against her husband: *Pittam* v. *Foster*, 1 B. & C. 248; *Neve* v. *Holland*, 18 Q. B. 262.

The Statute of Limitations applies to debts payable by a married woman out of her separate estate (see *Hallett* v. *Hastings*); and the Married Women's Property Act apparently enables a wife to keep alive her liabilities in respect of her separate estate by making an acknowledgment or by part payment, or by suffering judgment to be obtained against her, but such acts of hers do not, we apprehend, affect her husband. On the other hand similar acts by him will not affect her direct liability to her creditors. Whether, if he chooses to keep alive his liability, he can still claim the benefit of his right to indemnity under section 13 is a question not necessary now to determine. But we can find nothing in the Married Women's Property Act to alter the cause of action of the plaintiff. The plaintiff's cause of action against the defendant is still founded on his wife's contract; and the plaintiff's cause of action is no more now the defendant's marriage than it was before the passing of the Act. Although the defendant's marriage is what makes him liable, there is no more reason now than there was before, for saying that, with reference to the Statute of Limitations, the cause of action accrues against him on his marriage, as distinguished from the time when it accrued against his wife. The Married Women's Property Act does not purport to amend or

alter the law as regards the time within which actions must be commenced. The law in that respect is what it was. It was contended that the plaintiff's cause of action against the wife did not in fact accrue until all the work which the plaintiff did for her was wholly complete, and reliance was placed on *Whitehead* v. *Lord*, 7 Ex. 691. This point was disposed of in the course of the argument: we cannot think that the reasoning in that case applies to miscellaneous work done by a solicitor for his client, although it may apply to such continuous work as bringing and prosecuting an action. The defendant in this case can therefore avail himself of the Statute of Limitations as to so much of the plaintiff's demand as accrued to him against the defendant's wife more than six years before the commencement of the present action. But as to the rest, the defendant is liable.

The appeal, therefore, will be allowed, and judgment be entered for the plaintiff for the amount sued, less £33 1s., the amount barred by the statute.

Appeal allowed.

Solicitors for the plaintiff, *Chester & Co.*, for *Chapman, Roberts, & Beck*, Manchester.

Solicitors for the defendant, *Hamlin, Grammer, & Hamlin*, for *Brighouse, Brighouse, & Jones*, Southport.

re Tredwell (1891) 2 Ch. 644

High Court of Justice.

Chan. Div. Kay, J. — Aug. 6, 1889.

In re Dear.
Helby *v.* Dear. (*a.*)

Will—Gift during widowhood—Gift over on death.

A testator gave all his property to his wife in trust for the benefit of his children so long as she remained unmarried. In the event of her marrying again she was to have a life interest only in a sum of £2,000. He authorized his wife and trustee to advance to either of the children £2,000 from the estate. At his wife's death the estate then remaining was to be divided into four parts, and the proceeds divided equally among the children then surviving. The widow married again before any of the children came of age.

Held, that the residue vested in the children at the marriage of the widow.

Adjourned summons.

Charles Dear, by his will, dated the 16th of November, 1886, gave to his wife all his property, to be held by her "in trust for the benefit of my children so long as she remain unmarried," with the exception of one-fourth, which he directed to be invested and accumulated. . . "In the event of her marrying after my death she is to have a life interest only in the sum of £2,000," to be re-invested as therein mentioned, "and in the event of her death to be divided equally between my children." He authorized his wife and trustee to advance to either of the children "£2,000 from the estate." . . . "At my wife's death the estate then remaining to be divided into four parts, and the proceeds divided equally amongst the children then surviving." The testator died on the 20th of November, 1886, and his will was proved on the 21st of December following. The trustee appointed jointly with the testator's widow renounced the trusts of the will.

The widow married again in 1889, and took out a summons as plaintiff asking for the decision of the court as to who were the persons entitled, during the period between her second marriage and her death, to the income of the testator's estate beyond the income of the £2,000 payable to her during her life; whether, during such or any other period, any part of the income of the said estate ought to be accumulated; and whether, on her second marriage, the interests of the defendants (the testator's children, of whom there were four, all of them infants) in his estate, other than the £2,000, became vested, or whether such interests were contingent on their respectively surviving the plaintiff.

Marten, Q.C., and *A. J. Allen*, for the plaintiff.—The income is undisposed of. The trust for accumulation has stopped because it depends upon the widow not marrying again. "Estate" means here "capital," and does not include income. There is no gift of estate to children who do not survive their mother, nor a gift of intermediate income.

Millar, Q.C., and *J. W. Williamson, jun.*, for the defendants.—"At my wife's death" must mean "when the estate comes to an end."

They cited *Luxford* v. *Cheeke*, 3 Lev. 125; *Bainbridge* v. *Cream*, 16 Beav. 25; *Stanford* v. *Stanford*, 35 W. R. 191, 34 Ch. D. 362; and *In re Tucker*, *Bowchier* v. *Gordon*, 35 W. R. 344, W. N., 1887, p. 37.

Marten, Q.C., replied.

Kay, J.—The testator's will clearly shows that the only objects of his bounty were intended to be his widow and children—no intestacy can be implied. It has been held that a gift for the wife during her life or widowhood, and at her death then over, is an imperfect gift intended to take effect on failure of the preceding trusts—*i.e.*, on death or re-marriage. In this case I think the gift is to a contingent class, to be ascertained at the death of the wife, the children then surviving. The death of the wife means the period of distribution, according to the cases that have been cited, which I think apply. Otherwise this result would happen—although this is a residuary gift among children, yet one of these children might attain twenty-one and die in the lifetime of the widow, and between his attainment of twenty-one and the death of the widow there would be no provision for him at all. The only power of maintenance would be under the Conveyancing Act, 1881, s. 43.

I do not dissent from *Bainbridge* v. *Cream* and *Stanford* v. *Stanford*, which are rather an extension of *Luxford* v. *Cheeke*, and I think a reasonable extension. The principle of *Luxford* v. *Cheeke* is, that when a testator gives property to his wife for life or until re-marriage, and then, forgetting that that provision is determinable on marriage, gives it over on her death only, that is held to mean death or remarriage. And it is not a very considerable extension of that doctrine, even if the property is given to a class surviving at the widow's death, to refer the words "then surviving" to the marriage as well as death, whichever shall first happen. In the event which has happened, I hold that the residue vested in the children of the testator living at the marriage of his widow.

Solicitors for the plaintiff, *Allen & Son*.

Solicitors for the defendants, *Lawrence & Son*.

(a.) Reported by C. H. F. Chrimes, Esq., Barrister-at-Law.

Chan. Div. North, J. } Aug. 5, 1889.

In re STANLEY'S SETTLED ESTATES. (*a.*)

Practice—Settled estate — Married woman — Separate examination—Settled Estates Act, 1877, *ss.* 24, 26, 50 *—Orders of December*, 1878, *rr.* 4, 13.

A married woman interested in a settled estate, who has been served with a notice of a petition for the approval by the court of a lease proposed to be made under the Settled Estates Act, 1877, *and who, in answer to such notice, states in writing that she submits her rights and interests to be dealt with by the court, need not be separately examined.*

Petition.

By virtue of a settlement, dated the 20th of January, 1871, and of a subsequent partition deed, certain real estate was settled upon trust for J. T. Talbot Stanley for life, with remainder to his sons successively in tail male, with remainders over. The real estate was also charged with a sum of £10,000 and interest by way of jointure for F. S. C. Stanley, the wife of the said J. T. Talbot Stanley, and portions for their younger children.

This petition was presented by the trustees of the settlement under the Leases and Sales of Settled Estates Act, 1877, for the confirmation of a mining lease for ninety-nine years. The petition was not served on anyone, but notices were delivered to all the parties interested, including Mrs. F. S. C. Stanley, under section 26 of the Act, requiring them to state whether they assented or dissented to the application, or submitted their rights and interests, so far as they might be affected by the application, to the court.

Mrs. F. S. C. Stanley answered, in writing, that she submitted her rights and interests to the court. She had not been separately examined.

Cosens-Hardy, Q.C., and *John Dixon*, for the petition.—When a married woman submits her interests to the court it is not necessary that she should be separately examined: Seton, 4th ed., at p. 1484.

St. John Clerke, for the proposed lessee.

NORTH, J.—I do not think it is necessary that Mrs. Stanley should be examined.

Solicitors, *Bell, Brodrick, & Gray.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) July 2.

Ex parte HART.

In re HART. (*b.*)

Liquidation by arrangement — Discharge—Refusal to register resolution—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 125, *sub-section* (10)—*Bankruptcy Rules*, 1870, *r.* 303 — *Bankruptcy* (*Discharge and Closure*) *Act*, 1887 (50 *&* 51 *Vict. c.* 66), *s.* 2.

In 1882 *a debtor presented a petition which resulted in a liquidation by arrangement, and in* 1884 *resolutions were passed at a meeting of creditors closing the liquidation and refusing the debtor his discharge. In* 1889 *a further meeting of creditors was held, at which the debtor obtained a resolution granting him his discharge, and he applied to the county court registrar, under section* 125, *sub-section* (10), *of the Bankruptcy Act*, 1869, *to register such resolution.*

Held, that the registrar was right in refusing to register the resolution, and that the proper course was for the debtor to apply for his discharge under section 2 *of the Bankruptcy* (*Discharge and Closure*) *Act*, 1887.

Appeal *ex parte* by the debtor against the refusal of the judge of the Coventry County Court to direct the registrar of the court to certify the debtor's discharge under section 125, sub-section (10), of the Bankruptcy Act, 1869.

In 1882 a petition under the Bankruptcy Act, 1869, was presented by the debtor in the county court, which resulted in a liquidation by arrangement. On June 12, 1884, a meeting of the creditors was held, at which resolutions were passed releasing the trustee and closing the liquidation, and it was also resolved that the discharge of the debtor be refused. On the 11th of April, 1889, however, a further meeting was called, at which the debtor obtained a resolution granting him his discharge, and he thereupon applied to the county court registrar, under section 125, sub-section (10), of the Bankruptcy Act, 1869, for a certificate to that effect. The matter was referred by the registrar to the county court judge, who refused to direct the registrar to register the resolution, on the ground that the creditors had no right to pass it, and that the debtor's proper course was to apply for his discharge under section 2 of the Bankruptcy (Discharge and Closure) Act, 1887.

The debtor now appealed from that decision.

Sidney Woolf, for the debtor.—The real ground of the refusal was that the registrar was of opinion that since the passing of the Bankruptcy (Discharge and Closure) Act, 1887, the undischarged liquidating debtor or bankrupt must apply under that Act, and cannot apply under the procedure provided by the Act of 1869. But it is simply optional with the debtor. The Act of 1887 does not take away the right of the debtor to apply for his discharge under the Act of 1869. Here all the formalities were complied with, and the certificate ought to have been granted.

CAVE, J.—In this case the county court judge has affirmed the refusal of the registrar to register a resolution of the creditors granting the debtor his discharge, and from that decision the debtor has appealed. The bankruptcy was an old bankruptcy under the Act of 1869, which, in fact, resulted in a liquidation by arrangement, and some years ago there was a resolution of the creditors refusing the debtor his discharge and closing the bankruptcy. Quite recently a further meeting was held, at which the creditors have resolved to grant the discharge, and it was that resolution which the registrar refused to register, on the ground that the creditors had no power to pass it.

Now, I have read the judgment of the county court judge, and I must say that I entirely concur with it. It seems clear upon the enactment that the creditors, having closed the liquidation in 1884, had no power now to pass a resolution granting the debtor his discharge. It may be that the creditors had no right to place themselves in the position in which they did, and it was argued in the court below that it was a hardship on a liquidating debtor, who had in such a case no means of obtaining his discharge. But, as was pointed out by the county court judge, there were two answers to that contention; for, in the first place, if the creditors by their resolution put the debtor into such a position that he could not obtain his discharge from them, the court would have granted it of its own authority on being satisfied of the propriety of doing so; and, secondly, section 2 of the Bankruptcy (Discharge and Closure) Act, 1887, now affords a complete remedy, for by it there is express power given to the court to grant a debtor his discharge on his application in such a case as this. That

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.
(*b.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

is the course which ought to be adopted, and the debtor ought not, after the liquidation had been closed in 1884, to have summoned such creditors as would attend and get them to pass a resolution which they had no right to do.

Appeal dismissed.

Solicitors for the debtor, *Crowders & Vizard*, for *Brewetts*, Coventry.

CORRECTION.—*In re Royle, Royle* v. *Hayes, ante*, p. 18; *Messrs. Bower, Cotton, & Bower*, agents for *W. H. Vaughan*, were the solicitors for the appellant, *not* for the respondent, on this appeal. The respondent's solicitors were *Messrs. Yielding, Barlow, & Piper*, agents for *Cobbett, Wheeler, & Cobbett*.

House of Lords.

From C. A. (England). March 28, 29; April 5, 9, 11; July 1, 1889.

DERRY v. PEEK. (a.)

Company—Misrepresentation in prospectus—Liability of directors—Action of deceit.

In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (1) *knowingly, or* (2) *without belief in its truth, or* (3) *recklessly, careless whether it be true or false. If fraud be proved the motive of the person guilty of it is immaterial.*

The directors of a tramway company issued a prospectus containing the statement that the company had the right to use steam or other mechanical power. This was untrue, but, under the circumstances disclosed, the directors were considered to have acted honestly, believing that the fact was as stated by them. In an action by a shareholder against the directors, claiming damages for the fraudulent misrepresentations contained in the prospectus, on the faith of which he had taken shares in the company,

Held (*reversing the decision of the* Court of Appeal, 36 *W. R.* 899, 37 *Ch. D.* 541), *that the action must be dismissed.*

This was an appeal from a decision of the Court of Appeal (36 W. R. 899, 37 Ch. D. 541) reversing Stirling, J. The facts are given at length in the report below, and are shortly as follows:—The Plymouth, Devonport, and District Tramways Co. was incorporated by special Act of Parliament in 1882, and soon after the directors issued a prospectus inviting subscriptions for ordinary share capital. The company was authorized by the special Act to use steam or any other mechanical motive power instead of horse power, but with the consent of the Board of Trade and the corporations. The prospectus contained a statement that the company by its special Act "has the right to use steam or mechanical motive power instead of horses."

The company had not, at the time this statement was made, in fact obtained, and it subsequently failed to obtain, the consent of the Board of Trade or of the corporations of Plymouth and Devonport, as required by section 35 of their special Act.

A petition for winding up was presented, and a winding-up order made in May, 1885.

The respondent had taken 400 shares in the company, and in February, 1885 (shortly after the petition for winding up was presented), brought this action against the directors for damages for the misrepresentations in the prospectus. Stirling, J., before whom the case was heard, came to the conclusion that the directors believed that they had the right stated in the prospectus, and dismissed the action. The Court of Appeal considered the appellants liable, the court being of opinion that the directors had not reasonable grounds for their belief. Against this the directors appealed.

Sir H. Davey, Q.C., Moulton, Q.C. (*Muir Mackenzie* with them), for the appellants.—This is the first case in which an imperfect statement has been held sufficient to found an action of deceit. At the most the statement is inaccurate in the sense of being imperfect. The real question is, Did they make this statement with a guilty intent to deceive? The common law is laid down clearly in *Taylor* v. *Ashton*, 11 M. & W. 401 (the headnote wrong) and *Joliffe* v. *Baker*, 32 W. R. 59, 11 Q. B. D. 255. *Polhill* v. *Walter*, 3 B. & Ad. 114, is relied on *contrâ*. There, defendant represented he had authority. The idea that something less than fraud was enough, crept in in *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 15 W. R. H. L. Dig. 14. *Smith* v. *Chadwick*, 30 W. R. 661, 32 *Ibid.* 687, 20 Ch. D. 27, 9 App. Cas. 187; and *Weir* v. *Bell*, 26 W. R. 147, 3 Ex. D. 238, were also referred to.

Bompas, Q.C., Widdrington Byrne, Q.C. (*Pattullo* with them), for the respondent.—The inference of fact when a man does not take proper care is recklessness, and it is not for the defendants to judge whether the inaccuracy is material or not: *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6, H. L. 377; Lord Westbury in *New Brunswick Railway and Land Co.* v. *Conybeare*, 10 W. R. 305, 9 H. L. Cas. 711; *Slim* v. *Croucher*, 8 W. R. 347, 1 De G. F. & J. 518, 523; *Evans* v. *Bicknell*, 6 Ves. 174; *Smith* v. *Chadwick*; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 29 W. R. Dig. 232; *Pasley* v. *Freeman*, 3 T. R. 51; *Haycraft* v. *Creasy*, 2 East, 92; *Chandelor* v *Lopus*, Croke Jac. 4; *Polhill* v. *Walter*; *Milne* v. *Marwood*, 15 C. B. 778, 3 W. R. C. L. Dig. 173; *Denton* v. *Great Northern Railway*, 4 W. R. 240, 5 El. & Bl. 860; *Thom* v. *Bigland*, 1 W. R. 290, 8 Ex. 725; *Rawlins* v. *Wickham*, 7 W. R. 145, 3 De G. & J. 304; *Mathias* v. *Yetts*, 30 W. R. 215, were referred to.

The House took time for consideration.

July 1.—Lord HALSBURY, C.—I have so recently expressed an opinion in the Court of Appeal on the subject of actions of this character, that I do not think it necessary to do more than say that I adhere to what I there said.* To quote language, now some centuries old, in dealing with actions of this character, "Fraud without damage, or damage without fraud," does not give rise to such actions (*per* Croke, J., in *Baily* v. *Merrell*, 3 Bulstrode, 95). I have had also the opportunity of reading the judgment of my noble and learned friend, Lord Herschell, and I could desire to add nothing to his exhaustive and lucid treatment of the authorities.

When I turn to the question of fact, I confess I am not altogether satisfied. In the first place, I think the statement in the prospectus was untrue, untrue in fact, and, to the minds of such persons as were likely to take shares, I think well calculated to mislead. I think such persons would have no idea of the technical division between tramways that had rights to use mechanical means, and tramways that had not. What I think they would understand would be that this particular tramway

(a.) Reported by CHARLES H. GRAYTON, Esq., Barrister-at-Law.

* See *Arnison* v. *Smith* (*No.* 2), 37 W. R., at p. 741, 41 Ch. D., at p. 367.

was in an exceptionally advantageous position—that the statement was of a present existing fact—that it had, at the time of the invited subscription for shares, the right to use steam. And I think such a statement, if wilfully made with the consciousness of its inaccuracy, would give rise to an action for deceit provided that damage had been sustained, if a person had acted upon a belief induced by such a prospectus. But upon the question that these statements were made with a consciousness of their misleading character, I cannot but be influenced by the opinions entertained by so many of your lordships, that they are consistent with the directors' innocence of any intention to deceive. The learned judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned judge below, they appear to me to have justified their decision upon grounds which, as I have already said, I do not think tenable—namely, that they, the directors, were liable because they had no reasonable ground for the belief, which nevertheless it is assumed, they sincerely entertained. I think it would have been satisfactory to have had a more minute and exact account of how this prospectus was framed, the actual evidence of the draftsman of it, and the discussions which took place upon the alteration in form; which alteration gave such marked and peculiar prominence to the special feature of this particular tramway in respect of the possession of power to use steam. Nevertheless, if, as I have said, the facts are reconcilable with the innocence of the directors, and with the absence of the *mens rea* which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability, which appears to me not to exist according to the law of England. As to the question whether Sir Henry Peek was induced to take his shares by reliance on the misleading statement, I admit that I have very considerable doubt. On the one hand, I do not believe that anyone can so far analyze his mental impressions as to be able to say what particular fact in a prospectus induced him to subscribe. On the other hand, the description of Sir Henry Peek, even now that the question has been pointedly raised and brought to his mind, of what did or did not induce him to take his shares, is hardly reconcilable with his having been substantially induced by the statement in question to take them. On the whole, I acquiesce in the judgment which one of your lordships is about to move—namely, that the judgment appealed from be reversed.

Lord Watson.—I agree with Stirling, J., that, as a matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned judges of the Court of Appeal meant to differ from that conclusion, but they have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England. But I shall not trouble your lordships with any observations of mine, because I accept without reserve the opinion about to be delivered by my noble and learned friend Lord Herschell.

Lord Bramwell.—I am of opinion that this judgment should be reversed. I am glad to come to this conclusion, for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud which, with all submission, I think wholly unfounded—a charge supported on such materials as to make all character precarious. I hope this will not be misunderstood; that promoters of companies will not suppose that they can safely make inaccurate statements with no responsibility. I should much regret any such notion, for the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over-sanguine, that it requires al the protection that the law can give it. Particularly should I regret if it was supposed that I did not entirely disapprove of the conduct of those directors who accepted their qualification from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give him a good price, as high a price as they can, while their duty to their shareholders is to give him one as low as they can. But there is another thing. The public, seeing these names, may well say, "These are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same," little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful. I am glad to think that Mr. Wilde, a member of my old profession, was not one of those so bribed. The only shade of doubt I have in the case is that this safety from loss in the directors may have made them less careful in judging of the truth of any statements they have made. There is another matter I wish to dispose of before going into the particular facts of the case. I think we need not trouble ourselves about "legal fraud," nor whether it is a good or bad expression; because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase, "legal fraud," except when actual fraud cannot be established. "Legal fraud" is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir J. Hannen, I cannot think the expression "convenient." I do not think it is "an expression which very clearly conveys an idea"; at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. But with these remarks I have done with it, and will proceed to consider whether the law is not that actual fraud must be proved, and whether that has been done. Now I really am reluctant to cite authorities to show that actual fraud must be established in such a case as this. It is one of the first things one learnt, and one has never heard it doubted until recently. I am very glad to think that my noble and learned friend now sitting opposite to me (Lord Herschell), who has been referred to by my noble and learned friend on the woolsack, has taken the trouble to go into the authorities fully; but to some extent I deprecate it, because it seems to me somewhat within the principle "*Qui s'excuse s'accuse.*" As I have said, I never heard a doubt on this subject till very recently. When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by fraud. *Warrantizando vendidit* gives a cause of action if the warranty is broken; knowingly and fraudulently stating a material untruth which brings about wholly or partly the contract also gives a cause of action. To this may now be added the equitable rule (which is not in question here) that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there

must be a contract and breach, or fraud. The statement of claim in this case states fraud. Of course that need not be proved, merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common-law lawyer, to the contrary; none has been cited, though there may be some incautious, hesitating expressions, which point that way. Every case, from the earliest in Comyn's Digest to the present day, alleges it. Further, the learned judges of the Court of Appeal hardly deny it. There is, indeed, an opinion to the contrary of the late Master of the Rolls, but it must be remembered that his knowledge of actions of deceit was small. I cannot think, then, that it is necessary to cite cases to show that to maintain this action fraud in the defendants must be shown. Now as to the evidence. The plaintiff's case is that the defendants made an untrue statement, which they knew to be untrue, and likely to influence persons reading it; therefore they were fraudulent. It is not necessary to consider whether a *primâ facie* case was made out by the plaintiff. We have all the evidence before us, and must judge on the whole. The alleged untrue statement is that "the company has the right to use steam or mechanical power instead of horses," and that a saving would be thereby effected. Now, this is certainly untrue; because it is stated as an absolute right, when in truth it was conditional on the approval of the Board of Trade, and the sanction or consent of two local boards; and a conditional right is not the same as an absolute right. It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true; as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to knowing the truth. A man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say yes, without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods, to be made, required a writing like a contract for goods in existence. If he was writing on the subject he would, of course, state the exception or qualification. Now, consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam, without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very last they cannot see the fraud. There is their oath, their previous character unimpeached, and there is to my mind this further consideration, the truth would have served their purpose as well. "We have power to use steam, &c., of course with the usual conditions of the approval of the Board of Trade, and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." During the argument I said I am not sure that I should not have passed the prospectus. I will not say so now, because certainly I would not pass it now after knowing the unfortunate use made of the statement, and no one can tell what would have been the state of his mind if one of the factors influencing it was wanting. But I firmly believe it might have been, and was, honestly done by these defendants. Stirling, J. saw and heard them, and was of that opinion. It is difficult to say that the plaintiff was not. The report of the 6th of November, 1884, showed that the consent of the Board of Trade was necessary, showed also that the Corporation of Devonport would not consent, showed therefore the "untruth," and yet the plaintiff "had every confidence in the directors." And see his answer to questions 53 and 365. I now proceed to consider the judgments that have been delivered. It is not necessary to declare my great respect for those who have delivered them. Stirling, J., refuses to say whether actual fraud must be shown, and deals with the case on the footing that the question is whether the defendants had reasonable grounds for making the statement they did. He holds, as I do, that they thought the company had the right, as put in the prospectus, to use steam. Then he says he must "come to the conclusion that they had reasonable grounds for their belief; at all events their grounds were not so unreasonable as to justify me in charging them with having been guilty of fraud." It is singular that the learned judge seems to consider that unreasonableness must be proved to such an extent as to show fraud. He then proceeds, for what seems to me unanswerable reasons, to show that they did every one believe that they had the right stated in the prospectus. He refers to what he saw of them in the box. He says he cannot come to the conclusion that their belief was so unreasonable and so unfounded, and their proceedings so reckless or careless that they ought to be fixed with the consequences of deceit. He makes an excellent remark that "mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that those things would come about, and when they did not come about, make them liable in an action of fraud." My only variation of this would be that it may be that the objection did not, and naturally did not, occur to them. It has not been argued, and I will say no more on the question whether had the plaintiff known the contents of the Act he would or would not have applied for the shares, than that I agree with Stirling, J. Cotton, L.J., says the law is "that where a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without a care whether it is true or false, that is, without any reasonable ground for believing it to be true," he is liable to an action for deceit. Well, I agree to all before the "that is," and I agree to what comes after if it is taken as equivalent to what goes before—viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained by "without care whether it is true or false." For a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue. For every man who makes a statement says, "The truth is so-and-so, and I know it or believe it." I say I agree to this as I understand it. It seems to me, with great respect, that the learned Lord Justice lost sight of his own definition, and glided into a different opinion. He says, "There is a duty cast upon a director who makes that statement to take care that there are no statements in it which in fact are false; to take care that he has reasonable grounds for the material statements which are contained in that document (prospectus), which he intends should be acted on by others. And although, in my opinion, it is not necessary there should be what I should call fraud, there must be a departure from duty, and he has violated the right which those who receive the statements have, to have true statements only made to them." This seems to be a most formidable matter. I agree there is some such duty. I agree that not only directors in prospectuses, but all persons in all dealings, should tell the truth. If they do not they furnish evidence of fraud; they subject themselves to have the contract rescinded. But to say that there is "a right

to have true statements only made," I cannot agree, and I think it would be much to be regretted if there was any such right. Mercantile men, as Stirling, J., says, would indeed cry out. No qualification is stated. If this is law, the statement may be reasonably believed to be true by him who makes it, but if untrue there is to be a cause of action, and that although he may have refused a warranty. I hope not. There is a duty to tell the truth. But it is a duty of imperfect obligation. It is a duty for the non-observance of which the law gives no remedy if there is no fraud. His lordship says:—"Where a man makes a false statement without reasonable ground to suppose it to be true, and without taking care to ascertain if it is true, he is liable civilly as much as a person who commits what is usually called fraud." I say I agree, if that means making a statement of which he knows or believes not the truth. His lordship proceeds to examine whether the defendants had reasonable ground for believing what they said, and comes to the conclusion that they had not, and so holds them liable, not because they were dishonest, but because they were unreasonable. I say they never undertook to be otherwise. He says:—"It is not that I attribute to them any intention to commit fraud, but they have made a statement without any sufficient reason for believing it to be true." Sir James Hannen says that he agrees with Cotton, L.J.'s, statement of the law, and adds: "If a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true," it is sufficient in an action of deceit. I agree, if he knows he has no such reasonable ground; otherwise, with great respect, I differ. He cites Lord Cairns (*Reese River Silver Mining Co.* v. *Smith*, 17 W. R. 1046, L. R. 4 H. L. 79), that "if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or not, they must, in a civil point of view, be held as responsible as if they had asserted that alone." So say I; but this does not support Sir James's proposition. Nor does he deal with what he quotes from Lord Cranworth. But, further, he speaks of legal fraud as meaning "that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility." But if there is moral culpability, I agree there is responsibility. But to believe without reasonable grounds is not moral culpability, but (if there is such a thing) mental culpability. He says: "The word fraud is, in common parlance, reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty." I agree the law applies it to all breaches of the moral duty to tell the truth in dealing with others; but that duty cannot be honestly broken. To be actionable a breach of that duty must be dishonest. Nay, it is a man's duty sometimes to tell an untruth. For instance, when asked as to a servant's character, he must say what he believes is the truth, however he may have formed his opinion, and however it wrong it may be. His lordship says he cannot think the directors had any reasonable ground for believing the prospectus to be true. But had they the question present to their minds? Even if this were the question, I should decide in their favour. As to the judgment of Lopes, L.J., I quite agree with what he says:—"I know of no fraud which will support an action of deceit to which some moral delinquency does not belong." I think that shows the meaning of what he says, "fourthly," though that is made doubtful by what he says elsewhere. I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action. I have examined these judgments at this length owing to my sense of their importance, and the importance of the question they deal with. I think it most undesirable that actions should be maintainable in respect of statements made unreasonably perhaps, but honestly. I think it would be disastrous if there was "a right to have true statements only made." This case is an example. I think that in this, as in some other cases, courts of equity have made the mistake of disregarding a valuable general principle in the desire to effect what is, or is thought to be, justice in a particular instance. It might, perhaps, be desirable to enact that in prospectuses of public companies there should be a warranty of the truth of all statements, except where it was expressly said there was no warranty. The objection is to exceptional legislation, and to the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither. In this particular case I hold that, unless fraud in the defendants could be shown, the action is not maintainable. I am satisfied there was no fraud. Further, if an unreasonable misstatement were enough, I hold there was none. Still further, I do not believe that the plaintiff was influenced by the misstatement, though I am entirely satisfied that he was an honest witness.

Lord Fitzgerald.—The pleadings and the facts have already been referred to by the noble lords who have addressed the House. The action is for deceit. The writ was sued out in February, 1885, and originally claimed rescission of the contract with the company. It was subsequently amended by striking out the company as defendants, and also the prayer for rescission, and it assumed the character of an action for deceit against the present appellants (five of the directors), and claimed "Damages for the fraudulent misrepresentations of the defendants."

The statement of claim, which is sufficient in form to raise the real question, alleged the misrepresentation to exist in the prospectus issued in January, 1883, and to consist of the paragraph so often read, that the company had a right to use steam or other mechanical motive power; and it was further alleged "that the defendants intended thereby to represent that the company had an absolute right to use steam and other mechanical power," and that such representation was made fraudulently, and with the view to induce the plaintiff to take shares in the company.

So far the real issue seems to have been raised fairly and clearly, and to depend on matter of fact. There were circumstances connected with the promotion of the company, and the procuring of four of the defendants to act as directors which tended to create suspicion as to these statements and their *bona fides*, and attracted the attention directly of the learned judge before whom the cause was tried. The defendants, who were severally produced as witnesses at the trial, were exposed to a very lengthened and searching cross-examination by counsel for the plaintiff, and were also carefully examined by the judge, as to these transactions, with the result apparently of freeing them from any imputation therein of moral misconduct.

The question which I am about to examine in the first instance, and excluding for the present the element of fraud, is whether the unsigned statement in the prospectus was a false statement in the sense of being untrue. That it was inaccurate so far as it purported to give the legal effect of the special Act I do not doubt, but was it untrue as representing the position of the company in a popular and business sense? The General Tramway Act, 33 & 34 Vict. c. 78, which regulates tramways generally, but subject to the provisions of the special Act, if any, of each company, places them under the supervision of the Board of Trade with a view to public safety, and for public protection generally, and by its 34th section it provides "that carriages used on tramways shall be moved by the powers prescribed by the special Act."

The special Act of this company became law on the 24th of July, 1882, and by section 4 the company incorporated by the Act is empowered to make the seven tramways in question in all respects in accordance with the plans and sections. Section 15 provides minutely for their formation, subject to the orders of the Board of Trade, and by section 16 the tramway is not to be opened for public traffic until it shall have been inspected and certified by the Board of Trade to be fit for such traffic.

Before referring to the 35th section of the special Act, we may glance at section 37 of that Act which empowers the Board of Trade to make bye-laws as to any of the tramways on which steam may be used under the authority of the Act, and section 44, which provides that where the company intend to use steam they shall give two months' notice. There are several other sections providing for the use of steam power if the company should elect to use it as a motor. In the light of those sections of the special Act and of section 34 of the general Act, let us now look at the particular paragraph of the prospectus, and section 35 of the special Act. By that section Parliament has done that which Parliament could do, and which the Board of Trade could not do. It has conferred on the company authority to use steam as its motive power. It has not imposed on the company the use of steam-power, but it says they may use it if they elect to do so. Before dealing with the consent of the Board of Trade, I desire to call attention to the provision in the 35th section, "that the exercise of the powers hereby conferred with respect to the use of steam shall be subject to the regulations in schedule A., and to any regulations which may be added thereto, or substituted therefor, by the Board of Trade for securing to the public all reasonable protection against danger, in the exercise of the powers by this Act conferred, with respect to the use of steam." Schedule A., referred to in section 35, contains no less than ten regulations for the direction of the company in the exercise of the right so conferred to use steam-power. Now, turning back to the words "with the consent of the Board of Trade," in section 35 of the special Act, that consent could not confer, nor would its absence take away, the right conferred by the Legislature to use steam as a motor. Its true character is that of a precaution imposed by the Legislature to defer the actual exercise of the right conferred until the supervision of the Board of Trade secures to the public all reasonable protections against danger. To attain these objects, the Legislature provides that the powers it has conferred should not be actually exercised without the consent of the Board of Trade.

I have, though with difficulty, arrived at the conclusion that the statement in the prospectus, that by the special Act the company had the right to use steam-power, was untrue in a popular or business sense.

Let us see for a moment in what way and with what meaning General Hutchinson used similar expressions. In his report of the 12th of July, 1884, he says: "The Act of 1882 gives, however, power to the company to use mechanical power over all their system; and I think it would be most objectionable that this power should be exercised on parts of Tramway No. 1 on account of the narrowness of three of the roads."

The remainder of the incriminated paragraph of the prospectus is "and it is fully expected that by means of this (*i.e.*, the use of steam) a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses." This was not untrue; there had been a division of opinion in the directory on the subject, which was finally, and before the issue of the prospectus, resolved in favour of steam, as appears from Mr. Petheck's letter of the 7th of January, 1883. The conclusion I have arrived at is that this paragraph of the prospectus, though inaccurate in point of law in one particular, seems on the whole to have been morally true. If this view is correct, it is an answer to the action; but, assuming that it is not correct, or that your lordships are not prepared to adopt it, I proceed to express my opinion on the remaining substance of the action. Cotton, L.J., describes the action as "an action of deceit, a mere common law action." The description is accurate, and I proceed to deal with it as a mere common law action. It has not been in the least altered in the characteristics by having been instituted in the Chancery Division, or tried by a judge, without the aid of a jury, nor are your lordships necessarily driven to consider on the present appeal some of the subtle and refined distinctions, which have been engrafted on the clear and simple principles of the common law. The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since the case of *Evans* v. *Collins*, 5 Q. B. 820, in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue, or, to adopt the language of the learned editors of "The Leading Cases," that "the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation or to have made it fraudulently without belief that it was true." The leading counsel for the respondent met the argument fairly on the allegations of facts. He alleged "that the defendants were not honest; that they stated in the prospectus a definite lie, and knew that it was a lie." That is the very issue, in fact, in the case.

The whole law and all the cases on the subject will be found in the notes of *Chandelor* v. *Lopus* and *Pasley* v. *Freeman*. There is also a clear and able summary of the decisions both in law and in equity, brought down to the present time in the recent edition of "Benjamin on Sales," by Pearson, Gee, and Boyd.

I desire to make an observation on *Chandelor* v. *Lopus*. The report in Cro. Jac. 4 would seem to have but little direct bearing on the present case were it not for the opinion attributed to Anderson, J.; but there is a valuable note in 2 Dyer by Vaillant (75 a), which is as follows:—Lopus brought an action upon the case against Chandelor, and showed that, whereas the defendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone, &c., called the bezoir stone, &c., upon which the defendant bought it, &c.; there the opinion of Popham, C.J., was, "that if I have any commodities which are damaged (whether victuals or otherwise), and I, knowing them to be so, sell them for good, and affirm them to be so, an action upon the case lies for the deceit; but, although they may be damaged, if I, knowing not that, affirm them to be good, still no action lies, without I warrant them to be good." The action seems originally to have been on a warranty which failed in fact, as there has been no warranty, and it was then sought to support it as an action for deceit; but it was not alleged in the court that the defendant knew the representation to be untrue. It was in reference to that that the observation of Popham, C.J., was made. He had the reputation of being a consummate lawyer.

The note in 2 Dyer (75 a) was probably by Mr. Treby, afterwards Chief Justice Treby. He edited an edition of "Dyer," published in 1688. I have not had an opportunity of referring to it, but it is said that he gave the public some highly authoritative notes in that edition. I have quoted from Mr. Vaillant's edition, published in 1793.

The whole evidence given on this appeal has been laid before your lordships, and we have to deal with it as a whole. That evidence has been already so fully stated and criticized that it is not necessary for me to do more than to state the conclusions of fact which, in my opinion, are reasonably to be deduced from it—viz., that the several defendants did not know that the incriminated statement in the prospectus was untrue; and that, on the contrary, they severally, and in good faith, believed it to be true. The conclusions, in fact, at which I have arrived render it unnecessary for me to consider the long and rather blundering list of authorities to which your lordships were referred, or to criticize the reasons given in the Court of Appeal for their decision in the present case. I desire, however, to make a single observation.

There is one characteristic which, as it seems to me, pervades each of the several judgments of the Court of Appeal—viz., that the *bonâ fide* belief of the defendants in the truth of the representation was unavailing, unless it was a reasonable belief resting on reasonable grounds. If this is correct, it seems to me that in an action for "deceit" it would be necessary to submit to the jury (if tried before that tribunal), not only the existence of that belief *bonâ fide*, but also the grounds on which it was arrived at, and their reasonableness.

I am by no means satisfied that such is the law, and, if now driven to express an opinion on it, I would prefer following the opinion of Lord Cranworth in *Western Bank of Scotland* v. *Addie*, in which he said, "I confess that my opinion was that in what his lordship (Lord Chelmsford) thus stated he went beyond what principle warrants. If persons in the situations of directors of a bank make statements as to the conditions of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless or negligent or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of *bona fides*.

I am of opinion that the decision of the Court of Appeal should be reversed.

LORD HERSCHELL.—In the statement of claim in this action, the respondent, who is the plaintiff, alleges that the appellants made, in a prospectus issued by them, certain statements which were untrue, that they well knew the facts were not as stated in the prospectus, and made the representations fraudulently and with a view to induce the plaintiff to take shares in the company. "The action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton, L.J., in delivering judgment. I think it is important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely—where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this, because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intending lender upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this, it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell* that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or in any of the Common Law Divisions, there being in my opinion no such thing as an equitable action for deceit." This was the language of Cotton, L.J., in *Arkwright* v. *Newbold*, 29 W. R. 455, 17 Ch. D. 301. It was adopted by Lord Blackburn in *Smith* v. *Chadwick*, and is not, I think, open to dispute.

In the court below, Cotton, L.J., said, "What, in my opinion, is a correct statement of the law is this: that where a man makes a statement, to be acted upon by others, which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of anyone to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care, "whether it is true or false, that is, without any reasonable ground for believing it to be true," I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement, careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief. I

shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true, an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others." The learned judge proceeds to say, "Although in my opinion it is not necessary that there should be what I should call fraud, yet, in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and, in my opinion, when a man makes an untrue statement, with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right, which those to whom he makes the statement have, to have true statements only made to them." Now, I have first to remark on these observations that the alleged "right" must surely be here stated too widely if it is intended to refer to a legal right, the violation of which may give rise to an action for damges. For, if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty, an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-bye to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud," and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud" or "fraud in law," but I may state at once that, in my opinion, without proof of fraud, no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. Sir James Hannen says, "I take the law to be that if a man takes upon himself to assert a thing to be true, which he does not know to be true and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes, L.J., states what in his opinion is the result of the cases. I will not trouble your lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement intended to be, and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby. "Fourthly, if it is untrue in fact, but believed to be true without any reasonable grounds for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable grounds as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen further, that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L.J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need not go further back than the leading case of *Pasley* v. *Freeman*. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode, who said, "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies": *Baily* v. *Merrell*, 3 Bulstrode, 95. In reviewing the case of *Crosse* v. *Gardner*, Carth, 90, Buller, J., in *Pasley* v. *Freeman*, says, "Knowledge of the falsehood of the thing asserted is fraud and deceit," and further, after pointing out that in *Risney* v. *Selby*, Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds (3 T. R., at p. 60), "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so," the latter words being specially emphasized. Kenyon, C.J., said, "The plaintiff applied to the defendant, telling him that they were going to deal with Falck, and desired to be informed of his credit, when the defendant, fraudulently, and knowing it to be otherwise, and with the design to deceive the plaintiff, made the false affirmation stated on the record, by which he sustained damage. Can a doubt be entertained for a moment that this is injurious to the plaintiff?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. *Creasey* was, again, an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges, thinking that the defendant's words touching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose

to inquire which view of the facts was the more sound. Upon the law, there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defence.

I may pass now to *Foster* v. *Charles*, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the court; Tindal, C.J., saying, "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood intending that another shall be led to act upon it as if it were the truth may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. *Charles* was followed in *Corbet* v. *Brown* 8 Bing. 33, and shortly afterwards in *Polhill* v. *Walter*. The learned counsel for the respondent placed great reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says, "It was contended that in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, fraud, and for this position was cited *Foster* v. *Charles*, to which may be added the recent case of *Corbet* v. *Brown*. The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshay* v. *Thompson*, 4 M. & G. 357, Maule, J., explains *Polhill* v. *Walter* thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill* v. *Walter*." In the same case Cresswell, J., defines "fraud in law" in terms which have been often quoted. "The case," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another."

In *Moens* v. *Heyworth*, 10 M. & W. 157, which was decided in the same year as *Crawshay* v. *Thompson*, Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Baron Parke said, "To support that count (viz., a count for fraudulent representation) it was essential to prove that the defendants knowingly," and I observe that this word is emphasized "by words or acts made such a representation as is stated in the third count relative to the invoice of these goods, as they knew to be untrue."

The next case in the series, *Taylor* v. *Ashton*, is one which strikes me as being of great importance. It was an action brought against directors of a bank, for fraudulent representations as to its affairs whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict entitled the plaintiff to judgment. Baron Parke, however, in delivering the opinion of the court, said, "It is insisted that even that (viz., the gross negligence which the jury had found) accompanied with damage to the plaintiff in consequence of that gross negligence would be sufficient to gain him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made. . . . But then it was said that in order to constitute that fraud, it was not necessary to show the defendants knew the fact they stated to be untrue, that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose, and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now, it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Collins* v. *Evans*, 5 Q. B. 805, they were reviewed by the Exchequer Chamber. The judgment of the court was delivered by Tindal, C.J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly, and in the full belief that it is true, affords a ground for action," he proceeds to say: "The current of authorities from *Pasley* v. *Freeman* downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true?"

In *Evans* v. *Edmunds*, 1 W. R. 412, 13 C. B. 777, Maule, J. expressed an important opinion often quoted, which has been thought to carry the law further than the previous authorities, though I really do not think it does so. He said, "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of fraud, for he takes upon himself to warrant his own belief of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still

have been fraudulently made." The foundation of this proposition manifestly is, that a person making any statement which he intends another to act upon, must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief, he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it, will support an action for deceit. In *Addie* v. *The Western Bank of Scotland* the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be misrepresentation or deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said, "I agree in the propriety of this interlocutor. In the argument upon this exception, the case was put of an honest belief being entertained by the directors, of the reasonableness of which, it was said, the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a *bonâ fide* belief in its truth, how can the *bona fides* be tested, except by considering the grounds of such belief. And if an untrue statement is made which is founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit." I think there is here some confusion between that which is evidence of fraud, and that which constitutes it A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned lord intended to go further, as apparently he did, and to say that, though the belief was really entertained, yet if there were no reasonable grounds for it the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say with all respect that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not in my opinion fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman* down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present and regarded as an essential element, that the deception was wilful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing. I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said:—"I confess that my opinion was, that in what his lordship (the Lord President) then stated, he went beyond what principle warrants. If persons in the situation of directors of a bank made statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be a consequence, not of their stating as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." Sir James Hannen in the court below seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference, I do not think it was intended to be, or can be, so limited. The direction which he was considering and which he thought went beyond what true principle warranted had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those which are quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the persons sued. I do not think they bear any such construction. In the case of the *Reese Silver Mining Co.* v. *Smith*, 17 W. R. 1046, L. R. 4 H. L. 64, he said:—"If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious, when making the assertion, that they were ignorant whether it was true or untrue. For if not, it might be said of anyone who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in *Evans* v. *Edmunds*. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek* v. *Gurney* the same learned lord, after alluding to the circumstances that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say, "They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind, all that your lordships have to examine is the question—Was there or was there not misrepresentation in point of fact? If there was, however innocent the motive may have been, your lordships will be obliged to arrive at the consequences which probably would result from what was done." In the case then under consideration it was clear, that if there had been a false statement of fact, it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he had there pointed out was, that in such a case

motive was immaterial; that it mattered not that there was no design to mislead or defraud the public, if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in *Foster* v. *Charles*, *Polhill* v. *Walter*, and other cases I have already referred to.

I come now to very recent cases. In *Weir* v. *Bell*, Lord Bramwell vigorously criticized the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times, at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure. In the same case Cotton, L.J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge in *Arkwright* v. *Newbold* laid down the law somewhat differently, for he said, "In an action of deceit, the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington* v. *Fitzmaurice*, 33 W. R. 911, 29 Ch. D. 459. In this latter case, Bowen, L.J., defined what the plaintiff must prove in addition to the falsity of the statement as, "Secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith* v. *Chadwick*. The late Master of the Rolls there said, "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing his statement is true, and not intending to deceive; but he may, through carelessness, have made statements which are not true, and which he ought to have known were not true, and if he does so, he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud; without which, the action will not, in my opinion, lie. It must be remembered that it was not requisite for Sir George Jessel in *Smith* v. *Chadwick* to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit." I may further note that in the same case Lindley, L.J., said:—"The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or, at all events, that they did not believe it to be true." This appears to me to be a different statement of the law from that which I have just criticized, and one much more in accord with the prior decisions. The case of *Smith* v. *Chadwick* was carried to your lordship's House. Lord Selborne thus laid down the law:—"I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representation made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural results of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned lord regards the proof of actual fraud as essential; all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie* v. *Campbell*, without seeing that, in his opinion, proof of actual fraud, of a wilful deception, was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions:—First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman* down to *Addie's case* in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell*, where it seems to be involved in Cotton, L.J.'s enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as well-established law. The *dictum* of the late Master of the Rolls—that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit—carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal. In my opinion, making a false statement through want of care falls far short of and is a very different thing from fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. Indeed, Cotton, L.J., himself indicated in the words I have already quoted that he should not call it fraud. But the whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained when

the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton* appears to me to be in direct conflict with the *dictum* of Sir George Jessel, and inconsistent with the view taken by the learned judge in the court below. I observe that Mr. Pollock, in his able work on Torts, at page 243 n, referring, I presume, to the *dicta* of Cotton, L.J., and Jessel, M.R., says that the actual decision in *Taylor* v. *Ashton* is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit. At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell*, a very different thing from knowledge, If I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false. I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the Legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether what he does be or be not deserving of that designation. It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants except Wilde with the inclination to scrutinize their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion. I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and, after carefully considering the evidence, I see no reason to dissent from Stirling, J.'s conclusion. I shall, therefore, assume the truth of their testimony. I agree with the court below, that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and, where no such power is prescribed, by animal power only. In order, therefore, to enable the company to use steam power, an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds if they thought that the consent of the board would be obtained as a matter of course if their requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men. I turn now to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the bar and director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the standing orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse power, and, no objection having been raised by the Board of Trade, and the Bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that practically and substantially they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations; but that, on any reasonable requirements being complied with, they could not refuse their consent. It never entered his thoughts that, after the board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore

states that he was under the impression that the passage in the prospectus represented the effect of section 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam; the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the Board of Trade, because, as they had got the Act of Parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is somewhat confused; but I think the bare effect of it is that, though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that, the company having obtained their Act, the board were going to give their consent, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam. As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they had been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. It is not unworthy of note that in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says, "The Act of 1882 gives the company authority to use mechanical power over all their system." I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test with the result that I have a strong conviction that a reasonable man, situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true. Adopting the language of Sir G. Jessel, M.R., in *Smith* v. *Chadwick*, I conclude by saying that, upon the whole, I have come to the conclusion that the statement "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit." I think the judgment of the Court of Appeal should be reversed.

Order of Court of Appeal of the 19th of November 1887, so far as appealed from, reversed; judgment of the Chancery Division of the 24th of March, 1887, restored; the respondent to pay to the appellants their costs in the Court of Appeal and in this House.

Solicitors, *Linklater, Hackwood, Addison, & Brown; Tamplin, Taylor, & Joseph.*

From C. A. (England). March 4, 5, 7; April 8, 1889.

Macdougall v. Knight. (a.)

Libel—Privilege—Publication of judgment.

A jury found that an alleged libel was (1) *a fair, accurate, and honest report of the judgment of a judge;* (2) *that it was published* bonâ fide *and with the honest intention of making known the true facts of the case, in order to protect the reputation of the defendants, and in reasonable self-defence; and* (3) *that the publication was not malicious.*

Held, that it was too late after the trial to raise the question whether or not the judgment did truly represent all the evidence given.

Decision of the Court of Appeal (34 *W. R.* 727, 17 *Q. B. D.* 636) *affirmed, but for different reasons.*

To what extent a judge's judgment or summing up to a jury is privileged, discussed.

This was an appeal from an order of the Court of Appeal (reported 34 W. R. 727, 17 Q. B. D. 636).

The action was brought by the appellant against the respondents to recover damages for the publication of an alleged libel contained in a pamphlet which purported to be a *verbatim* report of the judgment of North, J., pronounced in a cause in the Chancery Division brought by the appellant against the respondents.

The whole course of the proceedings are given in the judgment of Lord Halsbury, C.

The appellant in person.

Coleman v. *West Hartlepool Railway Co.*, 8 W. R. 734; *Stevens* v. *Sampson*, 28 W. R. 87, 5 Ex. D. 53; *Milissich* v. *Lloyd's*, 25 W. R. 353; *Lewis* v. *Clement*, 3 B. & A. 702; *Lewis* v. *Levy*, 6 W. R. 629, E. B. & E. 537, were referred to.

Sir E. Clarke, S.G., and *W. B. Odgers*, for the respondents, were not heard.

The House took time for consideration.

Lord Halsbury, C.—This is an action of libel in which the plaintiff complains of the defendants publishing a pamphlet purporting to be a *verbatim* report of the judgment of North, J., pronounced in a cause in which the plaintiff sued the present defendants in the Chancery Division of the High Court of Justice. The statement of claim alleges that the libel complained of was the publishing of a pamphlet purporting to be a *verbatim* report of the judgment of North, J., and, as something turns in this case upon the question which the plaintiff sought to raise, it is material to consider the pleadings.

The passages of which the plaintiff complains are set out as the particulars of the statements and innuendoes forming the alleged libel, and the third paragraph of the defendants' defence is as follows:—(3) "The defendants are auctioneers and upholsterers carrying on business in Bath, and having a large number of customers resident in Bath and the neighbourhood. The plaintiff brought the said action against the defendants in the Chancery Division of the High Court of Justice charging the

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

defendants with breach of contract, misrepresentation, and breach of faith. The said action was assigned for trial to the Hon. North, J., who, after a trial which lasted five days, gave judgment in favour of the defendants. The said pamphlet is a fair, accurate, and honest report of the said judgment of the Hon. North, J., and was published by the defendants *bonâ fide* and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence and without any malice towards the plaintiff.

The plaintiff replied by joining issue on the defendants' defence, and these were the issues which came before Huddleston, B., and a jury to be determined.

The publication of the pamphlet was admitted, and it was sought to be justified as a fair, accurate, and honest report of the judgment of North, J., and was alleged to be published by the defendants *bonâ fide*, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence and without any malice towards the plaintiff.

The jury found all the questions involved in these issues in favour of the defendants. They found that the pamphlet was a fair, accurate, and honest report of the judgment of North, J.; they found that it was published by the defendants *bonâ fide*, and with the honest intention of making known the true facts of the case in order to protect their reputation, and in reasonable self-defence, and they found that the publication was not malicious.

Now, it is impossible to deny upon the issues thus raised upon the pleadings that the judgment must be for the defendants, or that if the third paragraph of the defence is not an answer to the action a motion should have been made for judgment for the plaintiff, notwithstanding that there was a finding by the jury upon the issues in favour of the defendants. No such motion was made, but the notice of motion to the Divisional Court states, as the ground of the application to that court for a new trial, that the judge misdirected the jury by telling them that the occasion was privileged, and in telling them that if the pamphlet was a fair, accurate, and honest report of the judgment of North, J., its publication was privileged; and in not telling them that to be privileged it must be a fair, accurate, and honest report of all the proceedings at the trial. Also on the ground that the judge improperly ruled that the plaintiff was not entitled on the pleadings to object to the third paragraph of the defence as bad in law. Also on the ground that the judge improperly refused to give the plaintiff leave to amend his reply by adding that he objected to the third paragraph in point of law, and also on the ground that the verdict was against the weight of evidence. None of these points seem really to have been argued either before the Divisional Court or the Court of Appeal except the point as to the judgment being a separate and independent portion of the proceedings at the trial which need not disclose all that took place at the trial.

I think several questions which might have arisen as to that point are concluded by the conduct of the parties at the trial, and in the course they took before the Divisional Court and the Court of Appeal.

Huddleston, B. (page 142 of the appendix), says:—"What I shall ask the jury in substance is this. The plaintiff complains of what he calls a libel. The defendant says, first of all, that the pamphlet is a *verbatim* report of the judgment of North, J.; and then next he says, in substance the words were in fact spoken by the Hon. North, J., in delivering judgment. Those are the words complained of. He does not say that the whole of the book is put in the statement of claim; he merely says the passages. Then the defendant has pleaded that these passages were in fact uttered by North, J. Then he says that they are 'auctioneers and upholsterers carrying on business at Bath, and having a large number of customers resident in Bath and the neighbourhood. The plaintiff brought the said action against the defendants in the Chancery Division of the High Court of Justice, charging the defendants with breach of contract, misrepresentation, and breach of faith. The said action was assigned for trial to the Hon. North, J., who, after a trial which lasted five days, gave judgment in favour of the defendants.' Those facts seem to be admitted. Then they go on to say this: 'The said pamphlet is a fair, accurate, and honest report of the said judgment of the Hon. North, J., and was published by the defendants *bonâ fide*, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence, and without any malice towards the plaintiff.' Then, if the jury say that in their opinion that is so, there is a verdict for the defendants. Th t is the question."

Now, I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested Huddleston, B., definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted, no end could possibly be found for litigation. But I do not think it is alone from this omission that the course pursued by the plaintiff prevents him from complaining.

On a careful review of what passed at the trial, I think that the plaintiff did mean to deny the *verbatim* accuracy of the report of the judgment, and I think, further, that the effort which was made at the trial, and partly renewed at your lordships' bar, was not so much to contest the accuracy of the report, as a report of what actually took place, as to show that North, J., had drawn erroneous conclusions from the facts put in proof before him.

The ground on which the privilege of accurately reporting what takes place in a court of justice is based is, that judicial proceedings are in this country public, and that the publication of what takes place there, even though matters defamatory to an individual may thus obtain wider circulation than they otherwise would, is allowed because such publication is merely enlarging the area of the court, and communicating to all that which all had the right to know.

I am not prepared to admit that the judgment of a learned judge must necessarily be privileged. It is obvious that a partial account of what takes place in a court of justice may be the exact reverse of putting the person to whom publication is made in the same position as if he were present himself. If the evidence of a witness containing matter defamatory to an individual were published, and the cross-examination which showed the witness to be a person unworthy of belief were suppressed, it would obviously be a partial and inaccurate account of what took place; and if a learned judge's judgment or summing-up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, I think the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. Nor do I think there is any presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to

be so by evidence, and certainly not inferred as a presumption of law.

But in this case it is very obvious that the learned judge was never asked to submit any such questions as are now insisted on to the jury. The plaintiff was himself cross-examined as to whether there was any evidence in the cause not referred to in what is called the summing-up, and I think he wholly failed to suggest that the judge's judgment was erroneous in omitting to notice any evidence given in the cause; he complains of it, not because it did not fairly represent the evidence which in fact had been given, but because the learned judge did not draw from the evidence that was given, the same conclusions which Mr. McDougall insists he should have drawn.

Now, the question whether or not the judgment did truly represent all the evidence which had been given was a question of fact to be tried, if tried at all, before the jury, with the witnesses there, and with the documents before them. It is too late, either in the Divisional Court, in the Court of Appeal, or in this House, to suggest that that question should have been submitted to the jury when no such suggestion was made at the trial itself.

It seems to me that it would be most unjust to allow such a question to be raised at so late a period, and thus to allow a new case to be started by a plaintiff who had failed upon the questions of fact upon which he had elected to stand.

It seems to me that substantial justice was done by the course Huddleston, B., pursued, and I therefore think this appeal should be dismissed with costs.

Lord Watson.—I concur in the judgment which has been moved. The plaintiff joined issue with the defendants upon the defence stated, and the jury found upon all points against him, and I have seen no good cause for disturbing their verdict. Various other questions of delicacy and importance were discussed at the bar; but seeing that I agree with the Lord Chancellor in thinking that not one of these questions has been competently raised for the consideration of the House, I express no opinion with regard to them.

Lord Bramwell.—I agree with the opinion of the noble and learned lord on the woolsack, and with the reasons that he has given for it; but I wish to say a few words partly in justice to the plaintiff and partly to prevent the possibility of the decision of this House being mistaken, though I do not think it ought to be after what the noble and learned lord has said.

The case is shortly this: The plaintiff brought a former action against the defendants in the Chancery Division. North, J., rightly or wrongly, in the course of his judgment in that case expressed an opinion which was not creditable to the plaintiff, and which, when published, would be the subject-matter of an action for libel. Upon the same materials the Court of Appeal afterwards, though they affirmed the judgment of North, J., stated their dissent from the comments which he had made unfavourable to the plaintiff's character in the matter. The defendants in that action, who are also the defendants in this action, before the judgment of the Court of Appeal had been given, published the judgment of North, J., with the disparaging remarks in it to which I have referred, and distributed, I think, 1,500 copies of it to their own customers and patrons as they called them, and they did not accompany the publication of that judgment with the publication of the evidence.

Now, it is perfectly clear that upon that statement they did not give the plaintiff that chance of a favourable opinion being taken of his conduct in the case which they would have done if they had published the evidence, which, when it was before the Court of Appeal, caused the learned judges of that court to entertain the favourable opinion to which I have referred. It is perfectly clear, therefore, that even if the judgment was correctly published—and I have no doubt it was—it was so found by the jury—it was not a publication of all the circumstances of the case such as to enable persons to form possibly opinions unfavourable to the plaintiff, but possibly opinions favourable to him. Now this was done by the defendants not as purveyors of news; not that I mean to say a newspaper has any particular privilege except so far as it may be given by statute. It was not published by them for that purpose, but it was published by them for the sake of vindicating, as they said, their characters with their customers.

Now, what I wish to say in point of law is this (the noble and learned lord on the woolsack has expressed his doubt upon it already): That I am by no means prepared to say that under those circumstances there was not a cause of action on the part of the plaintiff against the defendants for libel for the publication of this judgment unaccompanied by the evidence. It is to be observed that there is no justification. That what North, J., said was true; the only statement in the statement of defence is that the report of the judgment was accurate, and was published without malice. I wish to guard against its being supposed that this House is holding that there was not a subject-matter of an action for libel there.

Then why is it that the plaintiff has not succeeded? For the reason that has been given by the Lord Chancellor. After the verdict of the jury had been given the objection should have been taken—"But I am entitled to judgment because, although the jury have found the facts in issue against me, no cause of action is stated in the declaration, because it is not stated in the declaration that it was a fair report of the proceedings at the trial, but merely a fair report of the judgment." That is the course that should have been taken, and if the learned judge had refused to give judgment for the plaintiff, then an application should have been made to the Divisional Court, and their refusal, if they had refused, should have been the subject-matter of an appeal upon that ground. But the point has never been so taken. There has been some curious suggestion that in some way or other the jury ought to have been asked a question which, in truth, was a question of law. The consequence is that the true ground for maintaining the plaintiff's action has never been put before any tribunal as it ought to have been. It has been put, as I say, not as an objection to the statement of claim, but in some way, not very intelligibly, that the learned judge did not leave some question to the jury which, in reality, if it was anything, was not a question raised upon the pleadings, but which was a question of law.

I have thought it right to make these remarks, as I have said, partly in justice to the plaintiff, and partly in order that it might not be supposed that this House is affirming that there was not a subject-matter of an action for libel in this case.

Lord Fitzgerald.—The pleadings and the facts have been already summarized. The replication "joins issue on the defence," but it contains no averment that the defence is insufficient in law, and, on the contrary, as the defence consists entirely of matters of fact, the replication imports that if the facts relied on in the defence should be established in proof, the defence is good in law.

The defendants' pamphlet contains the paragraphs complained of in the statement of claim, which undoubtedly are libellous of the plaintiff, and sufficient to maintain his action if the publication be not justified, or protected, or excused.

The defence admits the publication of the pamphlet, but alleges that the pamphlet is a fair, accurate, and honest report of the judgment of North, J., in the chancery action, and that it was published in good faith

and without malice. That is the substance of the defence, though the pleading comprises some other allegations, not absolutely necessary, but which go to rebut any inference of malice and to show the defendants' interest in the matter, and that in the publication they were not exceeding the limits of privilege. The defence, then, consisted of two main allegations—viz., (1) that the report gave accurately what North, J., did actually say in his judgment in the chancery action; (2) that the pamphlet was published without malice. This cause came to trial, and there was a perplexing contest as to what ought to be received in evidence and what rejected; but finally considerable latitude was given by the learned judge, and out of the tangle and confusion created principally by the plaintiff's examination it appeared plainly that the plaintiff failed to establish that the pamphlet was unfair or inaccurate, or that any material part of the evidence had been omitted in North, J.'s summary. The defendants' evidence proved that it did contain a fair, accurate, and honest report of what North, J., had said in his judgment in the chancery cause.

If it was expedient to enter on the question, I may point out that although the plaintiff got the utmost latitude from Huddleston, B., yet he failed in his contention to establish that the judgment of North, J., did not contain a full summary of the proceedings and evidence in the trial before him.

The jury found affirmatively that the pamphlet was a fair, accurate, and honest report of that judgment, and published by the defendants *bonâ fide*, with the honest intention of making known the facts of the case, in order to protect their reputation and in reasonable self-defence; and also found negatively that there was no malice. Thereupon judgment was given for the defendants.

I concur with the judge that there ought to have been then an end of this case, but the plaintiff's counsel had, in the course of the trial, put it rather doubtfully that the defence was not good in law. After the close of his case he says: "Your lordship understands I do not admit that this is a good plea of privilege." The defendants' counsel does not appear to have taken any objection to the summing up, or asked for any specific direction in point of law.

I collect from what occurred that the allegation of the plaintiff was that a publication of the judge's judgment alone could not raise a justification; it must be a report of the whole proceedings at the trial; that such a report, to be full and to be justified, should have contained the whole proceedings and the evidence at the trial, which had been dragging along for many days before the judge pronounced his judgment.

Now let us see what this judgment of North, J., really was. It was not exactly similar to a summing up of a judge to a jury who have heard the evidence, where he is acting in their aid as to the findings in fact which they are to determine, and directing them on such questions of law as have arisen. North, J., without a jury had the function of deciding on the facts and on the law, and had necessarily to review the evidence and state his conclusions on the facts. His decision on both facts and law was final between the parties unless reversed or varied on appeal. The plaintiff did appeal, both on fact and in law, and he has failed in the Divisional Court, in the Court of Appeal, and before your lordships.

North, J., was therefore pronouncing, and did pronounce, what was and is the final decision on the rights of the parties in that very complicated suit, and so far as they could be then determined at that stage of the suit. But before announcing his decision he precedes it by a review of the trial, and summarises the pleadings, the evidence, and the issues, and also gives his reasons at large for the judgment he is about to pronounce. The reasons for the judgment and the judgment itself are quite distinct, though together usually described as the judgment of the judge. If the decision of the judge, as pronounced by him, and subsequently recorded in his order or decree, had been accurately published, it would not be libellous unless the privilege which protects such a publication had been displaced by proof of actual malice.

The appellant pressed on your lordships that the defence (assuming it to be true in fact) presented no answer to the action, and he claimed to have judgment entered for him. He ought to have raised that question before the Divisional Court, but did not do so; but I assume, for the purpose of this appeal, that if the pleading presents no legal defence, then even at this stage of the cause the appellant's contention should prevail.

The privilege which attaches to the publication of the proceedings of courts of justice rests on the foundation that the law of this land is administered publicly and openly, and its administration is at once subjected to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our courts forms one of the excellences of our practice of the law, and admits of exception only in rare cases of such a character that public morality requires that the proceedings should be *in camera* wholly or in part. This openness and publicity was at one time peculiar to the law of England.

Barrington, in his observations on the statutes, and speaking of our open courts, says:—"I do not recollect to have met in any of the European laws with an injunction that all causes shall be heard *ostiis apertis*, except in those of the Republic of Lucca. In Scotland, by a statute of William and Mary, all causes must be tried with open doors, rape and the like being excepted, and Mr. Emlyn, in his preface to his edition of State Trials, says:—"In other countries the courts of justice are held in secret, with us publicly and in open view; there the witnesses are examined in private, and in the prisoner's absence; with us face to face, and in the prisoner's presence."

From this practice of the law the principle has been deduced, and in modern times expanded, that as a general rule the publication of a fair and *bonâ fide* report of the proceedings of a court of justice is *primâ facie* to be protected, and I may add that, speaking for myself alone, I am not disposed to narrow or limit that privilege. So far the law is not contested. But the appellant contends, in this particular case, that the occasion is not privileged because the defendants did not publish the whole trial, but only the judgment.

I do not intend to indulge in any abstract propositions. There is danger in doing so, and especially where the appellant has not been represented by counsel before your lordships. No authority has been brought before your lordships for the assertion that the privilege cannot exist where the publication is of a part only of the proceeding. *Lewis* v. *Levy* is directly contrary. Where, as in the case before North, J., the trial had been completed, and the publisher, in his publication, gives only the last scene—*i.e.*, the decision, with the judge's reasons for that decision—he may incur considerable risks—*e.g.*, he may exceed the limits of privilege, and he leaves himself open to the imputation that he has adopted the plan of a partial publication as the vehicle of malice. In the present case the defendants are freed from those dangers by their defence, which is now to be taken as true in all its facts.

The trial of the chancery cause before North, J., is stated to have occupied five days, and his judgment and reasons were delivered on a subsequent day, and I can entertain no doubt that in this particular case the publication of that decision, preceded by the judge's summary of the case, and the evidence, with his own reasons, comes *primâ facie* within the protection afforded

to the publication of proceedings of public courts of justice, and that to obtain that protection it was not necessary to give a report of all prior proceedings at the trial.

I confine my judgment to the particular case before your lordships' House. Your lordships will find some more extensive propositions expressed in the reasons of the courts below also discussed here. I do not mean to express dissent, but, as to some of them, I think that it would be desirable that they should be fully and pointedly discussed, before your lordships should be called on finally to accept them.

Lord MACNAGHTEN.—I concur in the motion proposed, but I prefer to do so upon the grounds which have been expressed by my noble and learned friend opposite (Lord Watson).

Lord WATSON.—I desire to make an explanation.

I did not think it necessary to express any opinion as to whether the plea stated by the defendants was a good plea, because it did not occur to me, for the reasons assigned by the Lord Chancellor, that the plea had been competently challenged in these proceedings.

On the other hand, I am free to state my opinion that, if the plea had been held bad, it would have been a question, not for the court, but for the jury to determine, whether the facts were sufficiently and fairly disclosed in the opinion of the learned judge.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Hermann H. Myer.*

Solicitors for the respondents, *Torr, Janeways, Gribble, & Oddie*, for *Payne & Fuller*, Bath.

Court of Appeal.

From Chan. Div. Oct. 29.

In re BRACKEN.

DOUGHTY *v.* TOWNSON. (*a.*)

Administration—Executor—Statutory notice to creditors and others—Advertisements—Sufficiency of publication—Practice—22 & 23 Vict. c. 35, s. 29—R. S. C., 1883, ord. 55, rr. 44, 46.

There is no rule of practice in the Chancery Division rendering it in every case necessary for the sufficiency of the publication of notices to creditors and others, under section 29 of the 22 & 23 Vict. c. 35, to have an advertisement of such notice inserted in the Times, *or some other London daily paper, in addition to the* London Gazette.

On the death of a testator, who had for many years previously thereto resided in Lancashire, where he had carried on the business of a farmer, the usual statutory notice to creditors and others was published by his executor in the London Gazette *and in three local weekly papers, but not in the* Times *nor in any other London daily paper.*

Held, that there had been sufficient publication of the notice to discharge the executor from liability.

The notice in question was dated the 16th of September, 1875, and the advertisement was published in the local papers on the 17th and 18th of September, and in the London Gazette *on the 21st of September. The time limited by the notice for sending in claims was, not one month from the date of publication of the last advertisement, but one month from the date of the notice.*

Held, that the notice was not insufficient on that ground.

Wood *v.* Weightman, 20 *W. R.* 459, *L. R.* 13 *Eq.* 434, *discussed.*

Appeal from North, J.

The plaintiff in this action claimed to be entitled, under the will of John Bracken, to a share in the proceeds of sale of certain property which had been sold in 1847 by John Chapman, as the then sole surviving executor of John Bracken, and which, as the plaintiff alleged, Chapman had never accounted for. Chapman had died in 1875, and this action was brought in 1888 against the defendant Townson, the sole surviving executor of Chapman.

The defendant, by his defence, admitted that he had received assets of Chapman's estate sufficient to answer all claims against the same, but pleaded that he or his co-executors had long since fully administered the same in a due course of administration, and had advertised for and paid all claims against the estate as by law required, and had not now in his possession any such assets.

North, J., had ordered that the point of law as to the sufficiency of the advertisements raised by this defence should, under ord. 25, r. 2, be disposed of before the trial of the action. A statement of facts, admitted by both plaintiff and defendant, was put in evidence for this purpose.

It appeared from this statement that John Chapman was a farmer who, at the time of his death and for forty years previous thereto, had resided in the parish of Tatham, in the county of Lancaster, and that the persons residing in that parish use Lancaster as their market town. A notice in the usual statutory form requiring all creditors or claimants upon the estate of John Chapman to send in particulars of their debts or claims to the executors of Chapman "before the expiration of one calendar month from the date hereof"—viz., the 16th of September, 1875—was advertised in the *London Gazette* of the 21st of September, 1875, in the *Lancaster Gazette* of the 18th of September, 1875, in the *Lancaster Guardian* of the same date, and in the *Lancaster Observer* of the 17th of September, 1875. The three last-mentioned papers were weekly papers, and were admitted to have a local circulation in Tatham. The plaintiff in the action resided at New York, in America, where her mother and grandmother, through whom she claimed, had also resided some years previous to 1847.

Section 29 of 22 & 23 Vict. c. 35 enacts that: "Where an executor or administrator shall have given such or the like notices as, in the opinion of the court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets."

On the above stated facts North, J., held that the advertisements issued were sufficient, and that no claim could now be sustained against the executor.

The plaintiff appealed.

Seward Brice, Q.C., and *F. H. Colt*, for the appellant.—The advertisements ought to have been inserted in the *Times* or some other well-known London paper as well as in the *London Gazette* and the local papers; it is the practice of the Court of Chancery in administration

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

suits to advertise in the *Times* or some well-known London paper in addition to the *London Gazette*: *Wood* v. *Weightman*, 20 W. R. 459, L. R. 13 Eq. 434. [FRY, L.J.—Is this point open to appeal? The statute says: "Such notices as would have been given by the Court of Chancery . . . in the opinion of the court in which the executor is sought to be charged," does that include the Court of Appeal?] We contend that the conclusion come to by the judge below as to the practice of the Court of Chancery was erroneous, and we are entitled to appeal on that ground. Again, the time limited by the notice was not sufficient, it should have been at least a month from the date on which the last advertisement of the notice was published and not a month from the date of the notice itself: *Wood* v. *Weightman*.

They referred also to *Newton* v. *Sherry*, 24 W. R. 371, 1 C. P. D. 246.

Gatey, for the respondent, the executor, was not called on.

COTTON, L.J.—This is an appeal from a decision of North, J., on a point of law raised on an admitted statement of facts. It was contended on behalf of the plaintiff, the present appellant, that the defendant was not relieved from liability because the statutory notice to creditors of the estate of J. Chapman, given by the defendant and his co-executors, was not—as the plaintiff alleges—sufficiently advertised. The notice was advertised in the *London Gazette* and in three Lancashire papers circulating in the locality where the testator had lived for many years; but the plaintiff contends that it should have been advertised also in the *Times* or some other well-known daily London paper, on the ground that it was the practice of the Court of Chancery in a creditors' administration action to direct advertisements to be inserted in such papers. In my opinion, however, for several reasons, this contention cannot be supported. Both the learned judge below and his chief clerk have found that such advertisement was not necessary. Then in the case of *Wood* v. *Weightman*, before Lord Romilly, there had been no advertisement in the *London Gazette*, and in my opinion that case lays down no set rule of practice as to the papers in which such advertisements should be inserted. In Daniell's Chancery Practice, 6th ed., p. 1014, it is stated that "the advertisement is inserted . . . in the *London Gazette*, and in such other papers as may be directed by the judge," and that indicates no such set rule of practice as is alleged by the plaintiff. In the chambers, at all events, of the learned judge who decided this case the practice is not to require, as an absolute rule, an advertisement in the *Times* or other London daily paper. Though I am not as familiar as my brothers are with the practice in chambers, yet my own view is that, under the circumstances of a case like this, where the testator had been living for many years previous to his death in Lancashire, and not carrying on business in London, an advertisement in the local papers, in addition to an advertisement in the *London Gazette*, was all that was necessary.

Then it was said that the time fixed by the notice was not sufficient, and that there should have been one month allowed from the date of the publication of the advertisement, instead of one month from the day of the date of the notice. In the present case the notice was dated "September 16, 1875," and the advertisements were issued on the 17th and 18th of September in the local papers and on the 21st of September in the *London Gazette*. I cannot think that that makes the notice insufficient, and I think that the time given was sufficient. In my opinion the decision of the learned judge below was quite right.

BOWEN, L.J.—I am of the same opinion. The question we have to decide is whether the executor has given such or the like notice as, in the opinion of the court in which the executor is sought to be charged, would have been given by the Court of Chancery in an administration suit. It still remains an open question whether this case is one in which an appeal to this court lies. But, assuming that an appeal does lie to this court, we should be extremely chary to interfere with the view of the court below—the court which is the proper tribunal to decide this matter. Is the opinion expressed by North, J., clearly wrong? As to the practice of the Court of Chancery, I leave it to my learned brothers to express their views of the decision of North, J., on that point. But I find with regard to the sufficiency of these advertisements the following facts:—First, that North, J., has, after consultation with his chief clerk, come to the conclusion that it was not the practice of the Court of Chancery to require advertisements to be inserted, as a matter of necessity, in the *Times* or other London daily paper; and, secondly, that no authority has been or can be produced to show that there has been any practice of the Court of Chancery contrary to the opinion taken by North, J., for the case of *Wood* v. *Weightman* is not such an authority. It is, therefore, quite impossible for us to overrule the decision of that learned judge.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Warriner & Kinch*, for *J. Stone*, Derby.

Solicitors for the respondent, *Tahourdin & Hargreaves*, for *Johnson & Tilly*, Lancaster.

From Chan. Div. Aug. 9, 1889.

CURWEN v. MILBURN. (a.)

Practice—Solicitor and client—Costs—Taxation—Bill of costs including items barred by Statute of Limitations—Solicitor's lien.

M. had acted for many years as solicitor for C. In June, 1888, C., becoming dissatisfied with M., signed an authority to other solicitors to obtain and receive from M. all deeds and documents in M.'s possession belonging to C. or relating to his property. The new solicitors wrote to M. requesting him, if he had any claim to a lien upon C.'s deeds, &c., to send them full particulars, and inclosing a copy of their authority. In further correspondence they asked for an early appointment for delivery up of C.'s deeds, documents, &c., and intimated that C. only required M. to deliver particulars of any unsettled bill of costs M. might have against him. Early in July, 1888, C. took out an originating summons as plaintiff against M. as defendant for taxation, and delivery up of deeds, &c., instead of proceeding by the usual petition of course (the summons containing no undertaking by C., such as would have been contained in a petition of course, to pay what should be found due on the taxation), and obtained an order for delivery by M. (within fifteen days of service of the order) to C. of a bill of M.'s fees and disbursements in all matters in which M. had been employed as solicitor for C., with a reference to the taxing master to tax and settle "the said bill," and to certify the amount due on either side, and for payment of the amount certified. And it was further ordered that C. should be at liberty to pay £350 into court, and that M. should thereupon deliver up to C. on oath all C.'s documents, &c., which were in M.'s possession or power, and that M.'s lien on such documents, &c., should attach to the £350 when paid into

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

court, and that the delivery of the documents should be without prejudice to M.'s lien. The taxing master, in taxing the bill, struck out the items incurred more than six years previous to the proceedings, on the ground that they were statute-barred, without reference to their propriety in other respects.

Held, that, the real object of the proceeding being clearly to obtain delivery up of C.'s documents, and for that purpose to ascertain the amount of M.'s lien on them, it must have been intended by the order to treat all the items as "due," whether they were recoverable by action or not, and therefore the taxing master ought to have taxed them all, whether statute-barred or otherwise.

Decision of North, J., *affirmed.*

Whether there was in the correspondence any acknowledgment sufficient to take the items, which would otherwise have been barred, out of the Statute of Limitations, quære.

Appeal from North, J.

In this case it appeared that Mr. Milburn, the defendant, had acted for many years as the plaintiff's solicitor. Eventually, however, becoming dissatisfied with the defendant, the plaintiff, on the 16th of June, 1888, signed a written authority, addressed to another firm of solicitors, requesting them to obtain and receive from the defendant all deeds and documents in the possession, custody, or power of the defendant belonging to the plaintiff, or in any way relating to his manor of P., and also all other deeds, &c., in the possession, custody, or power of the defendant belonging to the plaintiff, or in any way relating to the lands, tenements, hereditaments, matters, actions, things, and premises in which the plaintiff was in any way interested, and of which deeds, &c., the defendant had the possession, custody, or power as solicitor for the plaintiff, and also to obtain and receive from the defendant an account of his dealings and transactions with the plaintiff's lands, tenements, hereditaments, matters, actions, things, and premises since the defendant was appointed the plaintiff's solicitor many years ago, or for such other period as the new solicitors might think fit, and the plaintiff thereby authorized and requested the defendant to deliver up to the new solicitors all such deeds, books, papers, and documents as aforesaid. The new solicitors accordingly wrote to the defendant, inclosing a copy of the authority, and requesting him, if he claimed any lien upon the deeds, &c., of their client, to deliver them full particulars thereof without delay. Later on they wrote, in answer to questions, "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him," and asking for an early appointment for delivery up of their client's deeds, books, papers, and documents. That was on the 26th of June, 1888.

Mr. Curwen, on the 4th of July, 1888, issued an originating summons, as plaintiff, against Milburn as defendant, instead of proceeding by an ordinary petition of course, and the summons did not contain the submission by the plaintiff (which would have been contained in a petition of course) to pay what should be found due on taxation. An order, however, was made on the summons (upon the undertaking of the plaintiff to pay any additional costs caused by the form of proceeding) that the plaintiff should pay to the defendant any such additional costs, such costs to be taxed, and that the defendant should, on or before the 1st of October, 1888, or subsequently within fifteen days after service of the order, deliver to the plaintiff "a bill of his fees and disbursements in all suits, causes, or other matters of business in which he has been employed as solicitor for the plaintiff," and that it be referred to the taxing master to tax and settle the said bill, and there was a further order for the production on oath by the defendant of books, papers, &c., and that the defendant should give credit for all sums of money by him received of, or on account of, the plaintiff, and that he should be at liberty to charge all sums of money paid by him to, or on account of, the plaintiff. And it was ordered that if such bill, when taxed, be less by a sixth part than the said bill as delivered, the master to tax the plaintiff his costs of this application and of such reference, such last-mentioned costs to include only such costs as would have been incurred if the plaintiff had proceeded by a petition of course; and that if such bill, when taxed, shall not be less by a sixth part than the said bill as delivered, the master do tax the defendant his costs of this application and of such reference. And it was ordered that the master should certify the amount due from the plaintiff to the defendant, or from the defendant to the plaintiff, as the case might be, having regard to the costs of the application and of such reference so to be taxed as aforesaid, and any sum or sums of money which might have been so received or paid as aforesaid. Then, after directions for the payment of the amount so certified, the order proceeded to direct that the plaintiff should be at liberty to pay into court the sum of £350, and that the defendant should thereupon deliver over to the plaintiff on oath, on or before the 1st of October, 1888, all deeds, &c., in his custody or power belonging to the plaintiff, and, the plaintiff so requesting, and the defendant assenting, that the defendant should, within fifteen days after the payment into court of the £350, hand over to the plaintiff such documents as the plaintiff might, by himself or his solicitor, designate as wanted for immediate use. And it was ordered that the existing lien of the defendant upon the documents in his possession do attach to the sum of £350 when paid into court, and that the delivery over of such documents by him to the plaintiff be also without prejudice to the defendant's lien.

The taxing master proceeded accordingly to tax the defendant's bill, and in doing so struck out all the items incurred before a certain date on the ground that they were statute-barred, without reference to their propriety in other respects.

The defendant then delivered the following objections to the taxation:—(1) That he had a lien for his costs which was not affected by the Statute of Limitations; and (2) that the correspondence contained a sufficient acknowledgment of the plaintiff's indebtedness, as regards the items struck out, to take the case out of the statute. The master replied:—"The question of lien is not one for the taxing master, and does not render it incumbent upon him to tax a bill barred by the statute, or open to valid objection of any other description than that of amount. No evidence has been produced which, in my opinion, is sufficient to take the disallowed items out of the statute." He accordingly certified that he had taxed and settled the bill of fees at the sum of £204 11s. 9d., and, after allowing for moneys received by the defendant, and payments made by him, and for the costs of the reference, he certified that a sum of £25 18s. 2d. remained due from the defendant to the plaintiff.

The defendant then took out a summons to review the taxation on the ground that the taxing master's certificate, finding that only so much was due in respect of the bill he had been directed to tax, would prejudice the defendant's lien in respect of the statute-barred items, and might prevent him from enforcing it, as he would have no answer to an application for delivery up of the plaintiff's documents.

North, J., held that there was in the correspondence a sufficient acknowledgment to take the case out of the statute, and that the master ought to have taxed the items he had disallowed, but he declined to decide whether, under the common order to tax, the master would be right in disallowing without taxation all

items in a bill of costs which were statute-barred. He held that that question did not arise in the present case, as the parties clearly intended to have a taxation for the purpose of determining the amount of the solicitors' lien.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the appellant.—The letter of the 26th of June is relied on by the other side as taking the case out of the statute. Strictly speaking, no bills of costs had been delivered, but merely accounts. The bill in question began in 1873 and went down to 1878. The judge held that the letters amounted to a promise to pay. There are two points:—First, the letters were not written by Curwen himself, but by his agents, who had only a limited authority given by the document of the 16th of June. That did not authorize the solicitor to promise to pay a debt which would otherwise have been statute-barred. In the first place, this was not signed by the client himself; and, secondly, even if it had been, it would not be a sufficient acknowledgment. In *Quincey* v. *Sharpe*, 24 W. R. 373, 1 Ex. D. 72, which is relied on for the defendant, there was a clear demand, made twice over, for the account, and the letters had been written before the statute had run, though the action was brought after it had run. Here the statute had run before the letter was written. It is admitted there were accounts within six years, and the document must be taken as referring to them. Where there are several debts, some barred and others not, can it be reasonable to hold that asking for an account is a promise to pay the barred debts as well as the others? The authorities were reviewed in *Green* v. *Humphreys*, 26 Ch. D. 474, 32 W. R. Dig. 120. In *Skeet* v. *Lindsay*, 25 W. R. 322, there was a clear promise to pay what was due. If it were the law that, by merely asking for your account you rendered yourself liable for an old statute-barred debt which was not in your mind at all, it would be going much further than any case has yet gone. We are not asking to defeat the solicitor's lien as to the statute-barred debt. There must be a recognition by the debtor of the debt as a debt binding upon him: *Rowe* v. *Hopwood*, 17 W. R. 28, L. R. 4 Q. B. 1. If a man merely asks for an account it is an acknowledgment; but if he signs at the foot of an account that it is correct that is no acknowledgment. In *Spong* v. *Wright*, 9 M. & W. 629, the qualifying words "if just" were held to prevent a promise to pay being an acknowledgment. So in *Mitchell's claim*, 19 W. R. 1130, L. R. 6 Ch. 822, where it was held there was no unconditional promise to pay. That is exactly what occurred here. The clause here is equivalent to "if just." We are willing (if necessary) to submit to the order being varied so as to make it without prejudice to the defendant's lien. The taxing master would not, under the common order for a taxation of a bill of costs, tax statute-barred items. Surely the plaintiff could not have been ordered personally to pay debts barred by the statute when he had made no acknowledgment and done nothing to take them out of the statute.

Romer, Q.C., and *Swinfen Eady*, for the respondents.—What the plaintiff wanted to have taxed was all the bills of costs since the defendant was appointed his solicitor, many years ago. That authority was enclosed to the respondent, and an early appointment for delivery up of all books, deeds, and papers was requested. The object of the application was to obtain possession of the deeds, &c., for which purpose it was necessary to ascertain the amount of the defendant's lien on them. Under the order our client is bound to hand over the whole of the deeds on payment into court of £350. That must refer to the lien. The order directs delivery of "a bill," and taxation of "the said bill." The taxing master, therefore, had no jurisdiction to mutilate these accounts, and only deal with those parts of them which refer to the last six years. Secondly, as to the authority of the solicitors, the letter was ample authority in itself, but we can look at the other circumstances as well as that. They were the client's solicitors. Are we to inquire whether they went beyond their authority? The client himself has not ventured to deny the authority. [They cited *Bright* v. *Legerton*, 8 W. R. 678, 9 W. R. 239.] Delivery of all the bills was demanded. [FAY, L.J.—I think asking for one's account really means this (apart from authority), "Let me see what you claim," LOPES, L.J.—I think it is an admission that he owes something.] In *France* v. *Sympson*, 3 W. R. Ch. Dig. 42, Kay, 678, at p. 681, Page-Wood, V.C., said:—"It is not necessary for the purpose of a suit for an account to have an acknowledgment that a debt is actually due; but it is enough that there is an acknowledgment that an account is pending, and that the defendant promises to pay the balance." A statute-barred debt is "due," though it cannot be recovered. The common form of undertaking in an order to tax a bill of costs is to pay what shall appear to be "due" (1 Seton, 4th ed., p. 604). That must include statute-barred debts: otherwise the clients could recover their deeds without reference to the solicitor's lien.

Cozens-Hardy, Q.C., in reply.—*Bright* v. *Legerton* has no application to this case.

COTTON, L.J.—We have a question to decide here on the effect of an order made on a summons. It does not arise upon an order for taxation under the Solicitors Act, made upon the usual petition of course, but upon an order made on a special application for delivery and taxation of the defendant's bills of costs, and for delivery up of the plaintiff's documents, the order being that the defendant do deliver to the plaintiff a bill of his fees and disbursements in all causes and other matters in which he has acted as the plaintiff's solicitor, and that the bill be taxed. Then it is ordered that the taxing master shall certify the amount that is due from the plaintiff to the defendant, or from the defendant to the plaintiff, and that the balance so certified to be due be paid. And the plaintiff is to be at liberty to pay into court £350, on which the solicitor is to have a lien instead of on the books and papers, which, in the event of the £350 being so paid in, are to be delivered up to the plaintiff. If taxation was all that was wanted, this certainly seems a most extraordinary method of obtaining it. The evident purpose was to enable the plaintiff to obtain possession of his documents, and the real object of the taxation was to ascertain the amount of the defendant's lien on these documents. In my opinion the solicitor was bound to bring in bills of costs as to all the transactions, and the taxing master did not obey the order in only taxing the bills incurred within six years, and refusing to tax the other items on the ground that they were statute-barred. It is argued that the taxing master could not certify as due, items so barred. In my opinion the meaning of the order was that everything properly owing from the client, whether statute-barred or not, was to be regarded as "due." Debts barred by the Statute of Limitations are due, though no action can be brought to enforce payment of them. Then it is contended that as the plaintiff gave no undertaking to pay, he cannot be ordered to pay an amount which includes debts barred by statute. But the plaintiff has submitted to an order to pay what is found due on taking an account.

In my opinion, therefore, we cannot differ from the judgment appealed from, though we do not affirm it on precisely the same grounds. The whole matter is governed by this order made on the summons, the object of which was to ascertain the amount for which the defendant has a lien on the plaintiff's documents.

It is unnecessary to decide whether the plaintiff has done anything amounting to an acknowledgment of his indebtedness in respect of the statute-barred items.

FRY, L.J.—I am of the same opinion. The client, for some reason known to himself, was minded to depart from the ordinary course, and obtained an order upon a special application, which order was not in the usual form of an order made upon a petition of course.

The substance of the order requires the plaintiff's solicitor to deliver a bill of costs of all the suits, causes, and all other matters of business in which the defendant was employed or acted as the plaintiff's solicitor, and the taxing master was to tax and settle the bill as one bill.

Then the taxing master was to certify the amount or balance due from the plaintiff to the defendant, or from the defendant to the plaintiff, which was to be done in one certificate on the one bill, so that the certificate was to certify what was due for all matters of business extending over the entire period during which the defendant had acted as the plaintiff's solicitor. Liberty was given to the plaintiff to pay £350 into court, and upon his doing so his documents were to be handed over to him by the defendant. It appears to me that if this appeal were right, this order would have directed two certificates to be made, one for the amount for which the plaintiff was personally liable, and another for the amount for which the defendant had a lien; whereas, in fact, it only directed one certificate to be made. Therefore, I think the appellant is now too late in trying to raise this distinction. He ought to have asked only for the bill of costs as to the items not barred by the statute.

We all know that the effect of the Statute of Limitations is not to extinguish a debt, but only to prevent its recovery. The appeal fails.

LOPES, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford, & Co.*

Solicitors for the respondent, *Wood & Wootton.*

App. Bankruptcy. Oct. 25.

Ex parte BALL.
In re FRENCH. (*a.*)

Bankruptcy — Receiving order — Petition presented in wrong court—Judgment debt—Appeal pending from judgment—Discretion of registrar—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 97, *and s.* 7 (4).

The presentment of a bankruptcy petition in a wrong bankruptcy court by inadvertence will not invalidate the jurisdiction, as, by section 97 *of the Bankruptcy Act,* 1883, *when read with section* 95, *the proceedings can be removed into the proper court.*

Ex parte May, In re Brightmore, 33 *W. R.* 598, 14 *Q. B. D.* 37, *approved.*

A judgment debtor cannot, on the ground that an appeal from such judgment is pending, claim a stay of bankruptcy proceedings for the judgment debt as of right, as a stay on such grounds is entirely in the discretion of the registrar under section 7 (4) *of the Bankruptcy Act,* 1883.

Appeal of J. E. French, the debtor, against a receiving order made by Mr. Registrar Linklater on the petition of the trustee of the estate of T. S. Ashwin.

The grounds of the appellant were:—(1) That the London Bankruptcy Court had no jurisdiction to make the receiving order as the debtor's residence and domicile were in the country. (2) That the order was made in the matter of a judgment for costs in the High Court upon which an appeal was pending. (3) That this judgment debt was the only debt of the debtor, and that he had no assets to distribute.

Morton Daniel, for the appellant.—The only evidence in this case upon which the registrar could act was an affidavit of the debtor alleging that he lived at Southsea, and had only once been to the office in London where it was alleged he transacted business. A man who had been made a debtor under a judgment from which an appeal had been lodged, had a right to claim that proceedings in bankruptcy against him for that debt should be suspended pending the hearing of an appeal. The affidavit of the debtor showed that he had no other debts, and had no property to be distributed. Bankruptcy proceedings were for the purpose of distributing a debtor's estates among his creditors. Here there was only one debt and no estate to distribute. Admitting the discretion of the registrar to make the order, it should be reversed upon the merits of the case. Ashwin had brought an action against the debtor for the recovery of certain deeds which had passed to the debtor for good consideration and were no longer in his possession.

Bartley-Denniss, for the respondent, the trustee of Ashwin's estate, was not called upon.

Lord ESHER, M.R.—Three grounds for this motion have been stated. I will take them in order. First, it is said there was no jurisdiction in the London Bankruptcy Court to make the original order, because the debtor was resident in the country. It is clear that the decision in *Ex parte May, In re Brightmore,* 33 W. R. 598, 14 Q. B. D. 37, has put the proper construction on sections 95 and 97 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), as applicable to such cases. When a receiving order has been made inadvertently in the wrong court, that is not sufficient ground to make out no jurisdiction, but, on the contrary, by the provisions of section 97, the proceedings can be removed to the proper court, thus implying that the jurisdiction of the first court is not ousted, but is only transferred. There is no contention here that the commencement of the bankruptcy proceedings before the registrar in London was otherwise than by inadvertence: indeed we have only the statement of the debtor on affidavit that he has no residence in London, on which the suggestion of such inadvertence can be raised. At any rate no harm could be done to the debtor by such inadvertence, if any, since section 97 provides for the removal of the proceedings to any other court. The Bankruptcy Rules, 1884, rr. 19, &c., for the transfer of proceedings, equally assume that there is no lack of jurisdiction owing to the commencement of the proceedings being taken in the wrong court. This point of want of jurisdiction, therefore, fails.

Secondly, it is said that the judgment of the High Court, on the failure to comply with which the receiving order was applied for, being made the subject of an appeal, there was no jurisdiction in the registrar to issue a receiving order under such circumstances. But by the construction of section 7 (4) of the Bankruptcy Act the mere fact of an appeal being pending is not sufficient as of right to prevent a receiving order being made. The matter is within the discretion of the registrar, and, acting upon the well-known rule that we shall not interfere with discretionary powers unless we are "clearly of opinion" that it was wrongly exercised, I see no reason for being of such clear opinion. The registrar in his discretion held that the appeal did not seem a hopeful one, and my view would be the same.

Thirdly, it is said that no receiving order is to be

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

made upon the mere neglect of the debtor to pay a debt under a judgment if it is proved to be the only debt he owes, and that he has no assets to be distributed. To make an order under such circumstances is said to be an abuse of the bankruptcy law. It is not necessary for us here to determine whether this is good ground for staying a bankruptcy proceeding. Here the bankrupt fails to prove either fact. The mere statement in his affidavit before us is not enough. He must show in his examination before the court that such is the state of the case before any appeal to us can be made on such ground. The fact of his living without any assets is in itself a subject for examination. We cannot act upon that assumption here. I think, therefore, the appeal must fail upon this ground also, and must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The third ground of appeal depends upon proved facts before we can entertain it. There must always be a certain amount of ambiguity in the affidavit of a bankrupt who says that he has no property and no debts.

LOPES, L.J.—I entirely agree.

Appeal dismissed.

Solicitor for the appellant, *T. S. Ashwin.*

Solicitors for the respondent, *Newman, Hays, & Co.*

From Q. B. Div. Oct. 31.

PHILLIPS *v.* REES.* (*a.*)

Landlord and tenant—Distress for rent—Charges of distress—Bailiff's right to percentage fee—Agricultural Holdings (England) Act, 1883 (46 *&* 47 *Vict. c.* 61), *s.* 49; 2*nd schedule.*

In a distress for rent the bailiff and not the landlord is entitled to the percentage fee for "levying distress" specified in the 2nd schedule to the Agricultural Holdings (England) Act, 1883.

Coode *v.* Johns, 35 *W. R.* 47, 17 *Q. B. D.* 714, *dissented from.*

Appeal from the judgment of the Queen's Bench Division on a special case.

The plaintiffs, who were the owners of a farm, authorized the defendant, a certificated bailiff under the Agricultural Holdings (England) Act, 1883, to levy a distress on the goods of the tenant of the farm for £300 arrears of rent. The defendant levied the distress, and received from the tenant the amount of the rent and £7 10s., being 2½ per cent. upon the amount of the rent due, as well as the fee of £1 1s. to the bailiff for levy, being the charges authorized by the second schedule to the Act. The plaintiffs claimed to be entitled to the £7 10s., and brought this action to recover that amount. The Divisional Court (Mathew and Grantham, JJ.), on the authority of *Coode* v. *Johns*, 35 W. R. 47, 17 Q. B. D. 714, gave judgment for the plaintiffs.

The defendant appealed.

Section 49 of the Agricultural Holdings (England) Act, 1883, enacts that "no person whatsoever making any distress for rent" when the sum demanded and due exceeds £20 shall be entitled to more costs and charges for such distress than such as are set forth in the second schedule.

The second schedule provides a scale of charges, the two first items being (1) "Levying distress. Three per centum on any sum exceeding £20 and not exceeding £50. Two and a half per centum on any sum exceeding £50." (2) "To bailiff for levy, £1 1s."

Bowen Rowlands, Q.C., and *J. A. Foote*, for the defendant.—*Coode* v. *Johns* was wrongly decided. There is no distinction between "making" and "levying" a distress. 57 Geo. 3, c. 93, which fixed a scale of charges for distresses not exceeding £20, speaks of a broker "making" a distress. Formerly the bailiff got a percentage of one shilling in the pound. The Agricultural Holdings Act, 1883, was not intended to alter the law in this respect, but only to regulate the charges. In the second schedule to that Act the percentage is cut down, and one guinea is given in addition. But both sums go to the bailiff. The words "levying distress" are also used in the schedule to the rules made under the Law of Distress Amendment Act, 1888, but the guinea to the bailiff for levy is omitted. It is admitted that the percentage for levying distress under that Act will go to the bailiff, and the same words ought to be construed in the same way in the schedule to the Act of 1883.

They also referred to *Hart* v. *Leach*, 1 M. & W. 560.

Gore, for the plaintiffs.—The language used in the rules made by the Lord Chancellor under the Act of 1888 is no test for construing the language of Parliament in 1883. The words in section 49 of the Act of 1883, which is the governing section, are "making any distress" which mean authorizing a distress. The second schedule does not say to whom the percentage for "levying distress" is to go, and as it is expressly stated that the bailiff is to have one guinea for levy, the bailiff cannot be entitled to the percentage fee, and therefore the person authorizing the distress—that is, the landlord—is entitled.

He referred to *Harding* v. *Hall*, 14 W. R. 646.

Foote replied.

Lord ESHER, M.R.—This was an action between a landlord and a bailiff who had been employed by the former in carrying out a distress for rent. The bailiff levied the distress, and realized in addition to the rent certain charges as against the tenant which are set out in the second schedule to the Agricultural Holdings Act, 1883. The landlord asserts that he is entitled to part of those charges—namely, the 2½ per cent. on the sum of £300, the amount of the rent due. That depends upon the true construction of the Act of 1883. The same point was raised in 1886 in the case of *Coode* v. *Johns*, and it was there decided by the Divisional Court in favour of the landlord, and we are now asked to say that we do not agree with that decision.

In order to construe the Act we are entitled, or rather bound, to consider the state of the law at the time when the Act was passed. Prior to the passing of the Act the landlord had a right, when rent was in arrear, to distrain for the amount of the rent and for the expenses of realizing the rent by means of the distress. The ordinary course was to employ a bailiff. The goods of the tenant would be seized and sold for the purpose of realizing the rent in arrear and the expenses of the distress, and so far as the tenant was concerned the matter ended. As between the landlord and the bailiff, their relation was that of principal and agent. The usual course was for the landlord not to give express directions to the bailiff, but merely to authorize him to distrain the tenant's goods for the amount of the rent in arrear. That relationship and the contract implied from it were well known to the law. The authority of the bailiff was to realize by the distress the amount of the rent and the expenses of realising the rent by the distress. The terms of the implied contract were

* The Law of Distress Amendment Act, 1888, and the rules made thereunder, did not apply to this case, as the action was commenced before the Act came into operation.

(*a*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

so well known to the law that the law took judicial notice of them. Apart from special stipulations, those terms were that the landlord should pay the bailiff a reasonable sum for his services. The bailiff usually got that sum from the tenant as part of the expenses, but if he was unable to do so the landlord would pay it to him. What was a reasonable sum came as a matter of custom to be fixed in most parts of England. It was fixed at five per cent. on the amount of the rent distrained for. Then came the Agricultural Holdings Act, 1883, one of its objects being to regulate the charges of a distress. That Act was passed for the protection of tenants, and it fixed the sum payable for the costs and charges of a distress. It does not seem to me that the object of the Act was to interfere in any way with the contract between the landlord and the bailiff. It only regulated the amount of the expenses of the distress in favour of the tenant. There is nothing in the Act to show that it goes beyond the relief of the tenant. It is said that section 49 shows that the Act goes further. The words—"no person whatsoever making any distress for rent" exceeding £20 shall be entitled to any more costs and charges than are set forth in the second schedule—are relied upon as referring to the landlord and not to the bailiff. It seems to me that they naturally include the person who actually levies the distress—that is, the bailiff. They would no doubt also include the landlord, who authorizes the distress. Then turning to the second schedule, the object of which is to fix the costs and charges beyond which the tenant is not to be harassed, the first item is "levying distress" so much per cent. It is not said to whom the percentage is to be paid. Nor when one considers the matter was it necessary for the Legislature to say so. It matters not to the tenant to whom the sum is to go. The essential point for him is the amount. The next item is "to bailiff for levy," £1 1s. The other items are not material to the present case. It seems to me that there is nothing to show that these two items are anything more than in substitution for the costs and charges which the bailiff levied before the Act and which he kept for himself. Instead of a charge of 5 per cent. the bailiff is now to receive 3 per cent or 2½ per cent., as the case may be, and also one guinea for levy. The implied contract between the landlord and the bailiff is not altered, and that part of the expenses of realizing the rent the bailiff can keep, and he can make no further charge against the landlord. There is nothing to show that the landlord is to get more than he got before the Act. Therefore he gets his rent and no more. That being my construction of the Act, I cannot agree with the decision in *Coode* v. *Johns*. Nor are we bound to follow it in accordance with the well-known rule that where a particular construction has been given to a statute or mercantile contract, and that construction has been acted upon throughout the country, and men's dealings have been regulated by it, the court will follow it though they may disagree with it, because in my opinion the time that has elapsed since that decision is not sufficiently long. Nor can I see anything in the Law of Distress Amendment Act, 1888, which shows that the Legislature thought that decision right, and based the new legislation upon it. Therefore we must say that we do not agree with it, and this appeal must be allowed.

LINDLEY, L.J.—The question before us turns upon one or two sections of the Agricultural Holdings Act, 1883, and upon the second schedule to that Act. To understand the Act it is necessary to bear in mind the law as it stood before the Act. At common law a landlord had no right to sell goods distrained upon at all. The landlord had only the right to hold them, and the tenant had the right to redeem them on paying the rent due and the expenses. By 2 W. & M. Sess. 1, c. 5, the landlord was given the right to sell, and the right to realise the rent due, and the charges of the distress is expressly referred to. So far there was no scheduled scale of charges. The charges were to be reasonable charges. It is well known that the charges made were in many cases extortionate, and to remedy that the 57 Geo. 3, c. 93 created a scale of charges where the rent distrained for did not exceed £20, and that scale was fixed as between landlord and tenant, as between landlord and bailiff, and as between tenant and bailiff. The common law remained applicable to distresses for rent above £20. The landlord was still entitled in those cases to reasonable charges.

But when one looks at the authorities and the books on the subject, one sees that the charges never went to the landlord. The landlord only got his rent. Then came the Act of 1883, which substituted a schedule of charges for reasonable charges. Section 49 does not, in my opinion, touch the right to the authorized costs and charges; it only touches the amount, and leaves the person entitled to them as before the Act. The landlord says that he is entitled to the percentage charges, and he relies mainly upon the language of the second schedule. It is said on his behalf that the express mention of the bailiff being entitled to the guinea for levy suggests that the bailiff is to have no more. *Primâ facie* that is so, but when I consider the effect of it, such a construction seems to me to be utterly unreasonable, and I decline to draw that *primâ facie* inference. The result of such a construction would be that whereas before the Act the bailiff would be entitled to reasonable charges, after the Act he was only to have a guinea. The true view seems to me to be that the scheduled charges, are simply substituted for the former reasonable charges which generally amounted to five per cent. on the rent distrained for. That being so, I am unable to concur in the decision in *Coode* v. *Johns*, and this appeal must be allowed.

LOPES, L.J.—I am of the same opinion. The question is whether the landlord or the bailiff is entitled to the percentage. Precisely the same question arose in *Coode* v. *Johns*, but I am unable to agree with that decision. It is material to consider the law as it stood before the Act of 1883. The bailiff included in his levy the costs and charges of realizing the distress. These costs and charges usually amounted to 1s. in the pound. The landlord received only his rent, the bailiff took the percentage. The Act of 1883 was passed to prevent extortion by bailiffs and to regulate the charges to be made. It seems to me that the words, "making a distress" and "levying a distress," used in sections 49 to 52 and in the second schedule to the Act, are equivalent terms. The Act was not intended to make any change as regards the person who was to receive the charges. The bailiff received the percentage charge before the Act, and he is to receive it now. I cannot imagine any reason why it should be given to the landlord. The landlord incurs no expenses as a general rule. The bailiff, on the other hand, may have travelling expenses to pay, and also board and lodging, and it seems only reasonable that he should still receive the percentage. The same words authorising the percentage for "levying distress" are used in the rules made under the Law of Distress Amendment Act, 1888, the only difference being that the words "to bailiff for levy, £1 1s.," are omitted. Therefore if the proper construction of the Act of 1883 was that the landlord should get the percentage for "levying distress," he would also get it under the Act of 1888, and the bailiff would get nothing. In my opinion the bailiff takes the percentage, and this appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Peacock & Goddard*, for *Eaton, Evans, & Williams*, Haverfordwest.

Solicitors for the defendant, *Prior, Church, & Adams*, for *J. Price*, Haverfordwest.

From Q. B. Div. June 20, 1889.

EDEN v. RIDSDALE'S RAILWAY LAMP AND LIGHTING CO. (a.)

Company — Directors — Fiduciary position — Gift by promoters to director.

During the negotiations between the promoters of a company and the company, one of the promoters gave to one of the directors certain shares in the company.

Held, that the company had the option of claiming from such director the shares, or their highest value while held by him.

Appeal from the decision of Grantham, J.

The action was brought to recover fees alleged to be due to the plaintiff as a director of the defendant company. The defendants counter-claimed for a declaration that the plaintiff was a trustee for the defendants of 200 shares of the company standing in his name, or their value, at the defendants' election.

The company was formed to take over a lamp business, the promoters being two persons named Flatau and Elborough, the former of whom had purchased the business, which he sold to the company. Flatau and the plaintiff, among others, became directors, and Flatau, at the plaintiff's request, transferred to him 200 shares, which were thereupon registered in his name. At this time the terms of the contract for sale had not been carried out, and there were still questions pending with regard to it.

Grantham, J., gave judgment for the plaintiff on claim and counter-claim, and the defendants appealed.

W. Graham and *Gwynne James*, for the appellants.

Sidney Woolf and *A. H. Carrington*, for the respondents.

The following cases were cited:—*Hay's case*, 24 W. R. 191, L. R. 10 Ch. 593; *Carling's case*, 24 W. R. 165, 1 Ch. D. 115; *McKay's case*, 24 W. R. 49, 2 Ch. D. 1; *De Ruvigne's case*, 25 W. R. 476, 5 Ch. D. 306; *Pearson's case*, 25 W. R. 618, 5 Ch. D. 336; *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610; *Nant-y-Glo and Blaina Iron Works Co.* v. *Grave*, 26 W. R. 594, 12 Ch. D. 738; *Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660; *Clarke and Belden's case*, 37 L. T. 222.

Lord EBBER, M.R.—This is an action brought by the plaintiff against the defendant company, of which he was a director, to recover fees which he alleged were due to him as a director. The company not only traversed this claim, but they set up a counter-claim on the ground that the plaintiff, as director, was agent for the company, and that whilst he was agent he misconducted himself in a particular manner, so as to render him liable in damages. With regard to the claim, it appears that the plaintiff was appointed a director, and acted in that capacity, and no defence has been established to his claim for fees, so that he is entitled to recover the £400 which he claims as fees. As to the counter-claim, the case stands thus. The plaintiff was appointed director before the contract, which the company was formed to carry out, was made, and at that time he had applied for and had allotted to him a sufficient number of shares to qualify him as director. Whilst he was in this position the contract was entered into, so as to become binding on the company, and there was nothing to complain of in the conduct of the plaintiff at that time. But the contract having been made, had to be carried out; there were obligations on either side, and it was the duty of the directors to look to the interest of the company in carrying it out, and the duty of the plaintiff, as one of the directors and an agent for the company, to act for the company in all matters connected with the contract between the company and Flatau, the other contracting party. Whilst things were in that condition the plaintiff suggested to Flatau that he, the plaintiff, was in an unfavourable position as compared with the other directors, to each of whom Flatau had given vendors' shares to the amount of their qualification, while the plaintiff had qualified himself, and, thereupon, Flatau gave the plaintiff 200 vendors' shares. The reason suggested for the gift was to put the plaintiff on the same footing as the other directors. They were given because he was an agent, and in the course of carrying out of the contract. I do not say that the plaintiff took these shares from a man whose actions he was, as agent for the company, bound to watch, upon any agreement, or even understanding that he was to betray his trust and act favourably to Flatau—that would probably be to go too far, further than the learned judge who tried the case has gone; but I do not hesitate to say that the plaintiff put himself in a position which the law does not allow an agent to assume. It was not that he intended to defraud his principals, but he put himself in a position of temptation to do so. The duty of an agent to his principal does not permit the agent to put himself in such a position, and if he does so he commits a wrong against his principal.

It has been argued that the cases which have been decided between a director and his company do not apply where there is, as here, a binding contract between the promoter and the company. It may be that none of the cases have been decided under such circumstances as the present, but this rule of law is applicable to all agents. In such a case the remedy of the principal is an option either to claim what the agent has received, or to sue for damages. If that which the agent has received is money he must hand it over to his principal; if it is not money, but something else, the principal may insist on having it, or, if he chooses, the value of it. An agent who has so failed in his duty ought to have at once informed his principal of the breach of duty. In such a case the principal would claim that which the agent has received, and would thus have an opportunity of selling at the highest value reached. So if the agent does not disclose the matter, the value which the principal may claim, is the value which he might have obtained for the thing at any time between the wrongful act and the time when it came to his knowledge. Applying this to the case before us, the question is, what was the highest value of the shares after the plaintiff acquired them, and before the disclosure of the facts. The burden of proof of value would be on the defendants, but if they give *primâ facie* proof, then the *onus* would be shifted.

Transfers have been put in showing that the shares reached par value, so that the defendants are entitled to recover on their counter-claim the sum of £200. Under the circumstances there should be no costs of either claim or counter-claim, but the appeal has succeeded, and must be allowed with costs.

LINDLEY, L.J.—I am of the same opinion. The question on the counter-claim is, what are the rights of the defendants in respect of the 200 fully paid-up shares which the plaintiff received from Flatau. The position of affairs was this:—Under the contract Flatau was entitled to a very large sum of money, and the company had nothing out of which to pay it. In that state of things Flatau gave the plaintiff 200 shares. It would, in my opinion, be contrary to all principles of law and equity to allow the plaintiff to retain a gift so made to him by Flatau. A gift by a promoter to a director whilst there are any questions open between the company and the promoter, must be accounted for by the director

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

to the company for whom he is an agent, and the company has the option of claiming what is given, or its value—*i.e.*, the highest value whilst held by the director. The defendants, therefore, in this case are entitled to recover the shares, or their value. The evidence shows that at some time or other the shares were at par, and that is, therefore, the value which the defendants are entitled to set on them and to recover. The appeal must succeed, and I agree with the Master of the Rolls as to the costs.

LOPES, L.J.—I am of the same opinion. The important question in the case is that of the right of a director to retain a gift made to him by the promoter of a company. The result of the cases is that, if a director receives a gift from a vendor at a time when a contract of sale is not completed, he cannot retain it against the company, but must either hand it over to the company or pay its highest value. Here the plaintiff was agent for the defendants when he received the shares from Flatau, the contract was still incomplete, and questions might arise between Flatau and the company. Under these circumstances the plaintiff must account for the shares to the defendants. The value has been shown from the transfers, and the defendants are entitled to recover that value. I quite agree on the question of costs.

Appeal allowed.

Solicitors for the plaintiff, *Hatchett-Jones, & Co.*

Solicitor for the defendants, *Horace W. Chatterton.*

From Prob. Div. and Adm. Div. June 24, 1889.

"THE WESTBOURNE." (*a.*)

Ship—Salvage—Towage agreement—Supervening circumstances rendering agreement impossible.

The defendants' steamship becoming disabled when about 250 miles from Gibraltar and about sixty from Carthagena, an agreement was made with the master of the plaintiffs' steamship that the plaintiffs' vessel should tow her to Gibraltar for £600, the defendants' vessel to provide the hawsers. At this time the weather was moderate. The next day the wind increased to a hurricane, and, in consequence, several of the hawsers broke, only one rope being left. The master of the plaintiffs' vessel, finding it impossible to tow to Gibraltar, towed the defendants' vessel to Carthagena. The plaintiffs having brought an action of salvage,

Held, affirming the judgment of Butt, J., *that the supervening circumstances had made the service rendered wholly different from that contracted for, and that the court had jurisdiction to award salvage entirely independent of the contract.*

Appeal from the judgment of Butt, J., in an action of salvage.

The plaintiffs were the owners of the steamship *Howick*, and the defendants were the owners of the steamship *Westbourne*. On the 2nd of November, 1887, *The Westbourne* broke down in the Mediterranean, about 250 miles from Gibraltar and between 50 and 60 miles from Carthagena. *The Howick* fell in with her, and the master of *The Howick* agreed to tow *The Westbourne* to Gibraltar for £600, *The Westbourne* to supply the hawsers. Soon after the hawsers had been made fast bad weather sprung up, the wind blowing a hurricane. Next morning, the 3rd of November, the steel hawsers broke, the towage being continued with an ordinary rope. This rope also broke, and a fresh steel hawser and another rope were made fast. This steel hawser also broke, injuring an officer and a seaman of *The Howick*. The master of *The Howick* thereupon resolved to tow *The Westbourne* to Carthagena, signalling, in answer to a protest from the master of *The Westbourne*, that it was impossible to tow to Gibraltar. *The Westbourne* was accordingly towed to Carthagena.

The plaintiffs brought this action, claiming salvage apart from the agreement. The defendants paid £600, the agreed sum, into court.

Butt, J., found, on the advice of the Elder Brethren, that it was impossible, owing to wind and weather, to tow direct to Gibraltar, and held that, the agreement having been put an end to by supervening circumstances, he could award salvage apart from the agreement. He accordingly awarded £900.

The defendants appealed.

Sir W. Phillimore and *Raikes*, for the defendants.—The agreement in this case was a salvage agreement, and supervening circumstances could not affect it. It is not like a towage agreement. The going to Carthagena was merely in substitution for Gibraltar in the agreement.

They referred to *The True Blue*, 2 W. Rob. 176; *The Minnehaha*, 9 W. R. 925, 15 Moo. P. C. 133; Lush. 335; *The Betsy*, 2 W. Rob. 167; *The Waverley*, L. R. 3 A. & E. 369, 20 W. R. Adm. Dig. 19.

J. Gorell Barnes, Q.C., and *J. P. Aspinall*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—I am of opinion that this was a towage agreement entered into while *The Westbourne* was in such danger that she might require salvage assistance, and in that sense might be called a towage agreement in the nature of salvage. The fulfilment of the agreement becoming more difficult by reason of supervening circumstances would not of itself enable the Court of Admiralty to alter it. It would be binding. But if, owing to circumstances over which the salvors had no control, the agreed service was so far altered as to become in reality a wholly different kind of service, or a service of a wholly different class, the Court of Admiralty would have a right to deal with the case as if the original agreement had not been made. If, therefore, new circumstances supervened to the extent I have described, the court would have authority to deal with the case as one of salvage pure and simple, and to award such a sum as, under all the circumstances, it might think proper. In the present case when the agreement was made the weather was only moderately bad. *The Westbourne*, however, was so damaged that though she could sail she could not steer. She could only, therefore, be placed in safety by being towed. An agreement was therefore made to tow her to Gibraltar. Whether that was a pure towage agreement, or a towage agreement partly in the nature of salvage, it was an agreement to tow direct to Gibraltar, and not by way of Carthagena or any other place. The contract having been made, the evidence as to the supervening circumstances conclusively supports the finding of the Trinity Brethren. After the ship had been taken in tow, without any fault or without any wrong manœuvre, the ropes broke, in consequence of the wind having increased to a hurricane. Owing to the increase of the weather the circumstances were wholly altered, so that the ship, which was not in imminent danger before, must have been placed in a position of imminent danger. *The Howick* was bound to stay by her, but the nature of the service was so altered that she would have to tow a ship in imminent danger with only one rope. It would have involved imminent danger to both vessels to tow to Gibraltar. She could not attempt to tow to Gibraltar with any safety. It had therefore become practically impossible to fulfil the contract. The service rendered was altogether altered. *The Westbourne* was in fact saved by the services of *The Howick*. The Court of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Admiralty therefore had power to deal with the contract, and award salvage apart from it. The appeal must, therefore, be dismissed.

Lindley, L.J.—I am of the same opinion. The contract was to tow *The Westbourne* to Gibraltar by the ordinary route, and not round by the coast. The finding of the learned judge, acting on the advice of his assessors, disposes of the case.

Bowen, L.J.—I am of the same opinion. The first question is, What was the contract between the parties? I am of opinion that it was to tow *The Westbourne* direct to Gibraltar. It may be that if *The Westbourne* had been towed round by the coast, her owners could not afterwards object that the contract had not been performed. There was this further element in the contract, that it was to be performed in a particular way, *The Westbourne* finding the roper. It was a contract for a particular kind of service to be performed upon the high seas and to be paid for in a particular way. *The Westbourne* was in a position of danger, but if circumstances supervened and rendered it impossible to carry out the contract, the contract would be at an end, and if the ship was then towed into a place of safety, the rules as to salvage services would apply. Here the judge found that it became impossible to perform the contract in the way in which it was to have been performed, and for which the payment was to be made. The weather had changed. Circumstances had supervened which rendered it practically impossible to perform the contract. The court was, therefore, quite right in dealing with the case as it did.

Appeal dismissed.

Solicitors for the plaintiffs, *H. C. Coote & Ball.*

Solicitors for the defendants, *Waltons, Bubb, & Johnson.*

High Court of Justice.

Chan. Div. Kay, J. } Aug. 6, 1889.

In re Waters, Waters v. Boxer. (*a.*)

Will—Direction to set aside specific sums, with interest, together with simple interest, from specified dates—Time from which the interest payable.

A testator gave property to trustees upon trust after his wife's death to sell and retain two sums of £1,000, with interest, together with simple interest thereon at four per cent. from certain dates to the date of retainer, upon certain trusts. He empowered his trustees to postpone the sale of the real estate after his wife's death for any period not exceeding three years, and declared that the net rents and profits of such of his real estate as should not have been sold should be applied as the proceeds of sale would have been. After the widow's death in 1887 the real estate was not sold.

Held, that interest on the two sums of £1,000 was payable at four per cent. from the death of the widow.

Turner v. Buck, 22 *W. R.* 748, *L. R.* 18 *Eq.* 301, *distinguished.*

Adjourned summons.

By his will, dated the 7th of March, 1882, Azariah Waters appointed his wife, Mary Ann Waters, sole executrix, and gave her all his personal estate, and he devised to her all his real estate for life, and after her decease he devised the real estate to trustees upon trust to sell and retain thereout two sums of £1,000, with interest thereon respectively, and to stand possessed thereof, together with simple interest thereon, at four per cent. per annum from certain dates up to the date of such retainer, upon certain trusts in favour of his daughters, and their child or children, as therein mentioned. And he empowered his trustees to postpone the sale of the whole or any part of his real estate for so long after the death of his wife as they should think proper, but not exceeding three years. And he declared that the net rents and profits of such of his said real estate as should not for the time being have been sold should be applied as the annual income of the proceeds of sale thereof would be applied if the same premises had been actually sold and the proceeds of sale invested under the trusts therein contained. The testator died on the 16th of February, 1885, and his will was proved on the 21st of April following.

Mary Ann Waters died on the 12th of December, 1887. The real estate was not sold, and in 1889 this summons was taken out by one of the trustees of the will to determine the question from what date interest became payable on the two sums of £1,000.

Martelli, for the plaintiffs.

Christopher James, for two of the defendants' legatees.

Dunning, for persons interested in the residue, cited *Turner* v. *Buck*, 22 W. R. 748, L. R. 18 Eq. 301.

Kay, J.—This is a primary charge on the proceeds of sale, and so a primary charge on the real estate. [His lordship stated the effect of the will, and continued:—] No doubt the testator's meaning was that from the time when these legacies became payable—that is, from the death of the tenant for life, the time when it became an actual charge on the real estate and was raisable—the rents of the real estate were to be applied as if the £1,000 had been raised and invested, and the income were payable to the tenant for life.

In the case of *Turner* v. *Buck* legacies were given from the death of the testator, and the will directed one year in which the realization should take place. The learned judge who decided that case applied the rule as to personal estate, and held that one year from the testator's death must be allowed to the trustees to give them time to realize, and that the legacies did not bear interest till a year from the death of the testator. This is an attempt to apply that decision, which, so far as I know, is quite unique, to this case, where the direction is to sell, not at the death of the testator, but after the death of the tenant for life, and to say that one year must be given to realize the estate of the tenant for life, and that the income is charged, not on the proceeds of sale, but on the residuary estate. I am of opinion that that is quite wrong. There is a discretion in the trustees to postpone the sale and a direction as to the income as if the sale had taken place. That is a distinct direction to pay the income out of the charge on the real estate.

I therefore hold that interest is payable at four per cent. on the two sums of £1,000 from the death of the tenant for life.

Solicitor for the plaintiffs, *Martelli*, for *Burton & Son*, Great Yarmouth.

Solicitors for the defendants, *Whites & Co.*

Solicitors for persons interested in the residue, *Wilson, Bristows, & Carpmael.*

(*a.*) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

Chan. Div. } July 30, 1889.
Chitty, J. }

In re SOVEREIGN LIFE ASSURANCE CO. (*a*.)

Life assurance company—Winding up—Policy-holders—Scheme of arrangement—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 14.

Where annuities are secured by the guarantee, under seal, of a life assurance company, to trustees for the annuitants, such trustees are policy-holders within the meaning of sections 2 *and* 14 *of the Life Assurance Companies Act*, 1870; *and if a life assurance company has, under its deed of settlement, no power to sell or transfer its life assurance business, it cannot, under section* 14 *of that Act, enter into any arrangement for the sale or transfer of its life assurance business.*

This was a petition for the compulsory winding up of the Sovereign Life Assurance Co., and a scheme for the transfer of part of the company's business to another company having been prepared by a large number of the policy-holders with the concurrence of the directors, an application was made asking the court to order the petition to stand over, and in the meantime to allow the directors to present a petition under section 14 of the Life Assurance Companies Act, 1870, for the sanction of the court to the scheme.

Objections were taken to the scheme, and two question were raised:—First, whether section 14 of the Life Assurance Companies Act, 1870, conferred upon a company power to transfer its life assurance business, notwithstanding the company's deed of settlement contained no such provision; and, secondly, whether the trustees with whom the Sovereign Life Assurance Co. had covenanted to guarantee certain annuitants were policy-holders within the meaning of section 2 of the Life Assurance Companies Act, 1870.*

The company was incorporated in 1845 by a deed of settlement which contained no power for the sale or transfer of the company's business to another company, but a power was contained for a majority of two-thirds of the shareholders to alter, vary, and add to the provisions of the deed of settlement. It appeared at the hearing, that 80 per cent. of the shareholders were against any alteration being made in the deed of settlement for the purpose of inserting a power of sale or transfer.

Subsequently to 1862 the company was registered as a joint-stock company.

In 1865 the company acquired by purchase the business of the General Annuity Endowment Association, and by a deed dated the 22nd of June, 1866, certain funds were vested in trustees for the benefit of the annuitants of the association, and the company covenanted with the trustees to guarantee to them such amount, if any, as might be required to make good any deficiency in the said funds.

This petition was presented by a policy-holder in August, 1887, and after the appointment of a provisional liquidator the further hearing of the petition, with the consent of all parties interested, from time to time stood over in order to see if the disaster of a winding-up order could be averted. It appeared that the company's assets were valued at £235,000, and the liabilities at £460,000, the latter including a claim for £70,000 made against the company by the trustees for the annuitants of the General Annuity Endowment Association under the above-mentioned deed of the 22nd of June, 1866.

On the 11th of January, 1889, a committee of policy-holders was appointed to prepare, with the assistance of the provisional liquidator and actuaries, a scheme to save the company from being wound up. This scheme was completed in the middle of July, 1889, and it was thereby proposed to transfer the life assurance business of the company and all its assets to another life assurance company, and to provide that the policy-holders of the company should become policy-holders in the purchasing company without undergoing any further medical examination, and that the premiums payable by them should remain unaltered, but that the amounts of the policies should be reduced according to the age of the insured at the date of the transfer. No provision was made in the proposed scheme for the claims of the annuitants of the General Annuity Endowment Association.

The Sun Office was willing to negotiate with the company upon the footing of the above scheme, and the directors, at the request of the policy-holders, took out a summons for leave to present a petition under section 14 of the Life Assurance Companies Act, 1870, or to take such other steps as they might be advised for the purpose of endeavouring to carry out the proposed scheme of transfer, and that the costs, charges, and expenses of all such proceedings might be allowed and paid out of the estate of the company, and that they might also be indemnified against the costs of all parties appearing on this proposed petition. This summons was directed to be heard with the winding-up petition, and they came on together.

Whitehorne, Q.C., and *Boome*, for the petition.

Latham, Q.C., and *Whinney*, for the directors.

Swinfen Eady, for the committee of policy-holders, contended that the annuitants of the General Annuity Endowment Association were not policy-holders within the meaning of that term in the Life Assurance Companies Act, 1870.

Dauney, for the representatives of a deceased policy-holder, supported the application.

Maclean, Q.C., and *Devonshire*, for the trustees for the annuitants.

Sir Arthur Watson, Q.C., and *Chadwyck-Healey*, for eighty per cent. of the shareholders.

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* The material parts of sections 2 and 14 of the Life Assurance Companies Act, 1870, are as follows:—Section 2.—"The term 'policy-holder' means the person who for the time being is the legal holder of the policy for securing the life assurance, endowment, annuity, or other contract with the company."

Section 14.—"Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the court by petition to sanction the proposed arrangement, notice of such application being published in the *Gazette*, and the court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established." . . .

"The court shall not sanction, any amalgamation or transfer in any case in which it appears to the court that policy-holders representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate or in any company, the business of which it is proposed to tranfer, dissent from such amalgamation or transfer."

"No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer is confirmed by the court in accordance with this section."

"Provided always that this section shall not apply in any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance."

(*a*.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Ribton, for another shareholder; and

J. Trustram, for a policy-holder, opposed the application.

Romer, Q.C., and *Hull*, for the provisional liquidator, referred to *In re London and Southwark Insurance Corporation (Limited)*, 28 W. R. 565, and to *In re Argus Life Assurance Co.*, 37 W. R. 215, 39 Ch. D. 571, and approved the application, but feared it would be difficult to work out.

Whitehorne, Q.C., replied.

CHITTY, J., after stating the above-mentioned facts, continued as follows:—Numerous objections have been raised to the proposed scheme. The first is, that it is quite clear that section 14 is not an enabling section, and of itself confers no power on a life assurance company to transfer its life assurance business to another company. The scope of this section is, in fact, simply negative, and its operation is best seen by reading the paragraph towards the end which says, "No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer be confirmed by the court in accordance with this section." Now the position of the Sovereign Life Assurance Co. is this. It has, at the present moment, no power to transfer its assets to another company, though there is a provision in the deed of settlement enabling a majority of two-thirds of the shareholders to vary or add to the provisions of that deed; but eighty per cent. are adverse to the proposed scheme; what chance is there, then, that the two-thirds of the shareholders will agree to alter their deed of constitution so as to confer the power on the company itself of making this transfer. The chances are so small that I think that ground alone would be sufficient for me to dispose of the application.

But there are other objections which I will not pass by. The principal argument for the scheme proposed comes from the committee of policy-holders. The proposition embodied in the scheme is, putting it shortly, to transfer a portion only of the insurance business of the company to an existing company, the Sun Office. The 14th section is so framed as to show that what must be done under this section, where the power already exists in the company, is to transfer what the section itself terms "the business of life assurance," and Mr. Swinfen Eady was compelled to say that this would justify the transfer of a part of that business; he was compelled to say that because, if the term "policy-holder" in the section includes the annuitants claiming under the deed of June, 1866, it is plain that there would be a dissent exceeding the one-tenth which is sufficient, according to the subsequent part of this section, to prevent the court giving its sanction to this scheme. I do not propose to go through all the objections taken to the proposed scheme, some of which I have already dealt with in the course of the agreement with reference to the construction of this section. It will be sufficient for me now merely to state the short result of my conclusions. The term "policy-holder" is used in the body of the 14th section, and it is said that this term would not include the annuitants or the trustees under the deed of 1866. But the trustees have a covenant from the Sovereign Life Assurance Co. guaranteeing the amounts, if any, that are required to make good any deficiency in the fund. The fund that the trustees of this deed hold being insufficient for payment in full of the annuities at the present time, the trustees, by virtue of that guarantee, have a demand against the Sovereign Life Assurance Co., and that demand makes them, in my opinion, policy-holders within section 2 of the Act, which declares that "policy-holder" means "the person who for the time being is the legal holder of the policy for securing the life assurance, endowment, annuity, or other contract with the company." The trustees are the covenantees; they have the legal right to sue on the covenant, and the covenant is the contract for securing the annuities. That is sufficient, therefore, to show that the trustees are policy-holders within the 14th section, and then when the question of dissent of the one-tenth comes to be considered, their dissent, which is plainly expressed now, would be sufficient to prevent any order being made adverse to it. [His lordship then dealt with some other questions which do not call for a report, and made the winding-up order in the usual form.]

Solicitors, *James Robinson; Witham, Lambert, & Roskell; R. C. Devonshire & Monkland; Hepburn, Son, & Cutliffe; Eardley-Holt, & Hulbert; Linklater & Co.; W. H. Mason & Son.*

Chan. Div. North, J. } Oct. 30.

In re BARRATT.

WHITAKER *v.* BARRATT. (*a.*)

Administration action—Order for accounts—Executor—Trustee—Retainer—Set-off—Payment of debts—Rules of Court, 1883, *ord.* 15, *r.* 1; *ord.* 55, *r.* 10a.

An order for accounts under ord. 15, *r.* 1, *without a decree for administration, made in an administration action, does not prevent a creditor of the estate from suing the executor, or the executor from paying a debt due from the estate.*

Where, in a marriage settlement, a husband covenanted to pay to a trustee certain sums of money upon trust to pay the income to the wife for life, with an ultimate trust for himself absolutely, and died without performing his covenant, having appointed his wife sole executrix; and his creditors brought an administration action against the executrix and obtained an order for accounts under ord. 15, *r.* 1, *without a decree for administration, and the executrix was afterwards appointed trustee of the marriage settlement, and the testator's estate proved insolvent,*

Held, that the executrix, notwithstanding the order for accounts, was entitled to apply the assets in her hands as executrix in payment to herself as trustee of the debt due on the covenant in the marriage settlement.

Adjourned summons.

By an indenture dated the 25th of August, 1884, and made between G. Barratt, the testator in the action, of the first part, S. J. Barratt, of the second part, and G. J. Tucker, of the third part, in consideration of the marriage which was solemnized on the 27th of September between G. Barratt and S. J. Barratt, G. Barratt covenanted with G. J. Tucker to pay him within three years of the marriage the sum of £300 upon trust during the joint lives of G. Barratt and S. J. Barratt, to pay the income to S. J. Barratt, and, after the death of either of them, to pay the income to the survivor, and after the death of the survivor, and in default of children of the marriage, upon trust for G. Barratt absolutely. And by another indenture, dated the 23rd of September, 1884, and made between the same parties in consideration of the same marriage, G. Barratt covenanted with G. J. Tucker to pay him within twelve months of the marriage the further sum of £4,000 upon the same trusts as were declared respecting the sum of £300.

G. Barratt died on the 6th of August, 1885, having by his will, dated the 23rd of October, 1884, given all his property to S. J. Barratt, and appointed her sole

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

executrix; and his will was proved by her on the 13th of October, 1885. There were no children of the marriage.

The action was brought on the 28th of October, 1887, by creditors of the testator to the amount of £167 13s. 4d. against S. J. Barratt for administration of the testator's estate, and on the 20th of February, 1888, an order was made under ord. 15, r. 1, of the Rules of Court, 1883, for an account of the testator's personal estate not specifically bequeathed, and for an account of the testator's debts; and the judge not requiring any trial of the action other than that application it was ordered that the further consideration of the action be adjourned with liberty for all parties to apply.

By an indenture dated the 16th of March, 1889, the defendant S. J. Barratt was appointed trustee of the indentures of the 25th of August and the 23rd of September, 1884, in the place of G. J. Tucker.

The defendant brought in her accounts of receipts and payments on account of the testator's estate. From such accounts it appeared that the estate was insufficient for the payment in full of the debts and liabilities of the testator, and it further appeared that the defendant had received assets of the testator since his death amounting to £4,370 3s. 8d., and that, after deducting certain amounts, there remained a balance in her hands of £2,633 18s. 8d.

In the course of taking the accounts the defendant claimed that she had either under the general law regulating retainers by legal personal representatives, or by way of set-off under the conjoint operations of the 10th section of the Supreme Court of Judicature Act, 1875, and the 38th section of the Bankruptcy Act, 1883, a right to retain this balance or some part thereof in or towards payment or satisfaction of the said sums of £300 and £4,000 or of the value of her life interest therein. The plaintiffs resisted this claim by the defendant, and the matter was ultimately adjourned into court for argument upon a statement of the material facts of the case.

F. Thompson, for the plaintiffs.—The defendant has no right of retainer. There was no debt due to her at law and she had no right to receive the £4,000: *Cockroft* v. *Black*, 2 P. Wms. 298; *Loane* v. *Casey*, 2 W. Bl. 965; *Thompson* v. *Thompson*, 9 Price, 464. Her appointment as trustee did not give her any new right because an order for accounts had been made: *In re Compton*, 33 W. R. 160, 30 Ch. D. 15; *Jones* v. *Evans*, 24 W. R. 778, 2 Ch. D. 420; *Jones* v. *Jukes*, 2 Ves. jun. 518. The mutual credit clause does not apply in this case as there were no mutual dealings, and the debts must be in the same right: 46 & 47 Vict. c. 52, s. 38; *West* v. *Price*, 2 Bing. 455.

Cozens-Hardy, Q.C., and *T. Ribton*, for the defendant.—The widow is entitled to retain the whole amount: *Cockroft* v. *Black*; *Loane* v. *Casey*. If not she is entitled to retain the value of her equitable life interest: *In re Compton*. The order for accounts is not an administration decree so as to prevent creditors from suing and the defendant from paying: Rules of Court, 1883, ord. 55, r. 10 (a); *Marriott* v. *Thompson*, Willes, 186; *In re Mills*, W. N., 1884, p. 21; *Stedman* v. *Dunster*, 35 W. R. 624, 34 Ch. D. 742. The widest interpretation ought to be given to the mutual credit clause: *The Eberles Hotel and Restaurant Co. (Limited)* v. *Jonas & Bros.*, 35 W. R. 467, 18 Q. B. D. 459.

F. Thompson replied.

North, J.—There are two questions raised in this case—first, as to the widow's right of retainer, and, secondly, as to her right to pay herself. First, as to her right of retainer. It was said that the widow could have given a receipt for the money. I do not think she could. She was tenant for life of the fund, but, subject to that, it belonged to the testator's estate, of which she was executrix; but as executrix alone she could not call for it. As tenant for life of the fund she could not call for it. If she had chosen to release her life interest she, as executrix, might have given a receipt for the fund, but in that case she would have deprived herself of the benefit she claims. She cannot say that the whole fund so belonged to her as to give her a right of retainer. Secondly, she is trustee of the whole fund, and claims the right to pay herself. She is not beneficially entitled except to a life interest under the settlement. She was, however, appointed trustee of the fund at a date subsequent to the making of the order of the 20th of February, 1888. Before the order she could have paid the trustee, and the order does not prevent her doing so, as it did not put an end to her powers. The order for accounts does not prevent a creditor from suing her as executrix, or prevent her from paying a debt, and this view is supported by ord. 45, r. 10 (a) of the Rules of Court, 1883. The case of *Jones* v. *Jukes* is not in point, as there was a decree directing the usual accounts and a distribution. The order does not therefore prevent her from applying the assets in paying the debts due on the covenants in the settlements.

Solicitors, *Kemble & Co.*; *Agate & Garnett*.

Chan. Div. North, J. — Aug. 3, 1889.

In re Bithray. (a.)

Judgment creditor—Petition for sale of interest in land—Dispensing with inquiries—Judgment Law Amendment Act, 1864 (27 & 28 *Vict.* c. 112), *ss.* 4, 5.

Upon a petition by a judgment creditor who had obtained equitable execution by the appointment of a receiver, an order was made, without directing inquiries, for the immediate sale of the debtor's interest in land which was subject to a legal mortgage, there being evidence that the mortgagee (who consented to the sale) had not received any notice of any incumbrance on the land; that searches had been made by the petitioner's solicitor, who had found that no execution or other process affecting the land had been registered, except the order appointing the receiver, and that no bankruptcy petition had been presented or receiving order made against the debtor.

Petition.

This was a petition by a judgment creditor for the sale of his debtor's interest in land. The petitioner had obtained an order for the appointment of a receiver of the rents and profits of the debtor's land, without prejudice to the rights of prior incumbrancers.

The land was subject to a legal mortgage, and the mortgagee consented to the sale. The order appointing the receiver had been registered in compliance with the Land Charges Registration and Searches Act, 1888. The petitioner adduced evidence that the mortgagee had not received notice of any incumbrance affecting the land and that searches had been made by the petitioner's solicitor, who had found that no execution, order, or other process affecting the judgment debtor or his estates had been registered except the order appointing the receiver and that no bankruptcy petition had been presented or receiving order in bankruptcy made against him.

Welby King, for the petitioner, asked that an immediate order for sale might be made without any preliminary inquiries, and referred to *In re Calne Railway Co.*, L. R. 9 Eq. 658, 18 W. R. Ch. Dig. 116, and *In re Cooper*, 37 W. R. 330.

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

North, J.—I think I can dispense with inquiries in this case. The difficulty I at first felt was that the 5th section of the Judgments Law Amendment Act, 1864, says: "If it shall appear on making such inquiries that any other debt due on any judgment . . . is a charge on such land, the creditor entitled to the benefit of that charge shall be served with notice of the said order for sale." It might not unreasonably be said that that section necessarily involved the making of inquiries. But as inquiries have been dispensed with in the case of railway companies, I think I can dispense with them in the present case, since I do not find that the Act has made any distinction between railway and other companies. On the evidence before me I will, therefore, make an order for immediate sale dispensing with inquiries.

Solicitor, *G. Gardner Leader.*

Chan. Div. North, J. } July 22, 1889.

In re Prytherch.
Prytherch *v.* Williams. (*a.*)

Mortgagor and mortgagee—Legal mortgagee in possession—Appointment of receiver—Judicature Act, 1873, *s.* 25, *sub-section* 8.

A legal mortgagee who has once gone into possession of the mortgaged property cannot afterwards go out of possession, nor is he entitled, as of right, to have a receiver appointed.

Mason v. Westoby, 34 *W. R.* 498, 32 *Ch. D.* 206, *discussed.*

Action.

This action was brought by a person who was entitled to a share of the real estate of a testator against the trustees of his will, a solicitor named Bishop, and other persons.

The testator bequeathed the residue of his personal estate to his trustees upon trust to permit his wife to receive the income thereof during her life, and after her death upon trust thereout and out of the moneys to arise out of his real estate (which he charged for this purpose in aid of the residue of his personal estate, if insufficient) to pay to his younger children a legacy of £14,000, in equal shares, to be absolutely vested at twenty-one, with a clause of accruer in the event of the death of any such child under twenty-one. The plaintiff alleged that the trustees had raised by legal mortgages of the testator's real estate sums largely in excess of the amount which they were entitled to raise by mortgage. The mortgages had been transferred to the defendant Bishop, and he was in possession. The plaintiff claimed (*inter alia*) an inquiry what amount the trustees were entitled to raise and a declaration that Bishop was not entitled to rank as a mortgagee in respect of the excess. He also asked that the accounts might be taken on the footing of the above declaration, and that Bishop might be charged as a mortgagee in possession. The plaintiff also claimed to redeem the mortgage.

Bishop delivered a counter-claim, by which he claimed an account of what was due to him under the mortgages, and, in default of payment, foreclosure or sale. He also claimed the appointment of a receiver.

One of the questions raised during the hearing of the action was whether Bishop, having gone into possession, could go out of possession again, and whether he could obtain the appointment of a receiver.

Everitt, Q.C., and *E. Ford*, for Bishop, asked that a receiver might be appointed, and referred to *Mason* v. *Westoby*, 34 W. R. 498, 32 Ch. D. 206.

Napier Higgins, Q.C., and *C. Walker*, for the plaintiff, opposed the appointment of a receiver.

Cozens-Hardy, Q.C., and *O. Leigh Clare, Upjohn*, and *Waggett*, for other parties.

North, J.—I am not aware of any right of a mortgagee who has taken possession to give up possession again whenever he pleases. A mortgagee has a right to take possession at any time, but, in my opinion, when a mortgagee takes upon himself the burden which is imposed on a mortgagee in possession, he cannot give it up whenever he pleases. I feel sure that if any such right existed, some case on the point, or some passage in a text-book, would have been found. Nothing of the kind has, however, been found. It is said, however, that the mortgagee is entitled to have a receiver appointed. I cannot see that a mortgagee who is in possession is entitled to have a person appointed to assist him. I can understand that a mortgagee who is not in that position may have such a right. No doubt, under sub-section 8 of section 25 of the Judicature Act, 1873, a legal mortgagee can now obtain the appointment of a receiver if he makes out a proper case.

Sub-section 8 provides:—[His lordship read sub-section 8 of section 25, and continued:—] The court, no doubt, has the same power at the trial of the action as it would have upon an interlocutory application. But the words of sub-section 8 are "may" be appointed in all cases in which it shall appear "just or convenient." Will it be "just or convenient" in the present case? If there should happen to be a foreclosure, the costs of the receiver will be paid out of the rents, but if the mortgagor redeems he will have to pay them. I can see no reason why the mortgagor should have to bear the costs of a receiver. I think I have a discretion in the matter.

In *Mason* v. *Westoby* there was, no doubt, some reason why it was "just or convenient" to appoint a receiver, but I cannot treat that case as an authority that the word "may," in sub-section 8, is to be read "must." I do not think it will be "just or convenient" in the present case to appoint a receiver at the expense of the persons entitled to the equity of redemption. As, however, the persons interested in the equity of redemption do not object, I will appoint the mortgagee himself receiver without salary and without security.

Solicitors, *Berkeley & Calcott; Burton, Yeates, & Co.; Crowdy, Son, & Tarry; Clarke, Rawlins, & Co.*

Chan. Div. North, J. } April 8, 1889.

Ex parte School Board of London. (*a.*)

Copyholds — Tenancy in tail — Enfranchisement — Barring the entail.

A tenant in tail of land (forming part of a copyhold manor in which there was a custom to entail) died, having by his will devised his real estate to trustees upon certain trusts, under which his only daughter (who was his heiress in tail) was beneficially entitled to such real estate. The trustees were admitted tenants of the copyhold land upon the trusts of the will, and in 1876 *the lord of the manor executed an enfranchisement to the trustees upon the trusts of the will, and the trustees shortly afterwards executed a conveyance to the testator's daughter in fee. The enfranchisement was not made under the Copyhold Acts.*

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

Held, that the effect of the enfranchisement and the conveyance was to bar the estate tail in the copyholds.

Challoner *v.* Murhall, 2 *Ves.* 524, *followed.*

Petition.

On the 5th of August, 1887, the School Board for London gave Andrew Hart notice, pursuant to the Lands Clauses Consolidation Act, 1845, to treat for the purchase of certain hereditaments in Stoke Newington which the board were authorized to take under the Elementary Education Act, 1870. These lands were formerly copyhold of the manor of Stoke Newington, but at the date of the notice they had been enfranchised, and Hart claimed to be entitled to them in fee simple.

The board refused to accept Hart's title, and paid the purchase-money (amounting to £1,771) into court.

The title shown to the property was as follows:—

On the 27th of May, 1802, Sarah Ann Cotton was admitted tenant to the land, and immediately thereupon she surrendered the same to the use of herself for life, with remainder to the use of her children as she should by deed or will appoint, with remainder in default of such appointment to the use of her first and other sons successively in tail, with remainders over. Sarah Ann Cotton died without having exercised the power of appointment, and William Charles Cotton (who was the only son and heir in tail of her eldest son, T. D. Cotton, deceased) was on the 21st of November, 1843, admitted tenant according to the custom of the manor. W. C. Cotton died on the 20th of June, 1860, having by his will, dated the 10th of January, 1860, devised all the real estate to J. Holme and W. Tattersall, their heirs and assigns, upon certain trusts.

On the 12th of February, 1863, J. Holme and W. Tattersall were admitted tenants to the copyhold hereditaments, to hold the same unto them, their heirs and assigns, upon the trusts of the will. By a deed dated the 10th of July, 1876, the lord of the manor of Stoke Newington granted and enfranchised the said hereditaments unto and to the use of J. Holme and W. Tattersall, their heirs and assigns, to be holden in free and common socage, discharged of the copyhold tenure and all the incidents thereof. W. C. Cotton left an only child—viz., Elizabeth Maria Procter (the wife of Gilbert Procter)—and she became, under the trusts of her father's will, beneficially entitled to all the real estate which passed by the devise contained therein.

By an indenture dated the 21st of September, 1876, and made between J. Holme and W. Tattersall of the first part, Mr. and Mrs. Procter of the second part, and H. A. Gregg of the third part, wherein it was recited that the aforesaid enfranchisement was made by J. Holme and W. Tattersall at the request of Gilbert Procter and Elizabeth Maria, his wife, and the consideration moneys paid out of their moneys, J. Holme and W. Tattersall conveyed the hereditaments to Gregg and his heirs to the use of Elizabeth Maria Procter, her heirs and assigns.

Andrew Hart claimed to have acquired title through Elizabeth Maria Procter, and the board did not dispute that, if the effect of the enfranchisement and the deed of 21st of September, 1876, was to vest the hereditaments in Elizabeth Maria Procter in fee simple, Hart acquired such fee simple through her. Hart contended that E. M. Procter, as the only child of W. C. Cotton, became entitled on his death to be admitted to the said copyhold hereditaments as his heiress in tail, and that although she was never admitted thereto, yet the effect of the enfranchisement and the conveyance of the 21st of September, 1876, was to bar the entail in the land, and to make E. M. Procter absolute owner of it in fee simple as of freehold tenure. The school board disputed the above contention.

On the 27th of December, 1888, the school board paid the purchase-money into court, and executed a deed-poll, under the provisions of section 77 of the Lands Clauses Consolidation Act, 1845, vesting the land in themselves absolutely in fee simple in possession free from incumbrances.

Hart now presented this petition for the payment out to him of the £1,771 purchase-money in court.

Cozens-Hardy, Q.C., and *Dauney*, for the petitioner.—The petitioner is entitled to the purchase-money in court by virtue of the enfranchisement deed and the subsequent conveyance of the 21st of September, 1876. It is now well settled that an estate tail in copyholds is barred by an enfranchisement deed: *Challoner* v. *Murhall*, 2 Ves. 523; *Wilson* v. *Allen*, 1 Jac. & W. 611.

P. V. Smith, for the school board.—This is not the case of enfranchisement under the Copyhold Acts. In order to bar the entail something active is required on the part of the tenant in tail: *Margaret Podger's case*, 9 Rep. 104a, 106b. The case of *Challoner* v. *Murhall* goes too far, for if it is correct an estate for life would be capable of being defeated by an enfranchisement. With the exception of that case and *Dunn* v. *Green*, 3 P. Wms. 8, the authorities are against the petitioner.

He referred to *Parker* v. *Turner*, 1 Vern. 392; *Taylor* v. *Shaw*, Cases in Reports, 22; *Bernard* v. *Simpson*, Clayton, 138; and *Wynne* v. *Cookes*, 1 Bro. C. C. 515.

Cozens-Hardy, Q.C., replied.

NORTH, J.—Whatever the case might be, if the person taking the enfranchisement had been tenant for life, I think it is clear that the effect of an enfranchisement is to bar a tenancy in tail. It seems to me that the cases of *Challoner* v. *Murhall* and *Dunn* v. *Green* are clear authorities on the point, especially as they agree with the statement as to the law in Scriven on Copyholds, 4th ed., p. 558, and Watkins on Copyholds, and the only doubt which has been thrown upon it is in the notes by Mr. Coventry to Watkins on Copyholds, 4th ed., pp. 236, 438. Mr. Coventry was a conveyancer, and his remarks are more particularly addressed to conveyancing matters, and I cannot, on the strength of the doubt expressed by him, decline to follow *Challoner* v. *Murhall* and *Dunn* v. *Green*. The former case appears to me to decide the actual point now before me, and I, therefore, hold that the enfranchisement barred the entail.

Solicitors, *W. Beck; Gedge, Kirby, & Millett.*

Q. B. Div. (A. L. Smith, and Day, JJ.) July 22, 1889.

DUBOUT & CO. *v.* MACPHERSON. (*a.*)

Practice—Third party—Procedure—Service of notice out of jurisdiction—R. S. C., 1883, *ord.* 11, *r.* 1 (e); *ord.* 16, *r.* 48.

A third-party notice may be served out of the jurisdiction in any action founded on a breach, committed within the jurisdiction, of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, unless such third party is domiciled or ordinarily resident in Scotland or Ireland.

This was an application for leave to serve a third-party notice on one Boisduval, residing in France.

The defendant, who made the application, claimed an indemnity against Boisduval in respect of a portion of the liability alleged to have been incurred by the former as acceptor of two bills of exchange payable in London upon which the plaintiff sued as indorsee.

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Wills, J., at chambers, doubting whether he had power to give leave to serve such a notice out of the jurisdiction, referred the question to the court.

J. E. Raven, for the defendant, relied on *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, 24 W. R. Dig. 205, and distinguished the cases of *Speller* v. *Bristol Steam Navigation Co.*, 32 W. R. 670, 13 Q. B. D. 96, and *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123.

A. L. SMITH, J.—*Primâ facie* the rules are applicable only to persons within the jurisdiction, and the question is whether there is anything in those relating to third-party notices which specially permits of service upon persons out of the jurisdiction. This question arose in *Swansea Shipping Co.* v. *Duncan* under the rules of 1875, and the Court of Appeal there held that the provision in ord. 16, r. 18, of those rules, to the effect that such a notice should be served "according to the rules relating to the service of writs of summons," empowered the court to allow service of such a notice out of the jurisdiction. That provision, as to the service of third-party notices, is reproduced in terms in ord. 16, r. 48, of the rules of 1883. The third party in *Swansea Shipping Co.* v. *Duncan* was a company carrying on business in Scotland, but there was no exception in the rules of 1875 to the service of writs out of the jurisdiction in favour of persons ordinarily resident in Scotland corresponding to that which is to be found in the rules of 1883.

A similar point arose after the rules of 1883 came into force in the case of *Speller* v. *Bristol Steam Navigation Co.*, where leave was sought to serve a third-party notice out of the jurisdiction on a person ordinarily resident in Scotland, on the suggested ground that he was a "proper party" to the action within the meaning of ord. 11, r. 1 (*g*). The court there held that they had no power to give such leave, and that sub-section (*g*) of that rule did not apply to third-party notices. That decision is not in any way in conflict with the decision in *Swansea Shipping Co.* v. *Duncan*, and is no authority against the present application. Nor is the case of *In re Busfield* any authority against it. It was there decided that the court cannot order service of an originating summons out of the jurisdiction, and with that decision I quite agree, because there is no rule applicable to the service of an originating summons corresponding to the provision as to the service of third-party notices in ord. 16, r. 48.

The principle, then, of the *Swansea case* still applies, and the effect of the decision in that case, when read along with ord. 11, r. 1 (*o*), amounts to this, that wherever the action is founded on a breach, within the jurisdiction, of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, the court may allow service of a third-party notice out of the jurisdiction, unless the third party is domiciled or ordinarily resident in Scotland or Ireland.

The application must be granted, but the case must go back to Wills, J., to ascertain whether there was, in fact, a contract of indemnity, and whether, consequently, a third-party notice should issue at all.

DAY, J., concurred.

Application granted.

Solicitor for the defendant, *C. J. Cole.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) July 2, 1889.

WALKER v. HOBBS. (*a.*)

Landlord and tenant—Housing of the Working Classes Act, 1885 (48 & 49 *Vict. c.* 72), *s.* 12—*House unfit for habitation—Breach of implied condition—Damages.*

A tenant residing in premises which came under the Housing of the Working Classes Act, 1885, *was injured by the fall of a ceiling.*

Held, that he was entitled to sue the landlord for damages for breach of the implied condition that the premises were reasonably fit for habitation as provided for by section 12 *of the Act* (48 & 49 *Vict. c.* 72).

Appeal from the county court of Lambeth.

The plaintiffs were tenants of the defendant in a block of buildings provided for the working classes in Bermondsey. At the time of the letting some plaster had fallen from the ceiling in the plaintiffs' room, and the ceiling had been repaired by the landlord. Shortly afterwards a second fall of plaster took place, and finally a third fall took place, which injured the female plaintiff.

The plaintiffs sued the landlord upon three grounds—(1) for breach of warranty that the ceiling was sound; (2) for wrongfully leaving the ceiling in an unsafe condition; and (3) under section 12 of the Housing of the Working Classes Act, 1885, for breach of the implied condition that the premises were reasonably fit for human habitation.

The county court judge nonsuited the plaintiffs upon the first two grounds, but upon the third left the question to the jury, who found a verdict for the plaintiffs, with £50 damages.

The defendant appealed.

A. Clavell Salter, for the appellant.—The only question is whether the defendant is liable under section 12 of 48 & 49 Vict. c. 72. The words are, "In any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation." That simply makes the tenant's promise to pay rent conditional upon the premises being habitable; it creates no new promise on the part of the landlord. At common law there is no implied covenant on the part of the landlord that the premises are reasonably fit for human habitation or occupation: *Hart* v. *Windsor*, 12 M. & W. 61, and the landlord is not liable to his tenant for any injury arising from the condition of the premises. To imply a new duty on the part of the landlord is to alter the law in a way which was never intended. Further, the Act is purely a sanitary Act, and does not refer to matters of general repair. This is shewn by section 5, which speaks of "premises in a condition or state dangerous to health, so as to be unfit for human habitation."

Lambert, for the plaintiffs, was not called on.

Lord COLERIDGE, C.J.—The learned county court judge was perfectly right in his construction of this Act. The facts of this case are, shortly, that the plaintiffs went into these rooms as tenants. The ceilings were in a ruinous and dangerous condition, and fell down and seriously injured the female plaintiff. It is admitted that the ceilings were in a dangerous condition, and therefore that the rooms were not, speaking in a broad sense, fit for human habitation.

The question is, whether this action will lie—that is, whether the landlord is liable to an action for damages

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

under section 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72). That section provides that, "in any contract made after the passing of the Act for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is in all respects reasonably fit for human habitation." It is admitted that this part of a house was not reasonably fit for habitation, and that the condition was not fulfilled. It is contended by the defendant that the word "condition" in this Act is to be construed according to the strict common law meaning of the term, and that it only means that the tenant may, at his option, repudiate the contract of tenancy if the condition is not fulfilled; but that it does not imply any promise by the landlord to the tenant. The term "condition" might have that limited meaning in some Acts, but it would be utterly irrational so to construe it in this Act. The object of the Act was to provide the working classes with reasonably fit and proper dwellings, and therefore to bind the landlords to provide such dwellings. It would not afford much protection to the tenant if his only remedy was to give up his tenancy and turn out after he had been injured by the improper condition of the dwelling. The reasonable interpretation of the Act is that it imports a promise by the landlord to the tenant that the dwelling is reasonably fit for habitation, upon which promise, if it is broken, the tenant can sue.

The judge was quite right in leaving it to the jury to say whether the dwelling was reasonably fit for habitation, and this appeal must be dismissed.

Mathew, J.—I am of the same opinion. The term "condition" in this section does not mean simply a condition precedent affecting the whole consideration for the contract of tenancy; but even if it did, it would, in my opinion, upon the most technical construction, imply a promise by the landlord to the tenant.

Appeal dismissed.

Solicitor for the plaintiffs, *Worsfold.*

Solicitors for the defendant, *Bonner, Wright, Thompson, & Co.*

Q. B. Div. (Denman and Charles, JJ.) June 24, 1889.

Lowden v. Blakey. (a.)

Practice—Production of documents for inspection—Privileged communication.

L. brought an action of libel against B. in respect of an advertisement in a newspaper containing an account of certain chancery proceedings in which B. had successfully sued L. and others for infringement of his rights in a trade-mark. In an affidavit by B. mention was made of a draft advertisement prepared by him and settled by counsel before the publication complained of.

Held, that L. was not entitled to an order for the production of the draft advertisement for inspection.

Minet *v.* Morgan, 21 *W. R.* 467, *L. R.* 8 *Ch.* 361, *followed.*

Appeal from an order of a master referred by Wills, J., at chambers to the court.

In an action brought in the Chancery Division by the present defendant against the present plaintiff and others to restrain an infringement of his rights in certain trade-marks, Chitty, J., granted an injunction, which was affirmed by the Court of Appeal. The present defendant, considering that the injunction had been disobeyed, caused an advertisement of the proceedings in the chancery action and the decision therein to be published in a trade journal. The present plaintiff then brought this action, in which he complained of the advertisement as being a libel.

A summons having been taken out to restrain the continued publication of the advertisement, an affidavit was made by the defendant, in which he said that he had himself prepared a draft advertisement which had been settled by the counsel who appeared for him in the chancery action, the form in which it was so settled being that in which it was published in the journal.

The plaintiff then took out a summons under ord. 31, r. 18, asking that the draft advertisement might be produced for inspection. The master made an order for production, but Wills, J., on appeal, referred the matter to the court.

The defendant appealed.

Rosenthal, for the defendant.—The draft advertisement is privileged from production, having been originally drawn by the defendant in reference to the chancery action, and for the purpose of being submitted to his legal adviser. The definition of "privileged communication" laid down in *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. 361, includes documents prepared and used *ante litem motam.*

He also cited *Pearse* v. *Pearse*, 1 De G. & Sm. 12, and *Manser* v. *Dix*, 3 W. R. 313, 1 K. & J. 451.

Cracroft, for the plaintiff.—There is no good objection to this application for discovery. The case of *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, 29 W. R. Dig. 72, shows that professional privilege is of a very limited character, and is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights of property: see judgment of Jessel, M.R. This draft does not come within that rule, for it was prepared, not for the purpose of submitting to counsel, but for the purposes of publication.

He referred to ord. 31, rr. 15—18.

Denman, J.—I am of opinion that this order ought not to have been made. The defendant brought an action against certain persons, including the plaintiff, for infringement of his rights in a trade-mark, and succeeded in obtaining an injunction. He thought he had reason to complain of the plaintiff's conduct, and, after the action was concluded, he consulted his counsel as to the extent of his success. I assume that the defendant had it in his mind that any publication about the litigation might be dangerous if it stated anything with the least incorrectness. I assume also that he had a valid and honest complaint against the plaintiff, because he was successful. That being the state of things, he drafted an advertisement and sent it to his counsel, in order that he might see whether the statements were accurate. This draft advertisement, or something like it, was subsequently published. There is no doubt that the defendant so acted partly with a view of preventing some sale by the plaintiff of goods with the trade-mark in question. I am not sure that this was not privileged as being a communication with regard to the rights of property, within the limited definition of privilege laid down by Jessel, M.R., in *Wheeler* v. *Le Marchant*, but I prefer to rely on the general and broad words used by Kindersley, V.C., in *Lawrence* v. *Campbell*, 7 W. R. 33[illegible], 4 Drew. 485, and approved of in *Minet* v. *Morgan*. I think it was a confidential communication to counsel for the purpose of obtaining his advice, and that it was privileged, although it did not relate to existing litigation.

As to the rules, I do not think they apply to this case. The effect of a notice under ord. 31, r. 15, is that a document, if not produced, cannot be given in evidence at the trial. But it is not suggested that the defendant could himself give this draft in evidence.

I think the appeal must be allowed.

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

Charles, J.—I am of the same opinion. I think that this case is governed by *Minet* v. *Morgan*.

Appeal allowed.

Solicitor for the plaintiff, *A. V. Green.*

Solicitor for the defendant, *Ernest Salaman.*

Court of Appeal.

From Chan. Div. Oct. 30; Nov. 12.

In re Frisby.

Allison *v.* Frisby. (*a.*)

Statutes of Limitations—Principal and surety—Joint and several covenant to pay mortgage debt—Co-contractor—Payment of interest within period of limitation by mortgagor—Surety's liability, whether kept alive—3 & 4 *Will.* 4, *c.* 27, *s.* 40—3 & 4 *Will.* 4, *c.* 42, *ss.* 3, 5—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

If section 8 *of the Real Property Limitation Act* 1874, *applies at all to actions brought against one who, covenanting expressly as surety, has, jointly and severally with a mortgagor, covenanted for payment of the mortgage debt, then payments made by the principal debtor keep alive the remedy against the surety.*

Decision of Kay, J. (37 *W. R.* 603), *affirmed.*

Whether section 8 *does apply at all to actions brought against a surety on such a covenant*, quære.

Per Cotton, L.J.—*The section does so apply.*

Per Bowen, L.J.—*It does not apply.*

Appeal from Kay, J.

By a deed, dated December 10, 1872, Edward Frisby covenanted to surrender copyhold property to Mary Ann Scotney to secure £800. The deed contained the following covenant to pay the mortgage-money:—"And they, the said Edward Frisby and Matthew Frisby (as surety for the said Edward Frisby), do and each of them doth hereby for himself and themselves, and each of their heirs, executors, and administrators, covenant, promise, and agree to and with the said Mary Ann Scotney, her heirs, executors, and administrators, in manner following (that is to say), that they, the said Edward Frisby and Matthew Frisby, their heirs, executors, or administrators, shall and will, on the 10th day of June next, well and truly pay or cause to be paid, unto the said Mary Ann Scotney, her executors, administrators, or assigns, the aforesaid sum of £800 of lawful money aforesaid, with interest thereon at the rate of £4 5s. per cent. per annum, to be computed from the day of the date of these presents without any deduction or abatement whatsoever." The proviso for redemption was on payment by Edward Frisby (the mortgagor), his heirs, executors, or administrators. He duly paid the interest up to December, 1880. There was no express covenant to pay interest after the 10th of June, 1873, in case the principal or part of it remained unpaid. On the 21st of November, 1882, the mortgaged estate was taken in execution by debt under a judgment obtained by a prior mortgagee. In January, 1889, a judgment was obtained against the mortgagor for the mortgage-money due under the present mortgage, but he had not the means of satisfying it. In 1888 Matthew Frisby, the surety, died, and this claim for principal and interest was made in April of the present year by the mortgagee's executrix against Matthew Frisby's estate upon his several covenant. The executrix took out an originating summons (afterwards adjourned into court), asking for a declaration that she was entitled to rank as a creditor against Matthew Frisby's estate for £800 and interest since December 10, 1880, and an order for the administration of his estate if his executor did not admit assets.

The question was whether, Matthew Frisby having paid nothing under his covenant, his liability had not now ceased by virtue of section 8 of the Real Property Limitation Act, 1874, and section 14 of the Mercantile Law Amendment Act, 1856. The last-mentioned section is as follows:—"In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators."

Section 8 of the Real Property Limitation Act, 1874, is as follows:—"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." The case is reported below, 37 W. R. 603.

Kay, J., held that section 8 did not operate to bar the remedy of the mortgagee against the surety, but only against the mortgagor, and that even if he were wrong in that, the payment of interest by the mortgagor kept alive the surety's liability; also that section 14 of the Mercantile Law Amendment Act only applied to the enactments expressly mentioned in it.

Matthew Frisby's executor appealed.

Marten, Q.C., and *H. Percival*, for the appellant.—The case comes within the very words of section 14 of the Mercantile Law Amendment Act. [Bowen, L.J.—It is not the same sum of money that the mortgagor and surety here covenanted to pay; but only an equivalent sum.] It was the same sum—that is, it was not the sum advanced, but "the aforesaid sum of £800," mentioned just previously in the proviso for redemption. On the construction of section 8 of the Real Property Limitation Act, the payment must have been made by the person himself who is to be bound thereby. It would be hard that payment by another should keep up the liability. In *In re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291, 34 W. R. Dig. 108, payment by the mortgagor was held sufficient on the peculiar form of the bond in that case. Here there is only a simple covenant for payment by two persons. The argument as to there being two different debts would apply just as well if there were only one covenantor, there being the debt on the

(a.) Reported by R. H. Deane, Esq., Barrister-at-Law.

covenant, and that charged on the land. But it is really the same debt—it could not be demanded twice over.

They also referred to *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *Fearnside* v. *Flint*, 31 W. R. 318, 22 Ch. D. 579; *Cockrill* v. *Sparkes*, 11 W. R. 428, 1 H. & C. 699; *Chinnery* v. *Evans*, 11 H. L. Cas. 115, 12 W. R. H. L. Dig. 7; and *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52, 11 W. R. Ch. Dig. 55.

Renshaw, Q.C., and *Townsend*, for the respondent.—*Sutton* v. *Sutton* merely decides that as between mortgagor and mortgagee the remedy on covenant is barred in twelve years. That does not affect the present case, which is one of surety. There was nothing on the face of the mortgage to show that this was only a third mortgage, as was the case. The second mortgage was for £4,000 and interest to one Perkins, who took possession in November, 1882. The twelve years had not expired when he was put into possession. Section 42 of 3 & 4 Will. 4, c. 27, provides that where prior mortgagees are in possession subsequent incumbrancers may recover arrears of interest accrued due during such possession if they bring their actions within a year of the prior mortgagees going out of possession. So that, as regards the interest, time never has run at all. Here, as there was no express covenant to pay interest after the six months, "damages in respect of" arrears of interest are payable, and the section specifies and applies to such. [FRY, L.J.—But the proviso at the end of the section does not.] The damages are commensurate with the rate of interest. The debts are not the same debts where one covenanting party covenants on behalf of the other. The debt of the principal is for a sum secured on the land; but the debt of the surety is only in the event of default by the principal. "In fact, the one debt is not a part of the other—they are different debts": *In re Powers*, 30 Ch. D., at p. 295. As to damages in respect of interest, *Goodchap* v. *Roberts*, 28 W. R. 870, 14 Ch. D. 49, is in point. There, as here, there was no covenant for payment of interest after the day named for repayment of the principal. Here one of the covenantors is described on the face of the document as a surety. A surety only joins to indemnify. Our claim is that he shall indemnify us, the principal debtor having made default. Even if section 8 would otherwise apply to the case of a surety, it is qualified by the latter part of the section relating to the person by whom the payment must be made—*i.e.*, "the person by whom the same shall be payable." The Mercantile Law Amendment Act does not help the appellant at all, as section 14 does not apply to the Real Property Limitation Act of 1833, nor to that of 1874. Here the mortgagor has paid, so that the liability of the surety never arose.

Marten, Q.C., in reply. [COTTON, L.J.—Does the Act of 1874 apply except where the action is brought against the person liable on the mortgage; and if it does, does not payment by the mortgagor take the case out of the statute?]—There are many cases where the surety is discharged without the principal being discharged. This case cannot be distinguished from *Sutton* v. *Sutton*. The surety ought not to be in a worse position than the principal debtor. The words "by whom the same shall be payable," in section 8, include the surety. That payment must have been made by some person against whom the action is brought. [COTTON, L.J.—Was not the chief object of the Act to prevent a personal liability remaining when there was no charge left on the land?]

Cur. adv. vult.

Nov. 12.—COTTON, L.J.—This is an appeal from a decision of Kay, J., deciding that section 8 of the Real Property Limitation Act, 1874, has no operation in barring the remedy of a mortgagee against a surety who, with the mortgagor, has entered into a joint and several covenant to pay the mortgage debt and interest, and that, even if it had such operation, payment of interest by the mortgagor would keep alive the mortgagee's remedy against the surety. This court has already decided in the case of *Sutton* v. *Sutton* that section 8 applies not only to actions brought to enforce a mortgage against the land subject to it, but also to personal actions on covenants contained in a mortgage of land. It has been argued that the section only applies to an action brought against the person who has given the security, but I fail to find any such limitation expressed or implied in the words of the Act, and that being so, the court has now no right to put such a construction upon it. It is true that at a time when there were two Acts in force, one of which related to actions for the recovery of land, and the other to personal actions, a decision was given (*Hunter* v. *Nockolds*, 1 Mac. & G. 640) which was not in accordance with what this court has decided upon the present Act. But in my opinion it would not be reasonable to hold that that Act only applies to the person who has given the mortgage when another person has made himself liable for the debt. Then it was contended on the other side that the remedy is not kept alive against the surety when a payment has been made by the principal debtor within the period of limitation. But in my opinion the remedy is kept alive by such a payment, because the section says nothing as to the person by whom the payment is to be made. If the surety is to get the benefit of the section where no payment has been made, I think it is only reasonable to suppose that he was intended to bear the burden of the exception where payment has been made within the period of limitation. In my opinion it would be unreasonable to hold that the action is covered by the section, and yet that the clause relating to payment in the meanwhile does not apply when the action is brought, not against the mortgagor, who has paid, but against the surety, who has not. It has been already held that the 14th section of the Mercantile Law Amendment Act, which section expressly refers to special Acts, of which the Real Property Limitation Act of 1874 is not one, does not apply to that Act. There seem to be no cases which exactly cover the point in dispute, but the case of *Chinnery* v. *Evans*, though it is not exactly in point, tends in some degree to confirm the view which I have expressed. I think, therefore, that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion, though I have come to it on somewhat different grounds. I should myself have concurred with Kay, J., not only in the result at which he arrived, but also in the reasons which he assigned for arriving at it. In my opinion, section 8 was only intended to apply to actions brought against the mortgagor, but if I am wrong in that, and the section does apply to actions against a surety, then I am of opinion that payments made by the principal debtor have the effect of keeping alive the remedy against the surety.

FRY, L.J.—Whether section 8 does or does not apply, I must express my concurrence in the conclusion arrived at by my learned brethren. If the section does not apply, *cadit quæstio*. If it does apply, the question we have to consider is under what circumstances and by what person must payment be made in order to prevent the right of action from being barred. The words are, "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid." In my opinion, a payment satisfying those words is made whenever there is a render of money to a person entitled to receive it by any person liable to pay it. I quite agree that a voluntary payment by a stranger who is under no liability to pay, will not be sufficient to satisfy the terms of the section. But, on the other hand, if the words are to be confined to payments

made by the person sought to be charged, I think it would lead to great injustice; because, to take the common case, where there is a surety, as here, for the mortgagor, if payments of interest, as is usually the case, are made punctually by the mortgagor himself, it would, in my opinion, be contrary both to good sense and to the ordinary understanding as to the nature and effect of these arrangements, if it were held that the remedy against the surety was not kept alive by those payments, but that in order to keep it alive, part of the payments must be made by the surety, though the mortgagor is able and willing to pay the whole.

Appeal dismissed.

Solicitors, *Clarke, Rawlins, & Co.*, for *Percival & Son*, Peterborough; *Beaumont, Son, & Rigden*, for *Maurice Brown*, Peterborough.

From Chan. Div. Oct. 28.

In re COMBINED WEIGHING AND ADVERTISING MACHINE CO. (*a.*)

Company — Winding up — Garnishee — "Creditor" — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 82, *sub-section* (2)—*R. S. C.*, 1883, *ord.* 45, *r.* 2.

A person who has obtained a garnishee order against a company as garnishee, is not thereby constituted a creditor of the company, and, therefore, cannot present a petition, as a creditor, to wind up the company.

Appeal from a decision of North, J.

This was a petition to wind up the above-mentioned company. The petitioner had recovered judgment for £57 against one Wright, to whom the company were indebted in the sum of £38. The petitioner subsequently obtained a garnishee order absolute directing the company to pay to him £38, and in default that execution should issue against the company for the same. The petitioner issued execution against the company, and the sheriff made a return of *nulla bona*. He thereupon presented this present petition to wind up the company.

The petition was heard by North, J., on the 1st of June, when his lordship held that the petitioner was not an assignee of the debt, and was not a creditor of the company within the meaning of the Companies Act, 1862. The petitioner appealed from that decision.

Eve, for the appellant.—The petitioner is entitled to present a petition under section 80, sub-section (2), of the Companies Act, 1862. The fact that the petitioner obtained the garnishee order showed that he is entitled to be placed in the position of creditor of the company. The effect of garnishee proceedings was not to confer a new right, but to declare a pre-existing right. But even if the petitioner were not entitled under sub-section (2) of section 80 the evidence is sufficient to show that the company is insolvent. [COTTON, L.J.—Then are you a creditor within section 82 of the Act?]

He cited *Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342; *Chatterton* v. *Watney*, 29 W. R. 373, 573, 16 Ch. D. 378, 17 Ch. D. 259; *Ex parte Moore*, 33 W. R. 438, 14 Q. B. D. 627; *Ex parte Blanchette*, 34 W. R. 538, 17 Q. B. D. 303.

Firminger, for the company, cited *In re Connan*, 20 Q. B. D. 690, 36 W. R. Dig. 16.

Geo. White, for shareholders, cited *Butler* v. *Wearing*, 17 Q. B. D. 182, 34 W. R. Dig. 17; *Wood* v. *Dunn*, 14 W. R. 84, L. R. 1 Q. B. 77, 15 W. R. 180, L. R. 2 Q. B. 23; *Ex parte Baylis*, L. R. 2 Eq. 521, 14 W. R. Ch. Dig. 62.

COTTON, L.J.—From the way in which this case was opened to us, we thought it turned on the question whether the petitioner had a case under section 80, sub-section 2, of the Companies Act, 1862. That, however, is not the point we have really to consider. The question is not only whether the petitioner has made out a case for winding up the company, which I very much doubt, but whether he is a person entitled to present a petition. The latter point turns upon the construction of section 82. The appellant says: "I am entitled to present a petition; I am not a contributory, but I am a creditor." Is he a creditor? He is no creditor of the company except in so far as the garnishee order which he obtained, made him so. Mr. Wright owed him money for which he obtained a judgment. Having done that, he attached a debt due from the company to Wright, and the order has been made absolute. What does a garnishee order do? It is not an assignment of the debt due by the garnishee to the debtor of the garnishor, it merely gives the garnishor a lien upon that debt. That was laid down by Sir George Jessel, M.R., confirming the view taken by myself in the case of *Chatterton* v. *Watney*, 17 Ch. D. 262, where he says, "I quite agree with the view of Cotton, L.J., that a garnishee order does not operate as a transfer of the debt." Transfer does not necessarily mean absolute transfer, but a transfer of the debt by way of assignment, security, or otherwise. In this case, even if there were a transfer or assignment of the debt so as to constitute the petitioner an assignee either in law or equity of this debt so that he could claim to be a creditor under section 82, and entitled to present a petition, we should still have to consider the question whether he had made out a case for winding up this company. But on the ground that he is not entitled to present the petition, I think it unnecessary to go into the case on the merits. I am of opinion that this gentleman is not in any way a creditor of the company, and not in any way one of the persons entitled to present a petition.

I ought to refer to the question whether this is an equitable assignment of the debt. Of course if there had been an order by the person to whom the debt was owing to pay to the petitioner that would have been a good equitable assignment. But in my opinion a mere order in the nature of a garnishee order made by a competent authority attaching the fund, and enabling the person who has obtained the order to give a good discharge for it, is not an equitable assignment. The petitioner, therefore, cannot under the doctrine of equitable assignment claim to be a creditor in this case.

BOWEN, L.J.—I am of the same opinion. The real point is whether the appellant is a creditor within section 82 of the Companies Act, 1862. I think, in all probability, having regard to the language of the preceding section, that a creditor under section 82 includes a creditor in equity as well as in law. It is not necessary to decide it; I believe the point has been expressly left undecided in a previous case, and I desire to keep it open, but I should think it would include a creditor in equity. In any case I cannot see that this statutory position (which was created originally by the Common Law Procedure Act, 1854, and has been perpetuated by the rules under the Judicature Act)—namely, the relation which exists between a judgment creditor and the garnishee—is a position which involves the relation of debtor and creditor. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a court of common law that the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I

(*a.*) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

think that the relation which is created by that section, and the orders made under it, does not create a debt at all; it creates an attachment of the debt, or of a portion of the debt, and in case of non-payment confers the right of issuing execution, and nothing more. One must remember that these winding-up sections cannot be extended lightly or loosely, because they relate to procedure in the nature of execution against the company, and involve considerable results against property.

FRY, L.J.—I am of the same opinion. The 2nd rule of order 45 of the Rules of Court provides that the service of the garnishee order on the garnishee "shall bind such debts in his hands." The question, I take it, is what is the meaning of the words "bind such debts in his hands"? Now it has been argued that it amounts to a transfer of the debt. It is remarkable if that were the meaning of the words that those words were not used, and that the order does not say "transfer" the debt. But, further than that, the whole scheme of the order is inconsistent with its being a transfer, and in fact the question has been settled by the court. It is plain, to my mind, that there is no transfer of the debt. It is equally plain, to my mind, that the garnishee order does not make the garnishor a creditor of the garnishee. What the order does is this: it gives the garnishor certain statutory rights. It enables the garnishor to say to the garnishee, "You shall not pay the money which you owe to your creditor. I can give a valid receipt for it." It enables him, in the event of the money not being paid, to obtain execution. He has all these rights, but there is no transfer of the debt, and he is not created a creditor. The appeal must be dismissed, with costs.

White.—Will your lordships give the shareholders any costs? We were not served, but we appeared in the court below.

COTTON, L.J.—No, we cannot give you any costs.

Appeal dismissed.

Solicitors, *Norris, Allens, & Chapman; Perkins & Sawyer.*

From Q. B. Div. Nov. 6.

HOLTBY *v.* HODGSON.
BATESON (*Garnishee*). (*a.*)

Husband and wife—Married woman—Judgment debt—Garnishee order—Separate property—Entry of judgment—Relation back—R. S. C., 1883, *ord.* 41, *r.* 3; *ord.* 45, *r.* 1—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 1.

The plaintiff, in 1887, *recovered judgment against the defendant, a married woman, in the form laid down in* Scott *v.* Morley, 36 *W. R.* 67, 20 *Q. B. D.* 120. *On July* 23*rd,* 1889, *the defendant obtained a verdict for* £150 *against a third person for malicious prosecution, and the judge at the trial gave judgment, but judgment was not entered till October. On July* 31*st,* 1889, *the plaintiff, whose judgment remained unsatisfied, obtained an order attaching the* £150 *to answer his judgment.*

Held, affirming the judgment of the Queen's Bench Division, *that the order was rightly made, as the plaintiff had obtained a "judgment" against the defendant within the meaning of ord.* 45, *r.* 1, *and the* £150 *was a "debt owing" to the defendant within that order.*

Held also, that, by ord. 41, *r.* 3, *the judgment, when entered, related back to the day on which it was pronounced, and that, therefore, there was a debt at the date of the garnishee proceedings.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from the Queen's Bench Division.

In 1887 the plaintiff recovered judgment for a sum of money against the defendant, a married woman, in default of appearance, the judgment being in the form laid down in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120.*

On July 23rd, 1889, the defendant obtained a verdict for £150 against Bateson, the garnishee, for malicious prosecution, and the judge at the trial gave judgment for this amount. Judgment, however, was not entered until October, 1889.

On July 31st, 1889, upon the application of the plaintiff, whose judgment remained unsatisfied, the master made an order attaching the £150 to answer his judgment. Upon appeal the judge referred the matter to the court.

The court (Mathew and Cave, JJ.) affirmed the order.

The defendant appealed.

Crump, Q.C., and *Cyril Dodd,* for the defendant.—The judgment against the defendant was not a personal judgment; it was only a judgment against her separate estate, and therefore did not constitute a "judgment" and the plaintiff was not made a judgment creditor within ord. 45, r. 1. It created only a "proprietary liability": *per* Bowen, L.J., in *Scott* v. *Morley.* [They referred to *Chapman* v. *Biggs*, 11 Q. B. D. 27, 31 W. R. Dig. 8; *In re Gardiner*, 36 W. R. 142, 20 Q. B. D. 249.] Secondly, the £150 cannot be attached. Section 1, sub-section 2, of the Married Women's Property Act, 1882, makes this sum her separate property. It does not make it a "debt" due to her. It is not therefore attachable within ord. 45, r. 1, as that order only refers to "debts owing or accruing." Thirdly, there was no "debt" due to the defendant in respect of the £150 until judgment was signed. Therefore there was no debt at the time when the garnishee order was made. [LOPES, L.J., referred to ord. 41, r. 3.] That applies to actions tried without juries; rule 4 applies to cases tri e with juries. [They also contended that, as they coul prove that the defendant had no separate property at the date of the contract in respect of which the plaintiff obtained judgment against her, the decision in *Palliser* v. *Gurney*, 35 W. R. 761, 19 Q. B. D. 519, applied, and the defendant was not liable on the judgment. The COURT, however, said that the judgment was conclusive, and could not be reopened, the defendant having allowed judgment to go by default.]

T. Willes Chitty, for the plaintiff, was not called upon.

Lord ESHER, M.R.—The first objection taken in this case is that the plaintiff has not obtained such a judgment against the defendant, a married woman, as comes within ord. 45, r. 1, so as to entitle him to obtain a garnishee order. The ground of this contention is that the judgment is not a personal judgment against the married woman, but merely a judgment against her separate estate. The judgment was in the form laid down in *Scott* v. *Morley.* It was a judgment obtained by default, and it followed the writ, which was framed so as to obtain a judgment in the form laid down in

* The form in *Scott* v. *Morley* is as follows:—"It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction."

that case. By the judgment the plaintiff was to recover a certain sum and costs to be taxed, such sum and costs to be payable out of her separate property and not otherwise, and execution to be limited to her separate property not subject to any restriction against anticipation. The married woman is only liable on certain conditions, all those conditions being stated in the writ. Allowing judgment to go by default was an admission that all those conditions existed. That being so, the judgment was against her, though execution could only issue against her separate property. Such a judgment comes within ord. 45, r. 1. The judgment was for the payment of money, and the judgment debtor was liable under the judgment, though the money could only be realised in a particular way. All conditions existed which entitled the plaintiff to an attachment order, the married woman being "a debtor liable under the judgment." A phrase of Bowen, L.J., in *Scott* v. *Morley* was relied upon—viz., that section 1, sub-section 2, of the Married Women's Property Act, 1882, only subjected the married woman to a "proprietary liability." That was only a short way of saying that the judgment must be realized out of her property, and that she could not be made liable to any personal consequences, such as bankruptcy proceedings or attachment under the Debtors Act, 1869.

It was then said that the married woman had not obtained a judgment against a third person so as to make her a judgment creditor, but that it was only a judgment which gave her something as her separate property, and that, therefore, there was no "debt owing or accruing" to her. She has, however, a judgment, and the judgment debtor, the present garnishee, owes her the money. It is a play upon words to say that she has not obtained a judgment within the meaning of ord. 45, r. 1.

The last point taken was that there was no debt at the time the garnishee proceedings were taken, inasmuch as the judgment for £150 had not then been signed. The law before the Judicature Act was that the verdict was entered by the officer of the court at *Nisi Prius*. The *Nisi Prius* record was then made up. Upon that record the costs were taxed and the allocatur given. Judgment was then signed upon the allocatur. Under the Judicature Act there might be judgment without a verdict, as in the old chancery courts. Therefore in such a case there was no occasion for a *Nisi Prius* record, and so, to assimilate the procedure throughout, the *Nisi Prius* record was abolished. The judge at the trial has the power to pronounce judgment according to the verdict. The officer enters the verdict and gives his certificate. Judgment has then to be signed or entered. That brings me to ord. 41, r. 3, which provides that "where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the court or judge shall otherwise order, and the judgment shall take effect from that date." The judgment becomes effective from the day on which it is pronounced in court by the judge at the trial. It was argued that that only applied to a judgment pronounced in a case tried without a jury, and that rule 4 applied to a case tried with a jury. There is, however, nothing to support that contention. Therefore this judgment took effect from the day on which it was pronounced in court. Accordingly there was a judgment in existence at the time when the application for the garnishee order was made. I agree with the judgment of the Divisional Court, and this appeal must be dismissed.

LINDLEY, L.J.—The question raised in this case is whether a judgment for a sum of money recovered by a married woman can be attached. I feel no difficulty in coming to the conclusion that it can. The order dealing with attachment of debts is order 45. The applicant must prove that he has obtained a judgment, and that the judgment is unsatisfied. He must show that someone within the jurisdiction owes money to the judgment debtor. Thereupon he gets a garnishee order attaching the debt. It is first said that a judgment against a married woman is not such a judgment as can be made the foundation for garnishee proceedings, on the ground that it does not bind her personally, but only binds her separate estate. The judgment, however, is that the plaintiff do recover against the married woman a certain sum and costs, such sum and costs to be realisable out of her separate estate and not otherwise. The judgment is against her, and if her husband were to die the judgment would bind her, and execution could issue against her property in the ordinary way. The judgment, as long as she is married, is not to be executed in every way, but only against her separate property not subject to a restriction against anticipation. It is a mistake, therefore, to say that the judgment is not against her. It is true that she cannot be made bankrupt under it, or imprisoned under the Debtors Act, but it does not follow that it is not a judgment against her within ord. 45, r. 1.

The next point is that the judgment for £150 which the married woman has recovered cannot be attached as a "debt." I fail to see any ground for this contention. The judgment constitutes a debt due to her. The fact that it is part of her separate estate does not prevent it being attached. It seems to me to come within the words of ord. 45, r. 1. The last point is that the attachment was premature because no judgment for £150 had then been entered. I do not propose to add to what the Master of the Rolls has said upon this point. The words of ord. 45, r. 1, seem to me to dispose of this contention.

LOPES, L.J.—I am of the same opinion. The conditions precedent to a debt being attachable are that it must be a debt owing by the garnishee, and it must be a debt which the judgment debtor can compel payment of when he wishes. In the present case there was a debt owing by the garnishee which the judgment debtor of the garnishor could enforce payment of. That being so, there was an attachable debt within ord. 45, r. 1. With regard to the judgment against the married woman, it is a judgment against a married woman enforceable only against her separate property. There can be no personal remedy against her under the Debtors Act, nor can the judgment be made the foundation of bankruptcy proceedings against her. Those are the only distinctions between a judgment against a married woman payable out of her separate property not subject to a restriction against anticipation and a judgment against an unmarried woman. It was then said that there was no attachable debt until final judgment was signed. It seems to me that ord. 41, r. 3, is a complete answer to that point.

Appeal dismissed.

Solicitors for the plaintiff, *Emmet, Son, & Stubbs.*

Solicitors for the defendant, *Clinton & Buckby.*

From Prob. Div. and Adm. Div. July 8, 1889.

"THE VINDOMORA." (*a.*)

Ship—Collision—Duty of vessel in fog.

There is no rule of navigation that a vessel is not to alter her helm in a fog.

Appeal from the decision of Butt, J., holding *The*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Held, first, that the £50 constituted the fruits of the action, and that W. was entitled to a lien upon it for his costs.

Held, secondly, that the defendant's solicitors were liable to pay the £50, or so much thereof as would satisfy the lien, to W.

Held, thirdly, that the plaintiff was also liable, but not the defendant, who had received no notice of the lien.

Motion.

This was a motion on behalf of E. T. Ratcliff, the trustee in bankruptcy of the estate of E. J. Ward, formerly the solicitor to the plaintiff in this action, for an order that it might be referred to the taxing master to tax Ward's bill of costs against the plaintiff in this action, and to ascertain the balance due to Ratcliff as such trustee in respect of such costs and the amount of the lien or charge of Ward, or Ratcliff in his right, for the same over the sum of £56 paid to the plaintiff in compromise of the action, and that, upon such balance being ascertained, the plaintiff, the defendant, and Messrs. Clapham & Fitch, the defendant's solicitors, might pay to Ratcliff the sum of £56, or such less sum as should be sufficient to satisfy the lien. The writ in the action was issued on the 15th of July, 1887, claiming specific performance of an agreement for a lease, damages for breach of the agreement, and an injunction.

On the 29th of July, 1887, the statement of claim was delivered, and the claim was to the same effect as set forth in the writ.

On the 3rd of December, 1887, the defendant put in a defence and counter-claim. The defendant, by his defence, denied liability, and paid into court £50 in satisfaction of all damages, if any, to which the plaintiff might be entitled.

By the counter-claim the defendant sought to recover from the plaintiff a quarter of the year's rent of the premises and damages for alleged breaches of the agreement by the plaintiff.

On the 12th of January, 1888, on the motion of the plaintiff, an *ex parte* injunction was granted, and on the 28th of the same month a reply was delivered.

On the 24th of February, 1888, the *ex parte* injunction was dissolved, and an inquiry was directed as to the damages caused by the injunction, the defendant having liberty to apply for payment of his costs of that application in case the action should not be further proceeded with.

On the 22nd of March, 1888, notice of trial was given.

The chief clerk, by his certificate, dated the 3rd of November, 1888, certified the sum of £40 6s. 9d. to be the damages sustained by the defendant in consequence of the injunction, and that was subsequently confirmed by the judge.

At the time the action was brought Ward was solicitor for the plaintiff, but on the 25th of January, 1888, the plaintiff appointed Messrs. Boxall & Boxall to act as his solicitors instead of Ward.

On the 18th of May, 1888, another change took place, and the firm of Messrs. Ward & Rees, of which Ward was a member, became solicitors for the plaintiff.

Towards the end of October and at the beginning of November, 1888, negotiations took place between the defendant and his solicitors and the plaintiff, which resulted in the following agreement, dated the 2nd of November, 1888:—"It is agreed that this action shall be settled on the following terms: Plaintiff to receive the £50 paid into court in full discharge of all claims by him. Defendant to do whatever may be necessary to enable the plaintiff to obtain payment out of court of the £50. Each party to pay his own costs of the action." That agreement was signed by Ross as plaintiff in person and by Messrs. Clapham & Fitch, the defendant's solicitors. At the date of this agreement the plaintiff was impecunious. There was no evidence to show that this compromise was entered into to deprive the plaintiff's solicitor of his costs, and the applicant did not complain of the compromise, but of what took place afterwards. It appeared from the evidence that the plaintiff called at the office of Messrs. Clapham & Fitch on the 3rd of November, 1888, for the purpose of carrying out the terms which had been arranged. Mr. Fitch then told the plaintiff that he should go to his own solicitor and instruct him to carry out the terms. The plaintiff declined to do so, and Mr. Fitch then told him that he could either appoint other solicitors to act for him in the action or file a notice of appearance in person. The plaintiff adopted the latter course, and signed a notice of intention to appear in person which was served upon E. J. Ward, the firm of Ward & Rees having apparently then ceased to exist.

Ward, after having received this notice on the 9th of November, 1888, wrote to Messrs. Clapham & Fitch as follows:—"As I have received a notice from Mr. Ross that he intends to act in person in this action, I shall be glad to know if you have arrived at a settlement with him in the matter, and I give you notice not to pay him any money until my costs in the action have been paid." To that letter he received no reply, and then he wrote to the plaintiff in the action complaining of the notice and of the neglect to pay his costs. No notice was given by Ward to the defendant.

On the 10th of November, 1888, Messrs. Clapham & Fitch obtained payment to themselves out of court of the £50, and on the 13th of November they paid it over to the plaintiff. The plaintiff was also paid by the defendant an additional sum of £6 to recoup him for certain payments which he had made in respect of the house, the subject of the action. These two sums of £50 and £6 made up the £56 mentioned in the notice of motion.

C. Johnston Edwards, for the applicant.—Notice was given by Ward to Messrs. Clapham & Fitch of his lien before they paid this money over to the plaintiff. The evidence shows that there was collusion between the plaintiff and the defendant's solicitors to deprive Ward of his costs. The applicant is therefore entitled to have his lien satisfied out of the money so paid over.

He referred to *Welsh* v. *Hole*, 1 Doug. 237; *Ormerod* v. *Tate*, 1 East, 464; *White* v. *Pearce*, 7 Hare, 276; *Ex parte Bryant*, 1 Madd. 49: *Slater* v. *Mayor, &c., of Sunderland*, 12 W. R. C. L. Dig. 9; *The Hope*, 8 P. D. 144, 31 W. R. Dig. 50.

Pearson, Q.C., and *Beddall*, for the defendant and his solicitors.—The cases cited on behalf of the applicant are distinguishable. In each case there was a judgment or verdict. There is nothing in the present case equivalent to either, nor has any collusion been proved.

They referred to *Nelson* v. *Wilson*, 6 Bing. 568; *Ex parte Hart, In re Tovery* v. *Payne*, 1 B. & Ad. 660; *Quested* v. *Callis*, 10 M. & W. 18; *In re Sullivan* v. *Pearson, Ex parte Morrison*, L. R. 4 Q. B. 153, 17 W. R. C. L. Dig. 5; *Brunsdon* v. *Allard*, 7 W. R. 581, 2 E. & E. 19.

Haldenstein, for the plaintiff.

Edwards, in reply.—The £50 paid to the defendant in compromise of the action was property recovered or preserved by the solicitor: *Twynam* v. *Porter*, 19 W. R. 151, L. R. 11 Eq. 181; *Townsend* v. *Reade*, 4 L. J. N. S. Ch. 233.

April 17.—STIRLING, J. [after stating the facts, and holding that the £6 was not part of the money mentioned in the compromise, but an additional sum, and therefore distinct from the £50, continued:—].—Upon these facts, I think the £50 was handed to the plaintiff

as the result of the action, and constituted the fruits of it. Now the question is, what is the law with reference to this case? and, first of all, does a solicitor's lien for his costs attach to money received by way of compromise? It has been repeatedly held that it does. Thus, in *Davies* v. *Lowndes*, 3 C. B. 808, 823, there was a writ of right, which came on for trial at bar on the 17th of December, 1846, when, by consent of counsel for the respective parties, a verdict was taken, and judgment thereupon entered up for the tenant, the tenant by the like consent entering into a rule for payment to Mr. G. W. F. Cook, the demandant's attorney on the record, of the sum of £5,000 within a month. A rule had been obtained on behalf of Henry Clarke, one of the former attorneys in the action, calling upon the demandant and the tenant respectively to show cause why it should not be referred to one of the masters to ascertain the amount of the lien, if any, of Clarke upon the sum of £5,000 agreed by the rule of court of the 17th of December, 1846, to be paid by the tenant to Cook, the demandant's then attorney, for the compromise of the action, and why the tenant, or his attorneys, should not pay to Clarke the amount of such lien when so ascertained. Upon cause being shown, the court made the rule absolute, and ordered that such a sum should be paid into court to abide the taxation of Clarke's bill as should be sufficient to pay him. Wilde, C.J., said, "We feel no doubt that Clarke's lien attaches upon the fund in question, and we think it is not extinguished by the taking of securities that have turned out to be worthless." Again, in the case of *Slater* v. *Mayor of Sunderland*, 33 L. J. Q. B. 37, this had happened. At the trial of the action a verdict was taken for the plaintiff for £100, subject to a point reserved. Then negotiations were entered into, and it was agreed between the defendants and the plaintiff by their respective attorneys that the action should be compromised, the point reserved given up, and that the £100 should be taken for debts and costs. Then the plaintiff, having equitably assigned the £100 to another person, the plaintiff's solicitor gave notice of his lien to the defendants' solicitor, and required the £100 to be paid to him. The defendants thereupon refrained from paying the money to anyone, but were ready and willing to pay the money as the court should order; and Crompton, J., in giving judgment, says, "The rule is, I think, that the court will not interfere to set aside any arrangement which has been come to between the plaintiff and the defendant, in favour of the attorney, except where there has been fraud or collusion between the parties. That is decided in *Brunsdon* v. *Allard*." Then he goes on to say, "*Ormerod* v. *Tate* goes to the length that, after the defendant has had notice of the plaintiff's attorney's lien, the court will make him pay the money over again. I certainly could not go contrary to that case without great consideration. But here there is no attempt to interfere with any arrangement between the plaintiff and the defendants. I cannot refrain from acting upon the doctrine that, where no attempt is made to interfere with a compromise arranged between the plaintiff and the defendant, the court may lay hold of the fruits of the judgment for the benefit of the attorney." Then he refers to *Davies* v. *Lowndes*, and points out the distinction between that case and the cases which fall under the rule of *Brunsdon* v. *Allard*. In both those cases to which I have referred the fund was still *in medio* when the order was made, but the cases appear to me to go further than that.

I will next refer to the case of *White* v. *Pearce*. That was a suit for foreclosure, and at the hearing an order was made for payment by the defendant to the plaintiff of principal, interest, and costs within six months' after the master's report; and by consent, in default of such payment, that the mortgaged estate should be sold with the approbation of the master, and the purchase-money paid into court. Default was made, and the particulars and conditions of sale were carried in and approved by the master, and the sale appointed and advertised to take place on the 2nd of June, 1849. The solicitor of the plaintiff, having reason to suppose that an intention to compromise the suit was entertained by the plaintiff and defendant, gave notice to the defendant, and also to his solicitors, of his claim, as solicitor for the plaintiff in the cause, for the costs of the suit. The plaintiff and the solicitors of the defendant, acting on behalf of the latter, afterwards agreed to settle the mortgage debt and the suit for a sum of £300, to be paid by the defendant to the plaintiff, £200 of which was then paid, and £100 retained in the hands of the defendant's solicitors, and the sale was countermanded. The solicitor for the plaintiff by petition prayed that the plaintiff or the defendant might be ordered to pay the petitioner his costs out of any moneys paid, or to be paid, to the plaintiff in respect of the debt and costs, the subject of the suit; and if it should appear that the defendant's solicitors had received from, or on behalf of, the defendant any moneys in respect of the amount of the debt and costs for the purpose of settling the plaintiff's claim, that the defendant's solicitors might be ordered to pay the petitioner his costs thereout, so far as such moneys would extend. The Vice-Chancellor says this:—"The petitioner has undoubtedly a lien for his costs upon whatever has been received or paid for compromising the suit. The court does not, however, allow the lien to stand in the way of an amicable arrangement. There is nothing improper in the compromise; but if the defendant, not being under any pressure, except that which was the consequence of the decree, pays the debt of the plaintiff, with notice of his solicitor's lien, the question then is whether the payment is or not made by the defendant in his own wrong. In *Welsh* v. *Hole* Lord Mansfield puts the case of the assignment of a *chose in action*, which in legal strictness is not effectual, but still he says, as against the right of the assignee, the debtor, after notice, could not in equity discharge himself by a payment to the principal. The present is certainly not a weaker case. The defendant was asked to pay the money to the petitioner, and notice was given to him of the petitioner's lien for the costs of the suit. The estate would have been sold, and the money paid into court, if it had not been for this agreement between the plaintiff and the defendant. The agreement come to appears to be a very proper one, and I have no doubt that it was made *bonâ fide*, but I think the defendant, in the circumstances of the case, has paid the money in his own wrong, and that the petitioner has a right to proceed either against the plaintiff or defendant."

Now that is a very strong case, and it decides two things—first, that where money is received or paid as a compromise of a suit, and that money is in truth and in substance the fruit of the action, the solicitor's lien for costs extends to that; and further, upon the authority of the case of *Welsh* v. *Hole*, before Lord Mansfield, that if a valid compromise is made, and after the compromise has been made the solicitor gives notice that he has a lien for costs, it will be at the defendant's own peril if in the face of that notice he pays the money over which has been agreed to be paid to the plaintiff by way of compromise.

Now the authority cited by the Vice-Chancellor in that case is *Welsh* v. *Hole*; but that is not the only case which exists on the subject. Another and very remarkable case is that of *Read* v. *Dupper*, 6 T. R. 361. There the principal cause of action, which was for business done by the plaintiff for the defendant, was agreed to be referred to the master, who awarded a certain sum to be paid to the plaintiff, together with costs. The plaintiff afterwards threatened to take the defendant in execution

unless the money due to him was immediately paid; whereupon the defendant's attorney, after a notice from the plaintiff's attorneys not to pay it to the plaintiff himself, because their bill was not satisfied, paid the whole sum to the plaintiff himself. In consequence of that the plaintiff's attorneys obtained a rule calling on the defendant's attorney to show cause why it should not be referred to the master to see what lien the plaintiff's attorneys had upon the debt and costs recovered in the action as against the plaintiff himself, and why the defendant's attorney should not pay over that sum to the plaintiff's attorneys. Lord Kenyon says this: "The principle by which this application is to be decided was settled long ago—namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained. If, indeed, the money had been paid over *bonâ fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered." And then he refers to the case, which the Vice-Chancellor cited, of *Welsh* v. *Hole*, before Lord Mansfield. The rule, which was for payment by the defendant's attorney, was made absolute. Again, in the case of *Ormerod* v. *Tate*, the cause being at issue at the York Spring Assizes, 1800, the parties entered into bonds to refer it to arbitration, and the arbitrator awarded the defendant to pay the plaintiff £26 by two instalments—£10 on the 24th of May, 1800, and the remaining £16 on a certain future day. On the 16th of May the plaintiff's attorney, having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him from his lien for costs, served the defendant with notice to pay the amount of the damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the damages for his fees, &c.; notwithstanding which the defendant, on demand of the first instalment by the plaintiff's attorney when it became due, refused to pay it to him, but paid it over to the plaintiff himself. Thereupon a rule was applied for and obtained, and Lord Kenyon said: "The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and the defendant to cheat the attorney of his lien."

Now it was said that those cases had been overruled or questioned; but I cannot find any ground for coming to that conclusion. Certainly none of the cases to which I have referred are inconsistent with those two which were chiefly relied upon by the respondents upon this application—namely, *Ex parte Morrison* and *The Hope*. In fact, the cases divide themselves into two classes. In the last case, of *The Hope*, Lindley, L.J., referred to a passage in Chitty's Archbold's Practice as correctly stating the law upon the subject. I will refer to that first. It is there stated (14th ed., p. 164) that the solicitor's lien is merely, in truth, a claim for the equitable interference of the court on behalf of the solicitor, and then follows this passage:—"The court will exercise this equitable interference where the solicitor has given the opposite party, or his solicitor, notice of his lien, and that he claims the amount payable to his client, to be paid to him in the first instance; in which case the opposite party will, at his peril, pay the client or release the claim, or compromise it without the assent of the solicitor." In support of that proposition the cases to which I have referred are cited, and they appear to me to bear out the principle which is laid down in the text-book. That is the first class of cases. Then with regard to the other class of cases he says:—"So the court will exercise it, though no such notice"—that is, of his lien—"has been given, in cases where it is clearly made out that there has been some collusion or fraudulent conspiracy between the parties to cheat the solicitor of his costs. But, unless such notice has been given, or there has been such collusion or fraudulent conspiracy, the client, although he sues *in formâ pauperis*, may compromise with the other party, and give him a release, without the intervention of his solicitor; and the solicitor, in such a case, can afterwards look to him only for payment, and cannot proceed in the action." There is one sentence more which I ought to read, because it seems at first sight to point in the respondent's favour. "Even after such notice, the parties may, it seems, compromise before verdict or judgment without regard to the solicitor's claim for costs." But that is not to be understood, I think, as in any manner inconsistent with the prior part of the paragraph. It means, as I read it, simply this—and that is the law as I take it— that a *bonâ fide* compromise entered into before verdict or judgment, and even after notice of the solicitor's claim for costs, is good, and will not be set aside or affected at the instance of the solicitor, unless collusion or fraudulent conspiracy exists between the parties.

The cases of *Ex parte Morrison* and *The Hope* are authorities that the compromise of the 2nd of November is valid, and they would also be authorities that if the money had been paid over on the 3rd of November, before Ward gave notice of his claim, the court could not interfere. But they do not seem to me to conflict with this proposition, that where a valid compromise has been entered into under which a sum of money, the fruit of the action, is coming to the plaintiff, the defendant or his solicitor is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien, to pay that sum over to the plaintiff in disregard of the notice. That being the law, how do the facts stand here? In the first place, is the sum of £50, which is the subject-matter of the agreement of the 2nd of November, to be treated as the fruits of the action? It seems to me it must be. It was plainly paid under pressure of the action in order to settle it. It was a fund which was paid into court, and which, in the ordinary course, could not have been got out without notice to the plaintiff's solicitor had it not been for the notice which was given of the plaintiff appearing in person. Then, secondly, was notice given of the plaintiff's solicitor's claim for costs? It plainly was given to Messrs. Clapham & Fitch. They had distinct notice of it on the 9th of November, and after that they got the fund into their own hands and paid the fund over to the plaintiff in disregard of the notice. Accordingly, I think, subject to one further remark, that an order against them ought to go. I do not, however, upon the materials before me, see that the defendant Buxton is liable. No notice is shown to have been given to him, and the fund did not come into his hands; neither did he, as I think, authorize his own solicitors to receive payment of the money and hand it over to the plaintiff. All that he agreed to do was to do what was necessary to enable the plaintiff to obtain payment out of court of the £50. That payment out of court could not have been obtained without an order of the court. But it was not necessary for the purpose of getting it out of court that an application should be made either by the defendant or his solicitors. It might have been made by the plaintiff, and all the defendant would have had to do would have been to consent. I do not see, therefore, that the money came into the hands of the defendant or that he had notice given to him, and therefore I think there should be no order made against him.

Only one remark remains to be made, and that is that the solicitors on the record were Messrs. Ward & Rees, and not Ward alone. I have no explanation before me at the present moment as to how Mr. Rees ceased to have an interest in the fund; that defect must be supplied, or else Mr. Rees must in some way be made a party to the application. The plaintiff, who has received the fund, is liable as well as Messrs. Clapham & Fitch.

Johnston Edwards.—I will produce evidence that Rees handed over his interest in the fund to Ward.

Solicitors, *E. T. Ratcliff; Clapham & Fitch; J. E. Coxwell.*

Chan. Div. }
Kekewich, J. } April 2, 3, 1889.

HARRIS *v.* TUBB. (*a.*)

Leaseholds—Assignment—Consideration—Vendor's lien.

An assignment of leaseholds in consideration of natural love and affection is not voluntary.

Leaseholds, on which there was a vendor's lien, were assigned by the purchaser to his son in consideration of natural love and affection. The son had no notice of the vendor's lien.

Held, following Price *v.* Jenkins, 5 *Ch. D.* 619, 25 *W. R. Dig.* 253, *that there was sufficient consideration in the assignment to make the son a purchaser for value instead of a volunteer, and, therefore, that the vendor's lien did not hold against the son as assignee of the leaseholds.*

Trial of action.

One William Tubb was, at the date of the indenture next hereinafter mentioned, owner of certain leaseholds for a term of eighty-six years and three-quarters, subject to a peppercorn rent and lessee's covenants, and, in the view taken by the court of the evidence, to a vendor's lien for £148.

By an indenture dated the 24th of March, 1880, and made between William Tubb of the one part, and his son Alfred John Tubb of the other part, in consideration of the paternal love and affection which the said William Tubb had towards the said Alfred John Tubb, he the said William Tubb assigned the same hereditaments and premises unto the said Alfred John Tubb for the residue of the said term of eighty-six years and three-quarters, subject to the peppercorn rent and to the lessee's covenants.

It was not alleged that Alfred John Tubb had notice of the vendor's lien.

Alfred John Tubb subsequently mortgaged the same hereditaments and premises, with other property, to the plaintiff, Emma Harris, and died. She brought this action against Amelia Bayley Tubb, the administratrix of Alfred John Tubb, and against the vendors to William Tubb, claiming, *inter alia*, a declaration that any charge or lien to which the vendors might be entitled ought to be postponed to the plaintiff's mortgage.

Warmington, Q.C., and *MacSwinney*, for the plaintiff.

Hall, Q.C., and *P. V. Smith*, for the defendants, the vendors.—There is a vendor's lien for £148, which can be enforced, as the deed of 1880 was a voluntary deed.

Powell, for another defendant.

Oswald, for Amelia B. Tubb.—The deed of 1880 relieved William Tubb from liabilities under the lease, and therefore was for valuable consideration: *Price* v. *Jenkins*, 5 Ch. D. 619. There was moreover no notice of any lien.

Hall, Q.C., in reply.—A conveyance of leaseholds is not necessarily for value. If there is a real bargain and sale, and some inducement to get rid of property, the consideration may be valuable: *In re Lulham*, 32 W. R. 1013. But that was not the case here, as the property was valuable and was at once mortgaged. *Price* v. *Jenkins* has not been approved of and will not be extended, and was under the statute 27 Eliz. c. 4.

He referred also to the following cases: *Green* v. *Paterson*, 34 W. R. 724, 32 Ch. D. 95; *Hamilton* v. *Molloy*, 5 L. R. Ir. 339, 28 W. R. Dig. 197; *Gardiner* v. *Gardiner*, 12 Ir. C. L. R. 565; *Ex parte Hillman*, 27 W. R. 567, 10 Ch. D. 622; *In re Ridler*, 31 W. R. 93, 22 Ch. D. 74; *In re Marsh and Earl Granville*, 31 W. R. 845, 24 Ch. D. 11; *Lee* v. *Mathews*, 6 L. R. Ir. 530, 29 W. R. Dig. 71.

KEKEWICH, J., having decided on the facts that the vendors had a lien on the property for £148 unpaid purchase-money as against William Tubb, continued as follows: If Alfred John Tubb was a mere voluntary assignee of William Tubb, he was in no better position than his father, nor can his legal personal representative be in any better position. Now on the face of it the deed of the 24th of March, 1880, is a voluntary deed—*i.e.*, there is a good consideration, which is natural love and affection, as distinguished from a valuable consideration. That this was so appears from the fact that the property was valuable and money was raised upon it soon afterwards. If it were not for the decision in *Price* v. *Jenkins* I should regard that deed as a voluntary deed and declare the vendor's lien good as against the representatives of Alfred John Tubb. But that case was decided twelve years ago, and though it has been very much canvassed, and probably it is not too much to say that it has not received the unqualified approval of the profession, yet it has not been overruled. That case arose, it is true, under the statute 27 Eliz. c. 4; and there was everything to make the court uphold the assignment, which was for value, because there can be no question that to set aside such an assignment is to countenance a fraud. But James, L.J., though in his judgment he decided the question which he had to consider, arising as I have said, under the statute of Elizabeth, used language in that case which, as I must not forget, has passed under his eye and been allowed to stand as part of the case after revision by him. He says: "Can an assignment of leasehold property ever be, properly speaking, voluntary? I remember a case in my own practice at the bar, which is not reported, in which the owner of three leasehold houses made a promise on his deathbed to give one of them to his widow; and the executor accordingly signed a written agreement to assign one of the houses to the widow, she undertaking to pay an apportioned rent of one guinea to the ground landlord and performing the covenants of the lease. I advised that this was a *nudum pactum;* but it was held by Shadwell, V.C., to be an agreement for valuable consideration." It may be that Shadwell, V.C.'s decision was wrong. It may be that the question which James, L.J., there puts ought to be answered in the affirmative, that an assignment of leasehold property can, strictly speaking, be voluntary. But that is not consistent with the way in which it is put in the case, or, as I understand it, with the decision in the case, which seems to be founded on that general proposition. It is not for me to canvass that, and to say how far it ought to go. Mr. Hall presses me not to extend *Price* v. *Jenkins*; but, if my view of the case is right, I should not be extending it, but following it exactly.

A more difficult argument to deal with is this: that that decision is limited to cases under 27 Eliz. c. 4. I

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

cannot myself see that, on the face of the report. It was, it is true, a case under that statute; and no doubt there have been cases decided since—*e.g.*, *Ex parte Hillman, In re Ridler*, and, I think, also *Green* v. *Paterson*—in which the court seems to have treated *Price* v. *Jenkins* as applicable only to cases arising under that statute; but my difficulty is, that I nowhere find any judgment of the Court of Appeal saying that that is so. What has been said is no doubt consistent with that view; and it may be that when the Court of Appeal is called upon to consider the matter it may hold that view. But when I find, for instance, Cotton, L.J., in *Green* v. *Paterson*, referring to *Price* v. *Jenkins*, not at great length, but still at sufficient length for the purposes of the case then before him, and referring to it as decided under the statute of Elizabeth, but not saying in so many words that it is applicable to cases under that statute and to none other, I do not think that I am competent to supply those words and to say that it is applicable to no other cases. In Irish cases, where the judges are apparently not bound by the decisions of the Court of Appeal here, they have gone the other way, and thought themselves at liberty to decide differently. It would not be right for me to listen to those cases, because they have no authority here against the decisions of our own Court of Appeal. I am told that there are text-books which point to a review of *Price* v. *Jenkins* when the opportunity occurs; and if the amount in dispute in this case were larger I might express the hope that it would go to the Court of Appeal, and that this question which has agitated the professional mind would be set at rest. I should not of course apply the decision in *Price* v. *Jenkins* to any of those cases to which the Court of Appeal says that it is not applicable; but that seems to me to come to this: that it is not applicable to cases where, according to the statute or the practice of the court, you do look into the consideration to see whether it is sufficient or not. In ordinary cases that is not the rule; and so long as there is some consideration, and in the absence of fraud, the court does not inquire—does not "weigh in golden scales," as the phrase is—the consideration which has passed. I think that there was, according to *Price* v. *Jenkins*, some consideration sufficient to make Alfred John Tubb a purchaser for value instead of a volunteer, and that therefore the vendors' lien will not hold as against him and those claiming under him.

Solicitors, *A. H. Crowther; F. Bradley.*

Q. B. Div. (Huddleston, B., and Stephen, J.) Oct. 31; Nov. 1.

GERHARD v. MONTAGUE & CO.

LOW, SONS, & CO., *Claimants.* (*a.*)

Interpleader — Jurisdiction to order issue — Claimant substituted as defendant "in lieu of" applicant— Limitation of claimant to applicant's defences — R. S. C., 1883, *ord.* 57, *rr.* 1 (a), 7.

M. & Co. were sued by G. as acceptors on a bill of exchange. M. & Co. had handed the bill to L. & Co. for full value received. L. & Co. had really obtained the bill for one H. in consideration of the value of a cargo sent by G. to England from Russia, which H. instructed L. & Co. to sell on commission. H. obtained possession of the cargo on handing over the bill to G.'s agents in England. The bill was then forwarded to G. in Russia, and, being duly presented, was dishonoured, whereupon G. sued M. & Co. as acceptors. L. & Co. meantime give M. & Co. notice not to pay the bill, on the ground that they, L. & Co., had parted with the bill through the fraud of H., and that, the cargo being deteriorated, they had not received full value for the bill, and claimed to be recouped for their loss on its sale from the moneys handed to M. & Co. for the bill. M. & Co. apply for an interpleader issue to be ordered, which the master granted, and on which he substituted L. & Co. as defendants in lieu of M. & Co. On appeal to the judge at chambers the order for interpleader was affirmed, but a condition imposed limiting L. & Co., as defendants, to such defences only as M. & Co. could have raised.

Held, that, M. & Co. being "persons seeking relief who were under liability for a debt in which they were, or expected to be, sued by two or more parties making adverse claims" within the terms of R. S. C., ord. 57, *r.* 1 (a), *there was jurisdiction for the court or judge to exercise their discretion in ordering an interpleader issue, and that such discretion had been rightly exercised; but that there was no jurisdiction under ord.* 57, *r.* 7, *to limit the defences of the claimant, who is substituted as defendant, to such defences as the original defendant could raise, since the words of ord.* 57, *r.* 7, *empowering the court or judge to substitute any claimant as defendant "in lieu of" the applicant, the original defendant, did not mean that such claimant should stand "in the actual place of," but instead of, such defendant.*

Cross-motions against an order for an interpleader issue made by Wills, J., at chambers.

Upon the hearing of an application for an interpleader issue to be granted the master made such order, substituting the claimants as defendants, and upon appeal to the judge at chambers Wills, J., made the following order:—

Defendant to pay into court the sum of £588 18s. 7d. within a week, Low, Sons, & Co. (the claimants) to be substituted as defendants in the action brought by the plaintiffs against Montague & Co., but such substituted defendants to be confined to such defences and such grounds of counter-claim as the present defendants (Montague & Co.) might have set up.

The claimants (Low, & Sons, Co.) now moved against the above order in so far as it limited their defence to that available to Montague & Co., on the ground that the judge had no power to impose any such limitation.

The plaintiffs, Gerhard and Hey, moved that the whole order should be discharged, on the ground that there was no jurisdiction to make an interpleader order at all, or, if there was, that the discretion of the judge had been wrongly exercised.

Both orders were heard together, and the facts are fully set out in the judgment.

Pike, for the claimants.—The sole authority for interpleader orders is now contained in order 57 of R. S. C., 1883. By rule 7 of that order the judge may substitute a claimant as defendant "in lieu of or in addition to the applicant," but he has no jurisdiction to impose limitations on the defence of such substituted defendant.

J. E. Banks, for the plaintiffs.—This is not a case for an interpleader order because the two claimants are not claiming for the same subject-matter. An interpleader cannot be granted when, in the issue between the parties, either claimant would not be in the same position or could not assert the same rights of property. The plaintiffs' claim against Montague & Co. is on a bill of exchange, for the value of which the whole assets of Montague & Co. are liable. The claimants, Low & Co., can only claim against Montague & Co. for a specific sum of money, the price for which they bought the bill of exchange from them. No issue can be framed which would give the plaintiffs the same rights against Low & Co. as against Montague & Co; and if so, no interpleader will lie:—*Baker* v. *Australasian Bank*, 5 W. R. 258, 1 C. B. N. S. 515; *Farr* v. *Ward*, 2 M. & W. 844; *Dalton* v. *Midland Railway Co.*, 12 C. B. 458. If there is jurisdiction

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(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

the discretion of the judge has been rightly exercised in imposing a limitation on the defence to be raised by Low & Co. Since ord. 57, r. 7, the claimant can be substituted "*in lieu of*" the first defendant—*i.e.*, "in the place of" that defendant. The claimant, being exactly in the place of the first defendant, is limited to that defendant's right of defence.

R. Bray, for the defendants, Montague & Co.—The defendants are entitled to the relief of an interpleader order, and are not concerned as to any conditions imposed on the other two parties. They are persons "seeking relief under liability for a debt in respect of which they are sued, or expect to be sued, by two or more parties": ord. 57, r. 1 (*a*). They have been sued by the plaintiffs on the bill, and they can also be sued by Low & Co., who allege that they parted with the bill by fraud, and who, if so, remain the true holders of the bill: *Regan* v. *Serle*, 9 Dowling's P. Cas. 193; *Attenborough* v. *St. Katherine's Docks Co.*, 26 W. R. 583, 3 C. P. D. 450.

Pike, in reply.—Ord. 57, r. 1, clearly gives the judge discretionary power in granting an interpleader application. Rule 7 gives power to order an issue to be stated where advisable, but also a power to substitute or add a claimant as defendant, who, when so substituted, becomes a defendant in every respect instead of, and not in the shoes of, the former defendant. The discretion of both master and judge has been practically exercised in favour of an interpleader, and ought not to be reversed.

Huddleston, B.—We have to deal with two cross-motions. The claimants, Low & Co., move that the interpleader order may so far stand, but that the conditions imposed by my brother Wills be struck out from it. The plaintiffs seek to set aside the interpleader order altogether, though, if it is allowed to stand, they are willing it should remain, provided the conditions imposed on the claimants be maintained. The applicants for the order, the present defendants, Montague & Co., are content to have the interpleader order, whether with or without conditions, imposed on the other parties.

What are the real facts? The subject-matter of the litigation is really a cargo of game to be sent from Russia. The plaintiffs are Russian merchants consigning this cargo to London. Their agents are Shenker & Co., in London. Their instructions to their agents are that the cargo is to be consigned to one Hasfeld, but that they are not to part with the bill of lading until payment, or its equivalent, is received from a responsible person. Hasfeld, knowing this, sees Low & Co., and by representing to them, as is alleged, that the cargo was about to arrive, and that they (Low & Co.) were to act as agents for its sale with a payment on commission, induces them to find him means to pay for the goods. Low & Co. for that purpose propose to purchase the bill of exchange in question from Montague & Co. Hasfeld thereupon goes to Montague & Co. and gets the draft prepared by which the plaintiffs in Russia can obtain there the value of their consignment. Low & Co. take cash, £500 odd, to Montague & Co., and obtain from them the bill of exchange, under which they (Montague & Co.) are made liable at maturity for its amount. Low & Co. hand the bill to Hasfeld, who obtains from Shenker & Co. the bill of lading by handing to them the bill of exchange. This is sent out to the plaintiffs in Russia, and on being presented by them when due is dishonoured. Low & Co. allege that they parted with the bill to Hasfeld through a fraud on his part, because he represented the cargo as on the point of starting when it was really in harbour, and being composed of perishable articles was becoming deteriorated. The cargo being detained, was eventually sold by Low & Co. at a loss—namely, for £300 odd instead of £500 odd, the amount of the bill. They now allege their right to recover the bill or its value, because they only parted with it through the fraud of Hasfeld, whom they further allege to have been in reality the agent of the plaintiffs, who would therefore be answerable for his fraud. The plaintiffs sue Montague & Co. upon the bill as its acceptors. Low & Co., however, have given notice to Montague & Co. not to pay the bill, alleging that they have a cause of action against Montague & Co. for the same, and intend to maintain it. Montague & Co. being sued, or threatened to be sued, by these two parties, claim the benefit of an interpleader issue.

The master orders it, and Wills, J., confirms his order so far, but he incorporates into the master's order certain terms.

The questions for us are whether, under such circumstances, there is a right of interpleader at all; and, secondly, whether, if so, the judge has power to insert such conditions upon the claimants, who are substituted as defendants. When may relief by way of interpleader be granted? By ord. 57, r. 1 (*a*), "where the person seeking relief is under liability for any debt . . . . for or in respect of which he is, or expects to be, sued by two or more parties making adverse claims thereto." Clearly Montague & Co. were persons seeking relief as being "under a liability for a debt for or in respect of which two parties were making adverse claims." They had been, in fact, sued by the plaintiffs, and had notice from Low & Co. of their claim, in respect of which they might expect to be sued. The guiding words of the rule are, relief "may be granted" under such circumstances. A discretion is given to the judge to refuse or to grant the relief so applied for. Therefore the master and judge had jurisdiction to make this interpleader order. Ought that discretion to have been exercised in granting the relief? I should be quite ready to exercise my discretion here in ordering this relief, even if it had not been already so exercised by the judge and master, and I see no reason to overrule their discretion so far. It is hard upon the plaintiffs, who have parted with their cargo, to have to go from one person to another to recover its value. But Low & Co. have equally a grievance in having been, as they say, imposed upon by a person alleged to be an agent of the plaintiffs. Montague & Co. are certainly in a very hard position, since they are absolutely innocent parties, who have parted with a bill of exchange for value received, and are now called upon to meet that bill which they had reason to believe would be met elsewhere. Low & Co., again, have paid cash to obtain the bill, and have lost the full value of the cargo as well. Montague and Co. are clearly liable as acceptors of the bill, and, if so, have practically no defence. Low & Co. are equally clearly entitled to recover from someone their loss on the depreciated cargo, for which they had paid full value in the purchase of the bill. If they can show fraud in their parting with the bill, they have a good defence to the action by the plaintiffs, which, if sustained, would make Low & Co. the true holders of the bill, on which they could recover from Montague & Co. the difference between the value paid for it and the less amount realized for the sale of the cargo. Clearly, under such circumstances, Montague & Co. are entitled to be relieved from being made parties to this action. I hold, therefore, that the discretion was rightly exercised, and that the interpleader order ought to be granted.

The question remains whether the terms imposed by Wills, J., on the claimants, Low & Co., can be maintained—that is to say, whether he had jurisdiction to attach any such conditions to an interpleader order, limiting Low & Co. to those defences only which Montague & Co. could set up. I am of opinion that the judge had no power to grant an interpleader order and yet impose conditions on the claimants other than security for costs. By rule 7 of order 57 the judge "may order any claimant to be made a defendant in lieu of or in addition to the applicant," or "may order that

an issue between the claimants be stated and tried." It is said that the claimant being substituted "in lieu of" the original defendant, means that he must stand exactly in that defendant's shoes, but the words do not admit of such a narrow interpretation. The claimant may be made an additional defendant, in which case clearly he would be at liberty to raise any additional defences open to him, or he may be substituted altogether as defendant for the original defendant, in which case the same liberty must be left to him. The words mean "instead of" rather than in the actual place of the original defendant. I think, therefore, the limitation of Low & Co. to the defences only which Montague & Co. might have set up, is not warranted under the rules as to interpleader now in force. The order of the master, therefore, for an interpleader issue and for the substitution of the claimants as defendants will stand, and the order of Wills, J., will be varied so far as the limitation to particular defences is concerned.

STEPHEN, J.—I agree. If there is anything in the plaintiff's contention that the words "in lieu of" in rule 7, order 57, ought to have the narrow interpretation he wishes to impose on them, there is nothing to prevent him raising that contention at the trial, so as to prevent Low & Co. going into other defences than those open to Montague & Co., but I find no jurisdiction to make such an interpretation a condition of the grant of an interpleader order as has been done here.

Cross-motion of the plaintiffs dismissed.

Motion of the defendants granted.

Solicitors for the plaintiffs, *Bird & Moore.*

Solicitors for Low & Co., *Ingledew & Co.*

Solicitors for Montague & Co., *Hill, Son, & Richards.*

Q. B. Div. (Lord Coleridge, C.J., and Field, J.) } June 26, 27, 28, 1889.

THARSIS SULPHUR AND COPPER CO. *v.* SOCIETE INDUSTRIELLE ET COMMERCIALE DES METAUX. (*a.*)

Practice—Service of writ—Contract with foreign corporation—Appointment by foreign corporation of agent to accept service—Power of parties to contract themselves out of the rules—Bankruptcy of foreign corporation—Effect of on authority of agent—Ord. 9, *r.* 8.

It is competent for parties to a contract, to contract themselves out of the rules as to the mode of service of writs, and to appoint a particular person to accept such service: hence, where, in a contract made by an English company with a foreign corporation, the foreign corporation appoint a person within the jurisdiction of the English courts their agent to accept service of any writ or other legal process arising out of the contract, and where such appointment is to be irrevocable until some other agent is appointed, and no other agent is appointed, service of a writ upon such person is a good and effective service, although not in accordance with the rule as to service upon corporations, even though the foreign corporation has become bankrupt before the date of such service, as such bankruptcy does not operate as a revocation of the authority of the agent to accept service.

Appeal from an order of Pollock, B., at chambers, affirming an order of a master, refusing an application to set aside a writ on the ground that the defendants reside and carry on business in France out of the jurisdiction of the court, and that the writ was not properly served.

The plaintiffs are a company who carry on business in England, the defendants are a company incorporated under articles of association carrying on their business in Paris, and they never have had, and had not at the date of the service of this writ, any office or place of business in the United Kingdom.

The plaintiffs, in April, 1888, entered into a contract with the defendants for the sale and delivery to the defendants of certain quantities of copper, which the defendants were to accept from time to time.

This contract contained the following clause:—"This contract shall be construed according to English law, and for the purposes thereof the defendants hereby submit themselves to the jurisdiction of the High Court of Justice in England, and they hereby appoint A. H. Berthoud and John Reeves, of No. 41, Threadneedle-street, in the City of London, and every member for the time being of the firm of Coulon & Berthoud, of No. 41, Threadneedle-street aforesaid, or of any firm succeeding them in business, and every clerk for the time being of such firms, their agents on whom any writ or other legal process in respect of any matter arising out of this contract may be served, and such appointment shall not be revocable unless and until the defendants shall have appointed other agents carrying on business in London . . . and service of any writ or other legal process upon the agents hereby appointed shall be deemed to be good service on the defendants, and for the purposes of this clause the defendants elect domicile at the office of A. H. Berthoud and John Reeves aforesaid."

In April, 1889, the defendants were declared by a French court to be in judicial liquidation, and a judicial liquidator was appointed, and the business was being wound up under the French bankruptcy laws.

The defendants thereupon refused to accept any more deliveries of copper, and an action for breach of the contract to accept the copper was brought by the plaintiffs against the defendants.

The writ was personally served upon Mr. John Reeves, a member of the firm of Coulon & Berthoud, at 41, Threadneedle-street. The defendants did not appear to the writ, but made an application to set aside the service, on the ground that it had not been properly served according to the provisions of ord. 9, r. 8. The defendants had not revoked the authority of Mr. John Reeves to accept service on their behalf.

The master and judge at chambers held that the service was good, and refused to set aside the writ; the defendants appealed.

Tindal Atkinson, for the appellants.—The service here is bad, as it is not in accordance with the terms of the rule, and it is not competent for parties to contract themselves out of the rule. The contract to accept service at a particular place is a contract which can be revoked at any time; it is not binding upon the liquidator, and the bankruptcy revokes the power.

Barnes, Q.C., and *Houghton*, for the respondents.—The parties can contract as to the mode of service as they have done in this case, and such contract is good. The power to accept service is irrevocable unless and until another person is appointed, and no other agent has been appointed here. The contract to accept service in London is good, and the bankruptcy of the defendants does not revoke the authority of Mr. John Reeves to accept service.

The following cases were cited:—*Nutter* v. *Messageries Maritimes de France*, 54 L. J. Q. B. 527, 34 W. R. Dig. 150; *Copin* v. *Adamson*, 24 W. R. 85, 1 Ex. D. 17; *Gibson* v. *Carruthers*, 8 M. & W. 333; *Smith* v. *Buchanan*, 1 East, 6; *Lewis* v. *Owen*, 4 B. & Ald. 654; *Phillips* v. *Allan*, 8 B. & C. 477; *Bartley* v. *Hodges*, 9 W. R. 693; *Ellis* v. *McHenry*, 19 W. R. 503, L. R. C. P. 228; *Gardiner* v. *Houghton*, 2 B. & S. 743.

FIELD, J.—This is an action brought by an English

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

corporation against a foreign corporation, and the question now before us is whether the service of a writ which has been effected is a good service, and the defendants come, *quia timet*, and say, "Declare this to be a bad service, and do not let any judgment follow upon it unless we appear." The question therefore is, whether the writ has been effectually served.

Now, the principle of the rules of practice is that in all cases, where possible, personal service should be effected, and if prompt personal service cannot be effected, then that there may be a service in such manner as a judge may direct. In the case of a corporation service is effected according to the rule declaring what the terms of that service and the mode of service shall be; but that mode has not been adopted in the present case, therefore the case does not fall within that rule.

The service has been effected by delivering a copy of the writ to Mr. John Reeves at his place of business in London, and Mr. Reeves is a partner in a firm known as Berthond & Reeves, who acted sometimes as agents for the defendant corporation, and not merely as agents, because the service would be bad in accordance with the decision (*Nutter* v. *Messageries Maritimes de France*) to which my lord was party some years ago, which says that any person to be served must be an officer at the head office of the defendant company; but then the service is alleged to be good shortly by contract. Now, by the clause in question in the contract there is not a mere power of attorney given to Reeves; there is not a power given to him to do anything whatever; but there is a contract, whereby, for good consideration, the defendants contract that they attorn to the jurisdiction of this court, and further, that they have appointed certain persons to be their agents, on whom any writ for the purpose of this contract may be served. Had the matter rested there, it seems to me that that is an irrevocable appointment of those people; but it is clear that that is so by the clause itself, for the clause goes on to say that such appointment shall not be revocable unless and until the defendants shall have appointed other agents carrying on business in London. Therefore it was clearly within the power of the defendants to have, first of all, appointed other agents, and then they might have revoked the authority of Berthond & Reeves, but that they have not done. There is no suggestion anywhere that this appointment has been revoked, nor, indeed, would it have been possible to revoke it unless or until some other persons had been appointed.

The question, therefore, is raised whether or not, under the circumstances, this service is an effective service. Now it is clearly not a service in the manner provided by the rules, but then is it to be competent to anybody to contract themselves out of the rules, at all events to agree to a particular mode of service, and not only that, but to appoint a particular person to accept service for him. It is quite clear, on principle, that a person may appoint another for consideration as agent to accept service, and may contract with someone else that that person shall be the person, until revocation, to accept service. Not only is that so on principle, but there is an authority to that effect. North, J., has very recently held that view in the case of this very company, where he held that a foreign person can contract to have a domicile for the purpose of being sued within the jurisdiction (*Societe Industrielle des Metaux* v. *Companhia Portuguesa dos Minas de Huelva*, 33 S. J. 253). Therefore a person may so contract, and it seems to me that the defendants here have so contracted. It seems to me that if the matter had rested simply without bankruptcy or liquidation, there could be no question at all but that that would be good service.

The next point is, does the bankruptcy of the defendants render the service bad. The way in which it was argued for the defendants was this: It was said this was a personal contract between the plaintiffs and the defendants, and that is not binding upon the judicial liquidator, but is like the case of the revocation of a power of attorney by death or otherwise. That does not seem to me to apply here. What is the effect of the bankruptcy? We have a statement of the French law with reference to it, but I do not rely on that, because I assume that in French law *cessio bonorum* is very much the same as it is in this country—namely, that if a man has given up his property to be divided among his creditors, then the Legislature has said that a contract shall not be dissolved, but that there shall be simply a remedy against the property of the person who has made the contract. It is quite clear that it has long been the law that this country does not recognize the dissolution of a contract made in this country and declared to be the law by the legislation of a foreign State.

Under these circumstances, what effect can be given to the fact that the company has been put into judicial liquidation? The limits of the rule have been very well fixed in the case cited of *Phillips* v. *Allan*, which was the case of the discharge of an insolvent debtor by *cessio bonorum* in the Court of Session in Scotland, and it was held—in accordance with a previous case of *Smith* v. *Buchanan*—that such discharge is no answer to an action brought by an English subject in a court in this country to recover a debt contracted in England; and it was held in that case that the foreign law of Scotland did not affect the contract. It was sought for the defendants to distinguish these cases by saying that may be true with regard to the construction of the contract. It must be true also with regard to the remedy provided by the contract, because that was the very point there—whether a man could still sue upon a debt although, by the *cessio bonorum* of Scotland, the Legislature there had discharged him. However, I fail to see what distinction can be drawn between the construction of the contract or remedy, and this provision which is to give this mode of service, and it is a very important matter, generally as well as in this particular case, as this is a contract which the plaintiff company would not have entered into but for that provision.

I think it would be a very dangerous precedent to decide that such a contract should be void for the purpose for which it was entered into—namely, for the service, and that a man should be relegated to somebody somewhere else. I am certain the parties never intended that state of things to exist.

The motion, therefore, must be refused, with costs.

Lord Coleridge, C.J.—I will only say that I concur in the judgment of my learned brother, because it appears to me quite clear that any judge would give substituted service in a case of this sort, and that would be the same practically.

Appeal dismissed.

Solicitors for the plaintiffs, *Upton, Athey, & Upton.*

Solicitors for the defendants, *Murray, Hutchins, & Stirling.*

Prob. Div. & Adm. Div. Probate. } October 29

In the Goods of Samuel Covell (*a.*)

Probate—Practice—Administrator absconding—Revocation of grant—New grant.

Where an administrator could not be found, having absconded, after threatening to commit suicide, and the

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

only estate remaining unadministered was a claim for debt against a bankrupt's estate, the court without citation revoked the grant and made a new grant to one of the next of kin.

Application to revoke the grant to Samuel Henry Smyth Covell of letters of administration *de bonis non* of the personal estate and effects of Samuel Smythe, and to make the grant to Mrs. Welsh.

Samuel Covell, the testator, died on September 1, 1875, leaving, by his will, his residuary estate to the four children of his son Samuel Henry Covell.

Samuel Henry Covell proved the will on the 15th of September, 1875, and died on the 13th of January, 1880, leaving part of the personal estate and effects of the said Samuel Covell unadministered, and after making his will, by which he left all his property to his wife, who predeceased him, and appointed her sole executrix.

On the 17th of March, 1880, letters of administration *de bonis non* to the personal estate and effects of the said Samuel Covell were granted to Samuel Henry Smyth Covell, one of four children of the said Samuel Henry Covell.

Samuel Henry Smyth Covell partly administered the estate of Samuel Covell, and on the 9th of December, 1884, he left his home, and had never since been heard of by his relations or friends. He left behind him a letter to his sister which pointed to suicide, and three days before, he had attempted to commit suicide by taking laudanum. A detective was employed and advertisements issued for several months, but without his friends being able to discover if he was alive or dead.

The only unadministered personal estate of the said Samuel Covell was a claim for about £1,084 against a bankrupt's estate expected to pay about 5s. in the pound, and it was desired to obtain representation to the deceased's estate for the purpose of proving against the bankrupt's estate and receiving the dividend. The applicant, Mrs. Welsh, was a married woman, one of the four children of the said Samuel Henry Covell.

Bargrave Deane, in support of the application, referred to *In the Goods of Bradshaw*, 36 W. R. 848, 13 P. D. 18. [BUTT, J.—In that case the administrator was abroad; here, if alive, it is not shown that he is abroad. Must he not be cited ?]

He also referred to *In re Jenkins*, 3 Phill. Eccl. Cas. 33; *In re Hoare*, 2 Sw. & Tr. 361n.

BUTT, J.—I think the precedents cited show that I have the power to do what is asked, and on the facts I am satisfied that the applicant is entitled to the grant.

Solicitors, *F. Venn & Co.*

Prob. Div. & Adm. Div. } June 25, 1889.
Probate. }

In the Goods of MINSHULL (*a.*)

Administration—Special circumstances—Uncertainty as to next of kin—Agreement between parties alternatively entitled—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

A doubt, depending on the validity of a marriage of the grandmother of one of two persons, having arisen as to which of them was the sole next of kin of the deceased, who died intestate, an agreement was made between them that one of them should apply for a grant of letters of administration to the deceased's estate, and, after payment of all expenses and costs, divide the residue between them.

Held, that there were special circumstances in the case which authorized the court to grant such letters of administration to the applicant under section 73 of the Court of Probate Act, 1857.

In the Goods of Hopkins, *L. R.* 3 *P. & D.* 235, 23 *W. R. Dig.* 7, *followed.*

Application on behalf of Mary Frances Hall, for a grant to her of letters of administration of the personal estate and effects of Harriet Minshull, deceased, under section 73 of the Court of Probate Act, 1857.

Harriet Minshull died on the 20th of November, 1883, in the Marylebone Workhouse, in the county of Middlesex, a spinster, and intestate. She was entitled to £200 Consols under the will of Samuel Minshull, deceased, which became payable to her estate on the death of Harriet Lalliment, who died on the 20th of March, 1888. This sum was believed to be subject to a mortgage, on which about £150 was due. She was also entitled, as sole next of kin of her sister, Elizabeth Grindley, to a legacy of the same amount under the same will, which also became payable on the death of Harriet Lalliment.

Mary Frances Hall, the wife of William Henry John Hall, was the greatniece and sole next of kin of Harriet Minshull, and the only person entitled in distribution to her personal estate and effects, if Mary Minshull, a sister of the said Harriet Minshull, was lawfully married to Edward Francis Finden, the grandfather of Mary Frances Hall. If Mary Minshull was not lawfully married to Edward Francis Finden, the sole next of kin of Harriet Minshull, and the only person entitled in distribution to her personal estate and effects, was Harriet Louisa Minshull Demarest, the first cousin twice removed of Harriet Minshull.

A doubt having been raised whether Mary Minshull and Edward Francis Finden were lawfully married, Mary Frances Hall and Harriet Louisa Minshull Demarest, in order to avoid litigation, agreed that Mary Frances Hall should apply for the grant of letters of administration, and that she should, as such administratrix, collect and receive the estate, and after payment thereout of the charges thereon and of the costs of administration and of the costs, charges, and expenses of both parties of and in relation to the grant and the administration of the estate, should divide the residue equally between Harriet Louisa Minshull Demarest and herself.

The trustees of the will of Samuel Minshull had paid into the Chancery Division of the High Court the amount of the legacies due to the estates of Harriet Minshull and Elizabeth Grindley.

Searle, in support of the motion, referred to the case of *In the Goods of Hopkins*, L. R. 3 P. & D. 235, 23 W. R. Dig. 7.

Middleton, for Mrs. Demarest, consented.

BUTT, J.—That case seems stronger than the present; I shall therefore follow it.

Application allowed.

Solicitors for the applicant, *E. W. & R. Oliver.*

Solicitors for Mrs. Demarest, *Gush, Phillips, & Co.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Prob. Div. and Adm. Div. Nov. 7, 19.

LISTER *v.* LISTER. (*a.*)

Divorce—Practice—Dissolution of marriage—Discretion of judge — Permanent maintenance — "Dum sola" *clause—20 & 21 Vict. c. 85, s. 32.*

It is within the discretion of the judge, under the 32nd section of the Act 20 & 21 Vict. c. 85, upon a decree for dissolution of marriage being made, to order the husband to secure to the wife, by way of maintenance, an annual sum for her life absolutely, without limiting the payment of it by a "dum sola" *clause." This discretion ought to be exercised in each case with regard to the facts thereof and the conduct and circumstances of the parties, as prescribed in the section, and no* primâ facie *rule ought to be laid down with reference to the insertion or omission of the above words limiting the payment of the annual sum to the wife with respect to the contingency of her marrying again.*

Appeal from Butt, J.

This was an appeal by a husband from an order of Butt, J., directing him to secure the payment of an annual sum by way of permanent maintenance to his wife, who had obtained a dissolution of the marriage on the ground of his adultery and cruelty.

The decree was made absolute on February 12, 1889, and on March 1 the lady presented a petition for permanent alimony.

The question was whether a "*dum sola*" clause ought not to have been inserted in the order.

Section 32 of 20 & 21 Vict. c. 85 is as follows:—"The court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may, in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the court shall have the same power to make *interim* orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation."

The registrar's report recommended that an annual sum of £195 out of the husband's income should be secured to the wife for life, or until she marry again.

Butt, J., made an order omitting the words "or until she marry again."

The husband appealed.

Finlay, Q.C., and *Henry Stokes*, for the appellant.—The words omitted ought to have been inserted. It is not reasonable that the husband should have to go on paying the maintenance money if the wife remarries. It was not intended to enable her to indulge in the luxury of maintaining another husband. The purpose of the section was to provide for the maintenance of the wife, and not for the punishment of the husband. [FRY, L.J.—At the time the Act was passed it was the practice to insert the "*dum casta*" clause.] [They referred to *Fisher* v. *Fisher*, 10 W. R. 122, 2 Sw. & Tr. 410; *Chetwynd* v. *Chetwynd*, 14 W. R. 184, L. R. 1 P. & D. 39, 44; *Sidney* v. *Sidney*, 13 W. R. Div. Dig. 16, 4 Sw. & Tr. 178; *Gladstone* v. *Gladstone*, 24 W. R. 739, 1 P. D. 442; *Medley* v. *Medley*, 30 W. R. 937, 7 P. D. 122; *Hart* v. *Hart*, 18 Ch. D. 670, 29 W. R. Dig. 100; *Harrison* v. *Harrison*, 35 W. R. 703, 12 P. D. 130.] In *Gladstone* v. *Gladstone* the wife had brought money into settlement. Here she brought nothing.

Inderwick, Q.C., and *Searle*, for the wife.—The opinions of the divorce judges have been modified since Sir C. Cresswell's time in the direction of greater liberality to the wife where the husband is the guilty party. Sir C. Cresswell's practice was to give a bare maintenance because the wife need not have obtained the divorce. In *Fisher* v. *Fisher* the money was the husband's, so the *dum sola et casta* clause was inserted. In *Gladstone* v. *Gladstone* it was held that the wife's own property ought to be given back to her unconditionally, but that the condition should be imposed on what was to be paid her out of the husband's property. In *Medley* v. *Medley* longer experience had altered Sir J. Hannen's opinion, and he would not make any restriction. In *Harrison* v. *Harrison* Butt, J., gave a portion of the income of the husband to the wife during her life ("joint lives" was a mistake in the report), and after postponing the question to the drawing up of the order refused to direct the restriction to be inserted. In an unreported case the judge thought that under the circumstances the provision should be for life, the woman being young, and the case a gross one. We ask your lordships to affirm the similar order in the present case. In *Corbett* v. *Corbett*, 13 P. D. 136, 36 W. R. Dig. 72, the maintenance was ordered to be paid to the wife for her life, her husband having a pension. In the present case Butt, J., tried the case and heard the evidence, and considered the case a very aggravated one, both as to the cruelty and the adultery.

Stokes, in reply.—*Corbett* v. *Corbett* had nothing to do with a *dum sola et casta* clause. [COTTON, L.J.—Is there any practice in the Divorce Court as to the insertion of these clauses?] The practice was to insert them till Butt, J., set his face against it. It is contrary to public policy to omit them.

Cur. adv. vult.

Nov. 19.—COTTON, L.J.—This was an appeal against an order of Butt, J., directing payment of an annual sum as permanent alimony to a wife after she had obtained a decree absolute for dissolution of marriage on the ground of her husband's cruelty and adultery. The ground of the appeal was that the judge excluded from the order for the wife's maintenance that which is usually inserted in these orders—that is to say, the words "as long as she shall remain unmarried," or words to that effect.

Now, if he had laid down that, as a general rule, the payment should be for the life of the wife absolutely, I should have desired to have the case re-argued before the full Court of Appeal. But he did nothing of the sort, he merely expressed his opinion that the judge had a discretion, which was to be exercised in each case according to the particular facts of that case, and he did not consider the circumstances of the present case were such as to call for the introduction of the limitation. He puts it as a mere matter of exercising his discretion, under the circumstances of the particular case, and under the 32nd section of the Act of 20 & 21 Vict. c. 85 he has, in my opinion, such a discretion. The section says "the court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the court, secure to the wife . . . such annual sum of money for any term not exceeding her own life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the

(a.) Reported by R. H. DRAKE, Esq., Barrister-at-Law.

parties, it shall deem reasonable." That leaves it to the judge's discretion absolutely. I do not say that it is a discretion the exercise of which cannot be appealed from, but I can see no reason in the present case for interfering with the manner in which the judge has exercised his discretion. He knows much more of the circumstances of the case, and of the conduct of the husband, than we can do. I think, therefore, that it would be wrong here for us to interfere with the exercise of his discretion, and that this appeal should accordingly be dismissed.

FRY, L.J.—The discretion exercised by the judge in this case is given by the Act to which Cotton, L.J., has referred. By section 32 of that Act the court may order the husband to secure to the wife either such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to the circumstances of the case and the conduct of the parties, it shall deem reasonable. Now, it was said here that Butt, J., had laid down a general rule that *primâ facie* any alimony should be for the life of the wife who had obtained the divorce; but a reference to his actual judgment shows that he did nothing of the sort. It was contended, on the other hand, that *primâ facie* the rule ought to be to give the wife the annual sum allowed as alimony only till she marries again. But that does not appear to me to be any more correct than the other contention. The Act empowers the judge to give the wife an annual sum for any period not exceeding her life, or in the alternative to give her a gross sum of money, and it could not be said that the enjoyment of the latter would be taken from her on her second marriage. The Legislature, therefore, is not, it may be inferred, unfavourable to the principle of granting an annuity for the whole life of an innocent wife. Therefore, it seems to me that the effect of the statute is to leave an unfettered discretion to the judge in each case, and I think we should be doing wrong if we attempted to lay down any *primâ facie* rule on the subject. The duty of the judge is to exercise his discretion in each case according to its circumstances. The only question for us, therefore, is whether, in the present case, he exercised it in a manner which we ought to reverse. The facts of the case are these:—The wife was married at the age of seventeen; she had no property of her own; but the husband had property producing an income of between five and six hundred a year. The husband turned out to be an intemperate and cruel man, and an unfaithful husband, and he made the life of his wife unbearable, drove her from his house, and compelled her to seek the aid of the Divorce Court against him. That is as great a wrong as it is possible for a man to inflict on his wife. Under those circumstances the judge has given her an annuity of £195 for life (about a third of her husband's income), which I think is not at all an unreasonable compensation to be made by a man who has acted as the husband in this case has been shown to have done, and violated all his marital duties.

I think this appeal should be dismissed with costs.

Appeal dismissed.

Leave to appeal to the House of Lords was refused.

Solicitors for the appellant, *Smith, Fawdon, & Low*, for *Wright, Williams, & Wright*, Leicester.

Solicitors for the petitioner, *Roche & Son*.

From Chan. Div. June 3, 4, 1889.

WHITE v. CITY OF LONDON BREWERY CO. (a.)

Mortgage — Public-house — Mortgagee in possession — Premises let by mortgagee, with stipulation that tenants should take beer from mortgagee—Account—Trade profits—Proviso limiting sum to be recovered by mortgagee.

In an action for account by a mortgagor against a mortgagee, a brewer, who had gone into possession and had afterwards sold the mortgaged premises—a public-house—a decree had been made directing (inter alia) "*an account of the rents and profits of the mortgaged premises received, or which, without wilful default, might have been received,*" *by the mortgagee, and also directing an inquiry as to* "*the profits made by the mortgagee in carrying on the business in the pleadings mentioned,*" *since he took possession of the mortgaged premises;*

Held, upon further consideration of the action, that the profits arising from the supply of beer by the mortgagee to persons to whom the mortgagee had let the public-house, with a stipulation that they were to take all beer from him, were not "*profits of the mortgaged premises,*" *but were profits of the mortgagee's brewery business, which was not in any way carried on on the mortgaged premises, and that the mortgagee was not bound to account for such profits;*

But held, also, that if it could be shown that the mortgagee could have got a higher rent for the mortgaged premises if they had been let free from the stipulation that the tenants should take all beer from the mortgagee, then the mortgagor would be entitled to relief in respect of the difference of the rents.

Decision of North, J., *affirmed.*

Appeal from North, J.

This action had been brought by the mortgagor of a leasehold public-house against the first mortgagees, who had been in possession of and had sold the mortgaged premises, and by it the plaintiff sought an account of what was due to the defendants on their mortgage; an account of the rents and profits of the mortgaged premises which the defendants had received, or, but for their wilful default, might have received; and that the defendants might be charged with an occupation rent for the period during which they were in occupation of the premises; an account of the profits of the business carried on upon the mortgaged property by the defendants or their agents; an account of the proceeds of sale; and payment of what should be found due by the defendants.

Judgment had been given in the action, and the following accounts were thereby directed:—(1) An account of what was due to the defendants under the mortgage; (2) an account of all sums of money laid out by the defendants in necessary repairs and improvements; (3) an account of the rents and profits of the mortgaged hereditaments received by the defendants, or by their order, or for their use, or which, without their wilful default, might have been so received; (4) an inquiry (without prejudice to any question in the action) as to what profits were made by the defendants in carrying on "the business in the pleadings mentioned" since they took possession of the mortgaged premises, and what sums might properly be allowed to the defendants for expenses in carrying on such business.

The chief clerk certified (*inter alia*):—(1) That there was due to the defendants at the date of the sale of the mortgaged premises £1,415 17s., principal moneys; that the property had been sold for £2,650, out of which the defendants had paid a second mortgagee the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

sum of £377 7s. 3d.; (2) that the defendants had, or, without their wilful default, might have, received rents and profits to the amount of £396 9s. 10d.; (3) that he disallowed a surcharge brought in by the plaintiff for £1,991 18s. 10d., the profits on beer supplied by the defendants to the premises from December, 1869 (shortly after the date when they had entered into possession of the premises), to September, 1879 (shortly before the date of the sale); (4) that no profits had been made by the defendants in carrying on the business, but that their carrying it on resulted in a loss.

The action then came on again before North, J., for further consideration, and on summons to vary the chief clerk's certificate, and his lordship held that the defendants could not be charged with the profits made by them on beer supplied to their tenants of the premises, but that the defendants were chargeable with such rent as might have been obtained if the premises had been let by them free from any restriction to take the beer from a particular firm; and he charged the defendants with £20 a year extra rent in this respect.

This was an appeal by the plaintiff, the mortgagor, from this decision of North, J.

The material facts are as follows:—

The plaintiff was the lessee of a public-house and carried on the business of a publican, and in 1868 he mortgaged the public-house to the defendants, who were brewers; the mortgage was to secure repayment of £700 and such further sums as might become due to the mortgagees for money advanced, goods sold, or otherwise, with interest. The mortgage contained a power of sale by the defendants if any default in payment should be made, and it was declared that the sale moneys should, after payment of all costs and expenses incidental to such sale, and the reimbursement to the mortgagees of all moneys they might have paid, or be liable to pay, for the repairs, insurance, or otherwise, or for keeping on foot the lease of the premises, be applied in payment of the principal and interest moneys then due on the security, and, subject thereto, in payment of the moneys then due to a second mortgagee, and the residue (if any) paid to the mortgagor; and then followed a proviso that "the total amount to be recovered by the mortgagees"—the defendants—"under these presents shall not exceed £900."

The defendants entered into possession of the mortgaged premises in September, 1869, from which date until March, 1871, they carried on on the premises the public-house business through a manager. The business was during that time carried on at a loss.

In March, 1871, the defendants let the premises to Moulton, as tenant, at a rent of £30 the first year (half of which sum was for furniture and fixtures put in by the defendants), and £40 a year afterwards, but the £40 was subsequently reduced to £30.

In August, 1873, the defendants let the premises to Hake at a rent of £60 a year.

Both Moulton and Hake, by the terms of their agreements, were bound to take beer from the defendants.

In September, 1879, the defendants sold the mortgaged premises, and the purchase-money, £2,650, was paid on the 24th of November, 1879.

Cozens-Hardy, Q.C., and *A. a'B. Terrell*, for the appellant, the plaintiff.

Napier Higgins, Q.C., and *J. D. Fitzgerald*, for the respondents, the defendants.

The arguments are fully dealt with in the judgments.

Lord ESHER, M.R. [His lordship referred shortly to the facts as above stated, and continued:—].—Proceedings have been taken in the plaintiff's name calling upon the defendants, the brewery company, to account for the purchase-money which they had received on the sale, and for the rents and profits during the time of their being in possession. That the proceedings are in reality taken in favour of the second mortgagee can hardly be doubted.

Disregarding, however, the form of the proceedings, let us see what must be the rights of the parties. The defendants are bound to account to the plaintiff, after the sale—for the proceeds of the sale—for any rents which they have received, or but for their wilful default or neglect might have received, from the property while they were in possession, and for any profits which, during that period, they made out of and by the mortgaged property. They have not to account for anything more, and as against that they are entitled to set the expenses which they have fairly incurred in consequence of having been obliged to take possession, and keep possession, and to sell. They have a right to set off against the sale the expenses of the sale. They have a right to set off against the rents and profits they have received any rents they have been obliged to pay (inasmuch as this was leasehold property), and any insurance they were obliged to pay, and anything else which was an expense put upon them by reason of their being obliged to take and keep possession, expenses which they were obliged to incur in order to receive the rents and profits which they are to account for.

But the nominal plaintiff says, "No, you must account to me for the profits which you have made upon beer which you have supplied to the house, as being part of the rent and profits which you have got out of the mortgaged property." Can these profits on beer supplied to the house be said to be profits by and out of the premises? Such an idea seems to me simply preposterous, and we cannot entertain it. Mortgages of beer-houses are of everyday occurrence, and the failure of the mortgagor to repay the brewer is a matter of every other day occurrence. Have the publicans who have fallen by the way in such numbers ever thought of raising this question? Not one. Neither did this man. It is the second mortgagee who thought of this. I suppose somebody has put this experiment into his head; it is an experiment which failed in the court below, and which fails here.

The question as to the profits on beer was the real fighting part of the case, and if the learned judge below had refused to consider anything else in the matter nobody could have objected. The plaintiff was playing for high stakes. He did not care about the difference of rent, he wanted £1,990 to be brought in, and then his surplus of a little less than £400 would have been nearly £2,400.

If a man plays for such high stakes and utterly fails, I feel inclined to say, "You cannot turn round when you have failed on that, and say you are entitled to a trifling advantage on another view of the matter." But the learned judge took a more indulgent view, and said to the mortgagees, "You took possession of the property, and you let the property; you were bound to the mortgagor to let it at a fair rent—you had no right, for instance, to let those premises for nothing, and then make a profit out of supplying beer to them. If you did not let the property for as good a rent as you could reasonably get, you ought to account for the difference between what you did let it for, and what you ought to have let it for."

The learned judge dealt with the matter upon that footing, and if he was to deal with it at all, that was the right footing. What the fair rent was is a matter of evidence, and the evidence here is as bad as the pleading; it goes to every point except the real point in the case. Now does the evidence show that the mortgagees let this house at any time for a less rent than they ought to have got? For the first two years they kept it in their own hands. There is no question but

that they had a right to do that, and the evidence is that if they had tried to let it at the time when they took possession they could not have got a tenant. The defendants then put Moulton in as their servant, and the value of the business is carried from nothing at all, by their money and by their servants, to something. After this, Moulton takes the house at a rent of £30 for the first year, and £40 for the next, and he was to take his beer from the defendants. He found that he could not make anything of it and asked them to reduce his rent to £30, and half of that was for furniture belonging to the defendants. The evidence is clear that nobody at that time would have given more.

In 1873 Hake came in at a rent of £60, and the evidence is that nobody at that time would have given more than he gave. The learned judge came to the conclusion that from the year 1874 to the year 1879 the property was let for a less rent than might have been got if there had been no stipulation to take beer from the defendants, and there being no evidence given on behalf of the plaintiff what amount of rent ought to have been got, the learned judge was obliged to make a guess, and he allowed £20 a year. If he had given only £10, the plaintiff could not have complained. He has got £100, which will go perhaps to assist the second mortgagee to pay the costs, for which I have no doubt he is liable, and with that he must be content. The appeal must be dismissed.

COTTON, L.J.—This case came on upon further consideration, and a motion to vary the chief clerk's certificate. The action was brought by a mortgagor against the mortgagees, who had been in possession and had sold the mortgaged property, to take an account of what the mortgagees ought to hand over to the second mortgagee or to the plaintiff out of the moneys which had arisen by the sale. The sale is not in any way impeached, but on various grounds it is contended that the certificate ought to be varied so as to be less favourable to the mortgagees. The great contention was, that the mortgagor was entitled to the profits made by the mortgagees as brewers in supplying the mortgaged property, which was a public-house, with their own beer. Now, first, is that question open on this decree?

There are two clauses on the decree under which it is said to be open. The first is an account, "of the rents and profits of the mortgaged premises received by the defendant company, or which, without the wilful default of the defendant company, might have been so received." In my opinion the profits of the brewers from supplying beer do not come within that. They are not the profits of the mortgaged hereditaments; they are the profits of the brewer's business, which is not in any way carried on upon the mortgaged premises. I know of no authority, and Mr. Cozens-Hardy can give me none, that a mortgagee is bound to account for any profits thus made. There was a suggestion that a mortgagee was, in some respects, in the same position as a trustee; but that was not pressed. As regards certain matters no doubt a mortgagee is liable to the same obligations and restrictions as a trustee; but he is not a trustee; and there is no authority to show that if a mortgagee of a public-house, who is a brewer, supplies the public-house with his beer, he is liable to account for the profits he makes by so supplying it.

The other clause of the decree, under which it is said that this point is open, is that directing, without prejudice to any question, an inquiry what profits were made by the defendant company in carrying on the business in the pleadings mentioned since they took possession. In my opinion that does not in any way touch the question. The business there referred to is not the brewery business, but the business of the public-house, and this inquiry is directed to such profits (if any) as were made by the defendant company in the business carried on in the public-house during the period they were in possession by their manager or servant, and in no way gave the plaintiff any opportunity of raising this question, nor entitled him to make the defendant company account for any profits they made as brewers, not in carrying on the business of the public-house, but in carrying on their own business. That was the main contention. The plaintiff's claim was disallowed in chambers before the chief clerk, and then was disallowed by the judge, and I think it was rightly disallowed.

There is then another point to be considered. A mortgagee in possession must account for the rents which, but for his wilful default, he would have received. The plaintiff says that if he fails as to the brewer's profits, yet he ought to have a larger sum in respect of the rents which the mortgagees would, but for their wilful default, have received. I think the learned judge was a little indulgent to the plaintiff, but in these days, if there is a question to be decided on the evidence before the court, we are not inclined to restrict the suitor very closely to the pleadings.

The learned judge has allowed the plaintiff an addition of £20 a year from the 19th of August, 1874, to the date of the sale, in addition to the rent obtained by the mortgagees. Before 1873 there had been a period during which the brewers had been in occupation by their servant, then a period during which they let nominally at £30, but really at £15 a year, since half the £30 was paid by the tenant for the furniture and fixtures which belonged to the brewers, and then a period of letting at £60 a year. I was rather struck at first at there being no occupation rent charged against the brewers while they were in possession by their servant; it does not appear to have been asked for; but if it had been, is there any case made for giving it? I think the evidence is the other way. At the time the brewers took possession the trade in the neighbourhood was in a bad state. We know that when trade is in a bad state workmen have not money to spend in beer, so the custom would fall off, and when a public-house has got into a low state there is a difficulty in re-establishing its business.

This house, at the time when the brewers took possession of it, could not be let, because nobody could carry it on without a loss, as the brewers found by experience. As soon as they could let it at all, they let it to Moulton, who found a rent of £40 too high and was allowed to remain at a rent of £30. On the evidence before us there is nothing which satisfies my mind that the defendants could by any possibility have obtained a larger rent than that, during the tenancy of Moulton. Then, I think, the learned judge was right in saying —when there was a change in the tenancy—that there was no ground for charging the defendants with more than the £60 rent which they received from Hake during the first year of his occupation; but after that time, when he had established himself, the learned judge thought that something more ought to have been allowed. The evidence on that point is of a somewhat doubtful character, but I think the plaintiff has not established that more should be given him than what the learned judge has allowed—viz., £20 a year, which comes altogether to £100, as the Master of the Rolls has said.

There is one other point to be considered. The mortgage contained a proviso limiting the amount to be recovered under it by the defendant company to £900. The mortgage is a mortgage for £700, and for such other sums as might be due from the mortgagor for money advanced or goods sold and delivered or upon any other account whatsoever, and in a mortgage of that kind there must be some limit to the amount to be secured to the mortgagees. I think the certificate is framed in a somewhat awkward way in finding that there was due £1,415 17s. principal, without mention-

ing how it was made up. It consisted of principal moneys of some sort, but only £788 5s. 9d. was due in respect of the £700 originally advanced and goods supplied, and, as I understand the proviso, it only applied to the £700, sums afterwards advanced, and money due for goods supplied, and as the amount of these did not exceed £900 the limit was not exceeded. Let us look at the declaration in the mortgage as to the application of the moneys arising from the sale. "All moneys to arise from any such sale shall, after payment of all costs and expenses incidental to such sale, or in anywise consequent on such default" (*i.e.*, default in payment of the money)—"and the reimbursement to the said company of all moneys they may have paid or be liable to pay for the insurance, repairs, or otherwise, or for keeping on foot the said lease and the licences belonging to the said premises"—these moneys, then, were first to be paid out of the money arising from the sale—and after this the money is to be "applied in or towards the payment of the principal and interest moneys then due on the security hereof." That is entirely distinct from reimbursing the mortgagees what they paid for insurance or for repairs, or in any other way for keeping the security on foot. In my opinion the proviso limiting the amount to be recovered does not apply to the moneys which the mortgagees can claim for their reimbursement, but simply to the principal moneys due on the mortgage, which are to be paid out of the sale moneys after the sums directed to be reimbursed have been paid, and does not prevent payment beyond the £900 either for interest or in respect of anything which is directed to be reimbursed. The objection on this ground, therefore, is not a good one. The appeal, therefore, fails.

FRY, L.J. — The main contention in the present case is a claim on the part of the appellant to receive a share of the profits made by the defendants in brewing beer supplied to a public-house. In my judgment the question does not arise here. The statement of claim asks for "an account of the rents and profits of the mortgaged premises received by the defendant company"; but it does not claim any portion of the profits made by them in brewing beer supplied to the tenant of the house. The decree follows the same lines. It directs an account of the rents and profits of the mortgaged hereditaments. It also directs an account of the profits made by the defendants whilst actually carrying on business on the mortgaged premises; but it does not direct any account of the profits made by them in brewing the beer. I think, therefore, it is entirely out of the question to raise that point in the present case. Whether, if it were raised, it would have any chance of success is very doubtful. I do not doubt that, if the mortgagee be a brewer, and let the house with a covenant to take all the beer from himself, and it can be shown that he could have got a larger amount of rent if the house had been free from that covenant, the mortgagor, either under the wilful default clause or otherwise, must have some relief in respect of the difference between the two rents. And some relief has been given him in this case; but I think the claim for a share of the profits made by the brewers in supplying beer is entirely outside this order.

As to the rest of the case, I shall content myself with saying that I entirely concur in the judgments which have been pronounced by the Master of the Rolls and Cotton, L.J.

Appeal dismissed.

Solicitors for the appellant, *Carr & Co.*

Solicitors for the defendant company, *Western & Sons.*

From Q. B. Div. Nov. 2, 7.

HORNSEY LOCAL BOARD v. MONARCH BUILDING SOCIETY. (*a.*)

Local government—Recovery of expenses—Charge on premises—Apportionment—Limitation of actions—Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 62—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A local authority who had incurred, in 1875, *expenses which, by section* 62 *of the Local Government Act,* 1858, *were made a charge upon the premises in respect of which they were incurred, did not apportion the expenses till* 1885, *and in* 1889 *brought an action against the then owner of the premises to effectuate the charge.*

Held, affirming the Queen's Bench Division (37 *W. R.* 556, 23 *Q. B. D.* 149), *that the expenses became a charge upon the premises at the date at which they were incurred; that the period of twelve years limited by the Real Property Limitation Act,* 1874, *s.* 8, *commenced to run from then, and therefore that the action was brought too late.*

Appeal from the decision of a divisional court (Mathew and Grantham, JJ.) reported 37 W. R. 556, 23 Q. B. D. 149.

In 1875 the local board, in pursuance of section 69 of the Public Health Act, 1848, after notices having been duly served, and default made by the owners, completed certain paving works in respect (*inter alia*) of premises of which the defendants subsequently became owners.

In 1885 these expenses were apportioned, and in 1886 notice of the apportionment was served on the defendants, and a demand made for payment. In 1889 this action was commenced in the Clerkenwell County Court for a declaration that the expenses were a charge on the premises, and for a sale of the premises to give effect to the charge. The county court judge gave judgment for the local board, but this was set aside by the Divisional Court on the ground that the expenses became a charge on the premises at the date at which they were incurred, and therefore that the action was barred by section 8 of the Real Property Limitation Act, 1874.

The plaintiffs appealed.

Shiress Will, Q.C., and *Macmorran*, for the appellants.—A present right to receive cannot arise until the expenses have been apportioned. Until then there is a charge for an unascertained amount, and there can be no right to receive.

Henn-Collins, Q.C., and *Montague Lush*, for the respondents.—The charge is imposed on the land the moment that the expenses are incurred: *Tottenham Local Board* v. *Rowell*, 15 Ch. D. 392, 28 W. R. Dig. 138, and *In re Bettesworth and Richer*, 36 W. R. 544, 37 Ch. D. 535. The right to receive accrues at the same time, and is a present right to receive, although incapable of being enforced until after apportionment. Secondly, on the evidence the defendants were purchasers without notice of the charge, which, therefore, cannot be imposed against them.

They cited *Bassett* v. *Nosworthy*, 2 White & Tudor L. C. 1; *Ind, Coope, & Co.* v. *Emmerson*, 36 W. R. 243, 12 App. Cas. 300; *Westbury Rural Sanitary Authority* v. *Meredith*, 30 Ch. D. 387, 33 W. R. Dig. 109; *In re Poole's Estate*, 25 W. R. 862, 6 Ch. D. 739; *Corporation of Sunderland* v. *Alcock*, 30 W. R. 655; *Farnworth Local Board* v. *Compton*, 34 W. R. 334; *Thomson* v. *Eastwood*, 2 App. Cas. 215, 25 W. R. Dig. 341; *Rothery* v. *Munnings*, 1 B. & Ad. 15; *Batle* v. *Batle*, 20 W. R. 534, L. R. 13 Eq. 497.

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

Shiress Will, Q.C., replied.

Cur. adv. vult.

Nov. 7.—Lord EBHER, M.R.—This was an action brought by a local board to enforce a charge imposed on certain land by reason of the local board having done certain works in the street in front of such land. The defence set up by the owners of the land is, that the local board are too late, and that their action is barred by the Real Property Limitation Act, 1874, s. 8. The first question which arises—namely, as to when the charge attaches to the land—has already been settled by the Court of Appeal in the *Tottenham case*, which has been followed by *In re Betteswoth and Richer*. The charge attaches from the moment that the works have been completed—that is to say, in this case, that the charge was imposed on the land in 1875, more than twelve years after which the present action is brought. Then comes the question as to the construction which we must put on section 8 of the Statute of Limitations. This is clearly a proceeding to recover a sum of money charged upon, and payable out of, land within the meaning of that section, and so far the case is within the words of the section. But it is said the section does not apply, because in 1875 there was no one who had a present right to receive the money, and that right did not arise until the expenses had been apportioned. So to construe the section would, I think, be to say that the words "to receive" meant to enforce payment, which certainly, in the ordinary use of language, they do not. Until the expenses were apportioned the local board could not enforce payment, but they had a perfect right to receive the money, and were—being able to receive it—capable of giving a discharge for, or release of, it. To construe the section otherwise would land us in insuperable difficulties, and would give the local board the power of indefinitely postponing their action by postponing the apportionment. It has been, no doubt, argued that if they postpone the apportionment beyond a reasonable time a *mandamus* would lie to compel them to apportion; but why should we consider such difficulties when, according to the plain and ordinary meaning of the section, they will not arise. Then it was said that, in 1875, because the expenses had not been apportioned, the local board were not capable of giving a discharge for them. But I have already said that I think they had then a present right to receive the money, and, if so, they were capable of giving a discharge for it, because the receipt includes a discharge. The local board were not under any incapacity, which is, I think, what the words refer to. Therefore, in my opinion, the case falls within the section if the section is to be read according to its ordinary grammatical meaning. There is no reason why we should construe it otherwise, and, that being so, the plaintiffs' action is too late, and the appeal must be dismissed.

A point was taken as to the defendants having purchased without notice, and therefore it was said that the charge could not be enforced against them. According to the view we take of the Statute of Limitations, that point becomes immaterial; but I will only say that I should hesitate before acceding to such a proposition.

LINDLEY, L.J.—The question in this case turns upon the true construction of the Public Health Act and of the Statute of Limitations. The present action was brought to raise a charge on land on which an apportioned sum was chargeable. If a present right to receive the sum chargeable accrued in 1875 the Statute of Limitations is a bar to the action. The charge is created by the Local Government Act, 1858. A distinction is drawn between the summary remedy for the money against the person and the charge upon the land, and a special limitation is given in the case of the summary remedy for the personal action (*Greece v. Hunt*, 25 W. R. 543, 2 Q. B. D. 339). The question now arises as to what limitation is to be imposed with regard to the charge on the land. That appears to be given by section 8 of the Statute of Limitations. That section is a mere repetition of the similar enactment in the old statute (3 & 4 Will. 4, c. 7), and I therefore have looked to see whether our decision is in any way inconsistent with the cases on that statute. The language used in section 8 and section 2 differs; in section 2 the time is said to run from the period when a right of action accrues, section 8 speaks of a present right to receive. The phrase is perhaps a little ambiguous, and therefore it is necessary to look at the object of the Act and the consequences of the different suggested constructions. If one of those constructions would give rise to an anomaly no lawyer would adopt it if the other construction would not have such an effect. If the right to receive is to be read as equivalent to the right to sue the anomaly is produced that the creditor can by his own act postpone practically for ever the operation of the Statute of Limitations. No doubt it is the duty of the local board to ascertain the precise sum due by apportionment, but no time is fixed for that apportionment, and if we were to hold that the operation of the Statute of Limitations only begins on the apportionment we should be giving the local board an indefinite time within which to bring their action, which, as I have said, would, I think, be anomalous. But I do not think we are driven to such a construction. If we take the right to receive in its ordinary meaning, and not as meaning a right to sue, then the moment that the charge attaches to the land the Statute of Limitations begins to run. Looking closely at section 8 we see that it refers to charges both present and future. A "present" right to receive, therefore, refers to a reversionary charge falling in, and becoming an actual charge. Then what do the words "a person capable of giving a discharge" mean? I think that they were inserted to exclude persons labouring under any incapacity such as infancy or insanity.

The case of the Tottenham Local Board shows that the charge is a present existing charge from the moment of the completion of the works, and the present right to receive the money then arises, although the amount may not have been reduced to pounds, shillings, and pence. It is not necessary that the amount should be ascertained before there can be a right to receive. Take for instance the case of a dissolution of partnership: each partner has at once a right to receive the amount which may be found due to him on partnership accounts being taken, and the Statute of Limitations begins to run although the amount due to each partner has not been ascertained. There is no real difficulty about the question, and none of the cases decided under the old Act are in opposition to the view which we take. I have therefore no hesitation in saying that the Divisional Court were right in holding that this action was too late. As to the other question, it becomes unnecessary to consider it, and I will only say that I am not at all captivated by Mr. Henn Collins' argument.

LOPES, L.J.—The case raises an important question, and therefore, although I entirely agree with the judgments which have been delivered, I think I ought to add a few words of my own. It is said that a present right to receive means an effective right which can be enforced by action. In my opinion the words should be given their plain and ordinary meaning. The *Tottenham case* says that the expenses become a charge on the land the moment that they are incurred. Various things may have to be done after that before the right to receive them can be enforced, but, in my opinion, the right to receive them arises concurrently with the imposition of the charge. It is a present right to receive, although the amount is not yet ascertained. So

in a case where notice of action is necessary, a right of action exists although it cannot be enforced until the notice has been given. In my opinion the words "capable of giving a discharge" were only intended to exclude people labouring under an incapacity. This construction of the Statute of Limitations is consistent with the intention of the statute, and the opposite construction would, in my opinion, be anomalous, and would encourage the very uncertainty which the Act was intended to discourage.

On the other question raised, I say nothing. It is unnecessary to do so.

Appeal dismissed.

Solicitors for the appellants, *Tatham & Hardy.*

Solicitors for the respondents, *W. H. Withall & Co.*

From Q. B. Div. July 30, 1889.

CANADA SHIPPING CO. *v.* BRITISH SHIPOWNERS' MUTUAL PROTECTION ASSOCIATION. (*a.*)

Marine insurance — Mutual insurance association — Damage caused by "improper navigation" — Improper condition of ship to receive cargo.

By the rules of a mutual insurance association, the plaintiffs, who had entered their ship on the books of the association, were entitled to protection in respect of loss of, or damage to, any goods or merchandise on board the ship caused by the "improper navigation" of the ship.

A cargo of wheat was loaded on board the ship, and on arrival at its destination it was found that the wheat was tainted with the smell of paraffin, and it was rejected by the consignee. The smell arose from a cargo of liquid composition, carried on the previous voyage, which had leaked into the hold and saturated the limber boards and ceiling of the ship.

Held, that the damage to the cargo was not caused by "improper navigation" of the ship within the meaning of the rules, and that the plaintiffs were not entitled to recover the loss.

Appeal from the judgment of Charles, J., in favour of the defendants (22 Q. B. D. 727).

The plaintiffs were the owners of a ship called *The Lake Ontario*, which was entered on the books of the defendants, an association of shipowners, for the whole amount of her tonnage. Among the risks, events, and occurrences in respect of which, according to the defendants' rules, the plaintiffs were by reason of such entry entitled to protection were the following:—"4 (*d*). Loss of or damage to any goods, or merchandise, or other property, or things on board, or in charge of any ship entered for protection under these rules (not being the ship herself, or her tackle, furniture, or stores) when such loss or damage has been caused by the improper navigation of such ship, or by collision with any substance other than water. . . . Damage to or loss of goods or things on any pier, or jetty, or like structure caused by like improper navigation shall be deemed covered by this clause." "12. No member shall have any claim under these rules for costs or charges of repairing any ship entered for protection under these rules, nor for any damage to, or loss of cargo, or other things where the same shall have been caused by improper stowage."

It was proved at the trial that in November, 1884, *The Lake Ontario* carried a general cargo from Middlesborough to Adelaide, part consisting of seventy casks of patent liquid coating composition, to be used as paint for machine castings.

The ship arrived at Adelaide in May, 1885, and it was found that a quantity of the composition had leaked from the casks into the hold, and had saturated a portion of the dunnage, and the ceiling, and limber-boards of the ship. The whole ship was pervaded with a strong smell of creosote or paraffin. When she was empty the ceiling and limber-boards were scraped in the usual way, but no special measures were adopted to get rid of the smell.

In June she was loaded with a cargo of wheat in bags for Dublin. On her arrival in Dublin, after a few bags had been discharged, a complaint was made by the consignee that they smelt of paraffin. The discharge was stopped in consequence, and the plaintiffs bought in the cargo at the market price of undamaged wheat. The cargo was taken to Liverpool, where the whole was found to be more or less tainted with the smell of paraffin, and the plaintiffs sold the cargo for the best price they could get, and were losers to the extent of about £2,400. The present action was brought to recover this amount.

Charles, J., held that the damage was not caused by "improper navigation"; and secondly, even assuming that it was, that the case was one of "improper stowage." He accordingly gave judgment for the defendants.

The plaintiffs appealed.

J. Gorell Barnes, Q.C., and *Carver*, for the plaintiffs.—"Improper navigation" in this clause, as applied to a cargo-carrying ship, includes taking the ship to sea in a condition unfit for carrying her cargo: *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*, 35 W. R. 793, 19 Q. B. D. 242. The ship was fit to go to sea as far as her safety was concerned, but she was not fit to carry the cargo. It was therefore "improper navigation" to take her to sea in such a condition. This was not "improper stowage." Improper stowage has nothing to do with the state of the ship; it relates to the mode in which the cargo is loaded.

They also cited *The Warkworth*, 33 W. R. 112, 9 P. D. 145; *Tattersall* v. *National Steamship Co.*, 32 W. R. 567, 12 Q. B. D. 297; *Stanton* v. *Richardson*, L. R. 9 C. P. 390, 22 W. R. Dig. 223; and *Good* v. *London Steamship Owners' Association*, 20 W. R. 33, L. R. 6 C. P. 563.

Cohen, Q.C., and *Joseph Walton*, for the defendants, were not called upon.

Lord ESHER, M.R.—I do not agree that this court, in *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*, placed upon the words "improper navigation" a meaning other than their ordinary meaning. If the court had done so, I should think that the decision could not be a right one. The court paraphrased the meaning of the word "navigation," so as to enable it to apply that word to the facts of the case. In my opinion the case was rightly decided, and the phraseology used was perfectly accurate. In my judgment in that case I said:—"I think, therefore, that if there be negligence before the navigation of the ship commences—negligence of the owner or his servants—which has the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that makes the navigation, under those circumstances, improper navigation by the shipowner or those for whom he is liable. . . . Here the negligence commenced before the navigation of the ship commenced, but it was negligence of the shipowner and of those for whom he was responsible, and it had the effect that it rendered impossible, unless that matter were found out and put right, to navigate that ship, after her navigation had begun, safely with regard to the safety of the goods."

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

That seems to me to be a correct statement as to safe or unsafe navigation with regard to a cargo-carrying ship. It is not, of course, exhaustive. If that is the true meaning of the term "navigation" in an instrument like this, the question arises whether there was improper navigation in this case. The ship, with regard to her sailing qualities, was in perfect order. But there was a bad smell in her hold. I cannot call that "improper navigation." I agree with the reasoning and judgment of the learned judge upon that point. With regard to the question of "improper stowage" it is not material to consider it.

LINDLEY, L.J.—I am of the same opinion. I cannot see how the smell of the creosote in the hold of the ship can be called improper navigation. It had nothing to do with the safe sailing of the ship. There was, no doubt, something improper done, but I cannot bring it within the meaning of the term "improper navigation." It was said that *Carmichael's case* compelled us so to hold. The facts were wholly different. The judgment in *Carmichael's case* is perfectly consistent with our present decision.

BOWEN, L.J.—I am of the same opinion. The question is whether the damage here was caused by "improper navigation," and what is the meaning of those words in the instrument before us. It is clear that damage caused by improper navigation must be caused by navigation of an improper kind, and that damage not caused by navigation cannot be caused by improper navigation. Navigation means the sailing of the ship, having regard necessarily to whether it is a passenger or a cargo-carrying ship.

It is said that *Carmichael's case* is contrary to this, and that it decided that the damage was caused by "improper navigation" when it was not caused by anything to do with navigation in the ordinary sense at all. It seems to me to decide nothing of the sort. I think that the language used by the Master of the Rolls in that case, assuming that the instrument was in the same words as this, was perfectly accurate. The language used by the other members of the court must be construed with reference to the facts before them. Instead of that their language has been taken out and pressed upon us without the context and the surrounding circumstances. Damage caused by improper navigation must be damage caused by navigation of an improper kind, and according to *Carmichael's case* the navigation is not the less improper navigation because it arises from something which was done before the voyage commenced for which the owner is responsible.

Appeal dismissed.

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Solicitors for the defendants, *W. A. Crump & Son.*

High Court of Justice.

Chan. Div.
Chitty, J. } July 10, 11, 1889.

In re READ AND GRESWELL'S DESIGN. (*a.*)

Patent—Patents, &c., Act, 1883, *ss.* 47, 58, 60, 90—*Similar designs—Different classes—Designs Rules*, 1883.

Where a person has registered a design in one of the classes specified in schedule 3 *to the Designs Rules*, 1883, *another person cannot register a similar design in another class for similar articles made of different material.*

This was an application by a Miss J. Taylor, who had in January, 1886, registered a design in class 5 in schedule 3 of the Designs Rules, 1883, that the entry of a design registered by the respondents in November, 1886, in class 12 of the above schedule might be expunged from the register.

Class 5 is for "articles composed wholly or partly of paper (except hangings)," and class 12 is for "goods not included in the other classes." The designs were substantially identical.

Morton Daniel, for the applicant.—The respondents' design is not new and original at the date of registration as required by section 47: *Le May* v. *Welch*, 33 W. R. 33, 28 Ch. D. 24, 35.

G. White, for the respondents.—The applicant has no rights in her design outside the class in which it is registered: *Edwards* v. *Dennis*, 30 Ch. D. 454, 30 W. R. Dig. 197; *In re Lyndon's Trade-Mark*, 34 W. R. 403, 32 Ch. D. 109; *Jay* v. *Ladler*, 37 W. R. 505, 40 Ch. D. 649.

CHITTY, J.—The applicant's design is registered in class 5, which is for articles composed wholly or partially of paper, except hangings, which are included in another class. The respondents' design is registered in class 12, which is for goods not included in the other classes, and it is argued on their behalf that, although their design may not by itself be new and original, yet that it is so within the meaning of section 47 of the Act. That argument comes to this, that where a new and original design is registered in one class, a rival designer is at liberty to take the design and transfer it bodily to another class, and register it in that class, or, if it be on the register, may maintain it there. I do not think this argument can be sustained. No doubt the copyright in a design conferred by section 60 of the Act is limited to the goods in the class or classes in which the design is registered, and this is clearly the case, for under section 58, which gives a special remedy by penalty for the infringement of a registered design, the registered proprietor cannot proceed against the infringer in respect of goods outside the class in which the design is registered, and for this reason, that the person registering, having knowingly confined the registration to one class of goods, has, by so doing, impliedly given notice to all the world that they are at liberty to use the design for goods not included in the class or classes, for a person may register a design in more than one class. It is on this that the respondents' argument is based. But can the Legislature have had this intention? I suggested the case of a design registered for jewellery, and another trader, finding this to be so, and that articles marked with such design were being put on the market, and people were becoming generally acquainted with the design, taking this design and registering it in some other class of goods, such as glass (class 4) or lace (class 9), a thing which in the case of many designs might easily be done. I am satisfied that it was not the intention of the Legislature to allow this to be done. The answer to the argument is to be found really in section 47 of the Act, where the words used are, "Any new original design not previously published in the United Kingdom." To be capable of being registered a design must be "new or original" in fact, and not, as is suggested, "new or original" as to some particular class of goods. It cannot be said to be new and original if it has already been applied to articles of an analogous character.

This application must, therefore, be granted, and with costs.

Solicitors, *Reader & Hicks; Tyrrell, Lewis, & Co.*

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Chan. Div. Chitty, J. July 5, 1889.

Burland v. Broxburn Oil Co.
In re Burland's Trade-Mark. (a.)

Trade-mark—Fancy word—"Distinctive"—"Common to the trade"—Rectification—Patents, &c., Act, 1883, *ss.* 64, (1), (c), *and* (2), 74, (1), (b), (2), (3), 90.

The word "distinctive" used in section 74 (1), (b), *of the Patents, &c., Act,* 1883, *means* primâ facie *distinctive, and any word which, though* primâ facie *distinctive, is, in fact, common to the trade, must be disclaimed when registered as part of a combination.*

The words "common to the trade," in section 74 (1), (b), *are equivalent to "open to the trade."*

Motion.

This was a motion by the defendant company under the Patents, &c., Act, 1883, that the register of trade-marks might be rectified by expunging the word "Washerine" (which word had already been decided by Chitty, J., to be descriptive only) from the Mark No. 77,935, or in the alternative for the entry of a disclaimer of any exclusive right to the use of such word.

The mark was for a label to be put round bottles in which laundry preparations were sold. The mark contained the word "Washerine" in large letters at the top, middle, and bottom of the label, and again some seven times in smaller letters; secondly, the written signature of "F. A. Burland & Co."; and thirdly, a quantity of printed matter, part of which was laudatory of "Washerine," and part of which consisted of directions for use. The defendants (the present applicants) also manufactured and sold for laundry purposes a preparation which they advertised as "Washerine."

Romer, Q.C., and *Carpmael*, for the motion, cited Sebastian on Trade-Marks, p. 316, note *b.*, 2nd ed.; *In re Van Duzer's Trade-Mark*, 35 W. R. 294, 34 Ch. D. 623; *Humphries* v. *Taylor Drug Co.*, 37 W. R. 192; *In re Hudson's Trade-Marks*, 34 W. R. 616, 3 Rep. Pat. Cas. 155, 162; *In re Kuhn & Co.'s Trade-Marks*, 53 L. J. Ch. 238; Patents, &c., Act, 1888, ss. 10, 16.

Byrne, Q.C., and *John Cutler*, for the respondents (the plaintiffs), cited *In re Horsburgh & Co.'s Application*, 32 W. R. 530n, and *Thompson* v. *Montgomery*, 37 W. R. 637, 41 Ch. D. 49.

Romer, Q.C., replied.

Chitty, J.—I have to consider sections 64 and 74 of the Act of 1883, which have both been repealed by the Act of 1888, and new sections have been substituted for them. I am not at liberty to interpret the Act of 1883 by the Act of 1888, because the Act of 1888 comes after the Act of 1883, and because the language of the new sections—viz., 10 and 16 of the Act of 1888—when compared with sections 64 and 74 of the Act of 1883, varies, and I am not able judicially to say to what extent the Legislature was only making a variation in its language, and to what extent it was making substantially a new enactment. I refer to those two sections 10 and 16 merely for the purpose of saying that much that is obscure on the sections as they stood in the Act of 1883 has been now made clear, and that the substitution of the new enactments is to distinguish the essentials from the non-essentials when anything that is a trade-mark is registered, and to compel the person who seeks for registration to distinguish upon the face of the register itself that which is essential and that which is not. Now undoubtedly the respondents have a good trade-mark with reference to the written signature of the firm, and they say that they are entitled to register with that, without any disclaimer, the term "Washerine," as being a mere simple addition to the trade-mark, and a word in respect of which they can claim no rights.

Without going through the arguments at length, I will take the 74th section, which runs thus:—"Nothing in this Act shall be construed to prevent the Comptroller entering on the register . . . as an addition to any trade-mark," and then comes the two sub-sections. It is not clear on the face of this Act, looking at the words "as an addition to any trade-mark," whether that which is registered, is registered as part of the trade-mark, or is registered as an addition to the trade-mark; the language as it stands would appear, until I read what comes afterwards, to denote that it is an addition to the trade-mark, and not a part of the trade-mark itself. It is clear from some portions of the subsequent part of this section that something which can be registered as an addition to the trade-mark is not part of the trade-mark, because sub-section 2 of this section contains a provision for a disclaimer of some of this additional matter, and if on the face of the register the person registering disclaim a part of the addition, it is plain that that part of the addition so disclaimed is not part of the trade-mark. Now the two sub-sections are (*a*) and (*b*), and I may, for the purposes of this case, lay aside the sub-section (*a*), because that relates to a trade-mark used before the 13th of August, 1875, and this trade-mark was not used before that date. Sub-section (*b*) runs thus: "In the case of an application for registration of a trade-mark not used before" the date I have mentioned, "any distinctive word or combination of words, though the same is common to the trade"—that is to say, nothing in the Act shall preclude the Comptroller from entering on the register as an addition to any trade-mark any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which his application is made. Now, staying there for one moment, the term "distinctive," as has been pointed out by Mr. Sebastian, is not consistent with the rest of the section, because if the word is common to the trade it is not distinctive. Therefore I take it, it means any word which is *primâ facie* distinctive, or which might be otherwise distinctive. Of course, directly it is really found to be common to the trade it ceases to be distinctive, but I think the meaning of it must be a word which is *primâ facie* distinctive.

In the case before me the word "Washerine" clearly was inserted on the register, as is shown by the evidence, as a distinctive word, and I take it that this part of the enactment, "any distinctive word," relates back to the 64th section, where the term "fancy word or words not in common use" occur, and as I read that section, and in conformity with what I understand to be Cotton, L.J.'s opinion upon it, the word "distinctive" runs through the whole of the sub-section (*c*), so that the latter portion of that sub-section in effect stands "a distinctive fancy word or words not in common use." The same section 64, in sub-section (3), uses other phraseology—namely, "any special and distinctive word." I think, therefore, that the phrase "any distinctive word" in sub-section (1) (*b*) of the 74th section has a reference to the language of the 64th section, but it now appears, and it is made part of the argument for the respondents, that in the result, though the respondents considered that the word "Washerine" was a distinctive word, it is not.

Then I have to ascertain what is the meaning of the phrase "common to the trade," and the respondents' argument is that those words are not used in their grammatical signification, but that they mean in common use in the trade, and their object in asking me to vary the language of the Legislature in that sub-section is apparent, because then they think they can escape from sub-section (2) of the 74th section, which requires them to enter a disclaimer where there is any

(a.) Reported by V. de S. Fowler, Esq., Barrister-at-Law.

such common particular or particulars to be found on the register, or proposed to be entered on the register. They were bound to disclaim any right to the exclusive use of the same. The argument in support of the interpretation of the words "common to the trade" being equivalent to "commonly used in the trade" is founded on the third proviso of the 74th section, the substance of which is that "any device, word," and so forth, publicly used before the date mentioned in 1875 "by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods." But that is no definition nor explanation of the term "common to the trade," except an explanation to the limited extent which I am about to mention. It might have been a question whether user by three or four or five or six persons would have made a word or combination of words common to the trade, and the proviso is introduced merely for the purpose of settling that question, which might have been a difficult one of fact, and saying that, where you have user in the trade by more than three persons, then the name so used shall be deemed to be common to the trade. But that is only a particular case, and it has not the effect of defining the meaning of the term.

Now, the applicants' contention is that "common to the trade" means that which is open to the trade to use, substituting another phrase in order to bring out exactly the meaning which the applicants contended ought to be placed upon the word, and in support of this contention they put this case: Supposing that there is some word which has been used by the trade largely some ten years or so, or by twenty or thirty persons before the application for registration under this Act of 1883, but for certain reasons all those persons except two have dropped the user, any of the others may have recourse to the user again at any time; but say the applicants, if the term "common to the trade" is confined to user, it must mean user at the time of the application. That was (I put the question specially to Mr. Byrne) also the contention on the part of the respondents, that "common to the trade" meant common use at the date when the application was made, and I think that is a very good illustration to show that the Legislature could not have intended to employ this term in that limited sense. The true solution of the question is very simple. The phrase "common to the trade" is not to be interpreted otherwise than according to the ordinary rules of grammar, and I think "common to the trade" means exactly what it says. I cannot really make use of a better term, which I think exactly corresponds with the meaning that it is "open to the trade." Therefore, I hold that the applicants are entitled to an order which is, within the 90th section, a variation, in fact, of the register, where without sufficient cause something has been entered upon it; or I will make the order as asked, that the respondents should disclaim any right to the exclusive use of the term "Washerine," and make the order with costs. I may add, as this case may go elsewhere, that, as I understand, Kekewich, J., has come to the same conclusion in *Humphries* v. *Taylor Drug Co.*, and I also gather that there are *dicta* of Cotton, L.J., in the two cases mentioned in the Board of Trade reports in conformity with what I have decided.

Solicitors, *Wilson, Bristows, & Carpmael; Janeways, Gribble, & Oddie*, for *W. Burtonshaw*, Crowle.

Chan. Div. North, J. } Oct. 28.

In re Jones.
Dutton *v.* Brookfield. (*a.*)

Will—Trustee—Power to mortgage testator's real estate.

A testator, after appointing two persons executors and trustees of his will, directed "that the trustees for the time being of my will shall have full power to settle my accounts and wind up my affairs as they or he shall think fit, and in so doing to make any sales and arrangements they or he shall judge expedient." And the testator devised and bequeathed all his real and residuary personal estate unto and to the use of his trustees upon the trusts therein declared. Shortly after the testator's death one of the trustees named in the will (the other having renounced probate and disclaimed the trusts thereof) raised a sum of £500 by a mortgage of a portion of the testator's real estate for the purpose of satisfying some pressing claims against the testator's estate.

Held, that the mortgage was authorised by the terms of the will.

Adjourned summons.

John Jones (hereinafter called the testator) by his will, dated the 5th of April, 1884, appointed his son-in-law, John Hignett, and his son, W. R. Jones, executors and trustees of his will. And the testator directed that the trustees or trustee for the time being of his will should have full power to settle his accounts and wind up his affairs as they or he should think best, and in so doing "to make any sales and arrangements they or he shall judge expedient." And the testator devised and bequeathed all his real and residuary personal estate unto and to the use of his trustees upon the trusts therein declared.

The testator died on the 7th day of April, 1884, and his will was proved by W. R. Jones alone, John Hignett, the other executor, having renounced probate and disclaimed the trusts thereof.

The testator had during his lifetime deposited a policy of assurance on his life with the defendant Brookfield as security for the sum of £500, advanced by the defendant to the testator, with interest. After the testator's death the defendant, at the request of W. R. Jones, handed to him the policy to enable him to obtain payment of the policy moneys from the insurance society, Jones undertaking to pay the defendant the moneys owing to him out of the policy moneys when received. After Jones had received the policy moneys he requested the defendant to allow the sum of £500 to remain in his hands at interest for a further period of five years on mortgage of a portion of the testator's real estate, Jones alleging that he required the money to satisfy some pressing claims against the testator's estate. The defendant acceded to this request, and an agreement dated the 6th of September, 1884, was entered into between the defendant of the one part and Jones (described as executor and trustee of the will of John Jones) of the other part whereby the defendant agreed that if interest on the said sum of £500 should be paid half-yearly at the rate of five per cent. per annum for the term of five years from the 29th of July, 1884, then last, the same sum of £500 should not be called in during that term. And Jones agreed that the said sum of £500 with interest thereon at the rate aforesaid should be charged upon the eleven houses in St. Anne-street, Chester, then in mortgage to the Provincial Insurance Co. for £1,800. The houses referred to in the agreement formed part of the testator's real estate. Interest was duly paid to the defendant by Jones until the 29th day of July, 1886. No interest was paid after that date. In

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

January, 1887, Jones died. In October, 1888, William Dutton and Henry Small were appointed trustees of the testator's will, and in the same year letters of administration *de bonis non* to the testator's estate were granted to the said William Dutton, who claimed to be a creditor against the estate. The testator's estate proving to be insolvent the trustees of his will refused to recognize the defendant's claim to be a secured creditor upon the property comprised in the agreement of the 6th of September, 1884, on the ground, as they alleged, that under the terms of the testator's will Jones had no power to mortgage or charge the testator's real estate. They accordingly took out this originating summons to have it determined whether by the agreement of the 6th of September, 1884, a valid charge was created in favour of the defendant over the property comprised in the agreement.

Napier-Higgins, Q.C., and *P. S. Stokes*, for the defendant.—We do not think this question can properly be decided on an originating summons under order 55. Creditors would not be bound. The plaintiff Dutton, no doubt, is a creditor, but he does not sue on behalf of himself and all other creditors. We are, however, willing to have the question decided on this summons if your lordship think you can do so. [North, J.—The summons must be amended by making another creditor of the testator plaintiff on behalf of himself and all other creditors of the testator other than the defendant, and making Dutton (as administrator *de bonis non* of the testator) a defendant instead of a plaintiff. If this course is adopted I think I can get over the difficulty suggested by the defendant's counsel. The summons should also be amended by asking for administration of the estate.]

Cozens-Hardy, Q.C., and *Russell Roberts*, for the summons.—The trustee had no power under the testator's will to mortgage the real estate: *Stroughtill* v. *Anstey*, 1 De G. M. & G. 635. The will contains no charge of debts.

Napier-Higgins, Q.C., and *Stokes*, for the defendant Brookfield.—We rely upon the words "make any sales and arrangements." We say those words authorize a mortgage. We do not want a charge of debts. *Stroughtill* v. *Anstey* does not apply, as in that case the trusts of the will contemplated a conversion out and out: *Ball* v. *Harris*, 4 My. & Cr. 264, applies.

They also referred to *Devaynes* v. *Robinson*, 5 W. R. 509, 24 Beav. 86.

Cozens-Hardy, Q.C., in reply.—In *Ball* v. *Harris* there was a charge of debts.

North, J.—Having regard to the language of this particular will, I think I must hold that the agreement of the 6th of September, 1884, created a valid charge upon the testator's real estate comprised therein. It is not suggested that the conduct of Mr. Brookfield has not throughout been in perfectly good faith, and if he fails to have a good security it is by reason of misfortune, and not through any fault of his own. His conduct has been *bonâ fide* from the first. [His lordship stated the facts and continued:—] The question now raised is whether this security so created in September, 1884, upon the property in St. Anne's-street is a good security or not. If it is Mr. Brookfield will be paid in full; if it is not he will only receive a dividend for the amount of his claim.

In my opinion, the arrangement which was made by Mr. Jones with Mr. Brookfield was one which it was within the power of Mr. Jones, as executor and trustee, to make. The point has been put that if he had not been executor, and if the trustee had been one person, and the executor or administrator another, the trustee could not have made the arrangement. Of course, he could not without the executor, and the executor could not have made it without the trustee. Mr. Jones filled both characters. He had the legal estate devised to him, and the terms upon which it was devised to him are stated in the will. The will begins by appointing Mr. Jones executor with another person, who did not act; then it proceeds, "And I direct that the trustees or trustee for the time being of my will shall have full power to settle my accounts and wind up my affairs as they or he shall think best, and in doing so to make any sales and arrangements they or he shall judge expedient." Mr. Jones was sole executor and trustee, and according to the evidence it appears that he required the money in question for pressing claims against the testator's estate. Under those circumstances, the defendant's right to receive the £500 was clear if he insisted upon it, but the right of Mr. Jones to sell the real estate to raise the £500 which he required for pressing purposes was equally clear, and is not disputed. Further than that, I think it is quite clear that he could, if he liked, have raised money by mortgage, and that is in point of fact what he did do. In my opinion, he was justified by the terms of the will in making an arrangement by which the money required for the pressing claims was retained in his hands, instead of being paid to the defendant, upon the terms of his giving the defendant the mortgage of the 6th of September, 1884.

So far as authorities go, *Ball* v. *Harris* seems to me to be nearer than any other to the present case. It is quite true that there is not here any charge of debts as there was in that case, and it was admitted that if there had been a charge of debts *Ball* v. *Harris* would not have been distinguishable. But here there are words which, in my opinion, justified the trustee in dealing with and settling the accounts, and which justified his dealing with the estate in the manner he did. In my opinion, those words give him exactly the same power as he would have had if the power had been given him, not by these words, but by a direct charge of debts upon the estate.

Under these circumstances, I am of opinion that the defendant is entitled to retain the security, and is not compelled to give it up for the benefit of the other creditors of the testator.

Solicitors, *Kennedy, Hughes, & Kennedy; Chester & Co.*

Chan. Div. North, J. } July 3, 1889.

In re Dixon.
Byram *v.* Tull. (*a.*)

Will—Construction—Gift to husband and wife and a third person—Indication of intention that husband and wife to take one share each.

A testator gave the residue of his estate to W., E. (the wife of W.), S., the wife of H., J., the wife of G., B., C., and D. (the wife of C.), to be equally divided between them, share and share alike.

Held, that, under that gift, W., and E., the wife of W., took one share each, not one share between them; and that C., and D., the wife of C., also took one share each, not one share between them.

Warrington *v.* Warrington, 2 *Hare*, 54, *followed.*

In re Jupp, 36 *W. R.* 712, 39 *Ch. D.* 148, *dissented from.*

Thomas George Dixon, by his will, gave the residue of his estate, after the death of his wife, "unto William

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

Byram, Elizabeth Byram, his wife, Sarah Byram, the wife of Henry Richards, Jane Byram, the wife of George Davis, George Dixon Byram, Cyrus Carter, and Charlotte Carter, his wife, to be equally divided between them share and share alike."

The testator died in September, 1882, and his widow in December, 1887.

This was an originating summons by the residuary legatees, other than Cyrus Carter and Charlotte, his wife, for the determination of the question whether William Byram, Elizabeth Byram, Cyrus Carter, and Charlotte Carter each took one share of the residue, or whether William Byram and Elizabeth, his wife, took one share only between them, and Cyrus Carter and Charlotte, his wife, also took one share only between them.

The defendants were Cyrus Carter and Charlotte, his wife, and the surviving trustee of the will.

Ingpen, for the plaintiffs, except William Byram and Elizabeth, his wife.—Under this gift husband and wife take one share only between them. The Married Women's Property Act, 1882, has not destroyed the rule of law that husband and wife take as one person under a gift to them with other persons: *In re March*, 32 W. R. 941, 27 Ch. D. 166; *In re Jupp*, 36 W. R. 712, 39 Ch. D. 148.

H. T. Eve, for the defendants.—A slight indication of an intention that husband and wife shall take separately will defeat the application of the rule of law that a gift to a husband and wife and to a third person is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person: *Dias* v. *De Livera*, 5 App. Cas. 123, 28 W. R. Dig. 34. The wording of the gift in the present case is a sufficient indication of an intention that husband and wife are to take separately; *Bricker* v. *Whatley*, 1 Vern. 233; *Warrington* v. *Warrington*, 2 Hare, 54; *Paine* v. *Wagner*, 12 Sim. 184; *In re Wylde*, 1 W. R. 9, 2 De G. M. & G. 724. The decision in *In re Jupp* referred chiefly to the effect of the Married Women's Property Act, 1882.

Ingpen, in reply.—The decision in *Warrington* v. *Warrington* rested upon the fact that there the husband and wife were equally related to the testator. It was not referred to by Kay, J., in *In re Jupp*.

North, J., read the gift in the will, and proceeded:—There are seven persons named in the gift, and there is no copulative except between the sixth and seventh. The question is whether the rule of law that a gift to a man, his wife, and a third person is to be construed as a gift of one moiety to the husband and wife and of the other moiety to the third person, should be applied in this case, so that William Byram and Elizabeth, his wife, take one share only between them, and Cyrus Carter and Charlotte Carter, his wife, also take one share only between them. It is pointed out in the cases that a very little indication to the contrary is sufficient to lead to an opposite construction. In the judgment of the Privy Council in *Dias* v. *De Livera* it is stated: "The rule of English law that a gift to a man and his wife and to a third person is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine. *Warrington* v. *Warrington*, *Paine* v. *Wagner*, and other cases illustrate the nice distinctions which have been given effect to on this subject. Knight-Bruce, L.J., in *In re Wylde*, attributes the rule to the position, which he describes as 'peculiar,' of husband and wife under our law."

That is a statement of the law by the Privy Council and also a recognition of *Warrington* v. *Warrington* and *Bricker* v. *Whatley*, as cases well decided upon the nice distinction recognized. It is material, then, to consider those cases. In *Warrington* v. *Warrington* the words are: "All the rest, residue, and remainder of my trust estate and property, whatever and wherever not herein disposed of, I leave equally between my brother, Thornhill Warrington, my sister, Anne Van Corlandt, widow, my nephew, William Henry Warrington, and Emma, his wife"—that is, between four legatees named, the only copulative being between the third and fourth, "their heirs and assigns, nevertheless subject to any bequest and legacy herein mentioned." It was given equally between them, and they, therefore, took as tenants in common. It was held that the gift was between all four equally, the wife and husband not taking merely one share between them. The Vice-Chancellor referred to *Bricker* v. *Whatley* thus: "It may be observed that Littleton, in stating the rule which has been referred to, always illustrates it by placing the husband and wife as the first parties to whom the estate is made; and in *Bricker* v. *Whatley* the occurrence of the word 'and' before the names of the husband and wife is adverted to by the Lord Keeper." Then he says, "The husband and wife are equally of kin to the testatrix, and there is nothing in the disposition of the names which can import any intention to treat either of them differently from the other legatees. I cannot do otherwise than hold the gift to be a gift in severalty to several persons, and the residue must therefore be divided into four shares, and the husband and wife declared to be entitled each to one of such shares." It is said that the decision turned on the fact that the legatees were equally related to the testatrix. That is not the case. The husband and wife were equally related to the testatrix, but the other legatees were not. The fact that the husband and wife were, the other legatees not being so, can throw no light upon the construction. I do not understand how that can affect the meaning, and I do not think it was a governing ground of the decision. That decision is recognized as law in the Privy Council in the case to which I have referred.

The case of *Paine* v. *Wagner* was also referred to and recognized as law. That is rather a complicated case and the words are distinct. I do not think it throws much light on the present case; but *Bricker* v. *Whatley* seems to me undistinguishable from the present case. Then *In re Jupp*, a decision of Kay, J., is relied upon; and if that had been the only case on the subject I should have thought the words in the will in that case so like those in the present that I should have been prepared to follow it. The words there were "and one share between my sister Mary Buckwell, Daniel Buckwell, her husband, and Harriet Buckwell, her stepdaughter, in equal parts," and Kay, J., there held that Mr. and Mrs. Buckwell took one half share only and their stepdaughter took the other half. The ground of the decision is put in the judgment shortly in this way: "Unless this gift is affected by the Married Women's Property Act, 1882, Mr. and Mrs. Buckwell would take one half and Harriet, the stepdaughter, the other half: *Bricker* v. *Whatley*, *In re Wylde*. In the last case, *Paine* v. *Wagner*, which was relied on before me, was considered as not a binding authority." I put *Paine* v. *Wagner* on one side and look at the two cases referred to. In *Bricker* v. *Whatley* there was a gift by a testator of all the residue and surplus of his estate to A., B., and C., and the wife of C., there being an "and" so that there was a copulative conjunction between the second and third names as well as another linking the husband and wife. The Lord Keeper held "that the husband and wife should have but one third part; and the rather for that he observed the two 'ands' in the devise, namely, to A., B., and C., and W., his wife; and though a man may devise to ten persons and add an 'and' betwixt every

person's name, yet it is not natural or usual to add an 'and' till you come to the last person."

Then in *In re Wylde*, the other case referred to by Kay, J., the gift was to J. C. and C., his wife, and W. L. in equal shares and proportions. There is the conjunction "and" between each of the three persons named; therefore, that case came exactly within the observations of the Lord Keeper, and the same view is taken by Knight-Bruce, who says: "For reasons stated in the argument, my conclusion here may possibly be consistent with the cases of *Warrington* v. *Warrington* and *Paine* v. *Wagner*. I am not sure that it is not." So that he did not consider he was overruling *Warrington* v. *Warrington*. Lord Cranworth says: "I confess that I was at first very much struck with the decision of Sir James Wigram in the case of *Warrington* v. *Warrington*, and I felt a difficulty in seeing a distinction between that case and the present. The distinction between it and *Bricker* v. *Whatley* is very fine, as Sir James Wigram himself thought. I think, however, that the cases were distinguishable. The ground upon which the Lord Keeper relied in *Bricker* v. *Whatley* was that the use of the word 'and' occurring twice in the enumeration of the legatees was not the ordinary form of language, if it was meant that all the four legatees named were to participate equally; therefore it was held that, according to the ordinary construction of a sentence so framed, the word 'and' occurring before the name of Stephen Whatley and Hester, his wife, must be taken to mean that the persons following it were meant to take, as if they were one person only, the same interest as each of the legatees previously named, the second 'and' which occurred between the names of the husband and wife being merely a subcopulative, showing that the two were to be treated as one person in the distribution of the benefits given, just as they would have been, according to Littleton, had the case been one of a devise of land. There being, therefore, that distinction between the cases of *Bricker* v. *Whatley* and *Warrington* v. *Warrington*, the latter case is not in the way of the application of the original doctrine laid down by Littleton."

The question is whether I ought to take a different view because of the decision in *In re Jupp*. There Kay, J., deals with cases in which the words differ from those in *Warrington* v. *Warrington*, and professes to follow those cases. I find that in those cases the proposition is recognised that a slight difference of language is sufficient to prevent the application of the rule of law on which they are founded. Kay, J., decided that case at variance with what I am now deciding. But I do not find that *Warrington* v. *Warrington* was referred to by him in his judgment; and he refers to two cases as supporting the view he took, which I find not only do not support his view, but do support the case of *Warrington* v. *Warrington*, which I must follow in this case.

Solicitors, *Alfred T. Lawden; John Nicholls & Co.*

Q. B. Div. (Mathew and Wills, JJ.) Nov. 8.

Leake v. Driffield. (a.)

Married woman—Contract—Deemed to be contract with respect to, and to bind, separate property—Showing the contrary—Question of reasonable inference—Clothing bought with separate income—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 3.

An action of contract against a married woman, under section 1, *sub-section* 2, *of the Married Women's Property Act*, 1882, *is answered, if it appears that, at the time of entering into the contract, the married woman had not any separate property which she could reasonably be supposed to have intended to bind.*

A married woman was entitled to the income of certain stock for her separate use without power of anticipation. At the time of entering into the contract sued upon, she had spent all the income then accrued in clothing for herself and her children:

Held, that it was unreasonable to suppose that she intended to bind the clothing by her contract.

Appeal from a judgment of the county court of Yorkshire.

The plaintiffs were a firm of drapers, and they sued the defendant for the price of goods sold and delivered. The defendant was at the commencement of the action a married woman, and she was sued as such under the Married Women's Property Act, 1882. Before the hearing, however, she was divorced from her husband. It appeared that by a settlement made previously to her marriage, which took place in 1867, she was entitled to the income of about £2,800 Consols for her separate use without power of anticipation. For many years she paid for her own clothing out of this income. She gave her orders to the plaintiffs, and duly paid for all the clothes supplied by them to her up to the 1st of March, 1884. In November, 1884, it was arranged between her and her husband that she should for the future pay for the clothing of some of their children as well as for her own, out of her separate income. From March, 1884, to May, 1886, during which time the defendant lived with her husband, the plaintiffs supplied her with goods to the amount of £21 19s. 10d., and it was for this sum that they sued.

The case came before his Honour Judge Turner in the county court at York on a default summons, under section 86 of the County Courts Act, 1888, in answer to which the defendant pleaded her coverture.

It appeared that the marriage had been dissolved by a decree absolute on the 29th of May, 1888.

The county court judge came to the conclusion that the defendant failed to show that she had not entered into the contract with respect to and to bind her separate property, and he thought that at the time when she ordered the goods she was possessed of free separate property—viz., the clothes on which she had spent her income. He therefore gave judgment for the plaintiffs for the amount claimed, execution to be limited to separate property belonging to the defendant on the 29th of May, 1888, which was not on that day subject to any restraint against anticipation.

The defendant appealed.

J. V. Austin, for the defendant.—It was decided in *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519, that in an action against a married woman under the Act of 1882 it was necessary for the plaintiff to show that the defendant had separate property at the time of entering into the contract. Here there is no evidence of any separate property which it is reasonable to suppose the defendant intended to bind. The separate property to which she was entitled, independently of her own and her children's clothing, was subject to a restraint against anticipation, and that is sufficient to rebut the presumption that she entered into the contract with reference to such property. The clothing was her only free separate property, and it is unreasonable to suppose she contracted with respect to that. Section 1, sub-section 3, of the Act says:—"Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." Sub-section 4 says:—"Every contract entered into by a married woman with respect to and to bind her separate property shall

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Before the Act there was a doubt as to how far a married woman's general engagements bound her separate estate. The Act says two things—(1) a married woman's general engagements shall bind all separate property which she has at the time of any particular engagement, and which it is reasonable to suppose she meant to bind; (2) where a married woman so binds such separate property she binds all future separate property as well. A question of fact lies at the basis of the matter—viz., what is the reasonable inference to draw in each particular case? see *Johnson* v. *Gallagher*, 9 W. R. 506, 3 De G. F. & J. 494; *London Chartered Bank of Australia* v. *Lempriere*, 21 W. R. 513, L. R. 4 P. C. 572. In *Harrison* v. *Harrison*, 36 W. R. 748, 13 P. D. 180, where a married woman's separate property was for her "sole, separate, and inalienable use," it was held that it was unreasonable to assume that she intended to contract with respect to it. It is equally unreasonable to make such an assumption here.

Scott Fox, for the plaintiffs.—Even before the Act such a contract as the present would not have been treated as a nullity. It would have been enforced to the extent of binding all separate estate existing at the time of the contract which was capable of being taken in execution. *Picard* v. *Hine*, 18 W. R. 178, L. R. 5 Ch. 274, decided that where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will in equity be made liable to the debt: see also *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454. Under the Act, which cannot have intended to relieve a married woman's separate property from any liability, it is sufficient for the plaintiff to show that the defendant had some separate property at the time of the contract; the nature or the amount of it is immaterial. The contract will then be deemed to have been entered into by the married woman with respect to and to bind her separate property. Sub-section 3 places the burden of showing the contrary on the defendant.

J. V. Austin replied.

MATHEW, J.—In this case I differ with reluctance from the judgment of the county court judge. I think that the plaintiffs' claim has been answered. The case put forward is, that the married woman had, at the time of entering into the contract, free separate estate which became liable to satisfy her engagement; and the question is whether there was separate estate in existence such as would be bound by her engagements. It was proved to the satisfaction of the county court judge that she had spent the income arising from her separate estate in buying clothes for herself and her children, and that at the time of the contract these clothes constituted the whole of her free separate estate. It was said that, being possessed of such separate estate (and the amount of it was immaterial), any contract made by her came within the Act, and was enforceable against any private income from time to time accruing to her. It was said, on the other hand, that no such consequence arises from the Act, and that the liability only exists where there is reasonable ground for supposing that the contract was made with reference to separate estate. Sub-section 3 of section 1 says that every contract by a married woman is to be deemed to have been made with respect to her separate estate, "unless the contrary be shown." Is it reasonable to presume that this lady entered into this contract with respect to her clothing or that of her children?

Palliser v. *Gurney* shows that the burden is on the plaintiff to prove that the married woman has separate property which can be made liable. *Harrison* v. *Harrison* is an authority that, where the separate property of a married woman is not alienable, it is unreasonable to assume that she entered into any contract with respect to or to bind her separate property; the very fact of its being inalienable shows the contrary to that assumption within the meaning of sub-section 3. I think it would be equally unreasonable to assume that the present defendant entered into this contract with respect to property which she could not do without.

WILLS, J.—I am of the same opinion. I think that, under sub-section 3, the burden is on the defendant to show the contrary. Has, then, the contrary been shown? The defendant appears to have spent the whole of her income on clothes; and they were the only free separate property belonging to her when she gave her orders to the plaintiffs. Is it possible to suppose that she was then professing to contract with reference to her separate property? I think it would be just as absurd if she had no separate property at all, and that this is a case in which a judge ought to direct a jury that it was impossible to draw the inference that the defendant intended to charge the property.

Appeal allowed; leave to appeal.

Solicitors for the plaintiffs, *Ridsdale & Son*, for *G. Crumble*, York.

Solicitors for the defendant, *Crowder, Austin, & Visard.*

Q. B. Div. (Mathew and Wills, JJ.) Nov. 5

GREENHAM v. CHILD.
THORNTON, *Claimant.* (a.)

Bill of sale—Description of grantor—Affidavit—Residence—41 & 42 *Vict. c.* 31, *s.* 10—45 & 46 *Vict. c.* 43, *s.* 11.

The grantor of a bill of sale had described himself in the affidavit as "residing at 20, Avington-grove, in the hamlet of Penge, in the county of Surrey." In the bill of sale he was described as "of 20, Avington-grove, and of 72, Beckenham-road, both in the hamlet of Penge, and of 100, High-street, Croydon, all in the county of Surrey." The grantor had offices at all these places, but he resided only at the first. The goods scheduled in the bill of sale were distributed among all three places.

Held, that he was sufficiently described in the affidavit within the requirements of section 10 *of the Bills of Sale Acts,* 1878 *and* 1882.

Appeal from a judgment of his Honour Judge Bayley sitting at the county court of Westminster.

The defendant, as the grantor of a bill of sale, had described himself in the affidavit attached to the bill as "the said Alfred John Childs, residing at 20, Avington-grove, in the hamlet of Penge, in the county of Surrey." In the bill of sale he was described as "of 20, Avington-grove, and of 72, Beckenham-road, both in the hamlet of Penge, and of 100, High-street, Croydon, all in the county of Surrey." All three were places of business, being several offices of the defendant as auctioneer, and the goods affected by the bill of sale were distributed among the three places, but he resided only at 20, Avington-grove. The plaintiff, the judgment creditor, sought to set aside the bill on the ground that the grantor was insufficiently described in the affidavit. The county court judge upheld the bill of sale, against which decision the plaintiff now appealed.

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

C. C. Scott, for the plaintiff.—The searcher for bills of sale is not bound to look beyond the affidavit, unless the description therein of the grantor of the bill is obviously insufficient. A man might have residences in different counties, but if only described as of one county the creditors in another county might not recognize the description: *Hewer* v. *Cox*, 9 W. R. 143; *Wallis* v. *Smith*, W. N., 1882, p. 77; *In re Wood, Ex parte McHattie*, 27 W. R. 327, 10 Ch. D. 398.

B. Bray, for the defendant, was not called upon.

MATHEW, J.—The object of the affidavit to a bill of sale is to make sure of the identity of the grantor of the bill. In describing his residence he is taken, in popular language, to be describing the place in which he lives and for which he pays rates and taxes. Here a bill of sale is made affecting goods in different places belonging to the grantor. In the bill he is admittedly properly described as of the three places of business, but it is said that this must be invalidated, because, in the affidavit, he is described as of only one place. But that place is his place of residence. If so, that is sufficient for the requirements of the Act. We are referred to the authority of *Hewer* v. *Cox*, but that rules that where a man carries on business at a place he is sufficiently described as residing there. Some *dictum* of Bacon, V.C., in a case only reported in the *Weekly Notes* in 1882, has been cited, but the Vice-Chancellor's later decision in *In re Woods* is against the present appellant.

WILLS, J.—I agree.

Appeal dismissed.

Solicitors for the plaintiff, *Vanderpump & Eve.*

Solicitors for the claimant, *Child & Son.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Nov. 1.

Ex parte BOARD OF TRADE.
In re WAYMAN. (*a.*)

Bankruptcy—Costs of solicitor—Appointment of solicitor as trustee in bankruptcy—Remuneration—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 72, 73—*Bankruptcy Rules*, 1886, *rr.* 305, 306.

Where a solicitor is appointed trustee in a bankruptcy, his remuneration must be in the nature of a commission or percentage, and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings.

Application by the Board of Trade for review of taxation of solicitor's costs.

The case raised a question of considerable importance to solicitors appointed to act as trustees in bankruptcy.

On June 1, 1888, the first meeting of the creditors of the bankruptcy was held, at which Mr. William Peed, a solicitor at Cambridge, was appointed trustee at a remuneration to be fixed by the committee of inspection. On August 24, 1888, the committee passed the following resolution:—"That the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in this bankruptcy."

Under this resolution the trustee did the legal work arising in connection with the estate, and carried in a bill of costs therefor.

Objection was taken before the registrar by the official receiver that the resolution was *ultra vires*, but the charges were allowed. It was also held by the taxing master on review that the resolution was valid, but the question was referred to Cave, J., as the judge in bankruptcy, for decision.

Muir Mackenzie, for the Board of Trade.—The objections of the Board of Trade to the allowance of these costs are that, having regard to section 72, sub-section (1), and section 73, sub-section (2) of the Bankruptcy Act, 1883, and to rules 305 and 306 of the Bankruptcy Rules, 1886, the resolution which the committee of inspection passed on August 24 was bad in law and inoperative. The trustee being a solicitor cannot charge the estate for business done in that character. A trustee who is a solicitor is not entitled to charge the trust estate with costs for professional services.

Tindal Atkinson, for the trustee.—If, where the trustee is a solicitor, he is only to be paid by a percentage, it is difficult to see why sub-section (2) of section 73 was enacted at all. Where the creditors employ a solicitor as their trustee they may then contract with that solicitor that he may charge in addition to his percentage, his charges as a solicitor. It does not follow that the remuneration provided for by section 73 must be limited to the remuneration mentioned in section 72.

CAVE, J.—I am of opinion that the committee of inspection have in this case done what they have no power to do. Section 72 is very plain, and it says that where the creditors appoint any person to be trustee of a debtor's estate, his remuneration shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised, and the other part on the amount distributed in dividend. Then, all that section 73, sub-section (2), says, is that "where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services." The result of that would be that his remuneration would be higher than in the case of an ordinary trustee, but still it must be in the nature of commission or percentage by virtue of section 72. The result is that the resolution is worthless, and no remuneration has been voted to the trustee. He must therefore send in his bill for taxation under sub-section (4) of section 72, which provides that where no remuneration has been voted to a trustee he shall be allowed out of the bankrupt's estate such proper costs and expenses incurred by him in or about the proceedings of the bankruptcy as the taxing officer may allow.

Objection allowed.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Solicitors for the trustee, *F. & T. Smith & Sons*, for *W. Peed*, Cambridge.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

C. C. R. Nov. 2.

REG. v. JOSHUA BROWN. (*a.*)

Criminal law—Jurisdiction of the Court for Crown Cases Reserved after plea of guilty — Unnatural offence—Fowls—24 & 25 Vict. c. 100, *s.* 61—*Attempted felony.*

It is not a condition precedent to give jurisdiction to

(*a.*) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

the Court of Criminal Appeal that a point of law existing "on the trial" should be formally taken at the trial.

R. v. Clark, 15 *W. R.* 48, *L. R.* 1 *C. C. R.* 64, *disapproved.*

A fowl is an animal within the meaning of the 24 & 25 *Vict. c.* 100, *s.* 61.

R. v. Dodds (*unreported*) *overruled.*

A conviction for an attempt at an offence may be supported, although the attempt could not possibly have culminated in the full offence in the manner intended.

R. v. Collins, 12 *W. R.* 886, *L. & C.* 471, *overruled.*

The prisoner had been convicted before Lord Coleridge, C.J., upon his own confession, at the assizes for the county of Essex, on an indictment charging him with an attempt to commit unnatural offences with domestic fowls. The depositions showed that in all probability the offence had been habitual with him, and had resulted in the death of several of the birds and serious injury to several others who were found torn and bleeding, apparently from the effects of attempted penetration.

After sentence passed, the learned judge was informed that the Court of Criminal Appeal, in an unreported case, had unanimously held that a duck was not an animal within 24 & 25 Vict. c. 100, s. 61, and the question for this court was whether the conviction should accordingly be quashed.

No counsel appeared.

The judgment of the COURT (Lord COLERIDGE, C.J., POLLOCK, B., FIELD, MANISTY, CAVE, DAY, and GRANTHAM, JJ.) was delivered by

Lord COLERIDGE, C.J. — There is a preliminary question arising out of the judgment in *Reg.* v. *Clark*, 15 W. R. 48, L. R. 1 C. C. R. 54, as to whether we have jurisdiction to consider a case in which the prisoner has pleaded guilty. The jurisdiction of this court is, by the 11 & 12 Vict. c. 78, s. 1, confined to questions of law "which shall have arisen on the trial," but we think that the not taking objection to an indictment, owing, for instance, to accident or ignorance, is not final, because any point upon which the sufficiency of the indictment depends does exist at the trial, though not formally taken. This is not a question of sufficiency of proof, as in *Reg.* v. *Clark*, which case is not, therefore, quite in point, and we are not obliged to differ from it in terms.

We are agreed that the unreported case (*R.* v. *Dodds*) should equally be overruled whether the judgment turned solely upon the question of the construction of the 24 & 25 Vict. c. 100, s. 61, or, whether as we are informed by some of the judges who took part in the decision it proceeded upon another ground—viz., that upon which the case of *R.* v. *Collins*, 12 W. R. 886, Leigh & Cave, 471, was based. It was there held that an attempt at larceny cannot be committed by a person putting his hand into the pocket of another for the purpose of committing larceny, there being at the time nothing in the pocket—that, in fact, if the attempt had proceeded without interruption, and could not possibly have culminated in the full offence, there could be no conviction for the attempt. The depositions in the present case seemed to make this reasoning inapplicable; but, independently of this, we do not think the decision in *R.* v. *Collins* should any longer be considered binding.

Conviction affirmed.

Prob. Div. & Adm. Div. Admiralty. } June 1, 18, 1889.

"THE STETTIN." (*a.*)

Bill of lading—Master liable for wrong delivery when bill of lading not produced.

Goods were shipped in London for a German port on board a German ship under the terms of a bill of lading in two parts, exclusive of the master's copy, making the same deliverable to M. or to his or their assigns. M. was the agent of P., and the shippers of the goods sent one of the parts of the bill of lading to P., and P. afterwards returned it to an agent of the shippers. When the ship arrived at its destination the master delivered the goods to M. without production of the bill of lading. In an action against the shipowners for wrong delivery of the goods the court found that the German law governing the case did not essentially differ from the law of England.

Held, that the defendants had not delivered the goods according to the contract of shipment, and that the plaintiffs were entitled to judgment, subject to a reference as to the amount of damages.

This was an action instituted in the City of London Court on behalf of Sir Charles Price & Co. against the German vessel *Stettin*, and against her owners, defendants, intervening, and subsequently transferred to this court.

The action was brought to recover damages for the wrongful delivery of fifty-seven barrels of seed oil which had been shipped by the plaintiffs on board *The Stettin* in the port of London under the terms of a bill of lading, of the material portion of which the following is a copy:—

"Shipped, in good order and condition, by Sir Charles Price & Co on board the steamship called *The Stettin* . . . now lying in this port bound for Stettin, fifty-seven barrels of seed oil . . . to be delivered, subject to the exceptions and conditions hereinafter mentioned . . . at the port of Stettin unto S. Mendelsohn or to his or their assigns, he or they paying freight for the said goods in London. . . . . In witness whereof the master or agent of the said vessel hath affirmed to two bills of lading, exclusive of the master's copy, one of which bills being accomplished the others to stand void.—Dated in London."

June 1, 18.—The action was now heard before Butt, J. It appeared by evidence taken under commission at Stettin that the seed oil, the subject-matter in the suit, arrived at Stettin on the 25th of June, 1888; that the next day Mendelsohn obtained them from on board *The Stettin*, and, acting on a letter from the plaintiffs, forwarded them the next day to Julius Manasse, Breslau; that Mendelsohn never produced any bill of lading when the goods were delivered to him; and that his firm carried on business as a forwarding agent at Stettin. It also appeared from a letter written by Manasse to Mendelsohn, and put in evidence under the same commission, that the bill of lading for the fifty-seven barrels of oil had been sent at the time to Manasse at Breslau by Ad. Tresler, the representatives of the plaintiffs at that place, and that after they had been despatched to Breslau, Manasse had at the request of another member of the firm of Messrs. Tresler given the bill of lading back to them.

The result of the remainder of the evidence appears from the judgment.

Cohen, Q.C. and *Pyke*, for the plaintiffs.—The German law governing this case is the same as the English law—namely, that the master of *The Stettin* was not justified in delivering the oil to any person who was not the holder of one of the bills of lading.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Barnes, Q.C., and *Joseph Walton*, for the defendants.—Mendelsohn was the consignee named in the bill of lading, and he never assigned over either the oil or the bill of lading, whilst the shippers sent the bill of lading to Manasse, to whom Mendelsohn forwarded the goods. The master, therefore, performed his contract, and both parts of the bill of lading were accomplished by a delivery of the oil to Mendelsohn. This is so whether the law to be applied is German law or English law, for, so far as this case is concerned, the two laws do not differ to any important extent. Moreover, Mendelsohn, in forwarding the oil to Manasse, acted as the plaintiffs' agent, and the plaintiffs have not in reality suffered from anything the shipowners have done. If they have sustained any damage it is by the default of their own agent.

BUTT, J.—I have no doubt, on the evidence, that Mendelsohn was the agent of Manasse, and not of the shippers of the goods. This disposes of one contention raised by the defendants, but the main point contended for by them is that, by German law, the shipowner is entitled to deliver to the consignee named in the bill of lading without production of either part of the bill of lading. Now German advocates have been called on both sides, but as they differ, I must, in this divergence of opinion, decide what, in the result, the German law appears to be. Having considered the reasons given by these advocates for their opinions, I have come to the conclusion that on this point German law does not essentially differ from English law. According to the English law and the English mode of conducting business a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. I hold that the shipowners must take the consequences of having delivered these goods without the production of one of the parts of the bill of lading.

There will be judgment for the plaintiffs, with, if necessary, a reference to the registrar and merchants for the assessment of damages.

Solicitors for the plaintiffs, *J. H. & H. E. Furnfield.*

Solicitors for the defendants, *T. Cooper & Co.*

Court of Appeal.

From Chan. Div. Nov. 19, 20.

In re NEW EBERHARDT CO. *Ex parte* MENZIES. (*a.*)

Company—Shares—Issue of shares as fully paid up—"Contract duly made in writing"—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The conditions required by section 25 *of the Companies Act,* 1867, *to exempt shares from being issued and held subject to the payment of the whole amount thereof in cash, are* (1) *the existence of a contract,* (2) *that the contract be duly made in writing,* (3) *that the contract be filed with the Registrar of Joint-Stock Companies, and these three things must be in existence and be done at or before the date of the issue of the shares.*

Held, accordingly, that a document, containing an agreement to issue shares as fully paid up, which was executed by one of the parties thereto only, and, being so executed, was filed at or before the date of the issue of the shares, did not, by reason of the acceptance of its terms by the other party after the issue of the shares, constitute a contract "duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares" within the meaning of section 25.

Decision of Stirling, J., *reversed.*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Appeal from Stirling, J.

In August, 1888, the Eberhardt and Monitor Co., hereinafter called the old company, went into voluntary liquidation for the purpose of a reconstruction scheme being arrived at, and by this scheme it was proposed that the assets and business of the old company should be transferred to the New Eberhardt Co., and that each £1 debenture in the old company should be exchanged for four preference shares in the new company of 5s. each fully paid. The present appellant, E. F. Menzies, was a debenture-holder in the old company, and at a meeting of the debenture-holders held on the 31st of August, 1888, he voted by proxy for a resolution approving of the proposed scheme, and this resolution was duly passed.

In pursuance of the proposed scheme, by an agreement dated the 25th of September, 1888, and made between the liquidator of the old company, and the new company, the latter company purchased the assets and business of the old company on the terms (*inter alia*) that the new company should allot and issue to the holders of debentures in the old company four fully paid-up preference shares in the new company of 5s. each for every £1 of principal due on the debentures, in full satisfaction and discharge of principal and interest due to them on their debentures.

This agreement was duly executed, both by the old company, through their liquidator, and by the new company, but it was not registered at the Joint-Stock Registration Office.

On the 28th of September, 1888, the New Eberhardt Co. affixed its common seal to a document bearing date the same day, and which purported to be an agreement made between the new company and the several persons whose names and addresses were set forth in the schedule thereto; this document recited the agreement of the 25th of September, and the fact that the liquidator of the old company had requested the new company to allot and issue to the persons named in the schedule to the present document, 45,724 fully-paid shares of 5s. each, in satisfaction of the amount secured by their debentures; and it was thereby witnessed that the new company should allot and issue to the persons named in the schedule thereto the number of shares set opposite their respective names, specifying the distinctive numbers of such shares, and credited as having the full sum of 5s. per share paid up thereon; and it was thereby agreed and declared that the shares included in the schedule thereto so to be allotted were to be held as shares upon which the full sum of 5s. per share had been paid, and that they should be liable and subject to no further payment; and the new company thereby undertook to cause this agreement to be duly registered at the Joint-Stock Registration Office before the said shares, or any of them, were issued. The schedule to this document contained the names and addresses of the debenture-holders in the old company, including the name of the present appellant, Mr. Menzies, but neither Menzies nor any of the other persons therein named as parties to this document, nor any person on his or their behalf, had ever signed this document.

On the 1st of October, 1888, the document of the 28th of September was registered at the Joint-Stock Registration Office.

On the 8th of November, 1888, Mr. Menzies received notice from the new company that 400 fully paid-up preference shares in the new company had been allotted to him, and on the 5th of December, 1888, a certificate of these shares, treating them as fully paid up, was received by him.

At that time Mr. Menzies believed that the new company had registered a proper and sufficient agreement for the purpose of providing for the issue of the said shares as fully paid up, and that he was under no liability to pay any money on them.

Shortly before the 19th of June, 1889, however, Mr. Menzies became aware of the fact that the only document registered at the Joint-Stock Registration Office was the document of the 28th of September, 1888, and he thereupon required the new company to cancel the allotment, and the certificate of the shares allotted to him, and to file a proper agreement, and re-allot new shares and issue a fresh certificate. The new company having refused to do so, on the ground that the registered document was a sufficient agreement, Mr. Menzies applied by way of motion to have the register of members of the new company rectified by striking out his name as the holder of the 400 shares therein, and that the new company might be ordered to enter into and execute a proper agreement with the applicant so as to secure to the applicant 400 fully paid-up shares in the new company, and that, upon registration of such agreement, the new company might be ordered to issue 400 fully paid-up preference shares to the applicant.

It appeared from the evidence that Mr. Menzies had not, since the certificate of shares was sent him by the new company, in any way acted as a shareholder in the new company, either by receiving dividend, attending meetings, or otherwise. It also appeared that the new company is a perfectly solvent company.

Section 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), provides that, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

Stirling, J., dismissed Mr. Menzies' application, on the ground that the requirements of section 25 of the Companies Act, 1867, had been sufficiently complied with by the registration, before the issue of the shares, of the document of the 28th of September, and the acceptance, after the issue of the shares, of the terms of that document by Mr. Menzies.

Mr. Menzies appealed.

Whinney, for the appellant.—The document of the 28th of September, 1888, which is the only document filed at the Joint-Stock Registry Office, did not, in fact, at the time it was filed, constitute an agreement at all, because at that time neither the appellant nor any of the other debenture-holders whose names are mentioned in the schedule to the document, nor any person purporting to act for them, had, in fact, assented to the terms of that document; neither, therefore, could there be any subsequent ratification, by the acceptance of the shares by the appellant, because there was no existing contract or agreement to ratify. Secondly, the document of the 28th of September was not a "contract duly made in writing" within the meaning of section 25 of the Companies Act, 1867, as the document was only executed by the new company, and was not signed by the appellant, nor by anyone purporting to act for him. To constitute an "agreement in writing" in the strict legal sense, "it is necessary that each of the parties should put his signature to the document": *Bewley* v. *Atkinson* (a case on section 3 of the Prescription Act), 28 W. R. 638, 13 Ch. D. 283, *per* Thesiger, L.J., 28 W. R., at p. 641, 13 Ch. D., at p. 298; and Jessel, M.R., in *Firmstone's case*, 23 W. R. 867, L. R. 20 Eq. 524, said that the words "duly made in writing" in section 25 of the Companies Act, 1867, meant "made by the contracting party," using these words, I submit, in the comprehensive sense of "each contracting party."

He also referred to *In re Lewis*, 24 W. R. 1017, 1 Q. B. D. 724 (a case on the Attorneys and Solicitors Act).

Grosvenor Woods, for the New Eberhardt Co., the respondent.—At the date of the registration of this document there was an existing agreement to which Mr. Menzies had assented, binding the new company to allot these shares as fully paid up in exchange for the debentures in the old company. The document of the 28th of September, which was registered, contained a statement of all the material parts of this agreement between the old and the new company, and therefore really amounted to a registration of that agreement. In *Anderson's case*, 26 W. R. 442, 7 Ch. D. 75, Baggallay, L.J., referring to the contract required to be registered under section 25 of the Act of 1867, quotes with approval the statement of James, L.J., in *Crickmer's case*, 24 W. R. 219, L. R. 10 Ch. App. 614: "It must be a contract which shows what shares are to be issued fully paid up, and for what consideration they are to be issued." As to the second point—viz., that there was no "contract duly made in writing," because the registered document was not signed by Mr. Menzies, I say the signature is not part of the contract, and it is sufficient to satisfy the requirements of the section, if that which both parties have in fact consented to, be evidenced in writing, and it is not essential that the *consensus* of the two minds should be declared in the written document itself: *Laythoarp* v. *Bryant*, 3 Scott, 238, 2 Bing. N. C. 735; *Williams* v. *Byrne*, 11 W. R. 487, 1 Moore P. C. C. N. S. 154; *Reuss* v. *Picksley*, 14 W. R. 924, L. R. 1 Ex. 342, which were all cases on the Statute of Frauds. An offer made in writing and afterwards accepted by parol will bind as a contract under the Statute of Frauds, for it is "quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction" *per* Willes, J., in *Reuss* v. *Picksley*. When the shares allotted and issued by the new company to Mr. Menzies were accepted by him the document of the 28th of September became a contract in writing as from its date. Again, the document of the 28th of September may be treated as an acceptance by the new company of the terms, as to the issue of shares, which Mr. Menzies had previously assented to. The document which has been registered, at all events, satisfies the object of section 25, as it gives the names and addresses of all the persons to whom these shares were issued, and the number of shares issued to each, and the amount which was to be credited as paid up on each.

COTTON, L.J.—The question is whether Mr. Menzies has contracted and agreed with the New Eberhardt Co. to take from it certain fully paid-up shares—*i.e.*, shares which in law could have no further claim made upon them. But he says that section 25 of the Act of 1867 has not been complied with because there has not been, before the shares were issued, a registration of such an agreement as is required by the statute, and what the statute requires is this. [The Lord Justice read section 25, and continued:—].

The question upon which this turns is, whether, before the issue of the shares, there was a contract duly made in writing and registered with the Registrar of Joint-Stock Companies?

What has been done here may have been perfectly honest and well-intentioned, but I am afraid there has not been a compliance with the statute.

There had been a proposal in the winding up of the old company to transfer all the assets of the old company to the new company on certain terms—viz., that the debenture-holders of the old company were to have 5s. shares, fully paid up, in the new company to the amount of their debentures. The law has enabled that to be done, provided there was a special resolution

passed by the debenture-holders, and that was done—that is to say, the debenture-holders authorized the directors of the old company to make a contract with the new company, and to transfer to the new company the property of the old company on those terms, and the present appellant assented to that. Then what was done? A memorandum of agreement was prepared, which recited a contract between the new company and the liquidator of the old company, and then went on in this way:—"And in pursuance of the said agreement"—that is, the agreement between the new company and the liquidator of the old company—"and of such request and direction of the liquidator, as aforesaid, the new company shall allot and issue to the persons named in the schedule hereto the number of shares set opposite their respective names in the 4th column of the schedule and credited as having the full sum of five shillings per share paid up thereon; and it is hereby agreed and declared that the shares included in the schedule so to be allotted as aforesaid are to be held as shares upon which the full sum of 5s. per share has been paid."

Now, this memorandum of agreement, this document, which was the thing that was registered, in my opinion contained no agreement at all; but I think it contained an offer to give all the debenture-holders named in the schedule fully paid-up shares to the amount standing to their names, and as soon as that offer was accepted by the debenture-holders then there became, no doubt, a contract between them and the new company in the terms of, and in accordance with, this memorandum.

But I cannot see that there is anything here which can amount to a contract in writing registered. What, in fact, was it that was registered? As I have before said, it was merely an offer made by the new company to issue shares as fully paid up to those persons named in the schedule who would come in to accept them. Now I cannot see how that can be, within the words of section 25, "a contract made in writing and filed with the registrar at or before the issuing of such shares."

At the time when this was filed there had been no acceptance by any person to whom it was intended to issue these paid up shares, and therefore there was then no contract at all.

I doubt whether there would have been a "contract made in writing," even although a contract had been made by reason of the acceptance by those persons of the terms offered. The words of section 25 are, "a contract made in writing," and that is very different from the terms of the Statute of Frauds, because what that statute says is, that no action shall be brought unless the agreement upon which such action is brought, "or some note or memorandum thereof," be in writing, signed by the party to be charged therewith. It may be—though I do not intend to express any opinion as to that—that in accordance with the decisions on the Statute of Frauds there might be a memorandum in writing within the meaning of that statute, although there had been no acceptance in writing, but merely an acceptance arising from acts or circumstances that were held to amount to an acceptance. Those cases turned, however, on the words, "a note or memorandum in writing of the agreement." In one of those cases (*Reuss* v. *Picksley*) it was held that there was an agreement constituted by acts and circumstances which amounted to an acceptance of an offer made in writing, and, there being an agreement, it was held that there was, within the Statute of Frauds, a good memorandum in writing of the agreement, because all the terms were stated in the document. That was apparently the ground upon which the court decided the case, for Willes, J., said, "All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th of September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposed as an agreement, and that the other party should afterwards assent, without writing, to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute." But in the present case the words of the statute are not "an agreement in writing or some note or memorandum of an agreement in writing," but "an agreement made in writing." That is something very different from a memorandum thereof made in writing, and in my opinion it is impossible to say that, when at the time of registration of this document there was only, in fact, an offer, there was an agreement made in writing at or before the issue of the shares, and which was registered at or before the issue of the shares.

But then it was ingeniously suggested by Mr. Grosvenor Woods that the document of the 28th of September was not a proposal at all, but was in fact an acceptance by the company of a proposal previously made by the shareholders, and assented to by the appellant. But as I understand the facts, what the appellant assented to at the general meeting was the resolution authorizing the liquidator to enter into this agreement with the new company. That was not a proposal made by the debenture-holders to the new company, it was merely that they gave authority to the liquidator to make the proposal to the new company, and, in my opinion, the document registered does not purport to be an acceptance of any offer made by the debenture-holders so as to constitute an agreement made in writing within the requirements of section 25. In my opinion, in the present case, there being merely a proposal made in writing by the company, it cannot be considered to be an "agreement made in writing" within section 25, or that that section has been complied with.

In my opinion, therefore, an order ought to be made that the name of the appellant be taken off the register of shareholders.

BOWEN, L.J.—I am of the same opinion, and I only express my individual view because we are differing from the learned judge in the court below.

For the reasons given by Cotton, L.J., it is plain that the document which has been registered is not an acceptance by the company of an offer by the appellant. There was no offer capable of being accepted made by the appellant to the company, but only a consent given by him to a resolution which authorized the agreement between the two companies.

If this document which has been filed is not the acceptance of an offer already made, what is it? It is an offer, and only an offer, duly made in writing, and filed while it was only an offer. The offer being something short of a complete contract, it was not a complete contract when it was filed. It is true that it did afterwards turn into a contract when it was accepted, but it did not, I think, turn into a contract duly made in writing, and it certainly did not turn into a contract duly made in writing at the time this document was filed, because it only became a contract long after the document was filed.

It is obvious, therefore, that, unless we are to fritter away this section by putting a forced construction upon it, the section has not been complied with. I regret this judgment for the reasons given in the argument by Cotton, L.J. I think it is a most unfortunate slip, and that in substance the object of the Act has been fulfilled, though the requirements of the Act have not been complied with. But we must see that the Act of Parliament is carried out in its letter as well as in its spirit.

The cases on the Statute of Frauds can have nothing

At that time Mr. Menzies believed that the new company had registered a proper and sufficient agreement for the purpose of providing for the issue of the said shares as fully paid up, and that he was under no liability to pay any money on them.

Shortly before the 19th of June, 1889, however, Mr. Menzies became aware of the fact that the only document registered at the Joint-Stock Registration Office was the document of the 28th of September, 1888, and he thereupon required the new company to cancel the allotment, and the certificate of the shares allotted to him, and to file a proper agreement, and re-allot new shares and issue a fresh certificate. The new company having refused to do so, on the ground that the registered document was a sufficient agreement, Mr. Menzies applied by way of motion to have the register of members of the new company rectified by striking out his name as the holder of the 400 shares therein, and that the new company might be ordered to enter into and execute a proper agreement with the applicant so as to secure to the applicant 400 fully paid-up shares in the new company, and that, upon registration of such agreement, the new company might be ordered to issue 400 fully paid-up preference shares to the applicant.

It appeared from the evidence that Mr. Menzies had not, since the certificate of shares was sent him by the new company, in any way acted as a shareholder in the new company, either by receiving dividend, attending meetings, or otherwise. It also appeared that the new company is a perfectly solvent company.

Section 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), provides that, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

Stirling, J., dismissed Mr. Menzies' application, on the ground that the requirements of section 25 of the Companies Act, 1867, had been sufficiently complied with by the registration, before the issue of the shares, of the document of the 28th of September, and the acceptance, after the issue of the shares, of the terms of that document by Mr. Menzies.

Mr. Menzies appealed.

Whinney, for the appellant.—The document of the 28th of September, 1888, which is the only document filed at the Joint-Stock Registry Office, did not, in fact, at the time it was filed, constitute an agreement at all, because at that time neither the appellant nor any of the other debenture-holders whose names are mentioned in the schedule to the document, nor any person purporting to act for them, had, in fact, assented to the terms of that document; neither, therefore, could there be any subsequent ratification, by the acceptance of the shares by the appellant, because there was no existing contract or agreement to ratify. Secondly, the document of the 28th of September was not a "contract duly made in writing" within the meaning of section 25 of the Companies Act, 1867, as the document was only executed by the new company, and was not signed by the appellant, nor by anyone purporting to act for him. To constitute an "agreement in writing" in the strict legal sense, "it is necessary that each of the parties should put his signature to the document": *Bewley* v. *Atkinson* (a case on section 3 of the Prescription Act), 28 W. R. 638, 13 Ch. D. 283, *per* Thesiger, L.J., 28 W. R., at p. 641, 13 Ch. D., at p. 298; and Jessel, M.R., in *Firmstone's case*, 23 W. R. 867, L. R. 20 Eq. 524, said that the words "duly made in writing" in section 25 of the Companies Act, 1867, meant "made by the contracting party," using these words, I submit, in the comprehensive sense of "each contracting party."

He also referred to *In re Lewis*, 24 W. R. 1017, 1 Q. B. D. 724 (a case on the Attorneys and Solicitors Act).

Grosvenor Woods, for the New Eberhardt Co., the respondent.—At the date of the registration of this document there was an existing agreement to which Mr. Menzies had assented, binding the new company to allot these shares as fully paid up in exchange for the debentures in the old company. The document of the 28th of September, which was registered, contained a statement of all the material parts of this agreement between the old and the new company, and therefore really amounted to a registration of that agreement. In *Anderson's case*, 26 W. R. 442, 7 Ch. D. 75, Baggallay, L.J., referring to the contract required to be registered under section 25 of the Act of 1867, quotes with approval the statement of James, L.J., in *Crickmer's case*, 24 W. R. 219, L. R. 10 Ch. App. 614: "It must be a contract which shows what shares are to be issued fully paid up, and for what consideration they are to be issued." As to the second point—viz., that there was no "contract duly made in writing," because the registered document was not signed by Mr. Menzies, I say the signature is not part of the contract, and it is sufficient to satisfy the requirements of the section, if that which both parties have in fact consented to, be evidenced in writing, and it is not essential that the *consensus* of the two minds should be declared in the written document itself: *Laythoarp* v. *Bryant*, 3 Scott, 238, 2 Bing. N. C. 735; *Williams* v. *Byrne*, 11 W. R. 487, 1 Moore P. C. C. N. S. 154; *Reuss* v. *Pickslay*, 14 W. R. 924, L. R. 1 Ex. 342, which were all cases on the Statute of Frauds. An offer made in writing and afterwards accepted by parol will bind as a contract under the Statute of Frauds, for it is "quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction" *per* Willes, J., in *Reuss* v. *Pickslay*. When the shares allotted and issued by the new company to Mr. Menzies were accepted by him the document of the 28th of September became a contract in writing as from its date. Again, the document of the 28th of September may be treated as an acceptance by the new company of the terms, as to the issue of shares, which Mr. Menzies had previously assented to. The document which has been registered, at all events, satisfies the object of section 25, as it gives the names and addresses of all the persons to whom these shares were issued, and the number of shares issued to each, and the amount which was to be credited as paid up on each.

COTTON, L.J.—The question is whether Mr. Menzies has contracted and agreed with the New Eberhardt Co. to take from it certain fully paid-up shares—*i.e.*, shares which in law could have no further claim made upon them. But he says that section 25 of the Act of 1867 has not been complied with because there has not been, before the shares were issued, a registration of such an agreement as is required by the statute, and what the statute requires is this. [The Lord Justice read section 25, and continued:—].

The question upon which this turns is, whether, before the issue of the shares, there was a contract duly made in writing and registered with the Registrar of Joint-Stock Companies?

What has been done here may have been perfectly honest and well-intentioned, but I am afraid there has not been a compliance with the statute.

There had been a proposal in the winding up of the old company to transfer all the assets of the old company to the new company on certain terms—viz., that the debenture-holders of the old company were to have 5s. shares, fully paid up, in the new company for the amount of their debentures. The law has enabled that to be done, provided there was a special resolution

passed by the debenture-holders, and that was done—that is to say, the debenture-holders authorized the directors of the old company to make a contract with the new company, and to transfer to the new company the property of the old company on those terms, and the present appellant assented to that. Then what was done? A memorandum of agreement was prepared, which recited a contract between the new company and the liquidator of the old company, and then went on in this way:—"And in pursuance of the said agreement"—that is, the agreement between the new company and the liquidator of the old company—"and of such request and direction of the liquidator, as aforesaid, the new company shall allot and issue to the persons named in the schedule hereto the number of shares set opposite their respective names in the 4th column of the schedule and credited as having the full sum of five shillings per share paid up thereon; and it is hereby agreed and declared that the shares included in the schedule so to be allotted as aforesaid are to be held as shares upon which the full sum of 5s. per share has been paid."

Now, this memorandum of agreement, this document, which was the thing that was registered, in my opinion contained no agreement at all; but I think it contained an offer to give all the debenture-holders named in the schedule fully paid-up shares to the amount standing to their names, and as soon as that offer was accepted by the debenture-holders then there became, no doubt, a contract between them and the new company in the terms of, and in accordance with, this memorandum.

But I cannot see that there is anything here which can amount to a contract in writing registered. What, in fact, was it that was registered? As I have before said, it was merely an offer made by the new company to issue shares as fully paid up to those persons named in the schedule who would come in to accept them. Now I cannot see how that can be, within the words of section 25, "a contract made in writing and filed with the registrar at or before the issuing of such shares."

At the time when this was filed there had been no acceptance by any person to whom it was intended to issue these paid up shares, and therefore there was then no contract at all.

I doubt whether there would have been a "contract made in writing," even although a contract had been made by reason of the acceptance by those persons of the terms offered. The words of section 25 are, "a contract made in writing," and that is very different from the terms of the Statute of Frauds, because what that statute says is, that no action shall be brought unless the agreement upon which such action is brought, "or some note or memorandum thereof," be in writing, signed by the party to be charged therewith. It may be—though I do not intend to express any opinion as to that—that in accordance with the decisions on the Statute of Frauds there might be a memorandum in writing within the meaning of that statute, although there had been no acceptance in writing, but merely an acceptance arising from acts or circumstances that were held to amount to an acceptance. Those cases turned, however, on the words, "a note or memorandum in writing of the agreement." In one of those cases (*Reuss* v. *Picksley*) it was held that there was an agreement constituted by acts and circumstances which amounted to an acceptance of an offer made in writing, and, there being an agreement, it was held that there was, within the Statute of Frauds, a good memorandum in writing of the agreement, because all the terms were stated in the document. That was apparently the ground upon which the court decided the case, for Willes, J., said, "All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th of September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposed as an agreement, and that the other party should afterwards assent, without writing, to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute." But in the present case the words of the statute are not "an agreement in writing or some note or memorandum of an agreement in writing," but "an agreement made in writing." That is something very different from a memorandum thereof made in writing, and in my opinion it is impossible to say that, when at the time of registration of this document there was only, in fact, an offer, there was an agreement made in writing at or before the issue of the shares, and which was registered at or before the issue of the shares.

But then it was ingeniously suggested by Mr. Grosvenor Woods that the document of the 28th of September was not a proposal at all, but was in fact an acceptance by the company of a proposal previously made by the shareholders, and assented to by the appellant. But as I understand the facts, what the appellant assented to at the general meeting was the resolution authorizing the liquidator to enter into this agreement with the new company. That was not a proposal made by the debenture-holders to the new company, it was merely that they gave authority to the liquidator to make the proposal to the new company, and, in my opinion, the document registered does not purport to be an acceptance of any offer made by the debenture-holders so as to constitute an agreement made in writing within the requirements of section 25. In my opinion, in the present case, there being merely a proposal made in writing by the company, it cannot be considered to be an "agreement made in writing" within section 25, or that that section has been complied with.

In my opinion, therefore, an order ought to be made that the name of the appellant be taken off the register of shareholders.

BOWEN, L.J.—I am of the same opinion, and I only express my individual view because we are differing from the learned judge in the court below.

For the reasons given by Cotton, L.J., it is plain that the document which has been registered is not an acceptance by the company of an offer by the appellant. There was no offer capable of being accepted made by the appellant to the company, but only a consent given by him to a resolution which authorized the agreement between the two companies.

If this document which has been filed is not the acceptance of an offer already made, what is it? It is an offer, and only an offer, duly made in writing, and filed while it was only an offer. The offer being something short of a complete contract, it was not a complete contract when it was filed. It is true that it did afterwards turn into a contract when it was accepted, but it did not, I think, turn into a contract duly made in writing, and it certainly did not turn into a contract duly made in writing at the time this document was filed, because it only became a contract long after the document was filed.

It is obvious, therefore, that, unless we are to fritter away this section by putting a forced construction upon it, the section has not been complied with. I regret this judgment for the reasons given in the argument by Cotton, L.J. I think it is a most unfortunate slip, and that in substance the object of the Act has been fulfilled, though the requirements of the Act have not been complied with. But we must see that the Act of Parliament is carried out in its letter as well as in its spirit.

The cases on the Statute of Frauds can have nothing

to do with this case, and it would not follow, even if this were held to be a contract within the Statute of Frauds, that the contract dealt with by this section may not be different. *Reuss* v. *Picksley*, and the case of *Smith* v. *Neale*, 5 W. R. 563, 2 C. B. N. S. 67, which preceded it, were not decisions that the documents amounted to a contract, but only that they amounted to a memorandum of a contract. We are bound by *Reuss* v. *Picksley*, and that case no doubt pushed the literal construction of the Statute of Frauds to a limit, beyond which it would perhaps be not easy to go; but unless we found the language of the Statute of Frauds repeated in this section, we should not be bound by *Reuss* v. *Picksley*, and if we were to follow it we should be following that which has not a real analogy.

FRY, L.J.—I am of the same opinion.

Section 25 of the Companies Act, 1867, requires certain conditions to exempt shares from liability to be paid for in cash.

Now, those conditions are as follows: The existence, at or before the date of the issue of these shares, first, of a contract; secondly, that the contract be duly made in writing; and, thirdly, that the contract be filed with the Registrar of Joint-Stock Companies.

Now, all these things must be done or be in existence at or before the date of the issue of the shares. You cannot have a contract filed before the issue of the shares if it is not a contract till after the issue of the shares. You cannot have it duly made in writing at that time unless it has been made before the issue of the shares. All these things, therefore, must be done at or before that time.

Now, what we have here is this. There was a contract between the old and the new company, which provided for the issue of these shares, but that was never registered; therefore, that is out of the question. But instead of that a certain memorandum of agreement of the 28th of September, 1888, was filed with the registrar.

Now, that purported to be between the new company and the several persons whose names and addresses are set forth in the schedule thereto. Not one of these persons, however, signed that agreement; not one of them is shown to have given any assent to the agreement until, by the acceptance of the shares after issue, they may be said to have concurred in the agreement.

It appears to me, therefore, that at the time of the issue of the shares there was no contract between the parties as to the terms of this instrument, and still less was there any contract duly made in writing.

Now, it is to be observed that we have been asked to attend to cases on the Statute of Frauds, but nothing can be more different than the language of this statute and the language of the Statute of Frauds. That is satisfied if the contract be in writing, or if the memorandum of the contract be in writing, signed by the party to be charged therewith; but here the contract must be *made* in writing, by which I understand that both parties to the contract must signify their assent to the terms of it in writing, and that, without going beyond the writing, you can see the existence of the contract between the contracting parties. That is the ground on which it appears to me that we cannot convert this document into a contract satisfying the language used in the section, by reason of the subsequent acceptance of its terms by some of the persons making the contract.

But then it is said that this document is not an offer by the company, but is an acceptance by the company of an offer previously made by the shareholders. But the misfortune of that is, that this document does not contain any writing stating the offer. It does not purport to be an acceptance of the offer; it proceeds on an entirely different footing. Therefore, if it were the fact that there were any such offer (and I agree in thinking there was not) this document contains no embodiment of such offer, and, therefore, is not a contract duly made in writing, by reason of the proposals of the shareholders.

I regret to have to come to this conclusion, because the document registered is an honest one, and one obviously disclosing the real transaction between the parties.

Appeal allowed.

Solicitors, *Snell, Son, & Greenip.*

From Lancaster Palatine Ct. of Chan. } Aug. 2, 1889.

PROCTOR *v.* BAYLEY. (*a.*)

Patent — Infringement — Infringement discontinued before action brought—Intention to infringe—Injunction—Damages.

An injunction against the infringement of a patent will not be granted where, though there has been an infringement, it has been discontinued several years before action brought, and there is no intention or probability of a renewal of the wrongful user.

In 1882 *A. commenced using experimentally certain machines supplied by B. In* 1883, *A. being dissatisfied with the machines, the user was discontinued and never resumed, and B. was requested to remove them, which he did in* 1885. *In* 1887 *C. obtained a judgment against B. that the machines were an infringement of C.'s patent, and shortly afterwards C. claimed royalties from A. for the use of the machines supplied by B. A. replied that he was not using, and had no intention of using, either B.'s or C.'s machines, and stated the circumstances under which he had formerly used them. In* 1888 *C. brought an action against A. for an injunction and account of damages. A., by his defence, denied infringement, and stated that, if there had ever been infringement, it had been discontinued long before the action, and that there was no threat or intention to infringe in the future.*

Held, reversing the decision of Bristowe, V.C., *that, though there had been an infringement, the circumstances were such as not to afford any inference that the infringement was likely to be repeated, and, therefore, an injunction ought not to be granted; consequently, this being a Palatine case, to which the Judicature Acts did not apply, damages could not be given except under Cairns's Act, under which they can only be given where there is a proper case for an injunction.*

Millington *v.* Fox, 3 *My. & Cr.* 338, *and* Geary *v.* Norton, 1 *De G. & S.* 9, *distinguished.*

Appeal from Bristowe, V.C., of the Lancaster Palatine Court of Chancery.

The plaintiff was the owner of a patent for machines (for feeding furnaces) known as "automatic stokers." A Mr. Bennis had induced the defendants in 1882 to try some of his "automatic stokers," on the terms that he was not to be paid for them unless the defendants found them satisfactory. The defendants not being satisfied with the working of the machines, requested Bennis to remove them, and in the meantime discontinued using them, and placed them in their yard. They were never used again, and were removed by Bennis early in 1885. The present plaintiff brought an action against Bennis (*Proctor* v. *Bennis*, 36 W. R. 456, 36 Ch. D. 740) on the ground that Bennis's "stokers" were an infringement of the plaintiff's patent, and he obtained judgment in

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

that action in February, 1887. In the following month he applied to the present defendants, claiming a royalty from them for having used the "stokers" supplied by Bennis. The defendants intimated in reply that they used neither the plaintiff's nor Bennis's stokers, and did not intend to use them. There was some further correspondence, which ended with a denial by the defendants that they had used or were using any machine which infringed the plaintiff's patent, or that they were under any liability to him.

The plaintiff, in January, 1888, commenced this action in the Palatine Court of the Duchy of Lancaster, claiming an injunction to restrain the defendants from infringing his patent, and an account of profits or damages. In their defence the defendants, while admitting the validity of the patent, denied their user of any machines which were an infringement of it. Alternatively, they said if they had used any such machines it had been done in ignorance of the plaintiff's patent, and only experimentally, that the experiment having been a failure they had discontinued the user years before this action was commenced, and they had not threatened and had no intention to use any such machines in future.

Bristowe, V.C., granted an injunction, and directed an inquiry as to damages, ordering the defendants to pay the costs of the action.

The defendants appealed.

Romer, Q.C., Rotch, and *Stoffurth*, for the appellants.—The judge was over-persuaded in the reply by the case of *Millington* v. *Fox*, 3 Myl. & Cr. 338; but the present case is different. Here there had been no infringement for years before action brought, and there was no intention or threat to infringe, and consequently there was no ground for an injunction. As to damages in lieu of an injunction, the case of *Ferguson* v. *Wilson*, 15 W. R. 80, L. R. 2 Ch. 77, is in point as showing they cannot be given under Lord Cairns's Act in a case like this where the plaintiff was not entitled to equitable relief. An account in equity cannot be ordered where an injunction cannot be granted: *Baily* v. *Taylor*, 1 Russ. & My. 73. An injunction ought not to have been granted in a court of equity to restrain a party from doing what he does not threaten or intend to do: *Stannard* v. *Vestry of St. Giles*, 30 W. R. 693, 20 Ch. D. 190. In that case there had been a threat or intention to infringe, but it had been abandoned. In *Geary* v. *Norton*, 1 De G. & S. 9, on which, and *Millington* v. *Fox*, the Vice-Chancellor relied, there actually was an infringement. In *Millington* v. *Fox*, which was a trade-mark case, the defendants had used the plaintiff's trade-marks on steel bars in ignorance of the plaintiff's rights, and though the defendants abandoned their user when they found the marks were private property, and offered to pay compensation, that was not till after action brought, and the Lord Chancellor granted the injunction but gave no costs. So far from supporting his case, *Millington* v. *Fox* is really against the plaintiff. There the judge came to the conclusion that the plaintiffs under the circumstances required and were entitled to the protection of an injunction. Here it cannot be so, as the defendants wrote (in answer to a complaint by the plaintiff) that they were not using any of the plaintiff's machines, infringing his patent or intending to do so. *Geary* v. *Norton* merely decided that plaintiffs were not bound to rely on assurances by defendants that they would not infringe again when they had already wilfully infringed.

They also cited *Caldwell* v. *Vanvlissengen*, 9 Ha. 415, on the same point.

Moulton, Q.C., and *Maberly*, for the respondent.—The plaintiff established at the trial the fact of the infringement by the defendants of his rights under the patent, and the denial by the defendants of the extent and scope of those rights, and their refusal to pay damages before action brought. The plaintiff was thus obliged to prove that the articles used by the defendants were within the scope of the patent. [FRY, L.J.—Was there any ground for believing at the time of the trial that the defendants would continue their infringements? Infringements discontinued years before would not justify an injunction.] What difference does it make whether you deny the validity of the patent or deny that the machines used are within the patent? The defendants claimed to use them as of right. The assertion of the right to use them is inconsistent with absolute certainty of the user not being repeated. There is no case which shows that the plaintiff must prove affirmatively that the defendants will repeat the offence. The user was discontinued, not because it was an infringement, but because the machines, being badly managed, wasted coal. [They referred to *Geary* v. *Norton* and *Losh* v. *Hague*, 1 Webst. Pat. Cas. 200.] As to the question whether an injunction ought to have been granted, the position of the defendants here was very similar to that of the defendants in *Millington* v. *Fox*.

Romer replied on the question of costs only.

COTTON, L.J.—This is an application by way of appeal from a judgment of the Vice-Chancellor of the Duchy of Lancaster granting an injunction and an inquiry as to damages. The action was brought on the ground that the defendants had infringed the plaintiff's patent. They did infringe it. Is there ground here to justify the exercise of the extraordinary jurisdiction of the Court of Chancery in granting an injunction? It is not enough for that purpose that a man has done a wrong, as the injured person may get damages for the wrong. But in a proper case the court says: We will do more than that—where a wrongful act is threatened and intended we will prevent it being done by granting an injunction beforehand to stop it. Now that all the superior courts exercise the same jurisdiction, the distinction between the jurisdiction of the Court of Chancery and of the common law courts is apt to be lost sight of. The Palatine Court of Chancery, however (unlike the Chancery Division of the High Court), having only the old jurisdiction in equity, can only give damages where the case is one for an injunction. In the present case, therefore, it becomes necessary to consider whether the order for an injunction can be sustained. Where a person has done a wrongful act there is a *primâ facie* ground for an injunction, because a presumption is afforded that he will go on doing it. Similarly the patentee may be entitled to an injunction if, though there has been no infringement in the past, there is proof of an intention to infringe in the future.

But here, though the defendants did infringe the patent, we must consider all the circumstances of the case to see whether the court ought to draw the inference that an injunction is necessary in order to prevent the wrongful act being repeated. The defendants here are not manufacturers or vendors, but merely persons who have used the patent stokers. When did they use them? It was a long time ago. They have discontinued the user ever since 1883. That user, when it occurred and while it lasted, was no doubt a wrongful act as against the plaintiff, and an infringement of his patent. It was, however, discontinued because the defendants found the patent stokers useless. Then, that being the case, is there any probability that there will be a repetition of the act? I think the answer must be that there is not. The strong point against the defendants is the course they took both before and after the action was brought.

The first letter rather puts the matter as if the infringement were being continued, asking for the payment of a moderate royalty, and threatening proceed-

ings if that is declined. Now before writing in that strain the plaintiff ought to have made inquiries as to when and under what circumstances the user had occurred. I cannot, however, commend the answer to that letter, for it refrains from giving information which would probably, if given, have put a stop to the bringing of the action. What it said was that the defendants were not using the plaintiff's patent and had no intention of using it. Now, if the plaintiff had, after receiving that answer made inquiries, he would have ascertained that it was four years since the defendants had used the patent stokers. In August the defendants wrote to the plaintiff informing him, in reply to his circular, that Mr. Bennis's stokers had been used by them but not found satisfactory. I do not think that was the letter of persons desirous of avoiding litigation, which might probably have been averted if there had been a greater desire to avert it. Then we come to the defence, which, the action having been brought to get damages and an injunction, does not take the course it ought to have taken, because it disputes the fact of infringement, and thus implicitly denies the plaintiff's right, but no intention was expressed or implied to continue the wrongful act. The plaintiff relies on the denial of his right by the defendants as showing their intention to continue the wrongful act. I agree with the Vice-Chancellor that it afforded no inference of their intention to continue the act, though it might have done so had they been manufacturers of the machines, and, in my opinion, no inference could be drawn from it that the summary action of the Court of Chancery was required to protect the plaintiff from injury. There is no ground for the plaintiff coming here to claim protection by the exercise of this extraordinary jurisdiction of a court of equity because there is really nothing to be protected from. But the Vice-Chancellor seems to have thought he was bound by the reported cases, and especially by the decision in *Millington* v. *Fox*, where the defendants had probably used the plaintiff's trade-mark in ignorance, and did not intend to use it again. But in that case the natural inference from the defendants' conduct, so far as it was within the plaintiff's knowledge, at the time the bill was filed, was that they did intend to continue the user. That being so, and it being shown that the defendants had stamped the plaintiff's mark on their steel bars, the court might have drawn the inference that the defendants there were selling the steel and not merely manufacturing it at that time. If there had been anything to lead to the inference that the defendants here intended to continue the user of the patent stokers the injunction would have been rightly granted, but I do not think that was so in this case.

Then in *Geary* v. *Norton* one of the defendants, though knowing of the patent, offered to sell the shawls which infringed the plaintiff's rights at two-thirds less than the patentees' price, and the proper inference was that there was a probability of the wrong act being repeated, and that the plaintiffs would not be safe unless protected by an injunction. In my opinion, on the facts of the present case we ought not to infer that there was any intention to continue the infringement, and, therefore, I think the Vice-Chancellor was wrong in granting the injunction.

Then, in the Palatine Court of Chancery there is no jurisdiction to give damages except under Lord Cairns's Act, and under that Act damages can only be given where an injunction might be granted; but where there is no case for an injunction damages cannot be given under that Act. There being no case for an injunction here, we cannot give damages. And we cannot give damages under the old common law practice where the plaintiff has brought an action for equitable relief to which he is not entitled. However, the defendants have so acted here as not to deserve costs below, but as the appeal is successful they must have the costs of that.

FRY, L.J.—In this case the Vice-Chancellor granted an order for an injunction, and further directed an inquiry as to damages. Now he had no jurisdiction to give damages in an action like this; except as in lieu of, or in addition to, an injunction under Lord Cairns's Act. The question as to whether damages could be given therefore depends on whether this was a proper case for an injunction. The defendants are not manufacturers or vendors of the articles which infringed the plaintiff's patent—they are merely persons who have used those articles, and that only on one occasion which was nearly five years ago. They have never used them again, and the reason they abandoned the use of them was because they did not answer. They are, therefore, not at all likely to repeat the act. That being so, ought an injunction to be granted? An injunction is intended to prevent injury, and not to protect rights, except so far as you protect rights by preventing wrongs. I think, therefore, there is no ground here for an injunction. What was most strongly pressed upon us was that the defendants asserted, even in their written defence, that they had a right to use the articles, but, in my opinion, having regard to all the circumstances of the case, there is no real probability of a repetition of the offence, though the defendants may have been foolish or ill-advised enough to make that assertion. The claim for an injunction fails, and with it that for damages. The plaintiff himself assesses the damages at a sum of £40, and instead of bringing an action at common law, he actually puts in motion all the machinery of a patent action in the Palatine Court of Chancery. There is nothing in the conduct of the defendants to support such a proceeding.

LOPES, L.J.—The wrongful act complained of here had been discontinued five years before action brought, and no repetition of it, or threat of repetition, has since taken place. If there were nothing more than this it would be abundantly clear that there was no case for an injunction. But the defendants challenged the plaintiff's right, and even up to and at the time of the trial they never admitted that they had infringed it. I have felt great doubt whether an inference ought not to be drawn from that conduct of theirs that a repetition of the infringement was probable. If so, the plaintiff would, I think, be entitled to the protection of an injunction. However, the rest of the court who are most likely much more familiar with this jurisdiction, do not take that view, and therefore, though I arrive at their conclusion with considerable doubt, I do not dissent from them.

Appeal allowed.

Solicitors, *Dangerfield & Blythe*, for *John Hall, Son, & Lord*, Manchester; *A. McDonald Blair*, Manchester.

From Q. B. Div. Nov. 27.

ATTORNEY-GENERAL v. EMERSON. (*a*.)

Practice — Stay of proceedings pending appeal—Discretion of court—Ord. 58, r. 16.

There is, and there can be, no practice to limit the absolute discretion given to the court by order 58, r. 16, to grant or refuse a stay of proceedings pending an appeal.

Application for a stay of proceedings pending an appeal to the House of Lords.

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the

(*a*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

applicant.—It is an established and universal practice in such cases to stay proceedings unless the solicitor to the respondents will give his personal undertaking to return the costs in the event of the appeal being successful: *Merry* v. *Nickalls*, 21 W. R. 305, L. R. 8 Ch. App. 205; *Grant* v. *Banque Franco-Egyptienne*, 26 W. R. 669, 3 C. P. D. 202; *Morgan* v. *Elford*, 25 W. R. 136, 4 Ch. D. 352; *Wilson* v. *Church*, 27 W. R. 843, 11 Ch. D. 576.

Stuart Moore, for the respondents.—There is no such practice as is suggested. The court has an absolute discretion, under ord. 58, r. 16, to grant or refuse the stay.

Lord ESHER, M.R.—In this case application is made to the court to stay proceedings under ord. 58, r. 16. That rule is in the following terms:—"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal may order."

Now, it is contended for the Crown that, whether there are any special circumstances or not, there is a universal practice in this court to stay execution for costs pending an appeal to the House of Lords, unless the solicitor will give his personal undertaking to return the costs in the event of that appeal being successful. Cases have been cited, and expressions of judges have been relied upon, to show that the court has laid down and established this practice. As to any expressions used by the judges before the Judicature Act, I think that they are absolutely immaterial. The rule has been made since those expressions, and it is a valid and binding rule. I cannot think that any of the expressions which have been used since the making of the rule are meant to convey that there is any practice of the kind suggested. The question really turns on the true construction of the rule. It is clear that the rule gives the court a discretion—that is to say, of course, a judicial discretion—to grant or refuse a stay. If any such practice as was suggested had been established, it would be a limitation of the discretion given by the rule. No court has any authority to lay down such a practice to alter the rule. The rule alone is binding on the court, and there is no such practice as is contended for; but the court has an absolute discretion to grant or refuse the application according to the circumstances of each case.

LINDLEY, L.J.—I am of the same opinion. I protest against the notion of limiting, by the practice of the court, the absolute discretion given by the rule. If a discretion is given to any court, it is their bounden duty to exercise it, and it is not competent to them to limit that exercise by laying down any rules of practice. No doubt this is often done, and saves trouble; but, in my opinion, it is entirely and utterly wrong. There is, and there can be, no such practice as that contended for by the Attorney-General. The rule gives a discretion, which must be exercised on the circumstances of each case.

LOPES, L.J.—The application is made under ord. 58, r. 16. According to my mind the interpretation of that rule is clear. The court has an absolute judicial discretion to grant or refuse the stay, and it would, in my opinion, be in contravention of the rule were we to hold that there was any practice limiting that discretion.

Solicitor for the Crown, *Solicitor to the Commissioners of Woods and Forests.*

Solicitor for the respondents, *F. E. Goodhart.*

From Q. B. Div. Nov. 13.

PRAED v. GRAHAM. (a.)

Practice—New trial—Action of libel—Excessive damages—Principle upon which new trial granted.

In an action ex delicto *in the nature of an action of libel a new trial ought not to be granted on the ground that the damages are excessive unless the court comes to the conclusion, upon all the circumstances, that the damages awarded by the jury are so large that no twelve reasonable men could have given them.*

Appeal from the judgment of the Queen's Bench Division, refusing a new trial in an action of libel.

The jury found a verdict for the plaintiff, damages £500. The defendant moved for a new trial, on the ground that the damages were excessive. The Divisional Court (Field and Manisty, JJ.) refused the application. The defendant appealed.

Fillan, for the appellant.

Lockwood, Q.C., and *Atherley Jones*, for the respondent.

Lord ESHER, M.R.—The rule of conduct upon which the court acts when it is asked to set aside the verdict of a jury in an action *ex delicto* in the nature of an action for libel on the ground that the damages are excessive, seems to me to be the same as that upon which the court acts when asked to set aside a verdict on the ground that it is against the weight of evidence. The rule may be stated thus:—If the court comes to the conclusion, having all the facts and circumstances before it, that the damages are so large that no twelve reasonable men could have given them, then the court ought to interfere and set aside the verdict. But if, on the other hand, the court should come to the conclusion that, though the damages are larger than the court, if it was acting as a jury, would give, yet it could not say that they are so large that no twelve reasonable men could have given them, then the court cannot interfere with the verdict. That, in my opinion, is the general principle, and all the special grounds for disturbing a verdict, such as the jury having misconceived the facts, or having been carried away by the speeches of counsel, will be found to come within the above rule. The same principle was stated in other language by Fitzgerald, B., and adopted by Palles, C.B., in *M'Grath* v. *Bourne*, 10 Ir. Rep. C. L. 160, 24 W. R. Dig. 131, that to render the damages excessive "the amount should be such that no reasonable proportion existed between it and the circumstances of the case." [His lordship then came to the conclusion, upon all the facts, that the verdict should not be set aside, and that the appeal should be dismissed.]

LINDLEY, L.J.—I am of the same opinion. I cannot say that twelve men could not have reasonably given £500 damages.

LOPES, L.J.—In an action of libel there is no exact measure of damages. The damages are at large in the discretion of the jury. To enable the court to grant a new trial it is not sufficient for the court to say that the damages are larger than they would themselves have given. The court must come to the conclusion that the damages are so obviously unreasonable as to lead to the conclusion that no twelve reasonable men could have given them.

Appeal dismissed.

Solicitors for the appellant, *White & De Buriatte.*

Solicitor for the respondent, *W. Bohm.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

boats. This would in practice be useless unless the right extended above, at least, ordinary high-water mark, and, seeing this, and the possibility of more difficult questions arising respecting the shore below that line, I suggested to the plaintiff's counsel that it would be as well to limit his claim to an injunction to the soil above it. This he properly conceded—not by way of abandonment of his larger claim, but as sufficiently meeting the exigency of the present case—on the understanding that words should be inserted in the judgment to prevent the concession from being cited against him hereafter. I see no answer to the plaintiff's claim thus limited. He admits, as he was bound to do, that, deriving title to the foreshore by royal grant, he can claim nothing that was not originally vested in the Crown, and that paramount to the right of the Crown in the open sea is the right of the public to navigate and fish.

It has long been settled that this right does not extend to places only occasionally covered by water, and the necessity of laying down some rule of reasonable certainty has introduced one which fully supports the claim just mentioned. It was solemnly decided in *Attorney-General* v. *Chambers*, in 1854, and it has never since been questioned, that the average of the medium tides in each quarter of a lunar revolution during the year gives the limit in the absence of usage to the rights of the Crown on the seashore. There is here no evidence of usage to interfere with the application of this rule. Instances have no doubt been mentioned of fishing vessels having been drawn, not only up, but over the Chesil Beach, but this has occurred only in stress of weather, actual or imminent—that is, under circumstances sufficient to repel usage even if they did not imply that peril or necessity which has ever been admitted to justify interference with proprietary rights. I take it, therefore, to be clear that whatever the rights of the plaintiff may be below the line of the ordinary high-water mark, as defined in the case above quoted, no right can be asserted against him above that line. The title of the public, which is paramount to that of the Crown, can only extend as far as the title of the Crown itself, and the grantee of the Crown, if he can be in no better position than his grantor, cannot, without special reasons, of which there is not a trace here, be placed in a worse one.

There remains the principal point in the case, and to my mind the only one presenting any real difficulty. The defendants claim to pass at their pleasure in suitable craft over the waters of the Fleet, including that part which alone the plaintiff seeks to protect—viz., that situate between Reed's End and a point 250 yards to the west of the Abbotsbury Stone. They disclaim all right or intention to enter within the limits of the decoy or to disturb the swans, and, further, they profess to care for the privilege claimed only for the purpose of carrying their fish from spots at which they happen to land them to the shore of the mainland; but their position, if tenable at all, can be so only on the footing of this water being navigable as of right—that is, open to all her Majesty's subjects. So far as any argument was made in support of a different position—that is, in favour of fishermen or a class of fishermen—it is disposed of by the remarks above made on the evidence of custom, which are equally applicable to this part of the case. The question in dispute admits of being thus plainly and tersely stated. Is the water of the Fleet within the specified limits navigable or not? If it be navigable in the proper sense in which that word is used concerning legal rights over water, the defendants are entitled to judgment. If, on the other hand, it be not in that sense navigable, they certainly fail. It becomes, therefore, important to determine the proper meaning of the word "navigable." Mr. Crackanthorpe, in reply, invited me to hold that the definition of "foreshore" must determine what is navigable, and that, if any water, or rather land covered with water, cannot properly be styled foreshore, neither can it be properly styled navigable. It is a tempting argument, because offering an easy method of solving a troublesome question. About the limits of the foreshore there is no doubt, and if I could have securely taken those limits as my infallible and only guide, there would have been no occasion for any further argument on this part of the case. I am not, however, satisfied that this is enough.

It is of course of the first importance to bear in mind not merely the rule respecting the limits of foreshore, but the more general doctrine on which that rule rests, and to use that rule in applying the doctrine to the question of navigability. But I think that one must go further back and not be content with the rule as being itself the only guide. The defendants point out that the plaintiff, while insisting that this water is not navigable, seeks to restrain them from navigating it, and that although it may be, and is, the fact that this water does not admit navigation by their ordinary fishing boats, to say nothing of vessels of larger draught, yet it can be navigated by those lighter boats which they find convenient to their trade purposes, and which are adapted to water of this particular character and depth. In short, they say that, being navigable by craft suited to the circumstances, it cannot be said to be not navigable at all. The answer to this plausible argument is that, as stated in *Murphy* v. *Ryan*, the word navigable has a popular and also a legal and technical meaning, and that this legal and technical meaning, although no doubt essentially requiring navigation to be possible, requires also something more—namely, the ebb and flow of the tide. The history of this limit of distinction between waters which are technically navigable and those which are not, is far too long and intricate for examination here. Such an examination would involve reference to many ancient writers, such as Lord Coke and Lord Hale, supplemented by others who have contributed much learning on those and other serious branches of law—as, for instance, Mr. Angell, the 13th chapter of whose work on watercourses, contrasting as it does the laws of England and America, deserves more attention than I have been able to give to it, and Chancellor Kent, whose commentaries have often been quoted in connection with this subject. He devotes a section in the second part of his commentaries to the division line, which has exercised the minds of many writers, between the jurisdiction of the Admiralty and of courts of common law. That division line has had something to do with the matter in hand, and so has also the broad common-sense which so often underlies the principles of English law and their application to the affairs of daily life. I am far from saying that the legal and technical meaning of "navigable" has been plainly rested upon any such practical reason as that navigation is impossible for any useful purpose of trade or commerce except where the tide ebbs and flows; but yet I cannot read any of the numerous treatises, whether in text-book or judicial decisions on the subject, without concluding that this practical reason is at the bottom of it. That is borne out by the legal meaning (for these words also have a legal meaning) of ebb and flow. Those who have framed the law of England on this subject—I speak principally, of course of the two great men above mentioned—saw the absurdity of treating as subject for this purpose to the ebb and flow of the tide, such land as is occasionally covered with water, but is during the greater part of the year dry.

They have, therefore, excluded from the meaning of these words not merely those exceptional tides which occur, it may be, only twice or thrice in the year, but also those high tides which recur more often, and have limited them to what are sometimes called average, sometimes ordinary, tides, and have been more than

ence precisely defined—*e.g.*, in *Attorney-General* v. *Chambers*. It is useless to multiply illustrations, but some will be found in the following cases:—*Mayor of Lynn* v. *Turner*, *Blundell* v. *Catterall*, *The King* v. *Mountague*, and *Pearce* v. *Scotcher*, 9 Q. B. D. 162—a case where the law is raised and stated somewhat differently, but substantially on the same lines. Neither to these nor to any other authorities do I propose to refer again. Seldom, I suppose, have so many been cited, even in a case of importance, and yet none been irrelevant. With such industry and zeal as the opportunities at my disposal and the season of the year permitted, I have angled in all these waters, and in some others, which, though not specified by counsel, were probably in their minds. Like the inhabitants of Chickerell and the neighbouring villages, I have, as regards many of them, been only more or less a fisherman, but, like them also, my occupation has not been without profit. There are not wanting passages in some of the books already quoted, and others, that to arms and creeks of the sea there may be applied, as one might naturally expect, considerations different from those applicable to the open sea beating against the main shore. And these considerations might possibly justify an easier conclusion against the defendants as regards the Fleet, or at least the part of it here in question, than if they were asserting rights over the open sea. But it is unnecessary to pursue this.

The result of the evidence is, in my judgment, adverse to them, even on the assumption that what they call the Little Sea ought to be treated on the same footing as the Great Sea, and I prefer to make that assumption in their favour. What is the evidence? On the part of the defendants there is little enough. Of the many witnesses called on their behalf some professedly knew nothing about tides, and those who knew anything at all had so limited the scope of their observations that they could afford me but little assistance. This makes me the more regret that the defendants were not afforded an opportunity of witnessing and, if they pleased, taking part in the experiments made on behalf of the plaintiff. I repeat what I have already said, in this case and in others, that if, whenever a party, plaintiff or defendant, intends to adduce evidence requiring experiments, measurements, or other applications of practical science, he offered his opponent an opportunity of participating in the process on fair terms, he would assist the court and advance the administration of justice without risk of injury to himself. According to my experience he would, in a large majority of cases, thereby gain some advantage. Here the experiments were made without any such offer, and the result is to make them less valuable than they might well have been, and to lay them fairly open to the criticisms of the defendants' counsel. It occurred to me that some independent observation would be useful, if not necessary; but, having regard to what really is absence of contradiction on the part of the defendants, and the confirmatory evidence on the part of the plaintiff, I hold those made, which I have no doubt were fairly made, sufficient. The confirmatory evidence is that of persons who have at different times seen dry portions of the land alleged to be covered with navigable water. That, of course, might be possible and yet the water be navigable, but the evidence goes to this—that the land was dry for days together, and that, I think, excludes the notion of navigability. Whether the water is more properly styled brackish, or salt, I cannot determine, but if it be really salt I am not disposed to attribute much importance, still less draw any concluded inference from the fact, remembering that under certain conditions, which must frequently recur, there is a supply of sea water coming through or over the beach. Taking all the evidence together, it has proved to my satisfaction, and I must hold, that so much of the Fleet as is in question, is not a creek or arm of the sea in which the tide ordinarily ebbs and flows. Variations there are, partly due to land streams or other causes, either constant or of frequent occurrence, but there is no diurnal ebb and flow. I must, therefore, hold that it is not navigable, and therefore also that the defendants have no right to pass over it, or, in other words, that the defendants or other persons passing over it without the plaintiff's licence are trespassers. If my view of the law and the result of the evidence be correct, this conclusion is inevitable.

My duty is to decide irrespective of consequences; but yet I am not sorry to think, as the evidence has convinced me I fairly may, that in restraining interference with the plaintiff's private property I shall not really be checking a useful industry or a means of livelihood. I am far from saying that the issue between the plaintiff and defendants is not of real importance. No doubt it is; and as, notwithstanding some irritability in the past, the defendants have assisted me to determine that issue unincumbered with smaller and comparatively trivial points, I should have been disposed to have relieved them from the costs of an adverse judgment. I am pleased to be able to follow my own bent with the assent of the plaintiff. My judgment will take the following form:—The defendants by their counsel disclaiming any intention to enter the plaintiff's decoy (which may be described by reference to one of the plans in evidence) or to disturb or injure the swans frequenting the Fleet, and the plaintiff by his counsel not asking as against the defendants or for the purposes of the present action any greater relief than hereinafter mentioned, restrain the defendants, &c., from (1) trespassing on the plaintiff's soil called the Chesil Beach, between Reed's End and the point 250 yards to the west of the Abbotsbury Stone (which limits can be defined also by reference to one of the exhibited plans); (2) stationing or maintaining fishing or other boats above the line of ordinary high-water mark within the limits aforesaid; (3) passing in boats or otherwise over the water or land of the Fleet within the same limits. No order as to costs.

Solicitors for the plaintiff, *Fladgates*.

Solicitors for the defendants, *Pitts & Savage*, for *Budge & Slade*, Wareham and Swanage.

Q. B. Div. (Huddleston, B., and Stephen, J.) Nov. 4.

Chamberlain v. Stoneham. (*a*.)

Costs—Witness in bankruptcy—Allowance to—Solicitor—Loss of time—Bankruptcy Rules, 1886, *r.* 71—*County Court Rules*, 1889, *ord.* 50, *r.* 16.

The decision in Collins *v.* Godefroy, 1 *B. & Ad.* 950, *that an attorney who has attended on subpœna as a witness in a civil suit cannot maintain an action against the party who subpœnaed him for compensation for loss of time, does not interfere with the statutory right of a witness in a bankruptcy proceeding to payment for expenses and loss of time.*

Appeal from the Shoreditch County Court.

The plaintiff was a solicitor, and attended before the registrar in the Barnet County Court on the summons of the official receiver to give evidence in certain bankruptcy proceedings as to alleged dealings of the bankrupt with his property. He was given 3s. 6d. as travelling expenses, but before being sworn asked for the usual allowance for a professional witness. The registrar

(*a*.) Reported by T. R. Colquhoun Dill, Esq., Barrister-at-Law.

thought the 3s. 6d. sufficient, and the plaintiff gave his evidence, and afterwards brought this action against the official receiver for £1 10s., his costs as a witness.

The county court judge, on the authority of *Collins* v. *Godefroy*, 1 B. & Ad. 950, dismissed the action, with costs, and gave leave to appeal.

The plaintiff appealed.

R. S. Wright, for the plaintiff.—Although *Collins* v. *Godefroy* may have been rightly decided in 1831, the law is now altered, and under the County Court Rules, 1889, ord. 50, r. 16, and the scale thereto, and the Bankruptcy Rules, 1886, r. 71, the plaintiff is entitled to an allowance for loss of time.

Mattinson, for the defendant.—The plaintiff's remedy was not by action in another county court, but by appeal from the registrar to the judge of the court at which he had attended. He might have done this by refusing to be sworn. On the authority of *Collins* v. *Godefroy* he is only entitled to recover his out-of-pocket expenses.

HUDDLESTON, B.—The only difficulty in this case arises from the decision in *Collins* v. *Godefroy*. Here the plaintiff says, "I am entitled by statute to my costs and allowances—that is, under the Bankruptcy Rules, 1886, and the County Court Rules, 1889." Under these rules he is entitled to recover the proper amount for his "expenses and loss of time," and but for *Collins* v. *Godefroy* this would be quite clear. In that case, however, there was no suggestion that the plaintiff could be entitled to recover for his loss of time unless upon the ground of usage, and that usage he was unable to prove. Lord Tenterden held that, although there was a promise to pay, there was no consideration to support it, it being the plaintiff's duty, apart from any payment, to attend and give evidence. This case is very different. The plaintiff's case is based on the rules. In *In re Working Men's Mutual Society*, 30 W. R. 938, 21 Ch. D. 831, *Collins* v. *Godefroy* was cited and was not acted upon, and we cannot act upon it here.

In my opinion the county court judge was wrong, and the case must go back to him to assess the amount to which the plaintiff is entitled.

STEPHEN, J.—I am of the same opinion. There is no real connection between *Collins* v. *Godefroy* and this case, because now the plaintiff's right rests on statutory authority.

Appeal allowed.

Solicitor for the plaintiff, *V. I. Chamberlain.*

Solicitor for the defendant, *Ernest Todd.*

Q. B. Div. (Field and Manisty, JJ.) Oct. 29.

BAZETT v. MORGAN. (a.)

Practice—Costs—Action founded on contract—Less than £50 recovered—Discretion of judge over costs—Right of appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

A writ in an action founded on contract was specially indorsed for a sum of £49 10s. 11d. More than twenty-one days after service of the writ the plaintiff obtained, under order 14, final judgment for £23 15s., leave being given to the defendant to defend as to the remainder. An order was afterwards made directing the case to be tried in a county court, but subsequently the plaintiff abandoned the remainder, except £4, which was by consent ordered to be paid to the plaintiff, with costs to be taxed. A judge at chambers gave the plaintiff his costs on the High Court scale. The defendant appealed.

Held, that, under section 116 of the County Courts Act, 1888, the judge at chambers had a discretion to give costs on the High Court scale, and that, having exercised his discretion as to the costs, no appeal lay from his order.

Appeal from an order made at chambers by Wills, J.

The writ in the action was specially indorsed for a sum of £49 10s. 11d. for the board and tuition of the defendant's son supplied by the plaintiff. This writ was served on the 19th of March, 1889, and on the 11th of April the plaintiff obtained an order, under order 14, allowing him to sign final judgment for £23 15s., with liberty to the defendant to defend as to the remainder. The summons under which this order was made was returnable on the 6th of April, but was adjourned until the 11th of April.

On the 30th of April an order was made that the case should be tried in a county court; before any further steps were taken a further order was made by consent "that the plaintiff do abandon his claim to the £25 15s. 11d. (the balance), except as to £4 10s. 11d., part thereof, and that the defendant do pay to the plaintiff the sum of £4 10s. 11d. and costs to be taxed."

The plaintiff made an application at chambers as to the costs, and Wills, J., ordered that the plaintiff should be allowed the costs of the action upon the scale in use in the Supreme Court.

The defendant appealed against this order upon the ground that the plaintiff was only entitled to costs on the county court scale. No leave to appeal was obtained.

Morton Smith, for the plaintiff, took a preliminary objection. There is no right of appeal, as the order was an order as to costs only, and by section 49 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), there is no right of appeal against such an order. Here the costs are in the discretion of the judge, and no leave to appeal was obtained. Order 65, r. 12, which deals with costs, is now superseded by section 116 of the County Courts Act, 1888, which in effect re-enacts that rule and gives the judge a discretion over the costs: *Barker* v. *Hempstead*, 37 W. R. 685, 23 Q. B. D. 8.

Lincoln Reed (*J. E. Palmer* with him), for the defendant.—The order under order 14 was not obtained by the plaintiff within twenty-one days after service of the writ, and therefore the case does not come within the proviso at the end of sub-section 2 of section 116. [FIELD, J.—You have to show that this was not an order as to costs only, which are in the discretion of the judge.] This action was for a sum above £20 and under £50, and so comes under the first sub-section, and not under the second sub-section. That part of sub-section 2 which gives the judge a discretion as to costs refers only to the actions mentioned in that sub-section, and not to the actions mentioned in the first sub-section. The case comes within sub-section 1, and the judge has no discretion as to costs, which ought to have been on the county court scale, as provided by sub-section 1.

FIELD, J.—The plaintiff brought this action, which is founded on contract, to recover a sum less than £50, but upwards of £20. The writ was served on the 19th of March, and a summons was taken out, under order 14, returnable on the 6th of April; the hearing of this summons was adjourned until the 11th of April, which was more than twenty-one days after the service of the writ, and on that day the plaintiff obtained judgment for £23 15s. We do not decide whether the case comes within the proviso at the end of sub-section 2 of section 116 of the Act; it is not necessary to do so, as the case comes within the words in the earlier part of the same

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

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...efendant, *T. Durant*.

[redacted] June 21, 1889.

[redacted]HAM v. HASLAR. (*a*.)

...d in negotiation—Value given by ...—Notice of fraud—Onus *of ...e Act*, 1882 (45 & 46 *Vict. c.*

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[redacted], Esq., Barrister-at-Law.

change Act, 1882, *the* onus *is on the holder of a fraudulently-negotiated bill to prove, not only that he has actually given value for the bill subsequently to the alleged fraud, but that he gave such value in good faith without notice of the fraud.*

Motion for a new trial, or that judgment should be entered for the plaintiff on the ground that the judge had misdirected the jury, and that the verdict was against the weight of evidence.

The action was brought by the indorsee of a bill of exchange for £500, against the defendant Haslar, as acceptor, and the defendant Johnson, as indorser. Judgment in default had been signed against Johnson, but the defendant Haslar pleaded the absence of any value or consideration for the acceptance or payment of the said bill by him, and alleged that he had merely accepted and delivered it to one Leslie for the purpose of getting it discounted for him, but that Leslie had, without his consent, handed it to the defendant Johnson, who fraudulently indorsed it to the plaintiff. At the trial, before Field, J., and a special jury, the defendant Haslar gave evidence to the above effect, and the plaintiff, on the other hand, proved that he had given £450 to Johnson for the bill after making inquiries as to the respectability of both defendants.

The judge directed the jury that if the plaintiff honestly and really advanced the sum of £450 in cashing or discounting the bill he was a *bonâ fide* holder for value, and that the *onus* was on the defendant Haslar to prove that the plaintiff had reason to suspect fraud. He further directed that there was evidence of the existence of circumstances which should have put the plaintiff on inquiry from which he wilfully abstained. The jury having found a verdict for the defendant, the plaintiff made the present application, on the grounds that the latter direction of the judge was wrong, and that the verdict was against the weight of evidence.

H. D. Greene, Q.C., and *A. T. Lawrence*, for the plaintiff.—The plaintiff is a holder "in due course" under the Bills of Exchange Act, 1882, and the judge ought not to have called upon the plaintiff to prove consideration and *bona fides*. The evidence that he has given full consideration to the indorser is not disputed.

Whateley (*Cock, Q. C.*, with him), for the defendant Haslar.—Whatever may have been the state of the law before the passing of the Bills of Exchange Act, 1882 (*Jones* v. *Gordon*, 26 W. R. 172, 2 App. Cas. 616), it is now clear that where fraud is proved in the inception or negotiation of a bill, the *onus* of proof is on the holder, not only that he gave value, but that he gave it in good faith and without notice of the fraud: *Bailey* v. *Bidwell*, 13 M. & W. 73; *Raphael* v. *The Bank of England*, 4 W. R. 10.

H. D. Greene, Q.C., replied.

DENMAN, J.—The summing up of the learned judge has been read through and fully commented upon, and I have come to the conclusion that, upon the true construction of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, he put the case too favourably for the plaintiff. Inasmuch as the argument in this case has turned to a great extent upon what is the present state of the law under the Act, I think that we must express our opinion upon it. The first clause with which we must deal is section 30, sub-section 2, which provides that "Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, . . . the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." Now the learned judge told the jury that, if money had really and in fact been given for the bill,

value had in good faith been given. I have never so read this section of the Act; and I think that the attention of the learned judge could not have been called to the other clauses of the Act. Giving "value in good faith" must mean something more than the mere actual and real passing of money or other value, and this appears clearly when the other clauses of the Act are looked at.

A "holder in due course" is, by section 29, sub-section 1 (*b*), defined to be a person who has taken a bill in good faith and for value, and without notice of any defect in the title of the person who negotiated it. Then section 30, sub-section 2, says, in effect, that if fraud in the inception or negotiation of a bill is proved or admitted, the holder must prove that he is a holder in due course as defined by section 29, sub-section 1 (*b*). Again, section 90 says that "a thing is deemed to be done in good faith . . . when it is, in fact, done honestly, whether it is done negligently or not." This clause is obviously founded upon the distinction which is pointed out by Lord Blackburn in *Jones* v. *Gordon* between honest blundering or carelessness, and a dishonest refraining from inquiry. Applying that construction to the words "value given in good faith," at the end of section 30, sub-section 2, it appears to me that those words mean value given honestly and without any notice of the fraud, in the sense explained by Lord Blackburn, and not merely the actual giving of value.

The words of section 30, sub-section 2, "if it is admitted or proved," mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury. That was the old law, as stated in *Hall* v. *Featherstone*, 3 H. & N. 284, which has not, I think, been altered by this Act. When, therefore, some sufficient evidence of fraud has been given, as in this case, the *onus* is on the plaintiff to prove both that he gave value, and that he had no notice of the fraud in the sense explained by Lord Blackburn in *Jones* v. *Gordon*.

In this case there was evidence of fraud which could not have been withdrawn from the jury, and their verdict on that point cannot be set aside as against the weight of evidence. The *onus* of proving that he had no notice being upon the plaintiff, it was essentially a matter for the jury to say whether he had satisfied them on that point; and I think that, even had the *onus* been upon the defendant, there was evidence upon which the jury were entitled to find a verdict for him.

The verdict, therefore, cannot be disturbed.

CHARLES, J.—It is impossible to say that there was not abundant evidence of the fraud practised upon the plaintiff to support the verdict. Then arises the important question in the case—whether there were circumstances in the transaction which ought to have led the plaintiff to make inquiries, and he wilfully abstained from inquiry.

At the time of the passing of the Bills of Exchange Act, 1882, it was uncertain how much the plaintiff had to prove in cases of this kind when evidence of fraud had been given. Lord Blackburn, in *Jones* v. *Gordon*, says:—"The language of the quotation from Parke, B., would seem to show that the *onus* as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case." The learned judge who tried this case took the view that the *onus* was shifted only to the extent of making the plaintiff prove that value was, in fact, given, not that it was also given *bonâ fide*. Upon the construction of the Act I respectfully differ from him. The plaintiff was bound to satisfy the jury that he gave value, and that he gave it in good faith. The Act has settled the law in accordance with the opinion expressed by Parke, B.

I agree with my brother Denman as to the meaning of the words "admitted or proved" in the earlier part of section 30, sub-section 2. The latter part of that section says that the holder must prove that value was in good faith given for the bill. Referring back to section 29, sub-section 1 (*b*), a holder in due course is defined to be a person who has taken a bill in good faith and for value, and without notice of any defect in the title of the person who negotiated it. Therefore a holder is, by section 30, sub-section 2, deemed to be a holder in due course until fraud is proved; but in that case he must prove that he is a holder in due course as defined in section 29, sub-section 1 (*b*). "Good faith" is, by section 90, defined to be the doing of a thing honestly. When, therefore, fraud has been proved, the holder must prove that he gave value honestly without notice of the fraud.

The jury have found against the plaintiff, and the verdict must stand.

Motion dismissed.

Solicitors for the plaintiff, *Thorneycroft & Willis.*

Solicitors for the defendant, *Roopers & Whateley.*

Q. B. Div. (Denman, and Stephen, JJ.) | Jan. 17; April 10; May 4, 1889.

CLIMPSON *v.* COLES. (*a.*)

Bill of sale—Building agreement—Mortgage—Power of entry—Power to sell materials—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act,* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

By a mortgage deed the plaintiff assigned to the defendants certain land, and buildings in course of erection thereon, "and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the buildings." The plaintiff covenanted that all such building materials should be considered as immediately attached to, and forming part of, the fee simple of such premises; none were to be removed without the concurrence of the mortgagees; and, in default of completion of the premises to the satisfaction of the mortgagees, a power to enter, seize, and take possession of all such building materials was given to them. Power was further given to the mortgagees, in case of default by the mortgagor, to sell all or part of the premises, and all building materials, bricks, timber, &c., standing and being thereon, or on any part thereof, either together or in parcels.

Held, that, inasmuch as the deed gave a power to sell the building materials, independently of the powers of entry and of taking possession of the premises, and exercisable without the latter powers being exercised, it was an assurance of personal chattels, or a licence to take possession of personal chattels as security for a debt, within the meaning of section 4 of the Bills of Sale Act, 1878, *and therefore was a bill of sale, and as such void under section* 8 *of the Act of* 1882 *for want of registration in respect of the personal chattels comprised therein.*

In re Yates, 36 *W. R.* 563, 38 *Ch. D.* 112, *distinguished.*

Cross-motions to enter judgment, or for a new trial after a trial before Manisty, J., and a special jury.

The material facts of this case were as follows:—

The plaintiff Climpson sued the defendants Coles and Carr for an alleged wrongful conversion of building materials and plant seized by them. The defendant

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

justified the seizure under a deed of the 13th of February, 1886, and they further counter-claimed against the plaintiff, on the ground that, by several indentures, including the one of the 13th of February, 1886, the plaintiff had mortgaged a great number of buildings at Eastbourne to secure separate sums of money, amounting to £11,000; and that, by a consolidation clause in each of the said indentures, the plaintiff was barred from redeeming any one of the mortgages without the others. The defendants therefore counter-claimed for the whole amount, and asked for an account to be taken of the amount due, and, in default of payment, for foreclosure. The plaintiff joined issue, but alleged further that the deed of February, 1886, was void for non-registration as a bill of sale under sections 8 and 9 of the Bills of Sale Act, 1882, so far as it made personal chattels a security for the payment of money; and he further alleged that the consolidation provision had never been made known to him. Upon the trial, before Manisty, J., and a jury, the question as to the Bills of Sale Act, 1882, was reserved as a point of law, and the judge held that the instrument was not a bill of sale requiring registration. Upon the other point he left to the jury "whether the plaintiff was told and made aware of the effect of the consolidation clauses?" The jury found that "the plaintiff's attention was called to the consolidation clauses, but that they were not sufficiently explained, for him to understand them." The judge, upon that finding, gave judgment for the plaintiff on the counter-claim, but he gave judgment for the defendants upon the plaintiff's claim for wrongful conversion, for which, by agreement, £25 had been assessed as damage, if any. The defendants now moved for judgment on the counter-claim or for a new trial upon the question of the consolidation of the mortgages. The plaintiff made a cross-motion for judgment upon the claim for the £25 against the decision of Manisty, J., on the ground that the deed of February, 1886, was void for want of registration as a bill of sale.

Reid, Q.C., and *R. Wallace*, for the plaintiff's trustee.

Muir Mackenzie and *W. Baker*, for the defendants.

Newson, for Colbran, a receiver in chancery.

Marshall Hall, for Mrs. Climpson.

Denman, J., delivered the judgment of the Court (Denman and Stephen, JJ.) [The learned judge, after reciting the facts of the case, held that the verdict of the jury upon the counter-claim ought not to be disturbed, and that the judgment upon that in favour of the plaintiff must stand, and continued:—].—With regard to the other question raised on the plaintiff's motion, that depends upon the construction of the deed of the 13th of February, 1886, and the cases relating to bills of sale.

The deed in question describes the plaintiff as mortgagor and the defendants as mortgagees. It recited that the mortgagor was erecting some houses on the land therein described and assigned to the mortgagees, and that he had applied to the mortgagees to lend him £2,700 for completing the said houses on the security of the said premises, to be advanced in certain instalments.

The material parts of the deeds were as follows:—

The mortgagor, "in pursuance of the said agreement, and in consideration of £65 paid by the mortgagees, the receipt of which he acknowledges, and also in consideration of the further sums to be advanced by instalments as aforesaid," covenanted that he would, on the 13th of May then next, pay the sum of £2,700, or so much thereof as should have been then advanced, with interest on the whole £2,700 at £5 per cent., to be calculated from the date of the deed, and also the amounts paid and due for the surveyor's certificates. It was then witnessed as follows:—"The mortgagor doth hereby assign and transfer to the mortgagees all those pieces of land" (describing them), "and also all those three messuages now being erected thereon by the mortgagor, and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the said buildings, to have," &c., "for all the term, estate, and interest of the mortgagor." Then followed a proviso that, if the mortgagor paid all sums then due by virtue of the indenture on the 13th of May, the indenture shall be absolutely void. Then followed, amongst others, the following covenants by the mortgagor:—1. To complete the buildings with all possible speed. 2. That all bricks, timber, slates, building materials, and other things which shall be brought upon the premises by or for the mortgagor for the purpose of completing the said messuages shall be considered as immediately attached to and forming part of the fee simple of and in the same premises, and no part of the said bricks, &c., shall be removed from the premises, but with the concurrence of the mortgagees in writing. 3. "That, in case the mortgagor shall not proceed with the completion, &c., to the satisfaction of the mortgagees, it shall be lawful for the mortgagees to enter upon the premises and to seize and take possession of all bricks, &c., and other building materials, and to complete the said messuages, &c."

The deed contained the following proviso:—"If the mortgagor shall make default in payment of the said sum of £2,700, or any part thereof which shall have been then advanced or paid in pursuance hereof, with interest, on the 13th of May next, or become bankrupt, &c., whilst any money remains due on this security, it shall be lawful for the mortgagees at any time thereafter, without any further consent of the mortgagor, to sell all or any part of the said hereditaments or premises, and all bricks, timber, slates, and other materials standing and being thereon, or on any part thereof, either together or in parcels, either by public auction or by private contract, with full power to make any stipulation as to title or otherwise as they may think fit, and to rescind any contract for sale and to re-sell without being responsible for any loss occasioned thereby; and to execute all such assurances as they may deem expedient, and in the meantime and until such sale, being in actual possession of the premises or in receipt of the rents thereof, to demise the premises or any part thereof, for any term not exceeding twenty-one years," &c.

It was contended before the learned judge at the trial on behalf of the plaintiff that this deed was a bill of sale, "void" for want of registration "in respect of the personal chattels comprised therein" under section 8 of the Bills of Sale Act, 1882. The learned judge thought that the case was covered by the decisions relating to building agreements, and held that it was not a bill of sale requiring registration. This question was elaborately discussed before us, and most, if not all, of the cases bearing upon the point were cited. In *Brown* v. *Bateman*, 15 W. R. 350, L. R. 2 C. P. 272, where the deed in question contained almost identical clauses to the present one, the instrument was held not to be "an assurance of personal chattels" or "a licence to take possession of personal chattels as a security for a debt" within the then existing Bills of Sale Act (17 & 18 Vict. c. 36). It was argued for the plaintiff that in that case the deed was not a mortgage by the builder to the money-lender, but was an agreement by the owner to demise to the builder for a long term, at certain rents, as soon as the builder should have erected certain messuages upon it, but we cannot see that that makes any difference, and the clauses in that deed relating to the right to enter and take possession of the land in question and the materials thereon are undistinguishable so far from those in this deed of February 13, 1886. In substance, the relations between the parties as mortgagor and mortgagees in the present case seem precisely on a par

with those between the parties in *Brown* v. *Bateman*. In *Blake* v. *Izard*, 16 W. R. 108, the clause provided that all materials upon the land should become the property of the intended lessor. The court there followed *Brown* v. *Bateman* in deciding that the instrument was not a bill of sale (*vide* Willes, J.). *Ex parte Newitt, In re Garrud*, 29 W. R. 344, 16 Ch. D. 522, is not at variance with these decisions, the words of the agreement being too different from the present case to constitute it an authority, and the court clearly held that *Brown* v. *Bateman* was rightly decided, but was not an authority in point (*vide* James, L.J.'s judgment).

In *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436, the Court of Appeal held that a document was not a bill of sale which provided that all materials brought upon the land should become the property of the lessor, whether affixed to the freehold or not. But the argument turned upon the words in the Bills of Sale Act, 1878, which are not relied on here—namely, as to "an agreement by which a right in equity to personal chattels is conferred." Here the words relied on are the same as those in the Act of 1854—namely, "assurances of personal chattels" or "licences to take possession of personal chattels as security for a debt," which were the words relied on in *Brown* v. *Bateman*; and it is clear from Bowen, L.J.'s judgment in *Reeves* v. *Barlow*, that he considered the clause providing for the property in the land to pass to the lessor was of the same effect as the clause in *Bown* v. *Bateman*, which, however, he distinguished on other grounds.

So far, then, on the contention of the plaintiff that the above cases cited did not apply to the present case, we think that on this one ground his contention was untenable—namely, in regard to any distinction between the relation of the parties in this case and in that of *Brown* v. *Bateman* and the cases following it.

The plaintiff, however, further contends that, inasmuch as in this case there was a power to sell any part of the materials upon the land separately upon default of performance of any part of the mortgagor's agreements, including that to repay the £65 advanced upon the execution of the deed, the case fell within the requirements of the Bills of Sale Act according to the decision of the Court of Appeal in *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310, and in *In re Yates*, 36 W. R. 563, 38 Ch. D. 112. We think that *In re Burdett* does not go further than to decide that, where a deed mortgages both personal chattels and other property, such deed is valid as regards the other property if it is possible to sever the provisions of the deed into two parts, so as to apply specifically to each species of property. The deed was a mere bill of sale in form, and the only question was whether it was void *in toto* under section 9 of the Act of 1878 for want of registration, or only in relation to the part affecting "personal chattels" as distinct from "trade machinery." The court certainly did not there lay down any rules as to the general application of the Act of 1878 to building agreements containing clauses such as the present deed. In *In re Yates*, however, there is a test laid down which seems to us applicable to the present case. That was a mortgage in consideration of an advance of £950, which the mortgagor covenanted to repay on a certain day with interest agreed. It conveyed certain land and buildings with a proviso for reconveyance on payment of principal and interest. It was agreed that the powers in section 19 of the Conveyancing and Law of Property Act, 1881, should be exercisable at any time after February 7 then next without it being necessary to serve the notice required by section 20 of the Act (*i.e.*, it gave power to sell the mortgaged property, or any part thereof, either together or in lots, when the mortgage-money became due" (*ib.*, section 19)). Upon the mortgaged property was a considerable amount of trade fixtures coming within the description of "trade machinery" as defined by the Bills of Sale Act, 1878, s. 5, and therefore coming within the description of "personal chattels" according to the exception in section 4 of that Act. But, inasmuch as section 7 of the Act provides that no fixtures are to be deemed to be separately assigned by reason only that they are assigned by separate words, or that power is given to sever them from the building to which they are affixed, or if by the same instrument any freehold or leasehold interest in the building to which they are affixed is conveyed to same person, it was held that the mortgage was not an assignment of the "trade machinery," which only passed by virtue of being fixed to the freehold, and that the deed gave no power to take possession of the machinery as chattels, and that the power of sale did not authorize the mortgagee to sell the trade machinery apart from the freehold, and that, therefore, the deed was not a bill of sale of the "trade machinery."

The decision, therefore, is against the argument that the Bills of Sale Act applied. But the ground of that decision was one which cannot apply to a case like the present, in which the chattels seized are pure chattels, and in which the power to deal with them is not a power to be derived from an Act of Parliament, but from the agreement between the parties themselves.

In *In re Yates* Cotton, L.J., very clearly draws the distinction. He says: "The mortgage is simply a conveyance of the land; it gives the mortgagee a right to the trade machinery, not as something assigned by the deed, but as annexed to the land, and so passing by the conveyance of the land. Nor, I think, does it give the mortgagee power to take possession of chattels. It empowers him to take possession of the land, but he can take possession of the trade machinery in no other way than by taking possession of the land to which it is affixed. Where an instrument is simply a mortgage of the fee simple of a freehold property, it cannot be such an instrument as is pointed out by the Bills of Sale Act—an instrument authorizing the holder to take possession of chattels apart from the land on which they are. I hold that, under this mortgage, the mortgagee had no power to sever the chattels from the land. He would only have a right to do so if a power of sale was given to him which authorized him to sell them separately." Lindley, L.J., says: "The question is whether the mortgagee of a mill, under a mortgage framed as this is, can seize and sever and sell, apart from the land or mill, the trade machinery on it. If he can, then it strikes me that, as regards trade machinery, it would be impossible to avoid conclusions that this is a bill of sale, and void because it is not registered." He agrees in holding that the deed in that case was not a bill of sale, because "the machinery passes as a portion of the land, not as personal chattels"; and he says: "If the mortgagee of a mill wants to have the power of selling the trade machinery apart from the mortgaged property, he must have a bill of sale." Now it is true there is nothing in the two last-mentioned decisions that overrule the cases of *Brown* v. *Bateman* or *Blake* v. *Izard*; but, on the other hand, there is nothing to show that those decisions can extend to a case where the deed does give express power to the mortgagee to enter upon the land and sell any materials which he may find there, intended to be used for the completion of the buildings which the mortgagor had covenanted to erect, in a case where the power to sell the materials is given "upon the neglect to pay money due for advances, as well as for any other default." It seems to us impossible to hold that the very extensive words in the deed of February 13, 1886, do not give the mortgagee power, upon default in payment of the advances made, to sell any "bricks, timber, slates, or other building materials standing and being on any part of the premises" without even entering on the premises, except so far as is necessary for raising the amount required and disposing of the goods. We think it impossible to hold that the mere provision

"that the materials brought upon the premises for the purpose of building shall become part of the fee simple," can exempt them from the operation of the Bills of Sale Act, and prevent them from being "personal chattels" within the meaning of that Act.

Therefore, applying the test given by the learned judges of the Court of Appeal in *In re Yates*, and finding no provision there such as that contained in the present case with regard to the power of selling those "personal chattels" which are the subject of the action, we feel bound to hold that the plaintiff is entitled to judgment upon his claim for £25, and not merely to have the benefit of it in account. Our judgment, therefore, upon both motions must be in favour of the plaintiff, and of course he is entitled to the costs of the action and of the counter-claim down to the present time, and of both motions heard before us. The costs of Colbran and Mrs. Climpson of and occasioned by their having been served with notice of the defendants' rule must be paid by the defendants.

We say nothing at present about any future costs to be incurred in taking the accounts upon the basis which we hold to be applicable, as above mentioned.

Judgment for the plaintiff.

Solicitor for the plaintiff, *G. R. Grant.*

Solicitors for the defendants, *Tippetts & Son.*

Solicitors for Colbran, *Alfred Hicks & Arnold.*

Solicitors for Mrs. Climpson, *Prince & Co.*

Court of Appeal.

From Chan. Div. July 25, 26; Nov. 20.

GLASIER v. ROLLS. (a.)

Company — Misrepresentation — Promoter — Action of deceit—False statement in prospectus—Proof of actual fraud necessary—Burden of proof—Costs—Shorthand notes of evidence—Practice as to allowance of costs of shorthand notes of evidence—Special direction necessary—Time for making application for—R. S. C., 1883, *ord.* 58, *r.* 4; *ord.* 70, *r.* 1.

In order to maintain an action of deceit the plaintiff must prove actual fraud or dishonesty on the part of the defendant in making the statement relied on as a misrepresentation, and nothing less will suffice.

So held, following the decision of the House of Lords in Derry *v.* Peek, *ante, p.* 33.

R. was the principal partner in a business which was to be turned into a limited company, of which he was a promoter, and of which he was to be a director as soon as the purchase was completed; the prospectus as to the company contained a statement that "the business at the present time returns a net profit of over seventeen per cent. on the capital employed." R. did not see the prospectus, as issued, before it was issued, but saw and corrected two drafts of it. The truth or falsehood of the statement appeared to depend upon the doubtful question of the proper meaning to be attached to the words "the capital employed"—that is to say, upon the amount at which such capital ought to be taken—a question involving, in this case, somewhat complex calculations, and depending (e.g., as to whether the value of the business premises ought to be included), to some extent, on mercantile usage.

Held (reversing the decision of Kekewich, J.), *that, even if the statement had been false in fact, of which there was no sufficient proof, the plaintiff had failed to discharge the burden, which lay upon him, of proving that it was false to the knowledge of the defendant so as to involve dishonesty on his part.*

At the time the case was decided by Kekewich, J., the decision of the Court of Appeal in Peek *v.* Derry, 36 *W. R.* 899, 37 *Ch. D.* 541, *not having been then reversed by the House of Lords, the law was understood to be that it was not necessary for a plaintiff, in order to succeed in an action of deceit, to prove actual fraud. The plaintiff accordingly did not press that part of his case, and the judge did not decide the question of fraud, but decided in favour of the plaintiff on the ground that the statement was untrue in fact, and that, though the defendant may have believed it to be true, he had no reasonable grounds for such belief.*

Held, that, as the plaintiff might have insisted on pressing the case of fraud, but had not done so, he ought not now to be allowed to put the defendant to the risk and expense of a new trial upon that issue.

After the order of the Court of Appeal in the present case, allowing the appeal and dismissing the action, with costs, had been passed and entered, the successful appellant applied to the Court of Appeal for an order that the costs of the shorthand notes of the evidence taken at the trial of the action, and of the transcripts of the judgments of the Lords in Derry *v.* Peek, *might be allowed on taxation.*

Held, that the court had no jurisdiction, after the order had been passed and entered, to alter it in the manner sought, the order, as passed and entered, having expressed what it was the intention of the Court of Appeal to order at the time the order was made.

The costs of shorthand notes of evidence are never allowed on taxation without a special direction in that behalf given by the court, and though the court, in the exercise of its discretion, can give such a direction, yet it is a discretion which, as a matter of practice, is only exercised under very special circumstances, and any application to the court to exercise such discretion should be made at or immediately after the time when the judgment is given.

Appeal from Kekewich, J. (37 W. R. 430).

In this case an old-established business of linoleum and floor-cloth manufacturers, belonging to Messrs. James Rolls & Sons, had been turned into a limited company. The defendant was the principal partner in the old firm, and he was to be a director of the company, but not till after the completion of the purchase. The company was incorporated in 1886, with a capital of £80,000 in 16,000 £5 shares. Before the shares were allotted a prospectus was issued, which contained, amongst other statements, the following:—"The annual sales are already very large, and the business at the present time returns a net profit of over seventeen per cent. on the capital employed."

Mr. Glasier, who was one of the shareholders in the company, brought this action against the defendant, on the ground that he (the plaintiff) had been induced to take shares in the company by the above statement, which was alleged to be false and known to be so at the time by the defendant, and for the issue of which the defendant was alleged to be responsible. The defendant, George Rolls, had not seen the prospectus, as issued, before it was issued, but had seen and corrected two drafts of it, in the first of which he struck out a statement that the profits exceeded twenty per cent. The defendant maintained that there were good grounds for believing that at the time the prospectus was issued the profits, in fact, amounted to seventeen per cent. on the capital; but the plaintiff alleged that, both at that time and for some time previously, the profits fell considerably short of that amount. The shares had become much depreciated since the allotment.

(a.) Reported by R. H. DEANE and M. J. BLAKE, Esqs., Barristers-at-Law.

Kekewich, J., held that the defendant, as a promoter, was responsible for the prospectus, and that the statement was incorrect in fact, and was made recklessly and without taking proper means to ascertain whether it was true, though not fraudulently, and therefore decided, on the authority of *Peek* v. *Derry*, 36 W. R. 899, 37 Ch. D. 541, that the defendant must make good the loss sustained by the plaintiff.

The defendant appealed, and the hearing of the appeal, having been postponed to await the decision of the House of Lords in *Derry* v. *Peek*, *ante*, p. 33, came on again immediately after the decision of the House of Lords in *Derry* v. *Peek* had been pronounced.

Moulton, Q.C., and *Muir Mackenzie*, for the appellant.—The first intimation Mr. Rolls had of the existence of the prospectus was by seeing it in the newspapers; but, believing the statement as to the profits being equal to seventeen per cent. on the capital employed, to be true, he took no steps to have it withdrawn. There is a dispute as to the meaning of the term "the capital employed," but in any case the statement was believed by Mr. Rolls, and was made *bonâ fide*. [LOPES, L.J.—If he made the statement believing it to be true, even though he had no reasonable grounds for so believing it, this action will not lie.] So the House of Lords have decided in *Derry* v. *Peek*. [FRY, L.J.—This case is like *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377.] If necessary, we say the defendant had reasonable grounds for his belief. The question is whether he is honest. The average yearly profit gives more than seventeen per cent. on the capital employed, which was £13,000 odd, not including the value of the business premises. The decision of the House of Lords in *Derry* v. *Peek* lays down that, in order to support an action like this, the statement relied on must have been made with a fraudulent intention. [FRY, L.J.—Lord Bramwell says a false statement believed in without reasonable grounds is actionable if the defendant knew he had no reasonable grounds. LOPES, L.J.—If a man deceives himself he is entitled to deceive others.] Only if he is honest; want of reasonable grounds is evidence of dishonesty. It is impossible to conceive a man having an honest belief where he knows he has no reasonable grounds. The statement here was correct upon the true view of what the capital was. Even if not true, the defendant believed it true. Either of those propositions is sufficient for our purpose. The capital, in the proper sense, was the balance of assets over liabilities—that makes it less than £14,000. That is a question of mercantile usage, not a question of law. The judge below took the capital at £28,000. The words "capital employed" must be taken in the sense in which the defendant meant to use them, not in what the judge may think the proper sense. An untrue statement made recklessly is actionable; but if the person deceives himself there is no fraud, and if made without any knowledge it is not actionable. If made without caring whether it be true or false the statement is actionable; but if made without consideration, yet not wilfully, it is not actionable. It must be found to have been made purposely; mere shutting of one's eyes is not sufficient to establish liability. No amount of mere carelessness is actionable: *Derry* v. *Peek*. [FRY, L.J.—Is no amount of negligence fraud?] Weight may be given to it as evidence of fraud.

Warmington, Q.C., and *J. M. Solomon*, for the respondent.—All the statements in the prospectus should be looked at. It is impossible that Rolls could have honestly believed them. *Derry* v. *Peek* is to be considered with reference to the facts of that case. It was not a case of a vendor, but of outside directors. [COTTON, L.J.—What is the difference? You must show that the statements here were dishonest, or we are against you.] Honesty here is impossible. A full account was made out in 1879, and, starting with that, the capital was then £22,000. [COTTON, L.J.—The plaintiff was never asked how he understood the words "capital employed."] Money spent in producing what has been sold is capital employed. In *Arnison* v. *Smith*, 37 W. R. 739, 41 Ch. D. 348, Lord Halsbury, C., adopts what Lord Selborne said in *Smith* v. *Chadwick*, 30 W. R. 661, 32 *Ibid.* 687, 20 Ch. D. 27, 9 App Cas. 187, and in *Derry* v. *Peek* he adopts what he himself said in *Arnison* v. *Smith*. You must take into consideration the man's knowledge and means of knowledge: *Smith* v. *Chadwick*, *per* Lord Selborne, C. Rolls had the knowledge and means of knowledge if he had chosen to use it. In the partnership deed the capital is put at £17,000. [FRY, L.J.—The goodwill is to be deducted from that.] No, it should be included. The question of dishonesty was not much dwelt upon below, not being then considered material. In the defendant's statement no deduction is made for depreciation, &c. A fraudulent statement by an agent, acting for, and for the benefit of his principal, renders the principal liable: *Barwick* v. *English Joint-Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259. Here Ashworth was the agent of Rolls: *Weir* v. *Barnett*, 26 W. R. 746, 3 Ex. D. 238. [FRY, L.J.—The judge below not having tried the question whether the agent was fraudulent, is not the utmost you can ask for a new trial on your paying costs?] The judge's finding amounts to dishonesty; he says the statement was inserted without sufficient justification—that is, recklessly. Rolls admitted he did not know what the capital was, and Lord Herschell, in his judgment in *Derry* v. *Peek*, asked whether a man can believe what he knows he is ignorant of. Belief must have reference to moral certainty. In *Smith* v. *Chadwick* both Jessel, M.R., and Lord Selborne held that there was actual fraud. We put it to Kekewich, J., that the statement was made dishonestly, and he found that no one concerned in making the prospectus had the means of stating the facts honestly. The finding of Kekewich, J., is a finding within Lord Herschell's definition of fraud. The judge here said the statement was made recklessly. [COTTON, L.J.—Was it not an honest statement by a man who took it in a different way?] Taking it in his own sense, on the basis of any possible estimate of the amount of the capital, the profits were in fact so far below what was stated that the statement could not have been honestly made. Taking it on any basis it must have been inaccurate. "Recklessly" means "without caring whether true or not," and not merely "without care." There is ample in this case to enable the court to decide that the appellant must have known the statement was untrue. The evidence shows that the capital, without reckoning the buildings, must have been in excess of the amount upon which the profits would pay 17 per cent. The account allowed nothing for depreciation, though Rolls' own evidence shows he was aware that in such accounts some allowance ought to be made for it. The burden of proof was on the defendant to show that his statement was honest, it being in fact so unreasonable as to make it unlikely that it could be true. In *Arnison* v. *Smith* Lord Halsbury, C., held the defendants guilty of actual fraud, and that such fraud was necessary to the plaintiffs' case, though Kekewich, J., had declined to decide the question, as he held that actual fraud was not necessary.

Moulton, Q.C., in reply.—In any case there is not enough to show fraud. It requires a clear case of untrue figures to raise even a presumption of fraud. Here there is great doubt even whether they were actually untrue.

COTTON, L.J.—This is an appeal by the defendant

from a judgment of Kekewich, J., who held him liable in an action of deceit.

What was relied on was this: It was said that Mr. Rolls, the defendant, was a party to the bringing out of this company and to the issuing of a certain statement in the prospectus; or that, if he did not issue the statement, he recognized and adopted it, as he abstained from correcting it after it was brought to his notice, and that the plaintiff took his shares on the faith of that statement, which was a false one.

The question really turns on one passage, which was this: "The annual sales are already very large, and the business at the present time returns a net profit of over seventeen per cent. on the capital employed."

It is reasonable enough, however, to refer to other points in the prospectus, and to see if it contains any evidence that it was adopted by Mr. Rolls, or anything to show dishonesty on his part; but I can see nothing whatever in it to show anything of the kind. He did not prepare it; and it is in favour of his honesty that, when the first draft was submitted to him, he struck out a passage to the effect that the returns showed a net profit of over twenty per cent. At the time the case was tried before Kekewich, J., the law as laid down by this court then stood, that a man was liable in an action of deceit if he made a false statement in order to induce others to act upon it, without having reasonable grounds for believing it to be true—in other words, if he made it recklessly. That was laid down in *Peek* v. *Derry*. But since that time the decision of the House of Lords in that case has upset that view of the law, and has laid down that the question of liability is to be governed by the old rules of law applying to an action of deceit—that is to say, that the statement must not only be untrue in fact, but must be made dishonestly, and that no amount of ignorance, or carelessness, or recklessness will make a man liable for a false statement in a prospectus.

The two questions here are, first, whether the statement made was in fact incorrect, and, secondly, whether, if incorrect, it was made dishonestly? As to the first question, Fry, L.J., takes a more favourable view than I have been able to, though I do not think I am prepared to say positively that the statement is untrue. It really depends on what is to be taken as the capital employed; but I shall not go into that, because I think this case is to be decided on the second point—whether the statement was made dishonestly. We cannot come to the conclusion that it was so made. I think the burden of proof as to that, lies on the plaintiff. According to the decision of the House of Lords, it lies on him to prove fraud by the defendant. Unless, therefore, there is the clearest evidence on the documents, or on the facts, that there has been fraud, it would not be right for us to find that the defendant was guilty of it, when the judge below, who saw and heard the witnesses, has not so decided. It has been argued that he *did* find fraud. But what he says is this: "I cannot doubt on the evidence that the paragraph was inserted without reasonable or sufficient grounds—that is, recklessly." He is bringing it within the term or definition of a reckless statement adopted by this court—*i.e.*, a statement made without reasonable grounds. It was conceded here that if the judge was right in his construction of the words "the capital employed," the statement was untrue in fact. But we are not compelled to decide that point, because I think it has not been shown that the defendant acted dishonestly in making the statement, and that is therefore the only question we need determine. [His lordship then examined the evidence to see if there was any proof of dishonest intention, and proceeded:—].

There is no evidence that the defendant here was guilty of what the House of Lords says is essential—*i.e.*, dishonesty—not folly; not acting on insufficient grounds—but fraud, or, to use the term which I prefer, dishonesty. The plaintiff has asked that, as the question of fraud was not brought before the judge below, the case may be sent back for a new trial. No doubt the case was tried when the law was supposed to be what was laid down by this court in *Peek* v. *Derry*, yet I always hold to this rule, that where there are two ways of bringing a case forward, but counsel, in the exercise of his discretion, elects to rely on only one, and the one relied on fails, it is wrong to give the plaintiff another opportunity of bringing forward the other, because he might and ought to have done that at the trial, instead of relying on the one only. So that the plaintiff is now too late in saying that he did not press the case of fraud because it was not necessary as the law then stood to do so. For the case of fraud would equally have given him a right to relief even if the decision of this court in *Peek* v. *Derry* had stood. The appeal, therefore, must be allowed and the action dismissed, with costs, and the plaintiff must be ordered to repay the costs paid to him upon the judgment below.

FRY, L.J.—This is an action of deceit, and it is really based on a single sentence in the prospectus, which was this: "The business at the present time returns a net profit of over seventeen per cent. on the capital employed." Before the judge below, the case was conducted on the ground that this statement was false in fact, and that, though the defendant may have believed it to be true, he had no adequate or reasonable ground for so believing. That was sufficient as the law was understood to be at that time, but now, by the decision of the House of Lords, it has been held not to be sufficient. The case accordingly has been argued here on the grounds, first, that the statement was false in fact; secondly, that the defendant knew it was false; and, thirdly, that the defendant's alleged agent knew it was false, and that that made the defendant liable. The respondent has to get over a preliminary difficulty arising from the fact that the case of fraud was not put prominently forward in the court below, and we are asked to convict a man of fraud on grounds on which the judge who heard the case did not convict him. I should pause long before doing that. The plaintiff's only hope of success would be by obtaining a new trial, and therefore the real question is, Ought we here to order a new trial on points not decided by the judge below merely because the case might have been put in a different way but was not? I think we ought not. I entirely agree with the remarks of Cotton, L.J., on that question. The plaintiff might have presented the two cases alternatively in the court below—that is, first, that the statement was false in fact, even if not fraudulent; and, secondly, that it was false and also fraudulent. I think we ought not now to put the defendant to the risk and expense of a new trial. There are two questions involved on this appeal. First, were the defendant's allegations false in fact? Secondly, were they false to the knowledge of the defendant? I confess I am by no means convinced that they were false in fact. The nearest evidence we have to show what the capital employed was, is from the partnership deed of 1885. The father was then dealing with his sons, and made what seems to be an honest estimate. In the absence of positive evidence I know of no firmer ground than that deed on which to take my stand in estimating the amount of capital employed in this business. The father said in his evidence that no capital had been added since. I should come, if it were necessary to decide the point, to the conclusion that the capital was less than £13,000, but all I say is that the statement is not shown to be false in fact.

I see no reason to doubt that the report on which the statement was based was substantially correct, but it is

not necessary to express a concluded opinion on that point, as the case entirely fails on both the main questions. Secondly, Was the defendant aware that the statement was untrue, assuming that it was so in fact? On the facts I hold he clearly was not. He said in his evidence that he believed the statement was true, and there was nothing to show that he was not speaking the truth. The action, therefore, fails, and the appeal must be allowed.

LOPES, L.J.—It is unnecessary in this case to express any opinion whether the judgment of Kekewich, J., would have been maintainable if the House of Lords had not reversed the decision of this court in *Peek* v. *Derry*. The House of Lords, however, as I understand their decision, have held that, if a statement is untrue in fact, but believed to be true, though without any reasonable grounds for that belief, no action can be maintained—there must be moral delinquency and some dishonesty.

Lord Herschell, in his judgment, adopted the first three definitions of what would make a false statement, sufficient to support an action of deceit, which I gave in *Peek* v. *Derry*, and rejected the fourth, which was this:—"If the statement is untrue in fact, but believed to be true, but without any reasonable grounds for such belief." The judge below acted on that fourth definition. The House of Lords have decided that, however unreasonable it would be for the defendant to believe the statement true, yet, if he does in fact honestly believe it, it will not support an action of deceit. So that, even if ninety-nine people out of a hundred would understand the statement in a sense in which it would be inaccurate, yet, if the defendant believed that it bore a meaning which would make it accurate, he would not be liable for it. For the reasons given by the other Lords Justices, I think the burden of proof that the statement was dishonest lies on the plaintiff, and has not been discharged by him, and also that there ought to be no new trial granted of this action.

Appeal allowed.

November 20.—On this day an application was made to the Court of Appeal, after the above judgment had been passed and entered, on behalf of the defendant, the successful appellant, that an order might be made to allow the costs of the shorthand notes of the evidence taken at the trial of the action before Kekewich, J., and also the costs of the transcripts of the judgments of the House of Lords in *Derry* v. *Peek*.

Muir Mackenzie, for the applicant.—The judge below only took short notes of the evidence, as he said there were shorthand notes being taken of it; these shorthand notes were transcribed for the use of the judges on the hearing of the appeal, and were in fact used and referred to by them; the hearing of the appeal would have taken a much longer time if these shorthand notes had not been taken and used. One of the questions in the case was as to the meaning of the word "capital," and the evidence on that was very conflicting. As to the transcripts of the judgments of the Lords, the hearing of this appeal was at first adjourned till after the decision of the House of Lords in *Derry* v. *Peek*, and it came on again for hearing, a short time after the decision of the Lords in that case had been pronounced, but before any full report of it had been published, and therefore it was necessary for the appellant to obtain transcripts of the judgments of the Lords. He referred to *Bigsby* v. *Dickinson*, 25 W. R. 89, 4 Ch. D. 24; *Philipps* v. *Philipps*, 28 W. R. 376, 5 Q. B. D. 60. [FRY, L.J., referred to *Earl De la Warr* v. *Miles*, 30 W. R. 35, 19 Ch. D. 807. COTTON, L.J.—The order made by the Court of Appeal has been passed and entered, and how can we now alter that order, by making a new order as to costs?] I am not asking that the former order of the Court of Appeal be altered, but that a new order be made. An application like this may be made after the former order has been drawn up: *Ex parte Steed*, 33 W. R. 80.

He also referred to ord. 58, r. 4.

Warmington, Q.C., and *J. M. Solomon, contrà*, were not called on.

COTTON, L.J.—This is an application made to us, to direct that the appellant should be allowed the costs of the shorthand writer's notes of the evidence in this case of *Glasier* v. *Rolls*, and also that he should be allowed the shorthand writer's notes of the judgments in the House of Lords in *Derry* v. *Peek*.

The order has been passed and entered, and except where there has been a slip in not embodying in the order what was really the intention of the court, that order cannot be varied, because that would be really altering an order of this court, after that order has become a final order of the court. Even if one had thought that this ought to be done, it cannot be. It is not merely giving some direction which was not embodied in the order, but it is this. The order has directed that the costs be paid by one party to the other, and ordered those costs to be taxed. Well, as regards the costs of shorthand notes of evidence, the master is directed not to allow them unless there is some special direction given by the judge or by the court which hears the case; and it has been already laid down by this court* that any application for that purpose ought to be made immediately after or at the hearing at which the order was directed, because then the court is in possession of all the facts of the case and can say whether or not it is reasonable that these costs should be allowed.

As regards the costs of the shorthand notes of the evidence, I must say, although that is not what my judgment turns upon, that we should never have allowed those costs here. Either the judge's notes, or if those notes were not sufficient, the notes taken by counsel would be quite sufficient, especially in a case like this, which really did not turn upon the *minutiæ* of the evidence, but upon the question as to what the law applicable to the case was. I am only now speaking from recollection, but I think that Kekewich, J., did not hold there was any fraud on the part of the appellant, the defendant, but only that he made a misstatement as to the capital, which was as to an inference to be drawn from the facts. There was some discussion as to what was properly called capital, &c. But certainly, independently of that, we ought never, except in very extreme cases, to allow the shorthand notes of the evidence, when there are the judge's notes to be referred to, and when counsel, by the note which they take, ought to be able to correct that if necessary. I decide the present application only on this ground, that as regards the altering the order which has been made, and which this in effect would be doing, we cannot do it, and ought not to do it, after the order has become the final order of the court, and has been passed and entered. That really applies to the application as regards the shorthand notes, both of the judgment of the House of Lords and the shorthand notes of the evidence.

As regards the notes of the judgment of the House of Lords those stand in a different position from the notes of the evidence, and if the taxing master, having regard to the circumstances of the case, thinks that those can be allowed, then no alteration of the order will be required. But I am of opinion that we cannot and ought not to make any alteration even as regards those, so as to make the order direct that which in fact at present it does

* *Hill* v. *Metropolitan Asylums District Board*, 28 W. R. 664.

not direct. I do not say at all what the effect of the order as it now stands is as regards the taxation; but I decline to make any alteration in the order in the events which have happened—namely, after the order has become the final order of the court, and is passed and entered, and there has been no slip in properly expressing what the order of the court was.

BOWEN, L.J.—I entirely agree with Cotton, L.J., and I think the judgment of the court in this matter ought to rest upon the ground on which he has put it. It is quite a different thing to come after a judgment and ask that it should be amended so as to express the real intention of the court, entertained by the court at the time the judgment is given. If an intention so entertained by the court is not expressed by the order there has been a miscarriage, and you set it right as a slip; but to seek to alter the judgment by asking that something be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the court, is really to ask us to make a different judgment from that which has already been perfected. It seems to me therefore it is too late now for Mr. Mackenzie to come with any part of his request.

I entirely agree with what the Lord Justice has said about the general practice as regards shorthand notes. Of course it is a matter of discretion. We cannot bind the discretion of the court, nor do we intend to do so in any similar case, but looking at the practice of the court I think it is most expedient that suitors should know that it would require an extreme case to induce the court to exercise such a discretion. To easily allow the shorthand notes on appeal would be, in my opinion, to add a new terror to litigation, of which there are plenty. It seems to me that this application must be dismissed with costs.

FRY, L.J.—I am of the same opinion.

Application dismissed.

Solicitors, *E. T. Tadman; Byrne & Lucas.*

(1898, 2 Ch. 539.

From Chan. Div. Nov. 7.

STROUSBERG *v.* SANDERS. (*a.*)

Costs—Taxation—Practice—"Objection in writing"—Review of taxation—Rules of the Supreme Court, 1883, *ord.* 65, *r.* 27, *sub-rules* 39—41.

An application by a party to a judge under ord. 65, *r.* 27, *sub-rule* 41, *for an order for a review of taxation of a bill of costs as to any item or part of an item contained therein, cannot be entertained unless the party applying has first carried in an objection in writing under sub-rule* 39 *with respect to each such item or part of an item.*

Decision of Stirling, J., *affirmed.*

Appeal from Stirling, J.

This was an appeal from Stirling, J., refusing to make an order on a summons under ord. 65, r. 27, sub-rule 41, of the Rules of the Supreme Court, 1883, for a review of taxation of costs.

It appeared that an order had been made in the action that certain costs of the defendants, the Commercial Bank of Scotland, should be taxed, and paid by the plaintiff, who had failed in an application for an *interim* injunction against them. Upon taxation the master disallowed some of the items in the said defendants' bill of costs incurred in respect of the said application. The defendants then carried in objections in writing to the disallowance, under ord. 65, r. 27, sub-rule 39, of the Rules of the Supreme Court, 1883. The taxing master, after considering the objections, changed his mind, and allowed the items. The plaintiff then, instead of carrying in objections in writing to the allowance of the items, took out a summons, under sub-rule 41, to review the taxation. Sub-rule 39 is as follows:—"Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same." Sub-rule 40 provides for the reconsideration by the taxing master, upon the objections, of his taxation. Sub-rule 41 is as follows:—"Any party who may be dissatisfied with the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to as aforesaid may, within fourteen days from the date of the certificate or allocatur, or such other time as the court or judge, or taxing officer at the time he signs his certificate or allocatur, may allow, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

Stirling, J., held that the plaintiff's application could not be entertained, on the ground that he had not carried in objections in writing (under sub-rule 39) to the allowance of the items.

The plaintiff appealed.

Crackanthorpe, Q.C., and *A. à B. Terrell,* for the appellant.—Sub-rule 39 was satisfied by the Bank carrying in objections to the disallowance. The only object of the written objections is to narrow the issue by pinning the party down to the objections taken, and also to assist the judge by showing him what items are objected to. It cannot have been intended that the other side must then carry in cross-objections in writing. That would be endless, as the first objectors would then have to bring in counter cross-objections, if the taxing master again changed his mind, and so on *ad infinitum;* and thus the path, provided by sub-rule 41, to the judge would never be trodden. The plaintiff asks for a review of taxation in respect of items as to which objections in writing were carried in by the other side. That is sufficient to satisfy sub-rule 39, though the objections were to the disallowance of the items, and we now object to their allowance.

Buckley, Q.C., and *Upjohn,* for the defendant Bank, were not called upon.

COTTON, L.J.—This is an appeal from an order of Stirling, J., refusing to send back a certificate, for the taxing master to review his taxation. The order was made upon an application, under ord. 65, r. 27, sub-rule 41, for a review of the taxation. That was refused. Was Stirling, J., right in refusing to order a review? I think he was. It was argued here very strenuously that the only object of sub-rule 39 was to narrow the issue so that the judge might know which of the items were objected to. But in my opinion that was not the only object. The objecting party has by sub-rule 39 to state his reasons, so that he may be confined to the grounds he has taken before the taxing master. [His lordship read sub-rule 39.] Does not this plaintiff come within that? He is a party dissatisfied with the allowance

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

of the items. Under that sub-rule, therefore, he is to specify in a short and concise form his objections, and the grounds and reasons for them, and may thereupon apply to the taxing master to review the taxation in respect of the items. But this was not done. Sub-rule 40 is not so material. It deals with the duty of the taxing master to review his taxation and give the grounds of his decision. The plaintiff has not got that. Then we come to sub-rule 41. [His lordship read sub-rule 41.] Well now, it is said that the plaintiff has complied with that, because he asked for a review of taxation as to items which had been objected to. That is not so. The objections carried in by the other side were against the *disallowance* of certain specified items for specified reasons, and not to their *allowance*, which is a different thing. Anyone who wishes to avail himself of that sub-rule can only do so when he has carried in objections in writing, and therefore the plaintiff ought to have carried in objections to the allowance. Fairly construed, sub-rule 41 must mean that the items must have been objected to by the party applying for a review of the taxation. Then there was a very ingenious argument put forward, that the bringing in of objections would tend to perpetuity, as each side would heap objections on objections *ad infinitum*. That would not be the case. After one party has carried in objections, and when the other party, after a change of mind by the taxing master, has carried in cross-objections, the whole thing is at an end. I think that the plaintiff has not followed the course required by the rules. He ought to have begun with sub-rule 39 instead of sub-rule 41. In my opinion, therefore, the order of Stirling, J., was quite right, and this appeal fails.

FRY, L.J.—I am entirely of the same opinion. The appellant here was dissatisfied with the allowance by the taxing master of certain items in a bill of costs. He says that sub-rule 39 has been satisfied because the disallowance of the items was objected to by the other side. But that is not what the rule requires. In sub-rule 39 the objection is to be either to the allowance or to the disallowance, and the grounds of the objection to the allowance or disallowance ought to be given. The objection to the allowance cannot be the same thing as the objection to the disallowance. I think therefore that the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Cuddon & Co.*

Solicitors for the respondents, *Rooke & Sons.*

From Q. B. Div. Nov. 20.

TOMLINSON v. CONSOLIDATED CREDIT AND MORTGAGE CORPORATION. (a.)

*Landlord and tenant—Fraudulent removal of goods to avoid distress—Bill of sale—Removal of goods within five days of seizure—*11 *Geo.* 2, *c.* 19, *ss.* 1, 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43), *s.* 13.

The statute 11 *Geo.* 2, *c.* 19, *giving a landlord power to sue for the fraudulent removal of the goods of a tenant in order to avoid a distress, does not apply where the goods have become, by the execution of a bill of sale by the tenant, the property of the bill of sale holder.*

The landlord has no power to sue under section 13 *of the Bills of Sale Act*, 1882, *where goods of the tenant granted by him under a bill of sale have been removed by the grantee, with the consent of the tenant, within five days after seizure.*

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

Lane v. Tyler, 56 *L. J. Q. B.* 461, 35 *W. R. Dig.* 32, *approved.*

Appeal from the decision of a divisional court (Field and Manisty, JJ.).

The plaintiff was the landlord of premises at Gunnersbury, which were let to a man named Flicker, who had given a bill of sale over his furniture to the defendants. On the 29th of September, 1887, rent to the amount of £30 was due from Flicker to the plaintiff in respect of the premises, and on the evening of that day the defendants, with Flicker's consent, seized and carried away the goods in order to avoid a distress. The goods were subsequently returned by the defendants to Flicker.

The present action was brought under section 13 of the Bills of Sale Act, 1882, for removing the goods of Flicker within four days after seizure, contrary to the provisions of the section, and a claim was added under 11 Geo. 2, c. 19, s. 3, for damages for fraudulently removing the goods of Flicker in order to prevent a distress for the rent due. It was tried before Grantham, J., and a verdict and judgment were given for the plaintiff, but were set aside by the Divisional Court.

The plaintiff appealed.

By the 11 Geo. 2, c. 19, s. 1, power is given to landlords within thirty days to follow and distrain on any goods of the tenant fraudulently or clandestinely carried away in order to avoid a distress for rent then due.

By section 3, "If any such tenant or lessee shall so fraudulently remove and convey away his or her goods or chattels, or if any person or persons shall wilfully or knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods and chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord . . . from whose estate such goods and chattels were fraudulently carried off double the value of the goods."

By section 13 of the Bills of Sate Act (1878) Amendment Act, 1882, "All personal chattels seized, or of which possession is taken after the commencement of this Act under or by virtue of any bill of sale, . . . shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of."

Waddy, Q.C., and *Ogle*, for the appellant.—The goods removed were distrainable, and were removed with the intention of defeating the distress for rent already due. Even if the case does not fall within 11 Geo. 2, c. 19, s. 1, the defendants, in removing the goods within five days after seizure, committed a breach of section 13 of the Bills of Sale Act, 1882, for which the landlord can sue.

Cock, Q.C., and *Clay*, for the respondents.—The goods were not the tenant's. They had passed to the defendants under the bill of sale. The goods were removed no doubt within the five days, but they were removed by the consent of the grantor, and the landlord cannot complain: *Lane* v. *Tyler*, 35 W. R. Dig. 32.

Lord ESHER, M.R.—In my opinion this appeal must fail. The action was brought upon the statute 11 Geo. 2, c. 19, and in order to succeed the plaintiff must bring himself within the statute. That statute imposes certain consequences in the case of the tenant's goods being fraudulently removed in order to defeat a distress for rent which is due at the time of removal. In this case there is no doubt that there was rent due, and that the goods were removed in order to defeat the landlord's distress for that rent. But they were not the tenant's goods; they were the goods of the defendants. Directly the bill of sale was executed the property in the goods

passed to the defendants. Therefore the case does not come within the statute. But it is said that the landlord can recover against the defendants, because, by section 13 of the Bills of Sale Act, 1882, the grantee of a bill of sale cannot remove the goods seized under a bill of sale until the expiration of five days from the date of the seizure. But the plaintiff has no right to complain of that. The case of *Lane* v. *Tyler*, which seems to me to be rightly decided, shows that where goods have been removed by the consent of the grantor of a bill of sale within the five days the landlord has no right to complain. The Bills of Sale Act was not passed in the interests of landlords, but to regulate the rights of grantors and grantees of bills of sale. That, therefore, disposes of the second point, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The statute of George II. refers to the fraudulent removal of the tenant's goods in order to avoid a distress. Here it is plain that the goods were not those of the tenant, but of the defendants. The property had been transferred by the execution of this bill of sale. As to the second point, it is obvious, when the Bills of Sale Act is looked into, especially having regard to section 7, which gives the grantor power to apply to the court within five days of the seizure, that the Act was not passed in the interests of the landlord, who has no *locus standi* to complain of its breach. Therefore the decision in *Lane* v. *Tyler* is correct, and must be adopted.

LOPES, L.J.—Up to the moment of the distress the goods of a stranger or of a lodger may be removed in order to avoid the distress without any contravention of the Act of George II. In this case the goods were not those of the tenant. They had passed to the defendants under the bill of sale. The removal, therefore, does not come within the statute. On the second point, I will only say that I entirely agree with *Lane* v. *Tyler*, which appears to me to be good law. If, with the consent of the grantor of a bill of sale, the goods seized are removed by the grantee within five days of the seizure, the landlord has no right to complain. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *J. B. Churchill.*

Solicitors for the respondent, *Vanderpump & Eve.*

From Q. B. Div. July 3, 4; Aug. 9, 1889.

JOHNSON *v.* LINDSAY. (*a.*)

Master and servant—Employer's liability—Accident—Negligence—Common employment—Common master—Contractor and sub-contractor.

J., a workman, was employed with others by H., a builder, in carrying out certain works which H. had contracted to do. Under the contract, L., an iron-founder, was to do certain special work (required to be done by a specialist) at a price to be paid out of the contract price for the whole work, but L. paid and had control over his own workmen. J., having been injured by the negligence of L.'s workmen, brought an action for damages against L.

Held, by Cotton *and* Lopes, L.JJ. (dissentiente Fry, L.J.), *that L. was a sub-contractor under H., and was, with his workmen, in the employment and under the control of H., who was accordingly the common master of the injuring and injured workmen; that the case was, therefore, governed by* Wiggett *v.* Fox, 4 *W. R.* 254, 11 *Ex.* 832, *and the action could not be maintained.*

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

Decision of the Divisional Court (Pollock, B., *and* Manisty, J.) *affirmed.*

Abraham *v.* Reynolds, 8 *W. R.* 181, 5 *H. & N.* 143, *explained and distinguished.*

Held, by Fry, L.J., *that L. was not a sub-contractor under H.; that the burden of proving that H. had control over L.'s part of the work and over the workmen engaged on it, lay upon L., and that he had not discharged that burden; that, even if there was common employment, there was no common master; and, that being so, the case was not within* Wiggett *v.* Fox, *and the defence of common employment was not maintainable.*

This was an appeal by the plaintiff, George Johnson, from an order of a Divisional Court (Pollock, B., and Manisty, J.) setting aside a verdict given in favour of the plaintiff, and entering judgment for the defendants.

Messrs. Higgs & Hill were contractors, and they entered into a contract with an architect, acting on behalf of the landowners, for carrying out certain building operations. Under the contract, Lindsay & Co., or any other firm to be approved by the architect, were to be employed to do a part of the work required to be done by specialists; and in fact Lindsay & Co. were so employed. The plaintiff was a workman employed by Higgs & Hill, and he was injured by a bucket falling on him, owing, as it was alleged, to the negligence of the defendants' workmen. The defendants denied the negligence and pleaded contributory negligence; and another defence set up, and on which this case turned in the Court of Appeal, was that of "common employment." The accident arose in this way:—A bucket was being hoisted up by Lindsay's men by means of a pulley to an elevated platform on which the defendants' part of the work had to be done, when the high wind unhooked it so that it fell on the plaintiff and injured him. He was picked up by one of the defendants' men, who, being asked by the plaintiff why they had not hooked the bucket securely, replied, "We were in a hurry."

The action was tried by Grantham, J., in Middlesex, and the learned judge put the above statement (as to the cause of the accident) to the jury as part of the evidence. The jury found a verdict for fifty guineas for the plaintiff. On appeal, the Divisional Court, consisting of Pollock, B., and Manisty, J., considered they were bound by the case of *Wiggett* v. *Fox*, 4 W. R. 254, 11 Ex. 832, and accordingly set aside the verdict on the ground of "common employment," and entered judgment for the defendants, and they also held that the plaintiff's statement as to what Lindsay's men had said at the time of the accident was not admissible as evidence.

The plaintiff appealed.

Guiry (*Harris, Q.C.*, with him), for the appellant.—The Divisional Court thought they were bound by the decision in *Wiggett* v. *Fox*; but, in the first place, that case is distinguishable from the present one, and, secondly, it has been overruled by more recent cases. Here the employers who were guilty of negligence were not sub-contractors under Higgs & Hill. The latter had no control over Lindsay's servants, nor Lindsay over theirs, and each paid their own. Higgs & Hill contracted to do the whole of the work in accordance with the specification, and the total amount to be paid them included payment for the part of the work to be done by Lindsay. It was all put into one so as to make a lump sum, but really the contracts were separate. [LOPES, L.J., referred to the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Co.*, 5 Ex. 343.] The nearest case to this is *Wiggett* v. *Fox*, but the facts were not the same, and if that decision were out of the

way this could not be held to be a case of "common employment." In that case the defendants were the contractors, and let out to the employer of the deceased certain piece work, and paid the deceased with their own hands, and retained the control over the deceased workman's employer and his workmen. The doctrine of "common employment" is recognized in *Priestley* v. *Fowler*, 3 M. & W. 1, but there the plaintiff does not seem to have been aware of the defect, though the defendant was. In *Abraham* v. *Reynolds*, 8 W. R. 181, 5 H. & N. 143, at p. 149, Channell, B., explained *Wiggett* v. *Fox*, showing the facts to be different from what they are here. In the present case neither of the contractors had power to dismiss the servants of the others. In *Rourke* v. *The White Moss Colliery Co*, 25 W. R. 263, 2 C. P. D. 205, *Wiggett* v. *Fox* was doubted. The principle that underlies the doctrine that an employer of labour is held not to be liable for damage to a workman caused by a person in the same employment, is that the workman can say Here is a person who is wanting in skill or care, if you do not dismiss him you will be liable for any mischief done by him, and unless you remove the source of danger I am entitled to leave your service without notice. [LOPES, L.J.—Defective machinery or an incompetent servant takes the case out of the doctrine of "common employment."] Yes, with the qualification that the master is aware of the defect or incompetence. The principle of "common employment" is also explained in *Warburton* v. *Great Western Railway Co.*, 15 W. R. 108, L. R. 2 Ex. 30, at pp. 32, 33. In *Turner* v. *Great-Eastern Railway Co.*, 33 L. T. N. S. 431, 24 W. R. Dig. 150, it was held that there was not common employment. Here, as in that case, each firm of contractors paid and retained control over their own servants. "Common employment" is where the plaintiff is in the position of a fellow servant of the wrong-doer. The service, employment, and payment must be common. In *Rourke* v. *White Moss Colliery Co.*, Cockburn, C.J., in considering whether *Wiggett* v. *Fox* was rightly decided, said, "My own view is that it was not." Therefore that case is not binding to the full extent to which it goes, but must be limited to its own facts and circumstances. *Hall* v. *Johnson*, 13 W. R. 411, 3 H. & C. 589, is another case of "common employment." In *Wiggett* v. *Fox* the man killed was under the control of the defendant, and in that case the wrongdoer was employed by the contractors in chief, and the sufferer by the sub-contractor, whereas here it was the converse case.

Kemp, Q.C., and *Poulter*, for the respondents.—The building owners made their contract with Higgs & Hill, and had nothing to do with Lindsay & Co., but they insisted on a part of the work being done by specialists, and so Lindsay & Co. were brought in by Higgs & Hill. [FRY, L.J.—How can the sub-contractor here, when sued by a servant of the head contractor, set up the case that his own servants are employed by the head contractor? Is that a defence against the negligence of his own servants?] Yes. In *Rourke* v. *The White Moss Colliery Co.* the other judges did not express any concurrence in the Chief Justice's *dictum* as to *Wiggett* v. *Fox*. The question of negligence arose from the way the bucket was fastened, which was only seen by the witness from a distance. Grantham, J., put to the jury as part of the evidence what was said to have passed between the injured man and Lindsay's workmen immediately after the accident. We ask to keep our judgment, or, in the alternative, for a new trial. [They referred to ord. 31, r. 6, of the Rules of the Supreme Court, 1883.] Lindsay is entitled to stand in the shoes of Higgs & Hill as to the defence of common employment. *Morgan* v. *The Vale of Neath Railway Co.*, 14 W. R. 144, L. R. 1 Q. B. 149, 5 B. & S. 570, referred to by this court in the case of *Charles* v. *Taylor*, 3 C. P. D. 492, 26 W. R. Dig. 140, is strongly in our favour.

Guiry, in reply.—In order to avail themselves of the defence of common employment, the defendants must be the common employer. In *Swainson* v. *North-Eastern Railway Co.*, 26 W. R. 413, 3 Ex. D. 341, Pollock, B., at p. 344, after referring to *Wiggett* v. *Fox* and the other cases, said, "In all these cases, there was not only a common employment, that is, employment with a common object, but also common service, that is, service under one master." [LOPES, L.J.—Was not Lindsay doing the work for which Higgs had contracted, so that both Lindsay and his servants were in Higgs's employment?] No. In order to ascertain who is liable, you must look to the wrongdoer himself or to the first person in the ascending line, who is the employer and has control over the work: *Murray* v. *Currie*, 19 W. R. 104, L. R. 6 C. P. 24; and *Bartonshill Coal Co.* v. *Reid*, 6 W. R. 664, where Lord Cranworth explained that a fellow workman knows the risks he undertakes. That was referred to and approved by Lord Cairns, L.C., in *Wilson* v. *Merry*, L. R. 1 Scotch App. Cas. 326, at p. 331. Higgs & Hill cannot be affected with the knowledge of the risks here. The principle of "common employment" is that as the servant has as good an opportunity as his master of judging as to the incompetence of his fellow-servant, he cannot recover damages from his master for injuries caused by that fellow-servant. That was not so here—the plaintiff had no opportunity of judging whether the persons employed by Lindsay were incompetent or not.

Poulter asked leave to refer to the Scottish case of *Woodhead* v. *Gartness Mineral Co.*, 1877, Court of Sess. Cas., 4th series, 469.

Cur. adv. vult.

Aug. 9.—COTTON, L.J.—I have had the opportunity of reading the judgment of Lopes, L.J., with which I agree.

LOPES, L.J.—The plaintiff in this case was employed by Higgs & Hill. The man whose negligence caused the injury to the plaintiff was directly employed by the defendants. The question to be determined is whether the plaintiff has a cause of action against the defendants as the masters of the man who caused the injury. This entirely depends on the relative position of the injuring and injured man. Higgs & Hill had contracted for the whole work of improving and altering certain dwelling-houses under the supervision of an architect. A certain portion of this work was of a special and definite kind, which was to be done under a special clause in Higgs & Hill's contract. The architect was to select the persons to do this work, and Higgs & Hill were to allow the persons so selected the use of their scaffolding, and were to provide them with any needful attendants for the carrying out of the work, and were to work with them as might be necessary for the due despatch of their work. The work was to be carried out in accordance with a specification and instructions to be forwarded by the architect to Higgs & Hill. The architect selected the defendants, and obtained an estimate for the work from them for £213, which was duly forwarded to Higgs & Hill. This sum was included in the contract of Higgs & Hill, and was to be paid by them. It was admitted that the man who caused the injury had been selected with reasonable care, and that all the materials and resources were adequate and proper. In these circumstances we are of opinion that the defendants became sub-contractors under Higgs & Hill, and were, together with the men directly employed by them, in the employment of, and under the general control of, Higgs & Hill, working together for one common object—*i.e.*, the carrying out of Higgs & Hill's contract—and taking upon themselves

all the risks naturally incident to the work they had undertaken. Higgs & Hill were the common masters of the injuring and injured men, both were in their employment, both were engaged at the time of the injury in performing an operation included in Higgs & Hill's contract, and for which Higgs & Hill were to receive payment, and both, the one directly and the other indirectly, were paid by them. This case comes within the decision of *Wiggett* v. *Fox*. In that case the defendants had contracted with the Crystal Palace Co. to erect two towers. They themselves supplied materials, scaffolding, and tools, but engaged one Moss as a piece-worker, who employed Wiggett and others as workmen under him. Whilst Wiggett was engaged at his work one of Fox & Co.'s own workmen let fall a heavy tool from the top of one of the towers and killed him. It was held that Fox & Co. were not liable. Alderson, B., said: "Here both the servants were at the time of the injury engaged in doing the common work of the contractors, the defendants, and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose." And again, further on in his judgment, he says: "If we were to hold the defendants liable, we should be obliged to hold that every contractor, where various tradesmen, bricklayers, plumbers, and the like are employed to build a house, would be liable for all accidents, &c., *inter se*, to the various workmen so employed in the common object, and it is difficult to see that it could stop there; possibly the common employer of them all might be made liable in such cases." The case of *Wiggett* v. *Fox* is the inverse of the present case, but appears to us to involve the same principle. It has never been overruled, but has been commented on by Channell, B., and Martin, B., in *Abraham* v. *Reynolds*. The defendants in that case were cotton brokers, and the plaintiff was the servant of Jump & Son, who had contracted to do all the defendants' carting. The plaintiff was sent by Jump & Son with a lorry to fetch cotton for the defendants from the warehouse of a third person. The cotton was lowered by the defendants' servants into the lorry, and there received by the plaintiff. Owing to their negligence a bail fell upon and injured him. It was held by the Court of Exchequer that, as he was not under the control of the defendants, he was entitled to recover damages from them, although he was engaged in a common operation with their servants. It is to be observed that it is not and could not be suggested that the defendants were the common masters of the injuring and injured man, nor were they both in any sense paid by the defendants. The work was joint but the employment different. Channell, B., and Martin, B., say they assented to the judgment in *Wiggett* v. *Fox*, because they thought Fox & Co. had control over Wiggett. Having regard to the facts of the case which they were deciding, we think they must have meant because they thought the relation of master and servant existed between Wiggett and Fox & Co. There is, therefore, a material distinction between the case of *Abraham* v. *Reynolds* and the present case. We know of no case where it has been held that a man is liable for an injury caused by his servant when the man doing the injury and the injured man are to be considered as employed in doing the work of another who is the common master of both. The principle of common employment has been carried much further in a recent Scotch case, *Woodhead* v. *Gartness Mineral Co.*, where it was held that all persons engaged upon the same work, whether in the same service or not, had taken the risks of the work upon themselves and had no remedy for anything but the personal negligence of those co-operating in the work. The English authorities do not go so far as this, and for the purpose of the present case it is unnecessary to go so far, as we think there was not only co-operation in the work, but a common master and a common employment. We therefore think that the appeal must be dismissed.

FRY, L.J.—I regret that I am unable to concur in the judgment that has been delivered. The case appears to me to be one of very considerable importance, and I will therefore state my reasons for differing from my learned brethren. The first question is whether Lindsay & Co. were sub-contractors to Higgs & Hill. I have come to the conclusion that they were not.

The facts were as follows:—Mr. Burden, the architect who was superintending the erection of the building, obtained an estimate from the defendants, Lindsay & Co., who were ironfounders, of the cost of constructing and fitting a fireproof flooring for the roof of the building. Mr. Burden subsequently entered into a contract with Higgs & Hill for the erection of the buildings. That contract nowhere provided that Higgs & Hill should do the whole of the work, nor is there any specification with regard to their doing that particular work. It contained a general provision that for the purpose of carrying out the works specified to be executed by other tradesmen, and for which provisional amounts were included in the estimate, the contractors were to allow free access to the premises and all reasonable facilities to such tradesmen for carrying out the several works reserved for them to perform. It also contained a special provision that Higgs & Hill were to provide a sum of £213 to be paid to Lindsay & Co., or any other firm to be approved by the architect, for the fireproof flooring in question; and were to allow Lindsay & Co. the use of their scaffolding, and to provide necessary attendants for the carrying out of their work, and to work with them as might be necessary for the due despatch of their work, all of which seem to me to be quite inconsistent with the idea of Lindsay & Co. being sub-contractors to Higgs & Hill. When the building had reached the point at which it became necessary for the flooring to be laid, the architect communicated with Lindsay & Co., and they proceeded to do the work. On that state of facts I cannot come to the conclusion that they were in the position of sub-contractors at all, but in my opinion they were independent contractors for a particular portion of the work.

Secondly, even if they were sub-contractors, the further question arises whether the contract contained any provision for Higgs & Hill having control over that part of the work and the workmen engaged on it. The burden of proving that there was any such control lies upon the defendants, but there is no evidence at all to show that Higgs & Hill had any power to control the execution of this part of the work, and there is nothing to show that they had any control over Lindsay & Co.'s workmen, or that they had power to dismiss them, or were under any liability to pay them, and the probabilities of the case seem to me very strong against this hypothesis. Lindsay & Co. had undertaken to do this work, and they were responsible for doing it rightly. They were specialists and employed their own skilled men, and therefore the notion that they would submit to the control of a firm of general builders is not one that commends itself to my mind. I think, therefore, that there was no control in Higgs & Hill over Lindsay & Co.'s work or workmen. Those appear to me to be the facts of the case. When I turn to the authorities I feel I am placed in a position of considerable difficulty. There appear to me to be cases binding on this court which do lay down certain principles of law with sufficient clearness. On the other hand, there are cases (and some of them in the House of Lords) which have laid down principles which, if fully developed, seem inconsistent with the cases which I consider binding on

this court. I think that *Wiggett* v. *Fox*, as explained by Cockburn, C.J., in *Rourke* v. *White Moss Colliery Co.*, and by Channell, B., in *Abraham* v. *Reynolds*, and by Pollock, B., in *Swainson* v. *North-Eastern Railway Co.*, does not govern the present case. All those cases proceed on this—that the control of one person over the work and the men is the test to be applied in order to ascertain whether the master is liable or not. In *Rourke* v. *The White Moss Colliery Co.* Cockburn, C.J., expressed his opinion that the decision in *Wiggett* v. *Fox* could only be supported on that principle. What he says is this: "It is quite unnecessary to say whether the case of *Wiggett* v. *Fox*, which was relied on by the defendants, was rightly decided. My own view is that it was not, though I might agree with the decision if I could come to the conclusion that the facts were what Channell, B., appears to have thought they were in the explanation he gives of that case in *Abraham* v. *Reynolds*." And in *Swainson* v. *North-Eastern Railway Co.*, which was a decision of this court, two of the Lords Justices took the same view.

I think, therefore, that in the present case, in which there was no control over the work or over the men by one common master, the defence of common employment cannot be maintained. But the next cases — *Warburton* v. *Great Western Railway Co.* and *Swainson* v. *North-Eastern Railway Co.* — seem to me to establish another proposition—that, in order that the master may escape liability, there must be not only common employment but a common master. In the former case Kelly, C.B., referring to the recent authorities, said:—"The principle, or, rather, the proposition, of law established by these cases is, that where two or more persons are the servants of one master and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another in the work or employment which is common to both or incidental to the carrying on of the general business or the operations in which the one and the other are engaged. And the ground upon which the decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive."

In *Swainson* v. *North-Eastern Railway Co.* that view was adopted not only in the Divisional Court, but by the learned judges of this court. Lord Bramwell said: "The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." And Lord Esher said: "I think that the authorities bear out the proposition laid down in the Exchequer Division—that in order to give rise to the exemption there must be a common employment and a common master." Applying that to the present case, if there was a common employment there certainly was no common master.

That, again, is explained in *Warburton* v. *Great Western Railway Co.*, L. R. 2 Ex., at p. 33, where it is said "the ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive."

The plaintiff here never received any wages from Lindsay & Co., whether they were sub-contractors or independent contractors, and therefore the principle stated by Kelly, C.B., for the exemption of the master does not apply. And I cannot help observing that this is the first case in which the doctrine of common employment has been held to apply to a sub-contractor. In the other cases the person complaining has been employed by the sub-contractor, and the wrongdoer by the head contractor. Those authorities which are binding on me lead me to the conclusion that the defence of common employment ought not to succeed. I will go a little further, however, and admit that I feel great difficulty in understanding the grounds of many of the cases. The case of *Wilson* v. *Merry* seems to approach the matter from a different side, and if that were the only authority to be considered I might concur in the conclusion arrived at by my learned brethren. I should then say that negligence is the default in performing some duty to take care; and I should say that the duty of a master to the general public is to take care that they are not injured by himself or his men, and that the duty of a master towards those in his employment in any given work which the master does not personally execute is to select competent workmen and furnish them with adequate materials and resources, and that if he does that he has discharged his duty. Here we have this question. What is the duty of a master who does not personally execute the work towards a workman not employed by him, but who is a servant of another master who has taken part in the common enterprise? I know of no authority to answer that question. But I do know that in *Wilson* v. *Merry* Lord Cairns indicated the difference in this respect between a member of the general public and a workman. He said:—"A servant may choose for himself between serving a master who does and a master who does not attend in person to his business." Applying that principle to the present case, a man may choose between taking part in an enterprise in which there is the co-operation of masters who employ servants, and not taking part in such an enterprise. If he voluntarily takes part in such an enterprise he cannot complain of the master who does all he can, who chooses competent servants and supplies them with fitting materials and appliances. That view might have commended itself to me if there were no other decision on the subject but *Wilson* v. *Merry*. But it is obvious that that law of reason would have far-reaching consequences, and it would, in my opinion, overrule some of the cases which are binding upon me. I do not, therefore, feel myself at liberty to adopt it.

Appeal dismissed.

Solicitors for the appellant, *Langlois & Biden.*

Solicitor for the respondents, *G. H. Finch.*

High Court of Justice.

Chan. Div. } Chitty, J. } Oct. 29, 30; Nov. 7.

NEATH PERMANENT BENEFIT BUILDING SOCIETY *v.* LUCE. (*a.*)

Building society—Mortgages—Ultrà vires—*Subrogation—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 15, *sub-section* 2.

Under section 15, *sub-section* 2, *of the Building Societies Act*, 1874, *the amount for the time being secured to a building society by mortgages from its members is not limited to the principal moneys thereby secured, but*

(*a.*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

includes also all such other sums as at the date of borrowing may be due in respect of interest, fines or otherwise, and instalments not then accrued, but secured by the mortgages and outstanding.

Where moneys were borrowed ultrà vires *by a building society and applied in advancing members who gave to the society mortgages to secure the repayment of the advances, it was held that the persons from whom the moneys were borrowed by the society in order to make the advances were entitled to follow their moneys into the hands of the advanced members, and claim against the mortgages held by the society for the amounts secured by the mortgages, notwithstanding that a premium was deducted from that amount by the society when advancing the members.*

Blackburn and District Benefit Building Society *v.* Cunliffe Brooks & Co., 29 *Ch. D.* 902, 34 *W. R. Dig.* 25, *followed.*

This was an action brought in the name of the above-named society by the official liquidator against the defendants to set aside certain mortgages by the society, on the ground that the mortgages were unauthorized and invalid as against the society. The borowing powers of the society were limited in terms identical with those of section 15 of the Building Societies Act, 1874, which, so far as material, is as follows:—

"15. With respect to the borrowing of money by societies under this Act, the following provisions shall have effect:—

"(1) Any society under this Act may receive deposits or loans at interest, within the limits in this section provided, from the members or other persons, or from corporate bodies, joint-stock companies, or from any terminating society to be applied to the purposes of the society.

"(2) In a permanent society the total amount so received on deposit or loan, and not repaid by the society, shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. . . ."

Certain questions of law were, in the course of the action, ordered to be set down to be heard and disposed of before the trial. The first question was, whether the word "amount," in the expression "the amount for the time being secured to the society by mortgages from its members" (Building Societies Act, 1874, s. 15 (2)), included the principal sum only or included also interest and other moneys outstanding and secured by the mortgages. From the rules of the society it appeared that when the society made an advance to one of its members the member paid a premium for the advance, and that in each case the premium amounted to £10 per cent. on the sum advanced, and was deducted by the society from the sum advanced to its members. It also appeared that the moneys which the society had borrowed from the defendants upon the security of the mortgages impeached in this action were applied in advancing members, and thereupon a second question was raised—namely, whether, in the event of the mortgages being invalid, the mortgagees would be entitled to follow their moneys into the hands of the members therewith advanced and to claim under the mortgages given by the advanced members to the extent of the moneys expressed to be secured by the mortgages, or only to that extent less £10 per cent., the amount deducted as premium.

Sir Horace Davey, Q.C., and *J. G. Wood*, for the plaintiff society, on the first point referred to sections 15 and 49 of the Building Societies Act, 1874, and on the second point to the *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.*, 29 Ch. D. 902, 34 W. R. Dig. 25.

Romer, Q.C., and *Levett*, and *Byrne, Q.C.*, and *Chadwyck Healey*, for the defendants, on the first point referred to *Laing* v. *Read*, 18 W. R. 76, L. R. 5 Ch. App. 4, and on the second point to *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126.

Sir Horace Davey, Q.C., in reply, referred on the second to *Laing* v. *Read* and to the terms of the judgment in the *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.*, which was produced.

Chitty, J.—The first point relates to the borrowing power of the society, which has a rule expressed in terms of an Act of Parliament, so I will address myself to the general clause in the Act. The 15th section of the Building Societies Act, 1874, empowers the society to borrow money, but in the case of a permanent society such as this there is a limit imposed by the 2nd sub-section of the 15th section. Now two terms are there compared. There is, first, the total amount received on deposit or loan and not repaid, and as to that term no question has been, nor could I think be, raised.

I will, by way of illustration, assume that on a given day the society had a sum of £100 which it had, at some preceding time, received. If, then, the society repaid a portion of that sum, this first term would be the balance, but if they had repaid nothing, this first term would be the whole amount which they had received. The first term does not involve any computation of interest whatever on the amount received. Thus if the society had, six months before entering into the borrowing transaction now in question, received a sum of £100 and had agreed to pay interest, so that at the date of the borrowing the £100 and some interest were owing, the first term would not consist of £100 and the interest, but simply of the £100. That is plain, because the language of the Act is the amount received. If several amounts are received, the first term is the total amount received and not repaid.

Then a comparison has to be instituted between that term and the second term mentioned in the sub-section—namely, "the amount for the time being secured to the society by mortgages from its members." The object of the comparison is to preclude the society from borrowing beyond the limit of the two-thirds mentioned—that is to say, the sum that they can borrow is not to exceed two-thirds of the amount for the time being secured by mortgages from its members.

The first point raised by the plaintiffs is, that the amount secured must be so interpreted as to exclude any interest owing on the security. The best way is to take a very simple case. Suppose, when the society receives a sum of money on loan, that a mortgage has been made to it for £100, payable six months after the date of the mortgage, with interest payable half-yearly. Suppose, also, that when the society receives money on deposit, that there is due to the society the £100 in respect of the principal, and, six months having elapsed from the date of the mortgage but a few days before the deposit, £2 10s. in respect of interest calculated at the rate of £5 per cent. per annum. The plaintiff's contention is that the amount secured does not include the interest. But why not? If the question is put in the popular or in the legal form what must the answer be? The question is, What is the amount secured? The answer is simple, the principal secured is £100, the interest secured is £2 10s., the amount is £102 10s. I can see no other answer. No reason can be suggested why these words should not have their simple meaning applied in a case like this.

Now I will suppose, by way of adding to my simple case, that there is a small fine due in respect of the non-payment of the £2 10s. interest. We will say there is accordingly a fine of 10s. What, then, is the amount secured? The answer is: £100, £2 10s., and 10s. I am unable to frame any other answer to that question.

of these terms, each party agreeing to be bound by his decision."

For the purpose of carrying this agreement into effect, Mr. Wolstenholme, after consulting with the respective solicitors of Mr. and Mrs. Burnaby, settled the following indentures of the 11th and the 18th of May, 1887.

By the indenture dated the 11th of May, 1887, Mr. and Mrs. Burnaby, in exercise of the power of joint appointment given by the marriage settlement, jointly and irrevocably appointed that, after the death of the husband and the death or remarriage of the wife, one moiety of the investments representing the sum of £10,000 should be held in trust for the daughter Ruby on her attaining the age of twenty-one years or marrying under that age, which should first happen, and to be then vested and not before; and also that, after the death of the husband and the death or remarriage of the wife, the remaining moiety of the investments representing the sum of £10,000 should be held in trust for the daughter Ruby on her attaining the age of twenty-one years or marrying under that age, which should first happen, and to be then vested and not before, but subject to the power of revocation thereinafter contained—viz., that it should be lawful for the husband by deed to revoke the appointment thereinbefore made as to all or any part of the moiety lastly appointed, and to permit such moiety, or the part thereof to which the revocation should extend, or any portion thereof respectively, to devolve as unappointed, or to make any new appointment thereof which would be made by him solely in case he had survived the wife. And it was thereby provided that, in case of any such revocation, the daughter Ruby should accept the moiety first thereinbefore appointed in satisfaction of the moiety to which she was or would be entitled assuming her to be the only child of the husband and wife, and that the moiety to which, or to any part of which, such revocation should extend should be taken as the moiety which, in default of appointment, and in case of there being only one child to take a vested interest, would devolve as if there were no child to take a vested interest. Also by the same deed the wife irrevocably appointed that, after her death, another sum of £10,000 (part of funds brought into the settlement by her) should be held on trust for the daughter Ruby.

The decree *nisi* for dissolution of the marriage was made absolute on the 17th of May, 1887, and by the indenture dated the 18th of May, 1887, Mr. Burnaby released his power of appointment over the funds brought into the marriage settlement by the now divorced wife, and the divorced wife released to the trustees all the interest, dividends, and income which under the marriage settlement she would, if she survived Mr. Burnaby, become entitled to receive from the investments representing the first mentioned sum of £10,000, to the intent that those investments, on the death of Mr. Burnaby, should be held on the like trusts as if she were also dead. And she also thereby released to Mr. Burnaby all power of appointment over the investments representing the first mentioned sum of £10,000.

On the 7th of June, 1887, Mrs. Burnaby was married to Sidney Willoughby.

By a deed poll dated the 30th of November, 1887, Mr. Burnaby revoked his appointment secondly made in the indenture of the 11th of May, 1887, of the moiety of the investments representing the sum of £10,000 in favour of the daughter Ruby, so that such moiety might (subject to any future appointment thereof which might be made by him) devolve as if the appointment in that indenture had not been made.

This was an action by Mr. Burnaby against the children Lancelot and Muriel, the child Ruby, Mrs. Willoughby, his divorced wife, and the trustees of the marriage settlement, in which action he alleged that the children Lancelot and Muriel were illegitimate, but admitted the legitimacy of his daughter Ruby, and claimed a declaration that one moiety of the investments representing the £10,000 ought to be held by the trustees of the marriage settlement upon the trusts affecting such moiety in case there was no child of his marriage with his divorced wife, or in the alternative rectification of the indenture of the 11th of May, 1887.

Mrs. Willoughby did not defend the action. The defendant Ruby in her defence upheld the appointment in her favour in the indenture of the 11th of May, 1887, and alleged that the deed poll of the 30th of November, 1887, was void.

At the trial of the action a great deal of evidence was given as to the proceedings of Mr. and Mrs. Willoughby (formerly Mrs. Burnaby) and the circumstances attending the births of the children Lancelot and Muriel, the effect of which appears from the various judgments in the case.

Napier Higgins, Q.C., C. A. Middleton, and *A. Young,* for the plaintiff.

Giffard, Q.C., and *Methold,* for the children Lancelot and Muriel.

Sefton Strickland, for the daughter Ruby.

Cozens-Hardy, Q.C., for the trustees of the settlement.

Napier Higgins, Q.C., called Mrs. Hook, and proceeded to put in evidence the conversations between Sidney Willoughby and the witness respecting the birth of Lancelot.

Giffard, Q.C.—These conversations are not admissible, as declarations of a husband and wife are not admissible to bastardize children born in wedlock, or to prove non-access: *Goodright* v. *Moss,* 2 Cowp. 591. The House of Lords did not upset this rule in admitting evidence in the *Aylesford Peerage case,* 11 App. Cas. 1, 34 W. R. Dig. 74.

NORTH, J.—I think the evidence of the conversations is admissible. I cannot distinguish these statements made in conversation from the letter of Lord Blandford, admitted as evidence by the House of Lords in the *Aylesford Peerage case.* I think the verbal statements of Willoughby are as admissible as if they had been put into writing. I do not treat them as evidence of the truth of the matters stated, but think them admissible as showing that he made arrangements for the expected confinement of Mrs. Burnaby, whom he was then living with and representing as his wife.

Napier Higgins, Q.C., for the plaintiff, proposed to tender as evidence an official French certificate of the entry in the register at the *mairie* at Hyères of the birth of the child Lancelot. A French witness named Roux proved that he had compared the certificate with the original entry, and that it was an accurate copy. There was evidence that the original book could not be removed from the *mairie.* [NORTH, J.—If the original book cannot be produced I think you are entitled to give secondary evidence of its contents, but I do not see how this document is evidence *per se.*] It is admissible under section 7 of Lord Brougham's Act of 1851 (14 & 15 Vict. c. 99). [NORTH, J.—I do not think that section applies. In my opinion the entry of the birth was not a "judicial proceeding of any court of justice" or a "legal document filed or deposited in any such court."]

Giffard, Q.C., for the children Lancelot and Muriel.—Secondary evidence of the contents of the register cannot be admitted: Taylor on Evidence, 7th ed., vol. 2 p. 1,328, plac. 1,593.

NORTH, J.—I think this document is admissible. The

passage quoted from Taylor on Evidence does not apply. The learned author is there speaking of official documents which are admissible as such; documents which prove themselves. The witness says he has compared the document with the original book, and tells me what is in the book. The document is admissible, not as an official document, but because the witness has compared it with the original, and by that means is able to say what the original contains. I am not now deciding anything as to the value of the evidence, but only that it is admissible secondary evidence of the contents of a foreign official book which cannot be produced here.

Napier Higgins, Q.C., C. A. Middleton, and *A. Young,* for the plaintiff, proposed to call the plaintiff as a witness.—We submit that, on the question of legitimacy, the plaintiff's evidence is admissible: Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3.

They referred to *In re Rideout's Trusts,* L. R. 10 Eq. 41, 18 W. R. Ch. Dig. 36; *In re Yearwood's Trusts,* 25 W. R. 461, 5 Ch. D. 545; *Guardians of Nottingham* v. *Tomkinson,* 28 W. R. 151, 4 C. P. D. 343; *The Aylesford Peerage Case.*

Gifard, Q.C., and *Method,* for the children Lancelot and Muriel, were not called on.

North, J.—I cannot accept this evidence. *In re Rideout's Trusts* seems to be an authority against Mr. Higgins rather than in his favour. The view taken by Vice-Chancellor Hall in *In re Yearwood's Trusts* seems to me founded on a misapprehension of *In re Rideout's Trusts.* I should have hesitated to say so on my own authority only, but the Common Pleas Division took the same view in *Guardians of Nottingham* v. *Tomkinson.* I have a reference also to a case before Kay, J.—*In re Walker,* W. N., 1885, at p. 196. That was a summons for the maintenance of a female infant, who claimed, as a child of Cecilia Ann Jackson, to be entitled to a half-share of a fund of £1,500. The husband of Mrs. Jackson, on behalf of a child of the marriage, disputed the title of the applicant, alleging that she was born at a time when Mrs. Jackson was living separate from him, and that the applicant was proved by the dates to be illegitimate. The husband tendered an affidavit, in which he denied having had sexual intercourse with his wife for a period before the birth of the child exceeding the period of gestation. *In re Rideout's Trusts* and *In re Yearwood's Trusts* were cited. Kay, J., declined to follow *In re Yearwood's Trusts,* and held that the evidence of the husband to prove non-access could not be received, and on the other evidence he refused the application. That case appears to me to be exactly in point, and I cannot, therefore, receive the evidence of the plaintiff.

Napier Higgins, Q.C., C. A. Middleton, and *A. Young,* for the plaintiff.—The presumption in favour of legitimacy may be rebutted by evidence: *The Aylesford Peerage case; Bosvile* v. *Attorney-General,* 36 W. R. 79, 12 P. D. 177. In the present case there is sufficient evidence to rebut the presumption of legitimacy.

Gifard, Q.C., and *Method,* for the children Lancelot and Muriel.—When there is any reasonable doubt, the court will presume legitimacy: *Plowes* v. *Bossey,* 10 W. R. 332, 2 Dr. & Sm. 145; *Morris* v. *Davies,* 5 Cl. & F. 163; *Foster* v. *Cook,* 3 Bro. C. C. 347. The plaintiff must prove that it is impossible that he should have been the father. He has not done so.

Sefton Strickland, for the child Ruby.

Cozens-Hardy, Q.C., for the trustees.

North, J.—The question which I have to decide is whether two of the three children born during the marriage of the plaintiff with his divorced wife are or are not his children, and I have come to the conclusion that there is ample evidence that neither of the two is a child of the plaintiff. [His lordship, after stating the facts, continued:—] I do not entertain the slightest doubt that Mrs. Burnaby went to Weymouth by appointment with Mr. Willoughby, or that adulterous intercourse took place between them during that visit. It is clear that, during the time in which the family doctor was attending Mrs. Burnaby in September and October, 1884, she was in the family way, and yet she never mentioned this fact to him. Her silence is very significant, and I cannot conceive why she should have concealed her condition from him, unless the reason was that she knew the child of which she was then pregnant was not the child of her husband. During the same period Mrs. Burnaby was constantly seeing her husband's sister, Mrs. Manners Sutton, of whom she was very fond, and with whom she was very intimate, and yet she never mentioned the fact of her pregnancy to her. Why it should not have been mentioned, if the child was the child of her husband, I cannot conceive. On the 15th of December Mrs. Burnaby left her home, without having communicated her condition to anyone, and there can be little doubt that she went away with Willoughby. Within a month afterwards she was living with him as his wife at an hotel at Hyères, in France.

A certificate of the registration of the birth of the child Lancelot at the *mairie* was put in, and its admissibility was objected to. I think that what took place is fully proved without the certificate, for Willoughby could not speak French, and he made the registration through the medium of Mr. Hook as interpreter, who has given evidence as to what took place. In my opinion the certificate is admissible, because M. Roux proved that he had compared it with the original entry in the register, and that it is an accurate copy, and it stands in the same position as a copy made by himself to refresh his memory. I think it is also admissible as an examined copy of a French official document. All these facts, in my opinion, tend to only one possible conclusion—viz., that the two children, Lancelot and Muriel, cannot be other than the children of Mr. and Mrs. Willoughby. I treat the evidence of the statements which were made by them, not as evidence of the truth of the statements which they made, but merely as proving that they did make those statements, thus showing what their conduct was at the time.

The only question, then, is, whether there was such possibility of access by the husband to the wife as to displace the result of this evidence by reason of the legal presumption in favour of legitimacy. This applies only to the child Lancelot.

The 21st of July, 1884, the day on which Mrs. Burnaby left her home, was the 279th day before the day on which the child was born. A good deal of medical evidence was adduced as to the ordinary length of the period of gestation. The witnesses do not all quite agree on this point, but they agree in substance, with the exception of Dr. Barnes. He is the only medical witness who differs from the others, and I cannot accept his view in opposition to theirs. I must accept their views in preference to his. And the conclusion to which I have come upon their evidence is, that the usual period of gestation is from 273 or 274 days up to 279 or 280 days, though there is a good deal of evidence which shows that the period is sometimes longer or shorter—that there is sometimes a difference of eight or nine days in either direction. But, having regard to the normal or usual period of gestation, the medical evidence does not enable me to come to a positive conclusion that the child Lancelot was the child of Willoughby rather than of the plaintiff. But I do find this, that up to the 21st of July Mrs.

Burnaby was living in the same house with her husband. That, however, is not conclusive, and I have to decide the question of fact which was thus stated by Lord Lyndhurst in *Morris* v. *Davies*: "Whether the circumstances are such as to satisfy me that no sexual intercourse did take place between these parties at the period to which reference is had." Mr. and Mrs. Burnaby had for a long time been leading a very unhappy life. The cause of this I do not know. They had for some years occupied separate bedrooms, and the wife had invariably locked the door of her room at night when her husband was at home. Her whole object in doing so was to exclude him. She spoke of him in terms expressive of extreme dislike. Upon this evidence I find, as matter of fact, that no sexual intercourse had taken place between them for some time prior to the 21st of July. Her acts, to my mind, are clear and palpable, and I am satisfied that an arrangement had been made between her and Willoughby for the purpose of his taking the rooms at Weymouth to which she went on that day.

I hold, therefore, that the question whether the circumstances are such as to satisfy the court that no sexual intercourse took place between Mr. and Mrs. Burnaby within a period prior to the 21st of July to which the birth of the child Lancelot could be referred, must be answered in the affirmative.

There is, however, another point to be considered. The husband and wife were living together again in the same house after the 24th of September, 1884, and there is no evidence of non-access at that time. But the evidence of Mrs. Hook is clear and reliable that the child Lancelot was at his birth at least an eight months' child, and indeed that he was fully matured. This makes it clear that he could not have been begotten in the previous September. Evidence was adduced to show a strong likeness between the child Lancelot and Willoughby. But there was also evidence to the contrary, and I set the one against the other, and leave this element out of consideration in forming my opinion. I am satisfied with regard to the child Lancelot, and there is ample evidence that he is not the child of the plaintiff.

I do not think it is necessary to refer at any length to the law on the subject. It is fully stated in the *Banbury Peerage case; Le Marchant's Gardner case*, App. 389; and in *Morris* v. *Davies*. I will only refer to the recent case of *Bosvile* v. *Attorney-General*, in which Sir J. Hannen directed the jury in accordance with *Morris* v. *Davies*, and this ruling was approved by the Divisional Court, who said: "There is the highest authority for saying that the presumption in favour of legitimacy may be rebutted by evidence." The facts of that case were very like those of the present case, and, though there was nothing there to prove the impossibility of access by the husband, the court held that the jury were not wrong in regarding the evidence against the legitimacy of the child as conclusive. In my opinion the evidence against legitimacy is much stronger in the present case. In that case, again, the Divisional Court said: "The lady herself seems to have regarded the child as the child of Mr. Craven, and not of her husband. The time fixed by her for the attendance of the monthly nurse was obviously based on a calculation which placed the commencement of the period of gestation subsequent to the day on which she left her husband's house, from which day she was living in adultery with Craven." I think that what took place in the present case with regard to the attendance of the doctors and the nurse before the birth of Lancelot is very strong evidence to show that the calculation of the time at which Mrs. Burnaby's confinement was e[illegible] to take place referred to something which [illegible] after she left her husband's house on the 21st [illegible] With regard to the conduct of Willoughby Burnaby, it is said that they may have been mistaken in thinking that the child was the child of Willoughby. But their conduct is the strongest possible evidence that something had taken place between them which made it not only possible but probable that the child was Willoughby's child.

With regard to the child Muriel, I think the case is clear. The evidence satisfies me that there was no possibility of access by the husband during the period to which her conception can be referred.

Adopting the rules of law laid down in the cases to which I have referred, the evidence that the children Lancelot and Muriel are not the children of the plaintiff is ample and conclusive, and I must declare that the child Ruby was the only child of the marriage between the plaintiff and his late wife.

Napier Higgins, Q.C., C. A. Middleton, and *A. Young*, for the plaintiff.—The only question that now remains is as to the validity of the appointment of the 11th of May, 1887. By the arrangement which was made, the child Ruby has obtained the benefit of the appointment made in her favour by her mother, and the appointment of half the £10,000. If necessary the court can rectify the appointment. On the exercise of a joint power of appointment, a power of revocation may be reserved to one of the appointors: *Brudenell* v. *Elwes*, 7 Ves. 382, and Sugden on Powers, 8th ed., pp. 364, 365.

Sefton Strickland, for the child Ruby, was not called upon.

Cozens-Hardy, Q. C., for the trustees.

NORTH, J.—The statement of claim asks in effect for a declaration that the trustees of the settlement ought now to hand over one moiety of the £10,000 to the plaintiff. In my opinion he is not entitled to call for it now. No one suggests that the appointment of the first moiety to the daughter Ruby is not perfectly good, though, of course, it is contingent upon its becoming absolutely vested in her, but, so far as it goes, it is perfectly good. Then, by the same deed, the second moiety is appointed to her, subject to the power of the plaintiff to revoke the appointment. And, by the deed of the 18th of May, Mrs. Willoughby purported to execute a release of all powers of appointment over the £10,000.

Now, as regards the arrangement effected by these deeds, I am not satisfied that it was good at all, and for this reason: the object of it is admitted to have been to enable Mr. Burnaby to receive £5,000 out of the funds absolutely at once. That, in my opinion, was not a legitimate object for the exercise of the power. The power was simply to appoint for the issue of the marriage in such manner as the parents should jointly appoint. An exercise of that power, to be valid, must be for the benefit of the issue, and for no other purpose. I am not satisfied, therefore, that the attempted exercise was not wholly void. But, even if it was clearly good as to the first moiety, still, as to the second moiety, the appointment is to the daughter Ruby, subject to a power of revocation by one of the two joint appointors alone. No authority has been produced to show that such a delegation of a joint power to one of the two donees is admissible. What the settlement contemplated was a revocation by the two, or possibly by the survivor if one of the two had become by death incapable of acting; but there is nothing to show any intention that the power of revocation given to the two should be exercised by one of them alone during the lifetime of the [illegible]. In my opinion, therefore, this attempt to give [illegible] a power to revoke the joint appoint- [illegible] and I do not, therefore, see how he [illegible] the £5,000 under such a revocation.

Then I am asked to rectify the deed of the 11th of May, 1887, but I do not see any possible ground for rectification. I have read the clause by which the parties agreed to leave the settlement of the deeds which were to carry out the terms agreed upon to Mr. Wolstenholme. The matter was discussed with him by the solicitors of the parties, and the deed of the 11th of May was finally settled by him as the person to whom, by the 12th clause of the agreement of the 21th of October, the power of settling the terms had been delegated by the parties who had agreed to be bound by what he did. That power was vested in him, and I do not see how I can say that what he did was not done rightly, or that I have any control by way of rectification over what he decided to be right between the parties. Nor do I see that there was in fact any mistake in what was done. It was done deliberately for the purpose of giving effect to what he advised them would be the best way of carrying out the agreement between them. I cannot, therefore, make any order for rectification.

Sefton Strickland, for the child Ruby, asked for a declaration that the two appointments were good.

North, J.—I feel a difficulty in making a declaration that the appointments are good, because the matter has not been gone into so fully as to enable me to decide whether there was a fraud on the power or not. I simply refuse to make a declaration that the plaintiff is entitled to have a moiety of the trust fund handed over to him now.

Solicitors, *Sanderson, Holland, & Adkin; The Official Solicitor; Roy & Cartwright; Cookson, Wainewright, & Pennington.*

House of Lords.

From C. A. (England). Nov. 30; Dec. 3, 4, 1888; May 27, 1889.

Hamilton v. Baker. "The Sara." (a.)

Maritime lien—Disbursements—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 10—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 191.

*The master of a ship has no maritime lien on it for disbursements.**

The Glentanner, *Swa.* 415; The Feronia, 16 *W. R.* 585, *L. R.* 2 *A. & E.* 65; The Mary Ann, 14 *W. R.* 136, *L. R.* 1 *A. & E.* 8; *and* The Ringdove, 34 *W. R.* 744, 11 *P. D.* 120, *overruled.*

Decision of the Court of Appeal, 35 *W. R.* 826, 12 *P. D.* 158, *reversed.*

This was an appeal from the decision of the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), reported 35 W. R. 826, 12 P. D. 158.

The respondent, the captain of *The Sara*, had drawn a bill on the owners for certain necessary disbursements, and the bill had been dishonoured by the owners.

The respondent, being liable on the bill, brought this action in *rem* in the Admiralty Division for the amount. The action was defended by the mortgagees of the vessel (the appellants) who had intervened, the question being whether the respondent had a maritime lien for his disbursements.

Finlay, Q.C. (*A. E. Nelson* with him), for the appellants.

Sir W. Phillimore and *J. G. Barnes, Q.C.*, for the respondent.

The Henrich Björn, 11 App. Cas. 270, 34 W. R. Dig. 179; *In re Rio Grande do Sul*, 25 W. R. 328, 5 Ch. D. 282; *The Pacific*, Br. & L. 243, 12 W. R. Adm. Dig. 31; *The Two Ellens*, 20 W. R. 592, L. R. 4 P. C. 161; *Bristow* v. *Whitmore*, 9 W. R. 621, 9 H. L. Cas. 391, were referred to in addition to the cases mentioned in the headnote.

A. E. Nelson replied.

The House took time for consideration.

May 27, 1889.—Lord Halsbury, C.—In this case the plaintiff, William Baker, brought an action *in rem* against the owners of the steamship *Sara* as defendants. The plaintiff claimed for disbursements which had been supplied upon his order as master of the steamship *Sara* at St. Vincent, in March, 1885.

The appellants intervened in the action, and their case was that they had taken a mortgage of the vessel on the 23rd of April, 1884; and, stripped of the other questions which have been disposed of by the evidence, the only real question is whether, under the circumstances I have stated, the plaintiff Baker had a maritime lien for his disbursements.

I believe the question might be even more compendiously stated by saying that the question is whether the decision of Dr. Lushington in the case of *The Mary Ann* can be supported by your lordships' House.

Now two propositions are absolutely certain: one is that before 1854 no such lien could be claimed; and the other, that neither the Act of 1854 nor the Act of 1861 created such a lien in express terms.

The arguments addressed to your lordships singularly enough, are in some of their aspects very effectively answered by some of the passages in the very judgment relied on.

It is not true to say that the mere enacting by the Admiralty Court Act that the High Court of Admiralty shall have jurisdiction, purports to confer a maritime lien. Dr. Lushington himself says that the same enactment provides that the proceedings in that court may be either *in rem* or *in personam*. Further, he says that there is a clear distinction between a maritime lien and a claim, the payment of which, the court has power to enforce from the ship and freight.

The whole of the learned judge's reasoning upon which his judgment ultimately turned was this: He says, "Supposing before this Act this court had jurisdiction to deal with any subject-matter in certain cases, and those only, and that in those cases the court was bound to recognize the existence of a maritime lien, and supposing that by this Act the Legislature extended the jurisdiction so as to enable the court to deal with the same subject-matter in other cases also, then I think that in such other cases, and with regard to the same subject-matter, the Legislature must be taken, notwithstanding the absence of any express words, to have intended to create a maritime lien."

This is the whole of the reasoning upon which the judgment depends, and it is necessary to examine how it justifies the judgment when applied to the subject-matter with which we are dealing.

Is it true that the court was bound to recognise a maritime lien for disbursements before the statute? Certainly not.

The example given of the master here is certainly a very strange one, since it is in a sense expressly given

* By the Merchant Shipping Act, 1889, 52 & 53 Vict. c. 46, s. 1, the master of a ship is given the same rights, liens, and remedies for the recovery of disbursements as he now has for the recovery of his wages.

(a) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

by the combined operation of 7 & 8 Vict. c. 112 and the 191st section of the Merchant Shipping Act, 1854.

The learned judge himself points out that the 10th section of the Act which he was construing cured the difficulty of *forum* in such a case by expressly giving the Admiralty Court jurisdiction to deal with any lien the master might have, and we have already seen that by the two former statutes the lien for the wages was actually and in terms created.

But how does the providing the *forum* for the special lien already created lead to any inference that the giving jurisdiction does create a lien?

It is true that where the contract was under seal, or where the terms were special and unusual, the Admiralty Court had no jurisdiction, because it was said that the sailor's ordinary contract with the master was presumed to be on the credit of the ship, whereas other contracts were said to be on the personal credit of the owners, but whatever may be said as to the practical abolition of the distinction as regards wages "earned on board the vessel" under a special contract or an ordinary contract, what relation has such a provision to the case of disbursements? Where the subject-matter, whether collision or seamen's wages, had in its own nature a maritime lien, I can well understand that the extension of the jurisdiction to a case where the nature of the subject-matter was the same—*e.g.*, collisions within the body of the county—carried with it, as inherent in the nature of the thing itself, a maritime lien, and it may well be argued that the Legislature did not intend to alter the incidents of the subject-matter thus submitted to a new jurisdiction.

The learned judge's own reasoning seems to me to lead to a different conclusion from that at which he arrived. Nor does the power to enter into the whole account given by the section already referred to, appear to me to carry the matter any farther.

The learned judge himself uses the most powerful argument against his own decision. A maritime lien, he says, springs into existence the moment the circumstances give birth to it, as damages, salvage, wages; and yet it is said here that whether there is a lien or not, is to depend upon whether the owners set up by way of set-off counter-claims by them against the master.

I share with many judges the difficulty of following the reasoning, and I am unable, therefore, to adopt the conclusions; but I do feel very strongly what has been forcibly expressed by Sir James Hannen in *The Ringdove* and by the Master of the Rolls in the present case—namely, the difficulty of the practical adoption in actual business of the decision in *The Mary Ann*, and I have striven to see whether it was possible to give effect to that practice; but I cannot omit to consider that we are construing comparatively modern statute law and not business documents merely. Your Lordships' House is asked to sanction a canon of construction that may extend more widely than the particular case now dealt with, and I am therefore constrained to move your lordships that the judgment be reversed and this appeal be allowed.

Lord WATSON.—There is but one substantial question raised in this appeal. Has the master of a British ship a maritime lien, enforceable in the Court of Admiralty, for disbursements made by him on account of the ship in a foreign port?

By the common law of England the master's claims, whether for wages or disbursements, did not carry with them any hypothecary interest in the ship; and, inasmuch as they rested upon contract alone, were not cognizable in the admiralty courts. The Merchant Shipping Act, 1854, gave the master in express terms the same lien which other seamen had for recovery of their wages by law or custom; and also conferred upon the Admiralty Court a limited jurisdiction to entertain other claims at his instance, whilst the Admiralty Court Act, 1861, extended its jurisdiction to any claim for disbursements made by him on account of ship. Neither statute expressly attaches a lien to his claims for disbursements; but it is said that the effect of their provisions is to give him the right by implication.

Section 191 of the Act of 1854, which creates a lien for the master's wages, concludes thus: "If in any proceeding in any court of admiralty or vice-admiralty touching the claim of a master to wages any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

I am willing to assume that the accounting which the provisions contemplate must be confined to items connected with the ship, and I do not doubt that a claim for disbursements is one which the master might competently prefer in answer to any set-off or counter-claim pleaded in defence to his suit for wages. But it does not appear to me to be a necessary or natural inference that the Legislature meant to attach a maritime lien to every demand which a master may competently make in the accounting, or to his claim for disbursements. When a variety of personal and unsecured claims are dealt with in a single clause, and it is expressly declared that one of them shall bear a lien, there arises a strong presumption that a similar privilege is not to attach to the rest; and that presumption cannot be overcome except by very plain implication. A proper right of lien constitutes a *nexus* upon the ship, which *suâ naturâ* must exist and accompany the claim from its inception; and it is very improbable that the Legislature should have intended to create a maritime lien which does not come into existence unless and until a plea of set-off is judicially stated in answer to a claim for wages. The strongest argument to the contrary is to be found in the suggestion that section 191 necessarily contemplates a decree *in rem*, which is said to imply the existence of a maritime lien. But the clause enacts that, in the event of the balance of accounts being against the master, the court is to direct payment, which cannot be effected by a decree *in rem*; and, so far as I am aware, there is no authority for the proposition that there must be a proper maritime lien for every claim which the Legislature has made enforceable against the ship.

The Act of 1861 which provides (section 10) that the Admiralty Court shall have jurisdiction "over any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship." But it also provides (section 35) that "the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*." In the face of that enactment it would be difficult to hold that the submission of a merely personal or contractual claim to the jurisdiction of the Court of Admiralty converted it into a real right against the ship from the time when it came into existence.

In *The Mary Ann*, which was decided by Dr. Lushington in 1865, that learned judge held that the master's claim for disbursements on account of ship does bear a proper maritime lien. In arriving at that result, I do not think the learned judge relied solely upon the provisions of the Act of 1861, although there are observations in his judgment which might admit of that construction. His reasoning leads me to infer that if, before the passing of the Act, claims for disbursements had been wholly excluded from the jurisdiction of his court, and had been unaccompanied by a

lien, Dr. Lushington would have held that the provisions of the Act were, *per se*, insufficient to create the right. He said (L. R. 1 Adm. & Ecc. 11):—"There is a clear distinction between a maritime lien and a claim, the payment of which the court has power to enforce against the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it as damages, salvage, and wages. But it does not follow that because a claim may by Act of Parliament be enforceable against the *res*, that therefore it created a maritime lien."

The law had already been laid down to the same effect by the learned judge in the case of *The Pacific*, which related to the claim of a material man. He there pointed out that in cases where statute gives to the creditor of an unsecured personal debt an action against the ship, and does not clearly prescribe that his claim shall override that of a mortgagee, such creditor in no case "obtains the ship as a security until he institutes his suit in this court." His right in that case is subject to any registered mortgage, and he must "arrest the ship, and then acquires the *res* as a security." So far I agree with the reasoning of the learned judge.

The real grounds of Dr. Lushington's decision in *The Mary Ann* are to be found in the fact that, before the Act of 1861, his court had a limited jurisdiction over claims for disbursement, and in the assumption that in such cases the master had a maritime lien. Upon these premises the learned judge argues, with considerable force, that it must have been the intention of the Legislature that, under the enlarged jurisdiction conferred by section 10 of the later Act, the master's claim for disbursements should have the same privileges which were attached to it under the limited jurisdiction established by the Act of 1854. Referring to section 191 of the earlier statute, and the effect which he attributed to it as creating a lien, *pro tanto*, for disbursements, Dr. Lushington says (L. R. 1 Adm. & Ecc. 12):—"If this be so, then, under this Act—*i.e.*, the Act of 1861—the master claiming his disbursements is to be preferred to the mortgagee, because, before the Act, his claim for disbursements was entitled to a similar preference in the only case where the court could take cognizance of such disbursements—namely, in the case of a set-off."

In my opinion, the *ratio* of the judgment in *The Mary Ann* fails, because I am unable to hold that the enactments of section 191 of the Merchant Shipping Act can be interpreted as creating a maritime lien for disbursements; and the enactments of the statute of 1861, even when tested by Dr. Lushington's own principles, are in themselves insufficient to create such a right.

In *The Feronia* the authority of *The Mary Ann* was followed by Sir Robert Phillimore, who refers to and adopts the views of his predecessor. It was again followed in the case of *The Ringdove* by Sir James Hannen, who stated that the reasoning of Dr. Lushington was not satisfactory to his mind. In the present case Butt, J., considered himself bound by these precedents, but intimated that, apart from their authority, he would have had considerable difficulty in holding that there is any maritime lien for master's disbursements.

None of these judgments in the Admiralty Court were brought under review; but in *In re Rio Grande do Sul Steamship Co.* the Court of Appeal, in a liquidation, gave incidental effect to a lien for disbursements. An observation is attributed to James, L.J., in that case, which, if it had been made *causâ cognitâ*, would have been entitled to great weight; but the report shows that the lien was conceded, and that the point which your lordships have now to decide was neither raised nor discussed.

It was strongly urged by the respondent's counsel that your lordships are now precluded, by a *series rerum judicatarum*, from denying effect to the principle laid down in *The Mary Ann* and *The Feronia*. But I do not think that these authorities, which have been followed but not approved in the most recent cases, are of sufficient weight to establish a latent security of an exceptional character against purchasers and mortgagees.

Lord MACNAGHTEN.—The main question argued in this case, and the only question upon which it is necessary to pronounce an opinion, is reduced to a narrow point.

It is clear that at the time of the passing of the Admiralty Court Act, 1861, disbursements made by the master of a ship in the ordinary course of his employment, did not create any lien in his favour. It is equally clear that neither the Act of 1861, nor any subsequent Act, has in terms conferred a maritime lien for the master's disbursements. Section 10 of the Act of 1861 declares that "The Court of Admiralty shall have jurisdiction over . . . any claim by the master of any ship for disbursements made by him on account of the ship." That section gave the court jurisdiction to entertain suits falling within its scope, and of itself it did nothing more. The jurisdiction, as the Act declared, might be exercised, either by proceedings *in rem* or by proceedings *in personam*. It thus became competent for the Court of Admiralty, on the master preferring his claim for disbursements, to arrest the ship on account of which the disbursements were made. But in the absence of a maritime lien, the arrest could not affect a subsisting mortgage or any other valid charge upon the ship.

So far the matter seems clear. And if the question depended solely upon the general law before the Act of 1861, and upon the language of that Act, there would be no ground for the contention put forward on behalf of the master in the present case. It cannot, however, be disputed that ever since the year 1865 it has uniformly been held that the claim of a master for his disbursements is to be preferred to the claim of a mortgagee. Dr. Lushington arrived at that conclusion without any hesitation in the case of *The Mary Ann*. His view was adopted and approved by Sir R. Phillimore. It was accepted by the Court of Appeal in the case of *In re Rio Grande do Sul Steamship Co.*, and it had been followed in *The Ringdove* by Sir James Hannen, who observed that he did not feel at liberty to disregard the authority of *The Mary Ann*, though he could not say that Dr. Lusington's reasoning was altogether satisfactory to his mind.

The appellants challenge the decision in *The Mary Ann* and the course of practice which has followed it. The respondent contends that the decision was right. But whether it was right or not he says that it is too late now even for this House to interfere. I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time, and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time. I propose, therefore, as briefly as I can, to examine the decision in *The Mary Ann*, and the circumstances under which it was pronounced.

Originally the master had no right to resort to the Court of Admiralty for his wages, or for anything due to him from the owners. The first alteration in this respect was made by the Merchant Seamen Act of 1844 (7 & 8 Vict. c. 112, s. 16), which gave the master, for the recovery of his wages, all the rights, liens, and remedies of an ordinary seaman, but only in the case of the bankruptcy of the owner. As however an ordinary seaman

had no right to come to the Admiralty Court when his wages were due under a special contract, this provision did not much improve the master's position.

Then came the Merchant Shipping Act, 1854, which in section 191 re-enacted the provision in the Act of 1844 as regards the master's wages, omitting all reference to the bankruptcy of the owner, and then went on to enact that "if in any proceeding in any court of admiralty . . . touching the claim of a master to wages any right to set-off or counter-claim is set up, it shall be lawful for such court to enter into, and adjudicate upon, all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

The first case of importance under this section was *The Caledonia*, 4 W. R. 183, Swa. 17, decided in 1855. There the master preferred a claim for wages, and arrested the ship for a sum sufficient to cover his disbursements as well. The mortgagees intervened. They declared that they had no intention of setting up any right of set-off or counter-claim, but they tendered a sum less than the amount claimed in respect of wages, on the ground that payments had been made on account of wages both by themselves and by the owners. Dr. Lushington held that, under the Act of 1854, if the owners chose to avail themselves "of any advances or anything in the nature of a set-off," the whole account between the owner and the master was opened, and he thought that the mortgagees could be in no better position than the owners. There the general account between the master and the owners was not taken as against the mortgagees, apparently because they disclaimed any intention of setting up a right of set-off. But as the general account was not opened, they did not get the benefit of payments made by the owners on account of wages. They were only liable through the master's lien; but they had to pay more than the lien covered.

In the case of *The Glentanner*, which was decided in 1859, the mortgagees were less discreet or less fortunate. They declared that they would set up a right of set-off or counter-claim. The master was then directed to bring in his accounts. The mortgagees did not file a counter-claim or set-off, but they objected to all the items in the master's account except those relating to the payment of wages. Dr. Lushington, in giving judgment, stated that he adhered to every word he said in *The Caledonia*. He thought that the general account, if opened at all, must be gone through and a balance made. He was of opinion that the accounts spoken of in the Merchant Shipping Act meant "the accounts between the master and the ship, exclusive of any private account between the master and her owners for merely extraneous purposes," and that a mortgagee taking possession of the ship, and claiming the benefit of items in the account against the master's claim for wages, thereby made himself a party to the whole account. Why, he asked, should the master be prejudiced by the sale or mortgage of the ship? He was of opinion that, as the mortgagees had declared to set up a counter-claim, and had opened the account, an item of £400 claimed for disbursements belonged to "the account arising and outstanding and unsettled between them and the master," who were, he said, "the parties to the proceeding."

It is to be observed that the learned judge does not in terms say that the master had a maritime lien for his disbursements. His argument, if I understand his judgment aright, rather seems to be that a mortgagee intervening and setting up a right of set-off or counter-claim took upon himself the personal liability of the owner for debts due in connection with the ship.

Then followed, in order of date, the Admiralty Jurisdiction Act, 1861, which gives the Court of Admiralty jurisdiction over any claim by the master for wages, whether due under a special contract or not, and for disbursements made by him on account of the ship. Soon afterwards the question arose as to the effect of that Act on the master's claim for disbursements as between the master and a mortgagee. The point was raised directly in *The Mary Ann*, in which Dr. Lushington gave judgment on the 7th of November, 1865. In that case, dealing with the language of the Act, the learned judge expressed the view which has since been established in the Privy Council and in this House. He thought that the words "the High Court of Admiralty shall have jurisdiction" meant "only what they purport to say—neither more nor less—that is, that the court shall take cognizance of the cases provided for." But he considered that, in determining whether in these cases of extended jurisdiction it was meant to create a maritime lien, or what was the intention of the Legislature, the court would look to the law as it stood before the late Act. And he came to the conclusion that, under the Act of 1861, the master claiming for disbursements was to be preferred to the mortgagee, "because before the Act his claim for his disbursements was entitled to a similar preference in the only case where the court could take cognizance of such disbursements—namely, in the case of a set-off."

I may observe that in that case also, the learned judge, while holding that the claim of the master was to be preferred to that of the mortgagee, does not say in terms that the effect of the Act was to give the master a maritime lien for his disbursements. However, in *The Feronia*, which was decided in 1868, Sir Robert Phillimore expressly stated that in the case of *The Mary Ann* it was decided that under the Act of 1861, "the master has a maritime lien both for his wages and disbursements, and that upon this ground his claim was preferable to that of a mortgagee." No doubt that was the practical result of the decision, and it has been so treated ever since.

Under these circumstances the question whether the decision in *The Mary Ann*, and the practice of the Admiralty Court, which rests upon it, can be supported, depends, I think, on the answer to be given to one or both of these further questions, (1) whether the decision in *The Glentanner* was right, and, if so (2), whether the existence of the rule there laid down justified Dr. Lushington's inference as to the intention and effect of the Act of 1861. It is not, I think, necessary to go into the latter question, because I am of opinion that the decision of *The Glentanner* was based on a construction of the Act of 1854 which is plainly erroneous.

Did the Act of 1854, as against a mortgagee or purchaser, give the master of a vessel a maritime lien for his disbursements in the event of his instituting a suit in the Admiralty Court for wages (which at that time he could only do in the absence of a special contract), and in the event of the mortgagee or purchaser thereupon setting up a right of set-off or counter-claim? The question, I think, answers itself. "A maritime lien," as was observed in *The Two Ellens*, "must be something which adheres to the ship from the time that the facts happen which gave the maritime lien, and then continues binding on the ship until it is discharged. It commences, and there it continues, binding on the ship until it comes to an end." A lien or preference, which is supposed to have its origin in a certain transaction, and yet has no binding force or effect unless and until two things happen, neither of which has any connection with the original transaction, is certainly not a maritime lien in the ordinary sense of the term. But then, did Parliament intend to create this anomalous preference or privilege—whatever it may be called—in the particular case of the concurrence of the two events contemplated by section 191 of the Act of 1854? It would be strange if it did. The Act gave the master a maritime lien for wages; that is, I

suppose, for the amount of his wages for the time being due and owing. Now, a man is bound to pay his own debts, and he is also bound to discharge a preferential claim on property upon which he has a security, if he means to make his security available. But even an honest man, without any disparagement to his honesty, may object to pay another man's debt, and may wish to investigate the amount of a preferential claim on property belonging to him as purchaser or mortgagee. Is it conceivable that it could have been the intention of Parliament that if the master brought a suit for wages, for which the statute gave him a maritime lien, a mortgagee or purchaser intervening for the protection of his own property, should not be at liberty to investigate the extent of the lien—to see both sides of the special account with which he is concerned—except at the risk of having to pay a claim which, up to that time, was neither a debt of his nor a charge upon his property? I cannot imagine that even in hard cases—and these are all cases of hardship — Parliament meant to encourage excessive claims by masters, or to set a trap for unwary mortgagees. Is there anything in the language of the Act of 1854 to countenance such a notion? I do not think there is. The Act speaks of accounts "outstanding and unsettled between the parties to the proceeding." When a mortgagee intervened "the parties to the proceeding," as Dr. Lushington said in *The Glentanner*, were the master on the one hand, and the mortgagee on the other; the master's claim for disbursements could not enter into the account between the mortgagee and the master. The claim for wages might properly come in, because it was a preferential claim on property belonging to the mortgagee. If Parliament had intended by the Act of 1854 to give the master a maritime lien or a preferential claim for his disbursements, nothing would have been easier than to have said so. And it is to be observed that in the very section in question a lien is given in plain terms for the master's wages.

In the result, therefore, I am of opinion that the Act of 1854 did not in any event give the master a maritime lien or preferential claim for his disbursements. It follows that in my judgment the decision in *The Glentanner* proceeded on an erroneous construction of the Act, and that the decision in *The Mary Ann*, and the practice of the Admiralty which rests upon it, cannot be supported.

Your lordships, on the one hand, were warned of the disastrous consequences of disturbing the practice of the Admiralty Court. On the other hand, it was urged that the disadvantages resulting from allowing such a lien more than counterbalance any possible advantage, and it was said that the facilities of communication which exist now-a-days between all parts of the world make it unnecessary to give the master a power which certainly may be abused. Between these conflicting views I do not venture to express any opinion. I have only to state what, in my judgment, the law really is. It is for the Legislature to alter the law if Parliament in its wisdom thinks an alteration desirable.

I think the appeal ought to be allowed.

Orders appealed from reversed; with costs here and below.

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondents, *Ingledew, Ince, & Colt.*

Court of Appeal.

From Chan. Div. Nov. 20.

In re SHEPHARD.

ATKINS *v.* SHEPHARD. (*a.*)

Practice—Parties—Death of judgment debtor—Abatement—Appointment of receiver of interest of deceased judgment debtor in real estate—Heir not served—Jurisdiction — "Equitable execution," nature of—R. S. C., 1883, *ord.* 17, *rr.* 1, 4; *ord.* 42, *rr.* 3 23, 28.

The appointment of a receiver of the interest of a judgment debtor in real estate, though sometimes inaccurately called "equitable execution," is not a mere form of execution, but it is relief, producing the same benefit as execution properly so called, but obtainable, and obtainable only, by means of an order of the court in that behalf, based on the fact that execution, properly so called, cannot be had.

After the death of a judgment debtor the court has no jurisdiction, on the ex parte *application of the judgment creditor, to make an order appointing a receiver of the interest of the deceased judgment debtor in real estate, for the purpose of satisfying the judgment debt, when the person on whom the real estate has devolved is not a party to the proceedings.*

So held, affirming (but on different grounds) the decision of Chitty, J.

Appeal from Chitty, J.

On October 25, 1888, the present appellant, R. W. Cory, who was the plaintiff in an action (*Cory* v. *Mark Shephard & Son*) in the Queen's Bench Division, obtained judgment for the payment of a sum of money by the defendants in that action, who were a solicitor firm consisting of Mark Shephard (since deceased) and his son, Herbert Shephard.

On August 3, 1889, the judgment debt being still unsatisfied, R. W. Cory took out a summons in that action for the appointment of a receiver over certain freehold property in which Mark Shephard had an equity of redemption. The hearing of this summons was adjourned by Pollock, B., to August 15, 1889, and again further adjourned to August 22, 1889.

On August 17, 1889, Mark Shephard died intestate, leaving another son, Stuart Shephard, his heir-at-law.

On August 20, 1889, the present action for administration of the estate of Mark Shephard was instituted in the Chancery Division by G. J. Atkins, a creditor of Mark Shephard's. The son, Stuart Shephard, was made a defendant in this action.

On August 21, 1889, on the application of the plaintiff Atkins, an order was made in the Chancery action by the vacation judge, acting for Chitty, J., whereby H. J. Pratt was at once appointed receiver of the real and personal estate of Mark Shephard (deceased), until a legal personal representative of Mark Shephard should be constituted or until further order, the receiver to give security on or before September 4, 1889, and the plaintiff in the action meanwhile undertaking to be answerable for all sums received by the receiver.

On August 22, 1889, the adjourned summons in the Queen's Bench action came on again before Pollock, B., and he made an order—which purported to have been made on hearing the defendants in that action in person—whereby the said H. J. Pratt was appointed receiver, upon first giving security, of the interest of Mark Shephard in the freehold property therein mentioned, and the receiver was thereby directed, out of the rents and profits or the proceeds of sale of the

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

said freehold property, to pay the judgment debt due to Cory.

On September 17, 1889, letters of administration of the estate of Mark Shephard were granted to his son, the said Stuart Shephard; and on the same day an order was made in the Chancery action directing that the receiver appointed in the Chancery action by the order of August 21, 1889, be continued until further order, and directing notice of this order to be given to R. W. Cory, the plaintiff in the Queen's Bench action, with liberty to him to apply in the Chancery action.

On September 25, 1889, the usual administration decree was made in the Chancery action.

On October 25, 1889, R. W. Cory applied by way of motion (under the liberty to apply) in the Chancery action that the receiver appointed in the Queen's Bench action, by the order of August 22, 1889, might be directed forthwith to receive the rents and moneys receivable in respect of the interest of Mark Shephard in the freehold property therein mentioned, and to appropriate the same in payment of the judgment debt due to Cory, or that such further or other order might be made as might seem fit, for the purpose of enforcing the security of the applicant Cory.

Chitty, J., refused this application, on the grounds (1) that the order of August 22 in the Queen's Bench action only appointed a receiver of the freehold estate therein mentioned upon the receiver first giving security, and as no security had as yet been given that there was, in fact, no receiver competent to act under that order; and (2) that the receiver appointed by the order of August 22 in the Queen's Bench action could not have entered into possession of any part of the deceased debtor's estate without committing a contempt of court on account of the receivership order made previously—namely, on August 21—in the Chancery action.

The learned judge also expressed an opinion that Pollock, B., had no jurisdiction to make the order of August 22, appointing a receiver over what was then in fact the property, not of the judgment debtor, he being then dead, but of another person who was not then in any way before the court, and without any proceedings having been taken to continue the Queen's Bench action against such person.

The applicant, R. W. Cory, appealed.

Romer, Q.C., and *Haldane*, for the appellant.—First, Chitty, J., was wrong in holding that when an order is made appointing a receiver upon his first giving security, the receiver is not competent to act until the security is given. *Ex parte Evans, In re Watkins*, 28 W. R. 127, 13 Ch. D. 253, a decision of the Court of Appeal, is directly in conflict with that view. [*Dibdin.*—We do not contest that now; that case was overlooked in the court below.] Secondly, the action in the Queen's Bench Division did not abate by the death of the defendant, Mark Shephard: ord. 17, r. 1. Then, by ord. 42, r. 23, a judgment creditor is entitled, notwithstanding the death of the judgment debtor, to apply for and obtain *ex parte* leave to issue execution against the chattels of the deceased judgment debtor; one mode of enforcing payment of a judgment debt is by obtaining equitable execution by means of the appointment of a receiver: *Anglo-Italian Bank* v. *Davies*, 27 W. R. 3, 9 Ch. D. 275; and an order appointing a receiver by way of equitable execution may be obtained *ex parte* if the judge consider it "just or convenient" that such order should be made: *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 37 W. R. 264, 22 Q. B. D. 173. Pollock, B., had, therefore, jurisdiction to make the order of August 22, 1889, notwithstanding the death of Mark Shephard. Order 17, r. 1, is not to be limited to matters happening before judgment, but it is general in its application. *In re Parker, Cash* v. *Parker*, 12 Ch. D. 293, shows that after the death of a sole defendant after judgment, a receiver may be appointed over the property of the deceased defendant, though no personal representative of the defendant had been then constituted. [FEY, L.J.—But in that case the plaintiff was a person entitled to take out the administration, and was, therefore, before the court.]

Roundell v. *Currer*, 6 Ves. 250; *Eldridge* v. *Burgess*, 26 W. R. 435, 7 Ch. D. 411; and *Jackson* v. *North-Eastern Railway Co.*, 25 W. R. 518, 5 Ch. D. 844, were also referred to.

Byrne, Q.C., and *Dibdin*, for the respondent (the plaintiff in the Chancery action), were not called on.

P. A. Kingdon, for the administrator of Mark Shephard.

COTTON, L.J.—This is an appeal from a decision of Chitty, J. The facts are shortly these. There had been a judgment obtained in an action in the Queen's Bench Division against Mark Shephard and his son Herbert Shephard. Then Mark Shephard dies, and after his death an administration action was instituted in the Chancery Division and an order appointing an *interim* receiver was made. On the day after this order was made, the judgment creditor in the Queen's Bench action applied to, and obtained from, Pollock, B., an order appointing the same person receiver, upon his first giving security, over Mark Shephard's interest in certain real estate, although Mark Shephard was in fact then dead.

Chitty, J., decided that the judgment creditor could obtain no priority by this appointment of a receiver, on the ground that it was only effectual on the receiver giving security, which he had never done. That view has now been admitted to be erroneous, and was not contested on this appeal. But the learned judge also expressed an opinion that the court had no jurisdiction to make an order appointing a receiver against an estate, which, at the time the order was made, was no longer the estate of Mark Shephard, for he was then dead—but had become the estate of his heir-at-law, who was not a party to the Queen's Bench action. In my opinion there was no jurisdiction to make that order.

It was said that the order was an equitable execution, and that, as legal execution might be had after the death of a judgment debtor, there was no reason why equitable execution should not be granted after death of the judgment debtor as well as legal execution.

I by no means assent to the proposition that legal execution could have been obtained after a judgment debtor's death at once, without any other step being taken. I think there are strong reasons for saying that it could not. But, assuming that it could, can an order for the appointment of a receiver be likewise made after the judgment debtor's death? In my opinion the whole argument in favour of that view arises from a confusion in the use of the term "equitable execution." The term itself is an erroneous expression. It is merely a term which has often been used as a short mode of expressing the fact that, by a receivership order, the same benefit might be obtained in equity as in common law was obtained by legal execution, but it is quite a different thing from execution at common law. A receiver was appointed by way of equitable relief only when difficulties existed in the way of obtaining legal execution. Under the old practice of the Court of Chancery a plaintiff came into equity in order to obtain the same benefit which he might have got by means of his legal right if there had been no impediments in his way. It is, however, wrong to say that the Judicature Acts gave any right to obtain this equitable relief against the estate of a legal debtor when there was no difficulty in obtaining execution at law, and if any practice contrary to this has grown up of late, such practice is, in my opinion entirely wrong.

But, passing from that, does the appointment of a receiver stand in the same position as legal execution? By the appointment of a receiver the judgment creditor obtains relief, arising not from the mere fact of having obtained judgment at law, but relief to which, under the circumstances, he is entitled in equity against the estate of the judgment debtor; the appointment of a receiver, therefore, cannot be obtained without an order of the court, a new order giving the applicant equitable relief. Such an order can only be obtained against a person over whom the court has jurisdiction.

In the present case the order was obtained against property which, by reason of the death of the judgment debtor and by operation of law, had then become the property of his heir, and the order was obtained without notice to the heir. It is against the heir this order is made, and the court had no jurisdiction over him, he not being a party to the action.

It is said that the rules and orders admit of this being done. It is said that by ord. 17, r. 1, the action is kept alive, because it was brought against father and son. The action no doubt is alive against the son, but not against the deceased father. That rule applied when, by reason of the death of a party, there was a devolution of his interest upon a person who was a party to the action, but it did not apply when the devolution was upon a person who was not a party to the action. The action was not alive against him. The right to make an order against the father was gone by reason of his death, and no order could be made against the property which had been his, until the person on whom it had devolved had been made a party to the action.

Reference has been made to the order made by Fry, J., in *Cash* v. *Parker*, 12 Ch. D. 293. There the plaintiff was a person entitled to take out administration if no one else did, and there, by analogy to the practice in the Probate Division of appointing a receiver *pendente lite*, the plaintiff, on his undertaking to take out administration, was appointed receiver in order to protect the property until a legal personal representative was constituted. In that case, therefore, a person who was entitled to invest himself with a legal right to the property was before the court, and the object of the order was to protect the property until he had done so.

The argument is based on a misconception of ord. 17, r. 1.

That rule does not enable the court to make an order adverse to a person not a party to the action without hearing what such person may have to say, or without taking the legal means to bring such person before the court.

In my opinion this receivership order was made *per incuriam*, the court having no jurdisdiction against the heir.

The decision of Chitty, J., is therefore right, though he decided the case on different grounds.

BOWEN, L.J.—I am of the same opinion. A judgment had been obtained against Mark Shephard and his son Herbert in the Queen's Bench Division; Mark Shephard died and departed this world and the suit at the same time; afterwards the plaintiff in the Queen's Bench action obtained an order *ex parte* (drawn up erroneously stating that the defendants appeared in person) for a receiver of the rents and profits of the property of the dead man. That property had been his, but by his death and by law it had passed to somebody else, and it is suggested that an order may be made *ex parte* against property which no longer belongs to the dead debtor, but which belongs to somebody else who has not been served with notice of the application. That, I think, cannot be right, for it seems contrary to natural justice.

But that is not all. It is said that this can be done because the appointment of a receiver is only equitable execution, and that at common law execution might issue as of right without anyone being served. I doubt if it is the practice at common law that you may as of right execute a judgment, obtained against a debtor who has since died, against his executor. If such is the practice I am not aware of it. There are certain statutory provisions which allow execution after death, but I think notice is required for these proceedings. Certainly this is not a case in which at common law execution could issue as of course.

Now equitable execution is not merely execution, but it is relief granted because execution at law could not be obtained; it is a substitute for legal execution where that cannot be had. It is wrong to say that an order for a receiver may be obtained in the Chancery Division *ex parte* without notice being served on the person entitled to the property to be affected.

But it is said that it can be done under ord. 17, r. 1. To my mind that is not so; rule 1 must be read with rule 4. [The Lord Justice read the rules, and continued:—] The fact that there was a co-defendant who survived, kept alive the action against him, but not as against the dead man, so as to enable proceedings to be taken against the persons entitled to the property of the dead man without notice to them. Ord. 42, r. 23, does not govern this case, as it deals with execution, not with the appointment of a receiver, and if it did, still the order could not be made *ex parte*.

FRY, L.J.—The appellant appears to me to assert that the appointment of a receiver is a kind of execution which may be had against a dead man's estate without notice to his executors, and giving priority to the person obtaining it over other creditors.

The idea that the appointment of a receiver is a kind of execution is entirely erroneous. It is quite true that the old Court of Chancery exercised this jurisdiction where a legal judgment had been obtained, but only when the applicant had shown that he had obtained judgment and had sued out the appropriate writs of *fi. fa.* or *elegit*, and was then met by certain difficulties arising from the nature of the property of the debtor, then and then only did the Court of Chancery grant a receiver in aid of the enforcement of legal judgments for legal debts. Relief by way of appointment of a receiver proceeded on the view that no execution could be had on the writ.

Further, the appointment of a receiver was an act requiring the exercise of judicial power on the part of the court. The circumstances I have referred to, would have to be proved before the court would make the order. The relief therefore granted by the Court of Chancery was not an execution of the judgment, but was relief granted because legal execution could not be obtained. All this has been summarized by judges at different times, under the expression "equitable execution," but I am apprehensive that the condensed expression has led to misapprehension, and to the idea that the obtaining the appointment of a receiver is a mere form of execution which can be obtained without the attention of the court being called to the circumstances which creates the equity on which alone the jurisdiction arises.

It has been said that in all cases at common law execution could be had against the estate of deceased persons without notice to the executors. On that point I will confine myself to expressing great doubt whether it is so.

Appeal dismissed.

Solicitors for the appellant, *Deacon, Gibson, & Medcalf.*

Solicitor for the plaintiff, *R. J. Witty.*

Solicitors for the defendant, *Mark Shephard & Son*

From Lancaster Palatine Ct. of Chan. } Aug. 2, 3, 5, 1889.

HEAP v. HARTLEY. (a.)

Patent—Exclusive licence for limited period and district—Whether exclusive licence amounts to assignment of patent—Right of licensee to sue in his own name—Notice—Patents, &c., Act, 1883, *ss.* 23, 36, 87.

An exclusive licence to use a patented invention in a particular district for a limited term does not amount to an assignment of the patent rights for that district, and does not confer any rights which enable the licensee in his own name to maintain an action without joining the patentee as a co-plaintiff against a person who has infringed the licensee's rights under his licence by using the invention within the said district and term.

M., a patentee, gave H. by deed an exclusive licence to use M.'s patent within a specified district for four years, and covenanted that he would not during the term sell the invention or grant other licences to use it within the district, and that, in case M. failed to take steps effectually to protect the patent against any infringement which should take place, H. should be at liberty to take such steps in M.'s name. The deed was duly registered under the Patents Act, 1883, *and shortly afterwards M. sold one of his patented machines to S., carrying on business outside the district, and S., two or three weeks later, sold the machine to J., who used it within the district.*

Held, that H., having a mere licence to use the patent, and no property in it, could not maintain an action against J. without joining M. as a co-plaintiff; and, further, that H., having failed on the evidence to satisfy the court that J., at the time he bought the machine, had actual notice of H.'s rights, the action failed on that ground also, and must be dismissed, with costs.

Decision of Bristowe, V.C., *affirmed.*

Whether registration under the Patents Act, 1883, *is notice to all the world,* quære.

Appeal from Bristowe, Vice-Chancellor of the Lancaster Palatine Court of Chancery.

Charles Edward Moser, to whom letters patent (No. 11,640) had been granted in September, 1885, for "improvements in gig-mills employed in the finishing of woven fabrics," granted by deed in 1886 to Mr. Heap, the plaintiff, the full and exclusive licence to use and exercise the said patented invention at all places within the borough of Rochdale and the local board districts of Norden, Wardle, Littleborough, and Milnrow for a term of two years, which was extended to four years by a subsequent deed. Moser also covenanted with Heap that, subject to a right for Moser to sell the invention, and grant licences to certain specified firms to use the same for themselves, but not to resell or transfer it, Moser would not, during the term, sell the invention, or grant licences to any company or person to use it within the aforesaid limits, and that if there should be any infringement of the patent, Moser would, as soon as he had notice thereof, take steps at his own expense effectually to protect the invention, and if he failed to do so that the plaintiff should be at liberty to do so in Moser's name. This deed, and also that extending the term, were duly registered under the Patents, &c., Act, 1883.

Early in 1888 Moser sold two of his patented machines to firms in Manchester, who resold them two or three weeks later to the defendants, Israel Hartley and his son Edward Hartley, who put them up for use within the district subject to Heap's exclusive licence. The defendants having been informed of the rights claimed by the plaintiff, and threatened with proceedings, did not discontinue the use of the machines, and the plaintiff, accordingly, in May, 1888, commenced this action in the Lancaster Palatine Court as assignee or exclusive licensee of Moser's patent for that district, claiming an injunction to restrain the defendants from infringing his rights. He also claimed damages, an account, and other relief. The plaintiff alleged, and the defendants denied, that the defendants had notice of the plaintiff's rights under the licence before they purchased the machines. The evidence on this point was not conclusive, but it was shown that Stephen Hartley (a brother of Israel Hartley), who had written to Moser asking for one of the machines, had received a letter in reply, before the date of the purchase, informing him that the plaintiff had the exclusive use of the patent in that district. There was also an affidavit by a workman named Lord as to what took place at a subsequent interview between Stephen and Israel Hartley and himself before the purchase. The hearing of a motion for an *interim* injunction was by consent treated as the trial of the action before the Vice-Chancellor.

Bristowe, V.C., decided that registration under the Patents, &c., Act, 1883, of an exclusive licence was not notice to the world, that actual notice to the defendants of the licence before the date of their purchase had not been proved, and that the defendants, as purchasers without notice, were not affected by the priority of the plaintiff's licence. He therefore dismissed the action with costs, without deciding the question whether an exclusive licensee could, in his own name, maintain an action for an injunction against an infringer without joining the patentee as a co-plaintiff.

The plaintiff appealed.

Moulton, Q.C., and *Staffurth,* for the appellant.—(1) The plaintiff, as exclusive licensee, is entitled to bring this action. (2) The defendants were perfectly aware of the plaintiff's rights when they bought the machines. The rights of a patentee are by law assignable, and the effect of giving a person an exclusive licence is to pass those rights. Why, then, should the patentee be a necessary party to an action to restrain infringement of them? This was in effect an assignment of the exclusive right to make and sell the patented machines. Suppose the patentee disappeared, would the licensee be deprived of his rights? [LOPES, L.J., referred to *Renard* v. *Levinstein,* 13 W. R. 382, 2 H. & M. 628.] Under section 36 the patentee can effectually assign all his rights. [FRY, L.J.—Is this licence an assignment of the patentee's right to sue?] Yes. As far as the licence extends, the assignee has all the rights of the patentee. [COTTON, L.J., referred to *Newby* v. *Harrison,* 9 W. R. 849, 1 J. & H. 393.] In that case the Lord Chancellor would have granted an injunction if there had been an exclusive licensee. [COTTON, L.J.—Would a judgment in this action as constituted bind the patentee?] No, it would only be binding *inter parties.* [COTTON, L.J., referred to *Edison & Swan, &c., Co.* v. *Holland,* 37 W. R. 699, 41 Ch. D. 28.] In *Hassall* v. *Wright,* 18 W. R. 821, L. R. 10 Eq. 509, a licence was treated as equivalent to an assignment. Actual notice is not necessary. [COTTON, L.J.—Notice raises the equity against the wrongdoer. He is not a wrongdoer unless he has had notice.] The defendants' user of these machines within the district is an infringement of the patent, and if they are doing it by the permission of the patentee he has no right to give that permission, because he has given the plaintiff an exclusive right. The patentee cannot derogate from his own licence. [FRY, L.J.—Then it is possible for a patentee to infringe his own patent?] Yes, if he has assigned it, or given an exclusive licence to use it. As to notice by registration, the object of the registration is that the public may be perfectly safe if they examine the register, which is notice to all the world as to where the rights of the patentee are. Moreover, the defendants had actual notice of our rights before they purchased.

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

They also referred to *Muskett* v. *Hill*, 5 Bing. N. C. 694; *Webber* v. *Lee*, 30 W. R. 866, 9 Q. B. D. 315; *Deroene* v. *Fabrie*, 1 Webst. Pat. Cas. 155; *Dunnicliff* v. *Mallet*, 8 W. R. 260, 7 C. B. N. S. 209; and to the Patents, &c., Act, 1883, ss. 23, 36, and 87.

Cozens-Hardy, Q.C., and *Maberly*, for the respondents.—[COTTON, L.J.—We need only trouble you upon the question whether there was actual notice here, Mr. Hardy.] It was not suggested even at the bar that the two Manchester firms, who bought these machines from Moser, had notice of the plaintiff's licence. They had, therefore, full power to deal with them, and exercised it by selling to us. It would be contrary to all analogies if you could prevent purchasers for value without notice from selling to persons in the district who had notice. Mere notice as distinct from fraud is not sufficient to entitle the plaintiff to relief, and there is no allegation of fraud in the pleadings. *Tulk* v. *Moxhay*, 2 Phil. 774, is a leading case on the equitable doctrine of notice. The defendants themselves, moreover, had no notice. On such evidence as that given in this case it is impossible to affect the defendants with notice. The suggestion that the purchase was really made by the defendants from Moser, the Manchester firms being only used as the medium as being outside the district, is quite without foundation.

Stafforth, in reply, referred to *De Mattos* v. *Gibson*, 7 W. R. 514, 4 De G. & J. 276 3; *Messageries Imperiales* v. *Baines*, 11 W. R. 322; *Catt* v. *Tourle*, 17 W. R. 662, L. R. 4 Ch. App. 654; *Werdermann* v. *Société Generale D'Electricité*, 30 W. R. 33, 19 Ch. D. 240; *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191.

COTTON, L.J.—In this case the point as to notice was dealt with last by Mr. Moulton, but I will deal with it first, in order that it may be disposed of before the question whether a licensee can sue for infringement of a patent is considered. The Vice-Chancellor has found that the plaintiff has not made out that the defendants bought these machines with notice of the agreement made between the plaintiff and the patentee. Now it was for the plaintiff to make that out as the essential basis of his right to relief, and to do so in such a way as to enable the court to act upon it, or else to show that an exclusive licensee can as licensee sue for infringement without proving that the defendant had such notice. In my opinion the plaintiff has not made out that the defendant had notice, though I agree that the case is one of some little suspicion. That, however, is not sufficient. The case was not, in the first instance, brought forward as one of notice, though the plaintiff does mention and support by affidavits, the agreement between himself and the patentee. Then, in answer to those affidavits, the defendant says, "I had no notice of that"; though he subsequently admits in cross-examination that Stephen Hartley had said something to him about it. Then the strongest point against the defendants is this: There is an affidavit by the Lords (husband and wife), and that is answered by an affidavit of one of the defendants. But there was no cross-examination on the question of notice so far as referred to in those affidavits (which is rather a striking circumstance), and, therefore, it would, in my opinion, be wrong to hold upon that that the defendant had notice of the agreement. We come, then, to the question whether the exclusive licensee for a particular district could maintain an action alone, without proving notice of the agreement, against a person whom he alleged to be infringing his rights under that agreement. In my opinion he could not. It has been contended that this, being an exclusive licence, must be treated exactly the same as a grant or assignment of the patent for the specified period and district. But it is quite a different thing, and one of the cases referred to goes to show the distinction. In the ice case, *Newby* v. *Harrison*, Wood, V.C., pointed out what the distinction is, that where there is only a licence which does not entitle the licensee to any property, it remains simply a licence—that is to say, an authority from the licensor to the licensee, enabling him to do lawfully something he could not otherwise lawfully do; but that where the licence entitles the licensee to take something away or acquire some property in it, then it amounts to a grant. Wood, V.C., said, 1 J. & H., at p. 398: "With regard to the word 'licence,' there is some little ambiguity. It is, however, well defined in the case of *Muskett* v. *Hill*, and I prefer stating it in the language there cited by Tindal, C.J., to giving my own. It is thus stated: 'A dispensation or licence properly passes no interest, but only makes an action lawful which without it had been unlawful; as a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful; but a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down, but as to carrying away the deer killed and the tree cut down, they are grants.' So here a licence to enter upon a canal and take the ice is a mere licence, and the right of carrying it away is a grant of the ice so to be carried away." In that particular case there was a licence to enter upon a canal and take the ice. In my opinion here a licence granted to a licensee, though exclusive for a particular time and in a particular district, could not be treated as a grant, but simply as a licence to do that which otherwise could not be done without violating the rights of the patentee. To my mind it is clear that this licence could not have been a grant of any right to sue, because the licence itself contains a conditional contract that, if there was any infringement within the district, the licensee should be allowed to use the patentee's name for the purpose of suing the infringer. It is not contended that there has been any violation of the agreement between the patentee and the licensee. If there had been, the licensee could have sued the patentee. What the licensee contends is that, being an exclusive licensee, his licence is in effect a grant, and that he can, therefore, without the concurrence of the patentee, and without any violation of the licensee's agreement with the patentee having taken place, sue the person who is infringing his rights. That is turning what is merely a licence into a grant of the letters patent. It is not necessary to go into the question argued by Mr. Moulton whether section 87 of the Patents Act renders this act of the defendants an infringement or not. If the plaintiff cannot sue except in the name of the patentee, it is immaterial to consider whether, as against the patentee, this is a right which he could not grant; and therefore an infringement. In my opinion the judgment was right, and the appeal fails.

FRY, L.J.—I am of the same opinion. The plaintiff here is suing under an exclusive licence to use a certain invention for a specified period of time within a specified district. He puts his case in a twofold manner. First, he says, "I am in the position of an assign of the patent for that period in that district, and I have, therefore, a right to restrain any person who infringes the patent within the district." That argument seems to me to be based on an entire error as to the nature of a licence. The true nature of a licence is this: it is a leave to do a thing, and a contract not to allow anyone else to do it. But it confers in itself no interest or property, though it may be, and often is, coupled with a grant of an interest in property. It only enables a person to do lawfully what he could not otherwise do, except unlawfully. I think, therefore, that an exclusive

licensee has no right to sue. Then, secondly, the plaintiff says the exclusive licence implies a contract not to grant to anyone else within the district, and that the defendants took the machines with notice of the contract, and therefore ought not to be allowed to violate it. But had they notice? In my opinion that was not proved. I agree that there are many circumstances of suspicion which might reasonably call for investigation. But, in fact, the plaintiff did not launch his case as regards the question of notice, and such ragged evidence as there is upon that question entirely fails to satisfy me. [His lordship then adverted to the evidence on the question of notice, and concluded:—] I therefore agree with Cotton, L.J., that this appeal fails.

LOPES, L.J.—I am of the same opinion, and I do not desire to add anything.

Appeal dismissed.

Solicitor for the appellant, *Church*, for *Jacksons & Godby*, Rochdale.

Solicitors for the respondents, *Radford & Frankland* for *Bowden & Walker*, Manchester.

From Q. B. Div. Nov. 19.

SMITH *v.* WOOD. (*a.*)

Penalty—Sale of coals in London—Deficiency in weight—Liability of seller—Method of weighing prescribed by statute—Sacks to be weighed with and without coals in them—Metropolis Coal Act (1 & 2 *Will.* 4, *c. lxxvi.*), *ss.* 54, 57.

In an action by a purchaser of coals to recover penalties from the seller for deficiency in weight under the Metropolis Coal Act, it is necessary to show that the sacks of coal were weighed in the particular manner prescribed by the Act.

Meredith *v.* Holman, 16 *M. & W.* 798, *approved.*

Decision of the Queen's Bench Division, 37 *W. R.* 800, 23 *Q. B. D.* 380, *affirmed.*

Appeal from the decision of a divisional court (Denman and Charles, JJ.), reported 37 W. R. 800, 23 Q. B. D. 380.

The action was brought to recover penalties under the Metropolis Coal Act (1 & 2 Will. 4, c. lxxvi.), s. 57, from a vendor of coals for delivering sacks of coal deficient in weight.

By section 54 of the Act if the purchaser require the sacks to be weighed they are to be weighed with the coals therein, and also afterwards without any coals therein.

By section 57 a person requiring the coals to be weighed shall procure the attendance of a policeman or other credible person, "and the said sacks, both with and without the coals therein," shall accordingly be weighed in his presence, and in case the coal in any sack shall be deficient in weight the seller shall forfeit for every such sack a sum not exceeding £5.

The plaintiff, having ordered coal from the defendant, who was a coal merchant, ten sacks of coal each purporting to contain two cwt. were sent to his residence. He desired to have them weighed, and, having procured the attendance of a policeman, the sacks were weighed by the carman in charge of the coal. Instead, however, of weighing the sack first with the coal in it and then empty in the manner required by the Act, the carman weighed each sack by placing it in one scale and placing in the other an empty sack together with the weights. Seven of the sacks being in this way discovered to be deficient in weight the plaintiff claimed to be entitled to penalties. At the trial, before Wills, J., and a common jury, the penalties were fixed at £10 10s., and judgment was given for the plaintiff for that amount. The Divisional Court set this aside, considering that they were bound by *Meredith* v. *Holman*, 16 M. & W. 798, which decided that the method of weighing prescribed by the statute must have been followed in order to entitle a person to sue for penalties under it.

The plaintiff appealed.

J. B. Walker and *Bassel Hopkins*, for the appellant.—*Meredith* v. *Holman* was wrong, and must be overruled.

Cock, Q.C., and *Chester Jones*, for the respondent, were not called upon to argue.

Lord EBHER, M.R.—I am not in the least prepared to overrule the case of *Meredith* v. *Holman*. On the contrary, I think it is obviously a right decision. The reason why the method of weighing adopted both in the present and in that case is objectionable is because it probably results in a wrong weight being arrived at. Unless the coal is weighed in the accurate and careful manner prescribed by the Act, people might be made liable to penalties who had not really incurred them. No doubt the Legislature were aware when they passed the Act that the weighing would have to be done by persons who were not very familiar with such a duty, and that was the reason that the method of weighing is so specifically provided. The statute is a penal statute, and it is an established rule that such statutes shall be construed strictly in favour of the people on whom penalties are imposed. In my opinion it is a condition precedent to the recovery of the penalty that the coal should be properly weighed—weighed, that is, in the mode prescribed by the Act in sections 54 and 57. I therefore think that the case of *Meredith* v. *Holman*, which was decided as long ago as 1847, is right, and that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. On a true construction of the Act the plaintiff cannot possibly succeed. I regret it, for there is no doubt that the coals were deficient in weight. But the statute is a penal one, and must be construed strictly. It prescribes a particular method of weighing which has not been adopted, but a rougher and more inaccurate method has been followed. That, as was held in *Meredith* v. *Holman*, with which I entirely agree, will not do. The penalty, therefore, is not payable.

LOPES, L.J.—It is an inflexible rule that a penal statute is to be construed strictly, and, therefore, if the mode of weighing prescribed by the Act is not followed no penalty is incurred. It is clear that it was a condition precedent to the recovery of the penalty that the sacks should be weighed first full and then empty. They were not so weighed, and, therefore, not only according to *Meredith* v. *Holman*, with which I agree, but also in accordance with the universal rule of construction of penal statutes, the plaintiff cannot recover the penalty.

Appeal dismissed.

Solicitor for the appellant, *S. Roberts.*

Solicitors for the respondent, *Lewis & Sons.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. Aug. 9, 1889.

CORNISH v. ACCIDENT INSURANCE CO. (a.)

Insurance (accident) — Exception — "Exposure of the insured to obvious risk of injury."

A policy of insurance against death or injury caused by accident contained an exception in the case of "the exposure of the insured to obvious risk of injury." The insured was killed by a train while he was attempting to cross the main line of a railway in daylight. There was no regular crossing at the spot: there was nothing to prevent a person about to cross from seeing an approaching train. The insured was neither short-sighted nor deaf.

Held, that the risk would have been obvious to him if he had been paying reasonable attention to what he was doing, and that therefore the exception applied.

Appeal from the judgment of Lord Coleridge, C.J., at the trial.

The action was brought by the legal personal representative of the insured upon a policy of insurance against death or injury from accidental and external violence. The insured was killed by a train while crossing a railway under circumstances mentioned in the judgment. The policy contained an exception from the risks insured against in the case of "death or disability arising from fighting, duelling, the hands of justice, intentional self-injury, whether under the influence of insanity or not, injuries sustained on a railway whilst travelling otherwise than in a passenger carriage, or whilst getting into or alighting from any carriage in motion, or whilst acting in violation of the bye-laws of a railway company, or occasioned by poison, or happening by exposure of the insured to obvious risk of injury," &c.

Lord Coleridge, C.J., directed the jury that the insured had lost his life by exposure to obvious risk of injury within the meaning of the exception, and the jury found a verdict that they were compelled by the ruling of the Lord Chief Justice to find that the deceased lost his life by incurring obvious risk, but that they were of opinion that it was an ordinary misadventure. Lord Coleridge, C.J., gave judgment for the defendants. The plaintiff appealed.

Jelf, Q.C., and *A. T. Lawrence*, for the appellant.—"Obvious risk" means obvious in fact to the man himself, and does not include a risk which, if he had taken reasonable care, he might have seen. It does not apply to mere negligence. There must be an intentional exposure to the risk.

They referred to *Schneider* v. *Provident Life Insurance Co.*, 1 Amer. Rep. 157; *Burkhard* v. *Travellers' Insurance Co.*, 48 Amer. Rep. 205.

R. T. Reid, Q.C., and *Fooks*, for the respondents.—"Obvious" means obvious to a man using ordinary care. Here the risk would have been obvious to a prudent man.

They referred to *Lovell* v. *Accident Insurance Co.* (not reported).

Jelf, Q.C., replied.

Cur. adv. vult.

Aug. 9.—The judgment of the COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.) was delivered by

LINDLEY, L.J.—This is an action brought by the legal personal representative of the late Richard Cornish to recover the sum of £1,000, being the amount for which he had effected a policy with the defendants.

Mr. Cornish was a farmer in Herefordshire. He had a farm which was intersected by a railway. He was in the habit of crossing the railway to get from one part of his farm to the other, and was killed whilst so doing in broad daylight one day in July, 1887. He had crossed the line to get a match from a man in a field on the other side. He had got the match and was recrossing. He had just got on the line of rails nearest to him—*i.e.*, the down line—and was recrossing, when a train on that line knocked him down and killed him. At the place in question there was no station; no proper crossing; no obstruction to prevent a person about to cross from seeing an approaching train. There was no evidence that the deceased was short-sighted or deaf. A train on the up line had passed shortly before the accident happened, and the deceased, who was then on the other side of the line, had seen this train coming and had waited for it. Whether he saw or heard the down train, which killed him, or whether he did not, it is impossible to say. But if he did not see or hear it, he would, nay, he must, have done so if he had been paying attention to what he was doing. There is no ground for imputing negligence to the persons in charge of the train which knocked him down.

Under these circumstances the deceased met his death by what may be properly called an accident, although his own want of care unquestionably contributed to his death, and the jury in effect found that he was killed by accident, as will be seen presently. But the policy excepts from the risks insured against, cases of death happening by "the exposure of the insured to obvious risk of injury," and the defendants contend that this case falls within this exception, and that consequently they are not liable on the policy. The Lord Chief Justice was of this opinion, and he so directed the jury. The jury found as follows: "We are compelled by the ruling of the Lord Chief Justice to find that Mr. Cornish lost his life by incurring obvious risk, but we are of opinion that it was an ordinary misadventure." The question we have to determine is whether the direction of the Lord Chief Justice was right.

The exception on which the defendants rely is so worded as to leave several important matters in doubt. The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general; there is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied, and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object; nor so as to render it practically illusory.

A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and if the words in question are construed literally the defendants would not be liable in the event of an assured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. In the American cases cited by Mr. Jelf the language of the policy was different, but the foregoing reasoning was adopted by the court. The real difficulty is to express the necessary qualification with which the words must be taken. In a case on the line, if a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. Without attempting to paraphrase the language so as to meet all cases, it is, we think, plain that two classes of accidents are excluded from it

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

isks insured against—viz. (1), accidents which arise from an exposure by the assured to risk of injury, which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure by the assured to risk of injury, which risk would be obvious to him at the time if he were paying reasonable attention to what he was doing. This last qualification is in accordance with the ruling of Cockburn, C.J., in *Lovell v. Accident Insurance Co.*, a note of which was furnished to us, and is warranted by the language used and by the objects to be attained. Any construction short of this would be going too far in one direction, just as a literal construction would be going too far in the other.

We accept the view of the jury that this accident may be called an ordinary misadventure, but the question is whether the policy covers it. We think not. We are not prepared to say that injuries occasioned by the negligence of the assured are in all cases excepted. Such a construction would render the policy little better than a snare to the assured. But there are degrees of negligence, and we are unable to read this policy as protecting a man against the consequences of running risks which would be obvious enough to him if he paid the slightest attention to what he was doing. In the present case the deceased did in fact expose himself to risk of imminent death. That is quite clear. If he looked and saw the train coming, the risk to which he exposed himself must have been obvious to him at the time. If the risk to which he exposed himself was not then obvious to him, that circumstance can only be accounted for on the supposition that he was not attending to what he was doing—*i.e.*, not looking to see if a train was coming and was near. We cannot construe the policy as covering a risk so run, and we agree with the Lord Chief Justice that there was no question of fact to leave to the jury.

The appeal, therefore, ought to be dismissed, with costs.

BOWEN, L.J.—I concur in the judgment. I should even go further, and say that the risk which the insured incurred was evident to his own senses. The line was a main line, which was not to be crossed like a street, and any person who attempted to cross it at such a place without looking to see if a train was coming incurred a risk which was evident to himself.

Appeal dismissed.

Solicitors for the appellant, *Lovell, Son, & Pitfield* for *Dayman & Walsh*, Oxford.

Solicitors for the respondents, *Wynne-Baxter & Keeble.*

High Court of Justice.

Chan. Div. North, J. — Oct. 31.

In re BLACKBURN.

SMILES *v.* BLACKBURN. (*a.*)

Will—Codicil—Construction—Power of appointment—Exercise.

A testator, having under his marriage settlement a power of appointment jointly with his wife during her life, and, in case of her predeceasing him without any joint appointment being made, a power of appointment as survivor by deed or will among the children of the marriage, by his will, made in the lifetime of his wife, after making certain specific devises and bequests, provided that any other estate or property of which he might be possessed at the time of his decease, or over which he might have a power of bequest or disposal, should be held in trust for the benefit of any younger child or children of the marriage as therein mentioned; and by a codicil, made after the decease of his wife, after making certain specific devises and bequests, and giving the residue of his real and personal estate to his second son, confirmed his will in all respects so far as it was capable of taking effect.

Held, that the power of appointment was well exercised by the effect of the codicil in republishing the will.

Adjourned summons.

By an indenture of settlement, dated the 4th of February, 1853, and made in consideration of the marriage of Joshua and Mary Ann Blackburn, two sums of Bank Annuities of £10,000 and £2,000 respectively were settled upon trust, after the death of the survivor of Joshua and Mary Ann Blackburn, for the children of the marriage in such shares and proportions as Joshua and Mary Ann Blackburn should jointly appoint, and in default of such joint appointment as the survivor of them should by deed or will appoint, and in default of any appointment for the children equally as therein mentioned.

The marriage was solemnized on the 5th of February, 1853.

By his will, dated the 11th of August, 1854, Joshua Blackburn, after making certain specific devises and bequests, declared that any other estate or property whatsoever, whether real or personal, of which he might be possessed at the time of his decease, or over which he might have the power of bequest or disposal, should be held in trust for the benefit of any younger child or children as therein mentioned.

By another indenture of settlement, dated the 15th of August, 1854, indorsed on the indenture of settlement of the 4th of February, 1853, a further sum of £2,000 Bank Annuities, being after-acquired property of Mary Ann Blackburn, was settled subject to a general power of appointment in her favour, which was never exercised, upon the same trusts as declared by the settlement of the 4th of February, 1853, concerning the moneys thereby settled.

Mary Ann Blackburn died in May, 1882, intestate, no joint appointment of the settled property having been made, leaving all the issue of the marriage, two sons and three daughters, her surviving.

By a first codicil, dated the 10th of July, 1883, Joshua Blackburn, after making certain specific bequests and devises, and giving the residue of his real and personal estate to his second son, proceeded: "In all other respects I confirm my original will so far as it is still capable of taking effect," and by a second codicil of the same date he appointed an executor and confirmed his will and first codicil.

This was an originating summons taken out by the trustees of the settlement for the determination of the question whether the settled moneys were appointed by the will or codicils of Joshua Blackburn, or whether they devolved as in default of appointment. The defendants were the five children of the marriage.

W. C. Druce, for the plaintiffs, stated the facts.

T. Rolls Warrington, for the defendant Joshua J. B. Blackburn, the eldest son of the marriage.—The testator could only exercise the power of appointment as survivor of his wife, and his will, made in her lifetime, could not operate as an exercise of the power by him as survivor: *Cave v. Cave*, 8 De G. M. & G. 131, 4 W. R. Ch. Dig. 63. The fact that it was confirmed by two codicils made after her death cannot make it a valid exercise of the power: *Hope v. Hope*, 2 W. R. 674, 4 Giff. 13; *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 20. On the true construction of the will and codicils the

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

power has not been exercised: *In re Cotton*, 37 W. R. 232, 40 Ch. D. 41. This view is supported by the maintenance clause.

Swinfen Eady, for the younger children.—The first codicil, executed after the death of the testator's wife, when he could make the appointment, brings down the will to the date of the first codicil, which must be regarded as incorporating the will. The power was in existence at the date of the will. *Hope* v. *Hope* is in my favour. The will and codicils must be construed as exercising the power: *In re Teape's Trusts*, 21 W. R. 780, L. R. 16 Eq. 442.

He also referred to *Sheldon* v. *Sheldon*, 1 Robertson, 81.

North, J.—I think that in this case the power of appointment was well exercised by the effect of the will and codicil. I quite concur in the decision in *Cave* v. *Cave*; and I do not think that the power could have been exercised by the will alone. I think that the codicil had the effect of republishing the will and making it a good exercise of the power of appointment, as if the words of the will had been repeated in the codicil. The will indicates an intention by the testator of exercising every power existing at his death. When the codicil was made that intention still existed. The effect is as if the codicil had said at its date what the will said at its date, and the codicil has the effect of exercising the power which the testator had at the date of the codicil. On the construction of the will and codicil, I think this is the true view. The case of *Cotton* v. *Cotton* is distinguishable. In the maintenance clause the testator gives maintenance out of income, and it would be absurd to make it apply to the settled funds in which his wife had a life interest. I think that the codicil republished the will, and exercised the power of appointment.

Solicitors, *Druces & Attlee*; *Pretor W. Chandler*.

Chan. Div. Kekewich, J. } July 25, 26, 1889.

Blore v. Ashby. (a.)

Practice—Third party—Appearance—No pleading—Right to take part in trial—Indemnity—Costs of unsuccessful defence—Rules of Supreme Court, 1883, *ord.* 16, *rr.* 52, 53.

The defendant in an action for specific performance of a contract served a third-party notice upon another person, alleging that he signed the contract as agent for that person. The third party appeared, but obtained no directions as to delivery of pleadings or defending the action. The defendant obtained an order that the question of liability between himself and the third party should be tried as soon as might be after the trial of the action.

Held, that the third party might appear by counsel and take part in the trial, and might have the question of his liability tried immediately after the trial of the action.

The defendant being held liable to the plaintiff on the contract, but entitled to an indemnity from the third party,

Held, that the third party must pay the costs of the third-party proceedings between him and the defendant, but that the defendant must pay the costs of his unsuccessful defence.

This was an action for specific performance of a contract to purchase two houses at Nottingham.

The defence was that Ashby signed the contract as agent for one Shepperson. Ashby served a third-party notice upon Shepperson, who appeared, but took no further steps in the matter. Ashby made an application to the court by summons under ord. 16, r. 52, for directions, and on March 6, 1889, it was ordered that the question of Shepperson's liability to indemnify Ashby should be tried as soon as conveniently might be after the trial of the action. No directions under ord. 16, r. 53, had been given.

The defendant was called as a witness, and was examined by his counsel and cross-examined on behalf of the plaintiff.

On counsel for Shepperson proposing to cross-examine the witness, defendant's counsel objected.

S. Hall, Q.C., and *Warrington*, for the plaintiff.

J. G. Wood, for the defendant.

Swinfen Eady, for Shepperson.

Kekewich, J.—This third-party practice is not quite settled yet, and it is desirable that one should know how far one ought to go. Mr. Wood contends that because Mr. Shepperson, who appears on a third-party notice, has not applied, as he might have done on the hearing of defendant's summons, for directions as to delivery of pleadings and so forth, he has admitted his liability, and is not entitled to have the question between him and the defendant tried at all. But the order of March 6, 1889, states that there is a question to be tried between the defendant and Mr. Shepperson; it says that "the question whether the said Frederick Shepperson is liable to indemnify the defendant to any and what extent under the notice shall be tried as soon as conveniently may be after the trial of this action, or after the defendant shall have submitted to judgment." It is therefore clear that there is a question to be tried. Then it is said that Mr. Shepperson ought to have got directions, and that he is in default for not doing so. To my mind it is the defendant who is in default. He made the proper application under ord. 16, r. 52, and now he says that the proper directions were not given under that order. If that be so he ought to have appealed and got the proper directions. If the order is not sufficient it is the defendant's fault. But it seems to me that it is sufficient. I know from the order, that I have to try the question of liability between the defendant and the third party, and that it is to be tried as soon as may be after the trial of the question between the plaintiff and the defendant—that is, in my opinion, immediately after the trial of this action. As there are no pleadings as between the defendant and the third party, I must try it as best I can upon the evidence with the assistance of counsel, and to help me to do so I think it right that the defendant should be cross-examined by Mr. Eady now.

At the close of the trial his lordship held that, as between plaintiff and defendant, the defendant was liable upon the contract. The question between the defendant and Shepperson was then tried, and it was held that the defendant entered into the contract as Shepperson's agent and was entitled to indemnity from him in respect of it. Upon these findings it was contended on behalf of the defendant, that Shepperson must pay the costs, both of the third-party proceedings and of the action.

Kekewich, J.—As to the costs of the third-party proceedings, there is no reason for departing from the ordinary rule. Mr. Shepperson must pay them. As to the costs of the action, the case is peculiar. As a rule, in the case of an action by a vendor for specific performance if the purchaser claims to be indemnified by a third party either as sub-purchaser or, as here, principal, the third party, if the case goes against him, ought to pay the whole costs of the action, which has

(a.) Reported by T. R. Colquhoun Dill, Esq., Barrister-at-Law.

presumably been defended for his benefit. But here there is no such presumption. Mr. Ashby said "I am not liable to Blore at all; I have a right of indemnity against Shepperson, but I have what is better than an indemnity, I have the absence of liability to the vendor." This contention was made for Ashby's own benefit; it did not help Shepperson. On the contrary, if this contention had been correct Shepperson would have been made the principal in the contract in the first instance and liable directly to the plaintiff instead of by a circuitous process. I think that Mr. Ashby defended this action for his own benefit, and whatever benefit he has derived from it he must pay for by bearing his own costs—that is to say, he has got an order against him in the action, and he has no right of indemnity against Mr. Shepperson as regards those costs.

Solicitors for the plaintiff, *Marsland & Co.*, for *W. B. Smith*, Nottingham.

Solicitors for the defendant, *Harvey & Capron*, for *H. H. Carter*, Nottingham.

Solicitors for Shepperson, *Aldridge, Thorn, & Morris*, for *Acton & Marriott*, Nottingham.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Nov. 22.

SCHWARTZ *v.* LOCKET. (*a.*)

Landlord and tenant—Tenancy from year to year—Eviction by superior landlord—Implied covenant for quiet enjoyment.

In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest, and if, on such determination, the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his landlord for damages for such eviction by the superior landlord.

Appeal from Bloomsbury County Court.

The plaintiff brought an action for damages for eviction from certain premises which she had held as tenant from year to year from the defendant.

In 1877 the defendant, who held the premises in question by lease, let the premises to a certain tenant for a term of three years. Before this term expired the tenant assigned his interest to the plaintiff, who entered into possession, and, on the expiration of the term in 1880, the plaintiff continued on in possession of the premises as tenant from year to year under the defendant as landlord.

About the year 1887 the defendant's lease expired, and both he and the plaintiff were soon afterwards evicted by the superior landlord in the middle of one of the years of the tenancy.

The plaintiff then brought an action for damages for such eviction against the defendant, as landlord, upon the ground that there was incident to the tenancy from year to year an implied covenant for quiet enjoyment. It was admitted that there was no express covenant for quiet enjoyment.

The learned county court judge held that in an ordinary tenancy from year to year there is no implied covenant for quiet enjoyment to protect the tenant against eviction by title paramount on the expiration of the landlord's interest, and he nonsuited the plaintiff.

The plaintiff appealed.

Ashton Cross, for the plaintiff.—It is said that, as the lessor's interest had expired before the end of the year, there was no implied covenant for title or for quiet enjoyment to protect the tenant from eviction after the landlord's interest had determined. The case of *Stranks* v. *St. John*, 15 W. R. 678, L. R. 2 C. P. 376, shows that that is not so, as there it was held that by agreeing to let, a lessor impliedly promises that he has a good title. Each year's letting is a fresh letting, and according to *Stranks* v. *St. John*, at the beginning of each year's tenancy there is an implied promise that the lessor has a good title to let for the whole of that year; there is an implied covenant for quiet enjoyment whether the lessor's title and interest continue for the year or not. The case of *Penfold* v. *Abbott*, 11 W. R. 169, relied on by the defendant, is peculiar, and is easily distinguishable from the present case. In that case the tenant knew that the landlord had only an unexpired term of a limited duration, but in this case there is no suggestion that the tenant knew of the limited interest of the defendant. The case of *Penfold* v. *Abbott* depends on *Adams* v. *Gibney*, 6 Bing. 656, where the lessor was tenant for life, and it was held that the tenant, having been evicted by the remainderman after the death of the lessor, could not maintain an action against the executors of the lessor; but there the tenant had notice that the lessor had only a life interest in the premises, so that the principle of that case does not apply to the present case. There is no suggestion here that the tenant knew of the limited interest of the defendant, and since the Vendors and Purchasers Act, 1874, we are not entitled to call for the lessor's title. If a person lets premises to me, and I know nothing of his title, there is an implied covenant for quiet enjoyment: *Stranks* v. *St. John*.

W. S. Goddard (*Cock, Q.C.*, with him), for the defendant.—The covenant for quiet enjoyment, even if there were one, came to an end when the defendant's interest expired, and the plaintiff is not protected against eviction by title superior. *Penfold* v. *Abbott* shows that. Wightman, J., there says:—"The present is the case of an agreement for a lease from year to year so long as both parties please, and the agreement on the part of the lessor implies no more than that the lessee shall have quiet enjoyment so long as his, the lessor's, interest in the premises lasts." That is precisely the case here. We give the covenant for quiet enjoyment so long as our interest lasts; when our interest ends our covenant for quiet enjoyment ends with it: *Adams* v. *Gibney*. So in *Woodhouse* v. *Jenkins*, 9 Bing. 431, there was, as in the present case, eviction by title paramount, and it was held that the lessor was not liable for damages for such eviction, the eviction being by title paramount, which he had no means of defeating. [He was stopped.]

Cross replied.

Lord COLERIDGE, C.J.—In this case it seems to me that the judgment of the learned county court judge must be affirmed. A demise from year to year does not imply a covenant against an eviction by a superior landlord. The principle is laid down over and over again, and there are five or six cases to that effect given in Woodfall on Landlord and Tenant. It would be most unreasonable to assume that the law imposes any such condition as this. No reason has been suggested why we should throw doubt on well-established law.

MATHEW, J.—I am of the same opinion. Where there is a tenancy from year to year, if the tenant wishes to protect himself against eviction by the superior landlord, he must have an express agreement to that effect. It would not be right to imply any such agreement.

Appeal dismissed. Leave to appeal refused.

Solicitor for the plaintiff, *Behrend*.

Solicitor for the defendant, *Leonard Nevill*.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Nov. 1.

Ex parte BOARD OF TRADE.
In re GEE. (*a.*)

Bankruptcy—Leasehold premises—Onerous covenants—Assignment by way of mortgage—Bankruptcy of lessee—Disclaimer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

Where the owner of leasehold premises, burdened with onerous covenants, assigns such premises by way of mortgage for the whole of the residue of the term granted by the lease, and subsequently becomes bankrupt, the equity of redemption which vests in the trustee in bankruptcy is not property burdened with onerous covenants within section 55 *of the Bankruptcy Act,* 1883, *and an application for leave to disclaim the lease need not be made by the trustee.*

Special case stated by his Honour Judge Chalmers from the Birmingham County Court for the opinion of the High Court of Justice, under section 97 of the Bankruptcy Act, 1883.

On January 4, 1889, the debtor presented a bankruptcy petition in the Birmingham County Court, and a receiving order was made against him on the same day. On January 16, 1889, the debtor was adjudicated bankrupt, and on January 18 an order was made for the summary administration of his estate, whereby the official receiver became trustee of the bankrupt's property.

The bankrupt was a builder, and by an indenture dated September 20, 1886, made between one W. Crowson as lessor and the bankrupt as lessee, the said lessor demised to the bankrupt, his executors, administrators, and assigns, a piece of land in the parish of Handsworth for a term of ninety-nine years at a ground-rent of £17, payable quarterly. In this indenture were contained covenants by the lessee to pay the ground-rent, to pay all rates, taxes, and outgoings chargeable upon the demised premises, to build on the demised land six houses according to plans and specifications to be approved by the lessor and to cost at least £900, to construct drains for the intended buildings, and to paint and keep in repair the houses and premises when built, and to yield up the buildings and premises in good repair to the lessor at the end of the term. The indenture also contained covenants by the lessee to insure, and to repair after notice, and negative covenants not to permit the premises to be used in a manner forbidden by the said indenture.

By an indenture dated July 27, 1887, made between the bankrupt and the said W. Crowson, reciting, amongst other things, the said indenture of September, 20, 1886, and also reciting—as was the fact—that the bankrupt had built on the demised land six houses, five of which were occupied and one of which was unlet, and that there was due to the said W. Crowson from the bankrupt a sum of £810 for advances and interest on such advances, the bankrupt assigned to the said W. Crowson the demised land with the buildings then erected or thereafter to be erected thereon for the whole of the residue of the term of ninety-nine years created by the indenture of September 20, 1886, subject to a proviso for the redemption of the said premises by the bankrupt on payment to the said W. Crowson of the sum of £810 and interest thereon at the rate of five guineas per cent. per annum on January 25, 1888.

The equity of redemption in the demised premises was of no value, and the bankrupt's estate was without any assets, and on June 28, 1889, the official receiver, as trustee of the bankrupt's property, applied to the county court for its directions as to whether it was, under the circumstances of the case, necessary, in order to free the bankrupt's estate and the trustee from all liability under the indenture of September 20, 1886, for the official receiver, as such trustee, to apply for leave to disclaim the equity of redemption and his interest in the demised property. For the purpose of obtaining leave to disclaim such equity of redemption and interest it would be necessary to incur the expense of an application to the court, and for the official receiver to give notice to W. Crowson.

The question of law which arose upon the application was whether the interest which the bankrupt had in the demised premises at the commencement of the bankruptcy consisted of lands burdened with onerous covenants, or binding the possessor thereof to the performance of any onerous acts, or to the payment of any sum of money, within the meaning of section 55 of the Bankruptcy Act, 1883; and, such question being one which might frequently arise, the county court judge thought it desirable to have it determined in the first instance in the High Court of Justice.

Muir Mackenzie stated the case.—The question is of importance, because if, in cases of summary administration where there are no assets, the official receiver must apply for leave to disclaim, the expense has to be paid out of the public funds. There was an assignment here for the whole term, and there are no affirmative covenants left to the trustee. There is no necessity to apply for leave to disclaim, because the whole liability to perform the covenants is vested in the assignee. The liability of the bankrupt on his personal covenants does not devolve on the trustee, and the covenants which run with the land pass to the assignee.

He referred to *Titterton* v. *Cooper*, 30 W. R. 866, 9 Q. B. D. 473; *Wilson* v. *Wallani*, 28 W. R. 597, 5 Ex. D. 155; *Mayor of Carlisle* v. *Blamire*, 8 East, 487; *Collyer* v. *Isaacs*, 30 W. R. 70, 19 Ch. D. 342; *Morgan* v. *Hardy*, 35 W. R. 588, 18 Q. B. D. 646; *Haywood* v. *Brunswick Building Society*, 30 W. R. 299, 8 Q. B. D. 403.

CAVE, J.—In my opinion in this case no disclaimer under section 55 is required. The section enacts that "where any part of the property of a bankrupt consists of land of any tenure burdened with onerous covenants," and so on. The question here is whether the bankrupt had amongst his property land burdened with onerous covenants. Now at the time when the lease was executed he undoubtedly had, because he was lessee, and as such was bound to perform the covenants of the lease, and if he had continued to be lessee up to the time of his bankruptcy, the effect of the bankruptcy would have been that the trustee would have become assignee of the lease, and, as such assignee, bound to perform those onerous covenants. It was with the view of enabling the trustee to get rid of the liability in such a case that section 55 was framed. In this case, however, previous to the bankruptcy the bankrupt had assigned the lease. Undoubtedly in an ordinary case of an assignment for value the assignor after the assignment remains liable on his covenants by virtue of the privity of contract. The assignee is also liable on them by virtue of the privity of estate. It is only on the ground of privity of estate that the trustee would have ever become liable on those covenants, and inasmuch as the previous assignment has transferred the liability to the assignee, leaving on the bankrupt only the liability under the covenant arising out of privity of contract, he ceases to have the land burdened with onerous covenants. It is true that some years ago a question did arise as to whether, in the case of a mortgage, the general rule applied. This, however, has been decided in the affirmative, and it cannot be doubted at this day, where there is an assignment to a mortgagee, the mortgagee becomes, by virtue of the assignment, the owner of the lease burdened with the

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

covenants, and the assignor no longer possesses any land burdened with onerous covenants which can, by virtue of the statute, become vested in the trustee. It is true that the assignor, where the assignment is by way of mortgage, retains the equity of redemption, but that is a right which is not burdened with onerous covenants. It is not because he is owner of the equity of redemption that he can be compelled to perform the covenants, but solely by virtue of the privity of contract that exists between him and the lessor, and that liability cannot be transferred by bankruptcy to the trustee. The right to call for a reconveyance, no doubt, is conferred, and does pass to the trustee, and if the trustee chooses to exercise that right, and have a reconveyance or a reassignment executed to him, he would then become the owner of the land burdened with onerous covenants. He is not compelled to exercise that right. Therefore the object of the statute, which is to free him from a liability which he is compelled to take on himself, cannot apply to the mere case of the transfer to him of the equity of redemption, which is accompanied by no burden unless he chooses to take the burden on himself, which he is not compelled to do.

I am therefore of opinion that there was in this case no land belonging to the bankrupt within section 55, and consequently that no disclaimer under that section is necessary.

Solicitor, *The Solicitor to the Board of Trade.*

Prob. Div. & Adm. Div. Divorce. } July 16, 1889.

Gillet v. Gillet. (a.)

Divorce — Aggravated assault—Summary conviction—Order—Wife not bound to cohabit—Order for weekly payment—Matrimonial Causes Act, 1878 (41 *Vict. c.* 19), *s.* 4—*Enforcing order—No jurisdiction in High Court.*

The High Court has not power to enforce an order made by a court of summary jurisdiction under section 4 *of the Matrimonial Causes Act,* 1878, *for a weekly payment of money by a husband convicted of an aggravated assault upon his wife.*

On a wife's petition for dissolution of marriage, on the grounds of her husband's cruelty and adultery, two orders were made for payment by the husband, of £16 *and* £45, *the wife's costs, which he had not complied with. The cruelty alleged was an aggravated assault, for which the husband had been convicted, and the court of summary jurisdiction had, under section* 4 *of the Matrimonial Causes Act,* 1878, *made an order that the wife was no longer bound to cohabit with her husband, and that the husband should pay her a weekly sum. The husband was* £58 *in arrear of such payments. The husband was entitled to a sum of money under a will. The petitioner obtained an* ex parte *injunction to restrain the husband from receiving the money payable to him under the will, on the ground that he had not paid to his wife the amounts before stated.*

The court (Butt, J.), *on an application to continue the injunction, and for the appointment of a receiver, continued the injunction till the hearing of the petition as to the two sums of* £16 *and* £45 *payable under the order of this court; but refused to continue it in respect of the sum of* £58 *payable under the order of the court of summary jurisdiction.*

Motion to continue an injunction which the petitioner had obtained on an *ex parte* application to restrain the respondent, her husband, from receiving a sum of £1,400 to which he was entitled under the will of Sarah Oakes, deceased, and for the appointment of a receiver.

On the 27th of June, 1887, the respondent was convicted before Mr. Chance, one of the metropolitan police magistrates, sitting at Lambeth, of an aggravated assault on his wife, and the magistrate made an order, under section 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and that the husband should pay his wife £1 weekly. A sum of £58 was now due under this order.

In October, 1888, the wife filed her petition praying for a dissolution of marriage on the ground of cruelty and adultery committed since the separation, the cruelty alleged being the aggravated assault of which the husband was convicted. In this suit two orders were made, one that the husband should pay into court £16 5s. 7d., the amount of the wife's taxed costs up to the date of the order, the other that the husband should pay into court or give security for £45, the estimated amount of the wife's costs for the hearing.

The husband had not obeyed either of these orders.

Walter, for the petitioner, in support of the motion.—The magistrate has made an order for the payment of money in a matrimonial cause, and his order has the same effect as a judicial separation granted by this court. We are compelled to come to the High Court because the magistrate has no jurisdiction to grant an injunction, and as there is now a suit for dissolution of marriage pending in this division, the application should be made here. The Court of Chancery has enforced the decision of the Divorce Court by appointing a receiver under section 25, sub-section 8, of the Judicature Act, 1873: *Oliver* v. *Lowther*, 28 W. R. 381; *Sidney* v. *Sidney*, 17 L. T. N. S. 9. This was a case where we were obliged to apply *ex parte* in the first instance or the object of the application might have been defeated: ord. 52, r. 3. This case differs from *Newton* v. *Newton*, 34 W. R. 123, 11 P. D. 11, where no order to pay had been made against the husband.

Searle, for the respondent.—The petitioner is entitled to nothing more than the statute gives her. The order for alimony was made under section 4 of the Matrimonial Causes Act, 1878, and sub-section 1 expressly states how that order is to be enforced—viz., "in the same manner as the payment of money is enforced under an order of affiliation." This court has no jurisdiction to deal with or enforce that order, and cannot treat the magistrate's order as a decree of judicial separation made by this court. I admit this court can enforce the payments for costs ordered by this court, but as there was no dispute on our part as to that, the petitioner ought not to have her costs, as the respondent would have paid those amounts.

Butt, J.—I think this injunction was properly granted as to the sums of £16 and £45, for the wife's costs, to be paid by the respondent under the order of this court, but I do not think it ought to have been granted as to the claim under the magistrate's order. I shall continue the injunction until the trial and allow the petitioner her costs of this motion. If the respondent pays the two amounts he can always apply to the court.

Solicitors for the petitioner, *Maynard & Sons.*

Solicitors for the respondent, *Alfred Hicks & Arnold.*

(a.) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England) May 13, 1889.

Membery v. Great Western Railway Co. (a.)

Negligence—Breach of duty—"Volenti non fit injuria."

Where a workman is engaged by an employer to do work which the employer has contracted with a third person to do on the premises of that third person, and the work is dangerous without help, it is not the duty of the third person to furnish such help.

The maxim Volenti non fit injuria *considered.*

The appellant was employed by a man named Younghusband, who had contracted with the respondents to supply men and horses for the shunting of trucks upon their line. When engaged, in the course of his employment, in shunting trucks the appellant sustained injuries which led to the loss of one of his feet, and he brought this action against the railway company for damages, imputing negligence to them in not providing a boy to assist in unhooking the trucks.

It appeared that the railway company were to provide boys if they had them; otherwise the shunting was to go on without them. To do so was dangerous, but the plaintiff, the present appellant, had shunted trucks sometimes with, sometimes without, boys, and had been at this work for years. There had been constant complaints to the company's servants of the want of boys. Upon the evening in question he had asked the foreman for a boy, and was told he could have one when there was one disengaged, but he proceeded to do the work alone, in the course of doing which the accident happened.

The railway company called no evidence, and submitted that there was no evidence of liability, but Manisty, J., left the case to the jury, who found that there was negligence in the railway company, which was the sole cause of the injury sustained, and gave a verdict for the plaintiff for £50. A new trial was refused by a divisional court.

On appeal the Court of Appeal set aside the verdict and judgment, and entered judgment for the defendants.

The present appeal was against this order.

W. Lynden Bell (*Waddy, Q.C.*, with him), for the appellant.—The railway company were bound to use due precautions for people coming to do work on their premises and for their advantage, and they failed to do so: *Indermaur* v. *Dames*, 15 W. R. 434, L. R. 2 C. P. 311; *per* Brett, M.R., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 509. The question of *volens* is a question of fact.

Woodley v. *Metropolitan District Railway Co.*, 2 Ex. D. 384, 388, 25 W. R. Dig. 155; *Thomas* v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D. 685; *Yarmouth* v. *France*, 36 W. R. 281, 19 Q. B. D. 647, were also referred to.

F. Lockwood, Q.C., and *John Digby*, for the respondents, were not heard.

Lord Halsbury, C.—In some respects this is certainly a very remarkable case, because the ground upon which the original verdict for the plaintiff was obtained has been abandoned by the learned counsel who has appeared in support of the judgment of the learned judge and the verdict of the jury.

Manisty, J., upon the facts with which we are now familiar, appears first to have rested the liability of the company on the ground of a duty cast upon them by a contract with their contractor. He says that it was a term of the contract that the company should find a boy, and he proceeds upon that assumption to rest the whole liability of the company upon their neglect in that respect in not fulfilling the obligation of the contract; and that, undoubtedly, is consistent with the statement of claim which the plaintiff brought and upon which the case was decided. We have now an admission that that fact, cardinal to the case as it was conducted at the trial before the jury, is to be abandoned and that there is no evidence to justify that allegation. We are therefore remitted to what is practically an application by the learned counsel who appears in support of the verdict that, upon another ground and upon a different cause of action, this case should be submitted to another jury in order to see whether they can found a verdict upon such cause of action, on which the plaintiff can retain what he claims against the defendants.

Now, it appears to me that, the original ground of the action having been abandoned, and the verdict of the jury upon that theory being perfectly immaterial to the facts which are now put in proof under your lordships' review, it would be almost enough for the purpose of disposing of this case to say that the whole ground of action as insisted upon at the trial has absolutely failed, and that it is perfectly impossible to maintain the right either to have a new trial or to have the verdict entered for the plaintiff. But I am unwilling to treat the case upon that ground, because it appears to me that, upon much broader grounds, it is impossible to maintain the right of the plaintiff in this case; and, in truth, one is embarrassed by the abundance of materials for showing that he has no case. The commencement of one's embarrassment in that respect is to ascertain in what way the obligation of the company is supposed to arise—What is the duty cast upon the railway company which the railway company have neglected?

The learned counsel has quoted a variety of cases establishing a proposition which I think at this time of day nobody will dispute—namely, that apart from a contract, apart from contractual relations, either with the plaintiff himself or with the plaintiff's employer, if any individual is brought upon premises belonging to the person charged with negligence, and some act is done or omitted by that person, or he omits to inform the person who is brought upon the premises of something in the nature of a trap from which he may suffer injury, there is a duty cast upon all such persons. Those cases commenced with the case as to the Princess's Theatre, and continue down to very recent cases where it has been established that such an obligation does arise. I am not aware of any case in which there is a charge, not of entrapping a person into a dangerous hole, but where it is supposed that there is some positive duty to do something which is omitted without some obligation cast either by law or by contract upon the owner of the premises. I am not aware that any case has ever been heard of in which such an obligation as is now insisted upon has been maintained. In the case of *Woodley* v. *The Metropolitan District Railway Co.*, where Mellish, L.J., pointed out the circumstances under which in his view the defendants were liable, the defendants themselves did the negligent act which occasioned the injury; the defendants themselves ran the train at its ordinary speed, without notice, without giving warning to the man who was working in their tunnel, or the opportunity of getting out of the way. Whether or not it would have been found one way or the other that the man himself was so careless as to disentitle himself from recovering, the fact remains that they did the act which caused the injury—they ran him down with their train, which was going at an undue speed at the particular point by which they were passing, when they knew that a person was there who might be injured. What analogy has that case to the case now before your lordships? It is almost reducing the thing to an absurdity by the mere statement of the proposi-

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

ment unauthorized by the terms of the trust, which the *cestuis que trustis* must accept or reject, and which could only be rejected when the *cestuis que trustis* ascertained the circumstances under which the investment was made. The realization of the property was merely a carrying out of the authority handed over by the former trustee to the new trustees in respect of this mortgaged property.

It is like a sale of mortgaged property by the mortgagee under a power, without the concurrence of the mortgagor. If the sale is improperly made, it may be impeached, but the mortgagor is bound by it if made with reasonable prudence, and is answerable for what remains due on the mortgage after deducting the proceeds of sale.

In my opinion in this case the former trustee handed over what was really trust property to the new trustees, with this power of sale, and therefore no duty arose in the *cestuis que trustis* to say whether they would accept or reject it, and the former trustee is liable for the deficiency.

Thornton v. *Stokill* was referred to in support of the case of the former trustee. In that case a testator, who had been a trustee, had invested part of the trust funds in buying cottage property, which was entirely outside the scope of his power of investment. The *cestuis que trustis* wanted to take the cottage property at a certain sum and prove against the estate for the residue of the trust funds. Lord Hatherley held that they had a claim to the houses as against general creditors, but that they had no right to set a value on them and then prove for the deficiency. That case has no bearing on the present case.

In my opinion the former trustee remained liable for the deficiency, though no notice was given to him by the *cestuis que trustis* that they would hold him liable.

Again, the plaintiff is not open to the objection raised against him that he directed a sale. He did not, in fact, direct a sale. The trustees referred to him, and he merely said he could not suggest anything better than a sale by auction. He was merely passive. I cannot, therefore, agree with the view taken by Kekewich, J., and there must be a decree against the former trustee for the loss occasioned to the plaintiff by this improper investment.

FRY, L.J.—I have been requested by Bowen, L.J., to deliver judgment before him.

The first question we have to consider is whether the investment was proper? whether it was one which a prudent man would make? I am of opinion that it was improper. A trustee who disregards the well-known rules of court as to the amount which may be lent on mortgage of a property—though they are not hard and fast rules—takes upon himself a considerable amount of risk.

The investment here was in cottage property, and the trustee invested on mortgage of it more than two-thirds of its value, as ascertained by his own valuer. Again, the character of the property was such that it depended for its value on shifting circumstances—*e.g.*, the character of trade in the locality; and the fact that at the time of the mortgage some of the houses were unfinished and unlet strongly corroborates the view that the investment was improvident.

The second question is whether the plaintiff has in any way lost his *primâ facie* right to call on the defendant to make good the loss.

Two arguments were brought forward to show that he had. First, that the plaintiff had become a purchaser of the interest of one of the *cestuis que trustis* with full knowledge of the investment, and, therefore, could not impeach it. The facts hardly support this argument. The plaintiff was a mortgagee before the investment was made, and he only bought the equity of redemption afterwards, and the only information he had even then was that contained in the letter of the 30th of January, 1883, which only told him what the trust funds were then invested in, and which gave him no reason for questioning the propriety of the investment. I think, therefore, there is no reason for holding that, on this ground, the plaintiff is deprived of any right he had.

Secondly, it is urged that the plaintiff was a party to the sale, and that he concurred in the sale of April, 1887. I do not think he did anything of the sort. What took place was this: the solicitor of the new trustees informed the plaintiff's solicitor of their intention to offer the property for sale, and, on the 19th of April, wrote to the plaintiff's solicitor that they would do so "unless you can suggest some other course"; and to this the plaintiff's solicitor replies:—"As we presume there is no prospect of the property in question improving in value, we presume the best course will be to offer it for sale by public auction." There is nothing in that; the plaintiff was not a person who was bound to concur or who was asked to concur in the sale, and what was done merely amounted to a consultation between the solicitors, and did not make the plaintiff in any way a party to the sale. The substratum on which the judgment of the learned judge was based is, therefore, erroneous.

But then it is said that the conduct of the new trustees has released the former trustee from his liability, because, as it is urged, a return—or an offer of return—of the property to the former trustee, who had improperly invested upon it, is a *sine qua non* if it be sought to make him liable for the investment. In my opinion, however, a defaulting trustee has no such right, nor can the right of the *cestuis que trustis* be lost in that way. I think that the liability of the defaulting trustee is to make good the loss sustained by the improper investment. How that is to be made good depends on the circumstances of each particular case.

In some cases justice will be best done by realising the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the full amount and let him take the benefit of the security; but there is no general principle as to a preliminary condition for relief.

In the present case all the new trustees did was this. The former trustee had lent on a mortgage which contained a power of sale. On his retirement he transferred that mortgage to the new trustees, who afterwards exercised the power of sale. How can it be said that they thereby debarred the *cestuis que trustis* from claiming relief against the former trustee? They sold under the power which the former trustee had himself given them by transferring the security to them.

BOWEN, L.J.—I am of the same opinion, and I do not propose to add anything as to the law of the case, because I am of opinion that the question of law decided by Kekewich, J., does not arise at all. I do not see that there is any evidence that the plaintiff directed the sale or did anything more than merely stand by.

I do not, however, differ from anything said as to the law by the Lords Justices, but I am myself clearly of opinion that the question of law does not arise.

Solicitor for the plaintiff, *H. Hocombe.*

Solicitors for the defendant Uppleby, *Hicks & Son*, for *Brown & Son*, Barton-on-Humber.

Solicitors for the new trustees and the beneficiaries *T. H. Bird*, for *H. C. Lisle*, Nantwich.

unreasonable. The master says, Here is the work, do it or let it alone. If you do it, I pay you, if not I do not. If he has engaged him he says, I discharge you if you do not do it, I think I am right, if wrong I am liable to an action. The master says this, the servant does the work and earns his wages, and is paid, but is hurt. On what principle of reason or justice should the master be liable to him in respect of that hurt? On this ground, also, I am of opinion the judgment should be affirmed. I may observe that the Court of Appeal thought that neither of the cases where this novel notion was entertained bore on the present.

Lord FITZGERALD.—I also am of opinion that the judgment of the Court of Appeal ought to be affirmed and this appeal dismissed; and I rest my decision upon one, as it appears to me, solid ground, without entering into some of the questions which have been discussed in the course of the argument. I think that, having regard to the statement of claim in the case which was before the learned judge who presided at the trial, it was his duty at the close of the plaintiff's case to have yielded to the requisition of the defendants' counsel, and to have directed either a nonsuit upon the case then made, or a verdict and judgment for the defendants.

Mr. Bell could not alter the plaint which is before us into any form which would give a substantial cause of action without abandoning the whole case, both made upon the present statement of claim and also made at the trial, and upon which the jury decided, and upon which the learned judge gave his judgment in favour of the plaintiff. That is a thing not to be allowed, because although I would be far from tying any suitor down to mere technicalities, he ought to succeed, if he succeeds at all, upon the case, in substance, which he has raised. Now I turn to the statement of claim, and it consists really of two allegations, both of which, in the amendment proposed, will have to be abandoned; that is, first, that there was a contract between this company and the present Mr. Younghusband, Mr. Younghusband, jun., that the company, in consideration of his performing this duty of shunting, would provide him on all occasions with a boy to assist in it; and the second allegation is that, in breach of that duty and that obligation, the company failed to supply that boy. I have already pointed out, in the course of the discussion, that that entirely fails. There was not any such contract with the present Mr. Younghusband; there was an arrangement with him which had been followed out by his father for several years and by his father's workmen, not that the company should absolutely provide boys to assist, but that they should be relieved from that obligation; and in place of it another was substituted, the new arrangement being that if a boy was available upon the premises they would give Mr. Younghusband the benefit of his services. To state these propositions is to show that, as the case was originally stated, it entirely and absolutely fails; and upon that ground I think the learned judge should have nonsuited the plaintiff.

It is further to be remarked that this calamity to this unfortunate man, for whom one cannot but express pity, was really occasioned how? By his doing for Mr. Younghusband, his employer, the duty which Mr. Younghusband had undertaken to perform with reference to the company, that is, to do the shunting without the aid of a boy if there was not a boy whose services were at the moment available. It is also plain that there was an absence of any compulsion. Membery had been doing this duty without the aid of a boy for at least seven years before the time of this calamity. Very likely he had sometimes asked for and sometimes got, and at other times did not get, such assistance. Upon the occasion in question he asked for the services of a boy, possibly not unreasonably, but the answer which he got was in substance this: "I am not bound to give you one—if a boy becomes disengaged and is available I will send him to you, but at present I have no boy." There is no compulsion there. The plaintiff goes to do the work which he has been previously doing for many years, and in the manner in which he has been previously doing it, and in the course of so acting he meets with a calamity.

I therefore rest my judgment upon this solid ground, that the learned judge at the trial ought either to have directed a verdict for the defendants or to have nonsuited the plaintiff—it is immaterial which—and I think that upon this ground the decision of the Court of Appeal ought to be affirmed. There are some other questions which are questions of difficulty and are not free from doubt, but upon which, as I do not think that they arise in the case, I forbear expressing any opinion.

Lord HERSCHELL.—I am of the same opinion. It is perfectly clear that in the present case the plaintiff has no right of action founded upon any contractual relation between him and the defendant company. But his case is, that upon the occasion in question he was, with the assent or at the invitation of the defendants, upon their premises engaged about work in which they had an interest, and that he was damaged by their negligence. I think that whenever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence is the allegation of a breach of duty, a duty to take care, and to inquire at once what duty (if any) there was on the part of the persons charged with negligence to take care, and if there was any such duty what was the extent of it at the time and under the circumstances which existed on the occasion when negligence is alleged to have been committed.

Now, I do not for a moment doubt that there was a duty incumbent upon the defendants towards the plaintiff at the time when he was upon their premises. They were not without duty towards him. But it is not enough to arrive at the conclusion that there was a duty or even a duty to take care; the extent of that duty requires to be determined. I cannot doubt that they were bound to take care that the machinery or appliances or tackle of theirs which he had to use in the course of his discharge of these duties in which they were interested were in a reasonably fit and proper condition; and certainly if they were not in such a condition, and if the defect in them was unknown to the plaintiff, I cannot doubt that the plaintiff would have his remedy against them. In addition to that, I think they were under the duty to him, having invited him upon their premises, not to permit their premises to be in such a condition that he unwittingly might fall into a trap of the existence of which he, unacquainted with their premises, would be ignorant, by which he might sustain an injury. Further than that, it might be (and I confess that I should myself be disposed to think that it was) their duty to take due and reasonable care that in the carrying on of their business they did not subject him to unreasonable risk owing to the acts which they did in the carrying on of their business. If they were carrying on a dangerous business, and one which would subject people employed upon their premises for their benefit to risk, they must take reasonable care, as it seems to me, that they do not do any act (I emphatically use the word "act") which would endanger the safety of the persons who thus, to their knowledge, are employed about their business upon their premises.

Assuming all that in favour of the plaintiff, his case goes much further, because his allegation amounts and must amount to this, that the defendants were bound to take care to supply all the assistance, by means of the employment of other persons in addition to himself, which was necessary in order to free his employment

from risk. That is really, when you analyze it, what the allegation of the plaintiff really amounts to. Now I am unable to see any authority for such a proposition; nor am I able to see that it is to be derived by analogy from any decided cases, or that it is really supported by any principle. It is utterly unlike that which in *Woodley's case* established the cause of action—namely, you must take care that the acts which you do are not done in such a way as to endanger others. That is very far indeed from supporting the proposition, that because a person is employed by somebody else upon your premises, you come under the obligation to afford to him all the assistance of additional persons which will render his employment free from danger.

It appears to me, therefore, that the plaintiff fails in making out the duty the breach of which alone would establish his case here and would enable him to maintain his action against the defendants.

Taking that view, it appears to me to be unnecessary to consider the further question whether this is a case to which the maxim *Volenti non fit injuria* applies, although I do not mean for a moment to suggest that I entertain any doubt that in this case it would be applicable; and I should not have alluded further to the question but for some observations which have been made by Lord Bramwell with regard to the extent of this maxim. It is certainly not necessary on the present occasion to determine the limits to the application of that maxim; but, after what has been said, I desire to say a word or two further with reference to it, because it is impossible to shut one's eyes to the fact that what he has stated is in conflict with opinions, at all events, which have been expressed by learned judges in the courts below. I do not propose on the present occasion to express any opinion with regard to them. They have not been argued before us, at all events, exhaustively, inasmuch as they did not arise in the present case, and I do not desire to bind myself in any way in future, but I want to make distinct that which I consider to be left absolutely open by the present discussion.

Lord Bramwell has suggested that in no case can the maxim be said to be inapplicable unless the person who has done the act was under some physical constraint or compulsion at the time when he did it, and that the consideration whether he would have come in conflict with his employer if he had refused to do it, or might have been dismissed from his employment, or would have been compelled to throw up his employment, is in no case a material consideration.

Now, the question which has arisen in former cases, and may arise again, appears to be this, whether a person employed in a manufactory, with the obligation on the part of his employer to use reasonable care to have his machinery in a suitable condition, who finds during the term of his employment, and in the course of his employment, that the machinery has, from want of care, become more dangerous than it otherwise would be, who, nevertheless, continues making the best of it and doing his work and performing his contract of service, would be precluded from maintaining an action against his employer for his undoubted breach of duty, because there would be a complete answer to it on the part of the master in saying:—"You proceeded with your contract of service and to fulfil the obligations into which you had entered to serve me, notwithstanding that you knew of this defect." Views have been expressed that in such a case the answer *Volenti non fit injuria* would not be a complete or sufficient answer on the part of the employer. I desire distinctly to say that nothing which has fallen from me to-day is to be considered as throwing any doubt upon that proposition. At the same time I refrain altogether from expressing any opinion upon it which could be supposed to be an affirmance of it. I desire to have the matter left open for argument if hereafter the question should arise and should be thought worthy of argument. It is sufficient to say that, even supposing the doctrine *Volenti non fit injuria* could not be set up in such a case as that, that has no application to the present case, where the circumstances which alone will prevent its being an answer do not exist.

Lord MACNAGHTEN.—I entirely agree in the result at which your lordships have arrived.

Lord HALSBURY, C.—I desire to concur in what Lord Herschell has said in reference to leaving open the question as to the doctrine *Volenti non fit injuria*. It was, in truth, upon that ground that I thought it right to call attention to the facts in this case affecting the employer and the employed.

Order appealed from affirmed, and appeal dismissed.

Solicitors for the appellant, *Edward Boyle & Sons.*

Solicitor for the respondents, *R. R. Nelson.*

Court of Appeal.

App. Bankruptcy. Nov. 8.

Ex parte BAIRD.
In re HECQUARD. (*a.*)

Bankruptcy — Debtor domiciled abroad — "Dwelling-house in England"—Single creditor—Action pending between same parties—Grounds for staying proceedings —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-section* (1) (d).

A debtor, a Frenchman domiciled in France, and having apartments in Paris, against whom a judgment had been obtained in France by an English creditor, which judgment had not been satisfied, came over to London to conduct an action upon an entirely distinct claim against the said creditor. He rented per month five furnished rooms on different floors in a house occupied by an agency office on the ground floor, and in which the lessor retained another room for his own use. He brought his wife and some servants, and stayed for three months. Subsequent to the date of the issue of the writ in the second action the creditor, brought an action in this country against the debtor to enforce the French judgment. He obtained judgment in that action, and, upon the failure of the debtor to comply with a bankruptcy notice, the creditor presented a petition against him. The debtor's action against the creditor was still pending, and the debtor alleged that there was no other creditor than the petitioner, and that there were no assets. The registrar made a receiving order.

Held, that the debtor "had a dwelling-house in England" within the meaning of section 6, *sub-section* (1) (d), *of the Bankruptcy Act,* 1883, *and that, provided he had such a dwelling-house within a year of the date of the presentation of the petition, no extent of the time of such occupation was necessary to make him liable to bankruptcy proceedings.*

Held, further, that there was no principle of law that the fact of there being no other creditor and no assets must be a bar to bankruptcy proceedings; that such facts must be shown upon the examination of the debtor, and not upon the making of the receiving order; and that such facts and the fact of other legal proceedings being pending were merely grounds for the exercise of the registrar's discretion.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Appeal by the debtor against a receiving order made by Mr. Registrar Hazlitt.

The debtor, the appellant, was a Frenchman, domiciled in France, against whom the creditor Baird, the present respondent, had obtained judgment in France in November, 1886, upon a bill of exchange of which the debtor was the acceptor. The judgment was not satisfied.

On March 18, 1889, the appellant came to London to commence an action against Baird in the Chancery Division, and for that purpose he rented five rooms in a furnished house. He brought his wife over and some servants, and took the rooms by the month. His whole stay extended to three months.

On April 26, 1889, the respondent commenced an action, in the Queen's Bench Division, upon his French judgment, and obtained judgment on June 6. The writ in the appellant's action against the respondent was issued in March, 1889, and the litigation was still pending. It was for the specific performance of an agreement relating to an alleged concession of ruby mines in Burmah by the late King Theebaw's Ambassador to Hecquard, under which he alleged a large sum was recoverable by him from Baird.

The respondent served a bankruptcy notice upon the appellant in July, 1889, and upon his failure to comply filed a petition in September, 1889.

The appellant alleged that he was not liable to bankruptcy proceedings in England on the ground that he had no residence or dwelling-house there, that he had no other creditors nor any assets, and that other proceedings were pending which would affect the respondent's claim as a creditor against him. The registrar held that the debtor had "ordinarily resided, or had a dwelling-house, in England" within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6 (1) (*d*), overruled the other objections, and made the receiving order, against which the debtor now appealed.

Sidney Woolf and *Bingwood*, for Hecquard, the appellant debtor.—The debtor did not "ordinarily reside or have a dwelling-house in England." The word "ordinary" qualifies dwelling-house as well as residence: Bankruptcy Act, 1883, s. 6 (1) (*d*); *In re Norris, Ex parte Reynolds*, 5 Morrell Bank. Reps. 111. The question whether the fact of there being no other creditors has not yet been decided, but was mooted in *In re Bullen, Ex parte Arnaud*, 36 W. R. 836, 5 Morrell Bank. Reps. 143, and *Ex parte Ball, In re French, ante*, p. 52. The fact of there being other proceedings pending in which the debtor may recover far more than sufficient to meet the creditor's claim is sufficient cause for the exercise by the registrar of his power to dismiss the bankruptcy petition under section 7, sub-section 3, of the Bankruptcy Act, 1883. The dates of the proceedings taken by the creditor upon a judgment obtained some years ago, show a desire to obstruct the other litigation of the debtor to which he is a party.

H. Reed, for Baird, the respondent creditor.—Under the old bankruptcy law residence in England for one day was sufficient to make a debtor liable to proceedings. A man's residence or dwelling-house is where he ordinarily sleeps, and no extent of time is mentioned in section 6 (1) (*d*), as a necessary qualification: *In re Williams*, 21 W. R. 451, L. R. 8 Ch. 690. The registrar had a right to exercise his discretion in overruling the other objections.

Sidney Woolf replied.

Lord EXMOUTH, M.R.—The question for us here is, Whether the debtor was, under the circumstances proved, liable to be subjected to bankruptcy proceedings? He was a French subject not domiciled in England. The question depends on section 6 (1) (*d*) of the Bankruptcy Act, 1883, by which it is enacted that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (*inter alia*) he is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." It is clear the time of such occupation need not be for a whole year. It is stated to be "within a year" before the date of the petition. If he has had a dwelling-house in England within a year the time of such occupation is not subject to any specified extent. The point is whether he had a dwelling-house and was not a mere visitor in this country? What is a dwelling-house is not stated in the Act. The question, therefore, for us, is to say whether, upon the facts as found, this debtor had a dwelling-house upon a reasonable construction of the words? He was clearly not a mere passing visitor in this country, come for the purpose of sight-seeing or what not. He came, as is acknowledged, for the purpose of helping on some litigation in which he was engaged. He took, not a mere room in a hotel by the day or under the ordinary circumstances of a voyager, into which the landlord can put someone else the moment it is empty, but say five furnished rooms (there seems a dispute about the exact number), three on one floor, two on another, in a building belonging to to an agent of a railway company. The agent lived in part of the premises, whether occupying an office there or not, I do not know. There was a common staircase. The agent is not alleged to have had exclusive use of the outer door and key. A Mr. M—— had taken these five rooms and another one, and furnished them. He had exclusive use of them. There was an entrance to the rooms on each floor from the staircase. M—— keeps one room and lets the other five to the present appellant. He reserves no right to shut the appellant out of any of these rooms or to control the outer door. He keeps no servant to look after the appellant's rooms, nor does he treat him in any sense as a mere lodger. The appellant becomes a tenant of these rooms for a definite time, for one month first and extending to three months finally. He has exclusive use and absolute control of them. He engages two, three, or four servants. There seems, again, a dispute as to the exact number. At any rate there were a cook and a butler. He brings his wife. His children were left at school in France. Under such circumstances he must be held to have had a dwelling-house in England within a year previous to the bankruptcy petition, and must, therefore, be taken to have become liable to be proceeded against under the Bankruptcy Act of 1883.

The other points urged on the appellant's behalf do not seem to me any more maintainable. The fact of the judgment debt on which the bankruptcy proceedings were taken being two years old is immaterial. The judgment creditor was an Englishman. The debtor was a Frenchman, up to this year residing in France. The creditor obtained judgment against him in France, but could not act upon that. Upon the debtor coming to England, the creditor obtains judgment on his French judgment, and serves the bankruptcy notice upon him owing to his failure to pay. It is said, further, that the creditor is the only creditor of the appellant. How do we know that? Other creditors may come forward when the notice is duly advertised. At any rate it is no duty of the creditor to show that there are other creditors, and the mere fact of a debtor saying he has no other creditor is not sufficient for the court to take any action to protect the debtor from being harassed by alleged unnecessary proceedings, even should it be their opinion that they ought to do so. It is said, again, the debtor has no assets. Again, we must ask, How can we know that, on the present occasion? It is quite possible that there may be property which can be made available as assets, but which can only be reached through bankruptcy proceedings. That must be shown

in the examination before the registrar. The time for the making of the receiving order is not the time when such a plea can be advanced. It must be ascertained by means of the further proceedings. As to the plea that other proceedings are pending, which would affect the same parties, and in which, if successful, the appellant would have ample assets to meet the respondent's claim, that is not sufficient to bar the bankruptcy proceedings as of right. If it had been shown that the creditor put the bankruptcy proceedings in motion upon a judgment obtained two years ago, but left dormant, and that he had only revived it for the purpose of preventing the appellant, the debtor, securing a fair trial upon another claim, that would be a fair ground upon which to ask us, or the registrar, to exercise our discretion in staying or dismissing the proceedings. But here the creditor has obtained an honest judgment for a debt. He has taken every step to enforce that judgment that was in his power. He has taken the first opportunity he has had of making the debtor amenable to that judgment, and upon his failure to pay the creditor takes apparently honest proceedings to secure what he can of a just debt. Why should he be prevented from following that course because the debtor shows a very vague and shadowy claim against other persons which he is endeavouring to establish in another division of the court? There is certainly no right to a stay or dismissal of the petition, there being only a discretion. I think, under the circumstances, the registrar exercised a wise discretion in refusing to dismiss or grant a stay. The appeal must be dismissed.

LINDLEY, L.J.—The only point in this case really is whether the debtor may be said to have had a "dwelling-house" in this country within the ordinary meaning of those words? A dwelling-house need not be a detached residence. Nor does the fact of its being vertical (such as a flat) as distinct from horizontal, make any difference. Upon the facts of this case, as shown in the judgment of the Master of the Rolls, I think it would be unduly restricting the language of the statute to hold that he did not occupy a dwelling-house.

As to the suggestion that there are no assets of the debtor to distribute and no other creditors, there is no principle of law laid down, that because that is so, no bankruptcy proceedings can be instituted. We know nothing about such a state of things here beyond the statement of the debtor. Under bankruptcy proceedings assets may be evolved which could not otherwise be reached or even be treated as assets apart from such proceedings. Those are matters to be gone into in the examination of the debtor, and may form grounds for the exercise of the registrar's discretion, but it is premature to ask us to exercise any discretion on those grounds. As to the argument that other proceedings are pending, it has not been established that they relate to the previous action of the creditor against the debtor. The creditor is entitled to say that the object of the pending action has no relation to the object of his action, which was simply to obtain money which has been now properly adjudicated to him, in failing to get which, he is entitled to pursue his remedy in the bankruptcy court.

LOPES, L.J.—It is clear that the debtor could not be described as a mere traveller passing through London without any intention of remaining for any length of time. He had exclusive possession of certain rooms for three months. He brings some servants. The fact that he had not the run of the entire house seems immaterial under the circumstances. I think the debtor had a dwelling-house in this country within the meaning of section 6, sub-section 3, of the Bankruptcy Act, 1883.

The fact, if it is one, of there being no other creditor, and no assets, is not sufficient to oust the jurisdiction of the registrar, though it might be a ground for a stay of proceedings. At present no opportunity has been given for such fact to be proved.

There seems no substance in the contention that another action is pending. That action has nothing to do with the particular judgment debt due to the respondent by the appellant. If the bankruptcy proceedings had been shown to have been instituted for the purpose of ousting the debtor's proceedings in the the pending action, that would be ground for our interference. The fact that judgment was obtained by the respondent in his action at a date subsequent to the pending action of the appellant is explained by the fact that the respondent was thereby simply enforcing the judgment in his favour already obtained in France in 1884, but which he could not enforce before, owing to the absence of the debtor from this country. When the debtor comes over to start his pending action, the creditor simply takes advantage of the debtor's presence here to enforce the creditor's properly obtained judgment.

Appeal dismissed.

Solicitors for the appellant, *Lumley & Lumley.*

Solicitors for the respondent, *Smiles, Binyon, & Ollard.*

From Chan. Div. May 13, 14; June 18, 19, 1889.

In re SALMON.

PRIEST *v.* UPPLEBY. (*a.*)

Trustee—Investment—Improvident investment in authorised security—Realisation of security by new trustees—No offer of the security to retired defaulting trustee—Liability of retired trustee—Practice—Third-party procedure—Appeal by plaintiff from order dismissing action against the defendant—Notice of appeal to third party—By whom such notice should be given—R. S. C., 1883, *ord.* 58, *r.* 2.

U., a trustee, authorised by the terms of the trust to invest in real securities, invested a sum of £1,300 *on a mortgage of freehold property, consisting of cottages, some of which were at the time unfinished, and the remainder of which were let at weekly rents to labourers. The property at the time of the mortgage had been valued at* £1,750. *U. afterwards retired from the trust, and new trustees were appointed, and the mortgage security was transferred to them. The new trustees, with the assent of the plaintiff, who was an assignee of one of the* cestuis que trusts, *sold by public auction the mortgaged property under the power of sale contained in the mortgage. The property realised a loss on the* £1,300, *but the sale itself was not in any way impeached. No offer had been made to U. to take the security for himself on paying the trust fund the amount lent on the security. The plaintiff by his action sought to make U. liable for the loss realised by the plaintiff.*

Held, that, though the mortgage investment was an investment authorised by the terms of the trust, yet, having regard to the value and the nature of the property, it was an improper investment; that U. was liable to make good to the plaintiff the loss occasioned thereby; and that U. was not relieved from that liability by reason of the fact that he had been given no opportunity of electing to keep the security for himself.

Decision of Kekewich, J., *reversed.*

Where a defendant in an action had brought in a third party for the purposes of indemnity, and the action of the plaintiff against the defendant was at the trial dismissed, but the plaintiff had appealed,

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Held (per Lord Esher, M.R., *and* Fry, LJ.; Cotton, L.J., dissentiente), *that, on the true construction of ord.* 58, *r.* 2, *the third party was not a party "directly affected" by the appeal, and that it was not the duty of the plaintiff as appellant to serve the third party with notice of the appeal, but that the proper course would be for the defendant to apply to the Court of Appeal for leave to serve the third party with notice of the appeal.*

Appeal from Kekewich, J.

The action was brought by the assignee of a beneficiary entitled to a reversionary share of residuary personal estate under the trusts of the will of the testatrix, Eliza Salmon.

The defendants to the action were George Charles Uppleby, a former executor and trustee of the will, and two new trustees, who had been appointed, under a power in that behalf contained in the will, on the retirement of Uppleby.

The action was for an alleged breach of trust said to have been committed by the defendant Uppleby, when sole trustee of the will, by reason of his investing part of the trust funds on a mortgage in fee of cottage property in Kingston-upon-Hull.

The material facts are as follows:—The testatrix had bequeathed her residuary personal estate to the defendant Uppleby on trust to invest the same (*inter alia*) on real securities in England, with power to vary investments, and to hold the trust premises for Annette Bower for life, with remainder for such of the children of Annette Bower as should attain twenty-one or marry.

Annette Bower had six children, all of whom attained twenty-one.

In 1877 one of these six children mortgaged his reversionary share in the trust premises to the plaintiff. On the 18th of July, 1881, the defendant Uppleby invested a sum of £1,300, part of the trust funds, on a mortgage in fee of real estate consisting of a number of cottages, some of which were not finished at the time, and the rest of which were let at weekly rents to dock labourers. The property in question had been valued by a local valuer at a sum of £1,750. On the 10th of November, 1883, the plaintiff purchased the equity of redemption of his mortgagor's share in the trust premises. On the 15th of November, 1884, the defendant Uppleby retired from the trusts of the will, and, under a power in that behalf contained in the will, two new trustees were appointed, and the mortgage investment of the £1,300 was transferred to them.

On the 17th of November, 1884, some of the *cestuis que trusts* of the trust premises released the defendant Uppleby from all claims in respect of the trust estate and covenanted to indemnify Uppleby against all cost he might incur on account of any acts or proceedings in relation to the trusts. On the 19th of April, 1887, the solicitor of the new trustees wrote to the solicitor of the plaintiff that the £1,300 mortgage had proved a bad security, and that the trustees proposed to sell the same unless the plaintiff's solicitor could suggest some other course, and the plaintiff's solicitor replied on the 22nd of April, "As we presume there is no prospect of the property in question improving in value, we presume the best course will be to offer it for sale by public auction." On the 14th of May, 1887, the mortgaged property in which the £1,300 had been invested was sold by auction by the new trustees, under the power of sale contained in the mortgage, and realized only £840, leaving £820 net after deducting the costs of sale. The defendant Uppleby, the former trustee, had no notice given him as to this sale.

In February, 1888, this action was instituted.

The defendant Uppleby served a third-party notice claiming indemnity against the *cestuis que trusts* who had executed the deed of release of the 17th of November, 1884, and the third parties entered an appearance and denied such liability. On the 1st of May, 1888, Stirling, J., made an order on a summons for directions taken out by the defendant Uppleby that the third parties should be at liberty to put in a defence, and that the question of indemnity should be dealt with at, but immediately after, the trial of the action, and that the third parties should be at liberty to appear at the trial and take such part therein as the judge might think proper, and also to apply generally as there might be occasion.

The action was transferred for trial to Kekewich, J., and was tried on the 22nd and 23rd of February, 1889.

Kekewich, J., dismissed the action, on the ground that the plaintiff was a party to the sale of the mortgaged premises made by the new trustees in 1887, and that the plaintiff could not call on the defendant, the former trustee, to make good the loss realized by the sale, when the former trustee had not, previously to the sale, been given the option of taking the property himself and making good the £1,300 to the trust estate.

The plaintiff appealed.

May 13, 1889.—On the appeal being opened,

Warmington, Q.C., and *J. G. Wood*, for the defendant Uppleby, took the preliminary objection that the appellant had not served the third parties with notice of the appeal.

They referred to ord. 58, r. 2.*

S. Hall, Q.C., and *P. Stokes*, for the appellant, contended that it was not the duty of the plaintiff as appellant to serve the third parties with notice of the appeal.

Lord ESHER, M.R.—The defendant in this action brought in third parties on the ground that he claimed to be entitled to indemnity from them, and he desired that the liability of the third parties to him might be tried at the same time as the question between him and the plaintiff, so that if he were made liable to the plaintiff he might insist on his rights against the third parties.

I cannot quite agree with what Kekewich, J., is stated to have done at the trial of the action. It is stated that he refused to allow counsel for the third parties to cross-examine the plaintiff's witnesses, and that he said he would try the case as between the plaintiff and the defendant first, and as between the defendant and the third parties afterwards. If the learned judge meant that he would try the question of the liability of the defendant to the plaintiff over again as between the defendant and the third parties, he was, in my opinion, going contrary to the theory and the intention of the Judicature Act and the third-party rules. However, in the result he gave judgment for the defendant as against the plaintiff, and if that judgment stands the third parties will be relieved from liability. But the plaintiff has appealed, and if, on the appeal, the plaintiff should succeed, the original question as to indemnity will arise again between the defendant and the third parties. The position of the third parties therefore may be that the case would have to be tried all over again, and thus the position of the third parties may be less favourable than it was before the appeal. In that sense, therefore, the third parties are interested in the appeal.

When the appeal was opened, however, the defendant

* Ord. 58, r. 2.—"The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any of the parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone the hearing of the appeal on such terms as may be just . . ."

takes the preliminary objection that the third parties had not been served with notice of the appeal by the plaintiff. What is the position of the plaintiff? He cares nothing about the claim of the defendant against the third parties, that is wholly immaterial to him. Yet, as the plaintiff is the appellant, and as the third parties are interested in the appeal, it may be that the appellant should bring in all persons interested in the appeal, and the defendant says that the plaintiff ought to have served the third parties with notice of the appeal, although not himself interested in the third party claim. The question depends on the right construction of ord. 58, r. 2. [His lordship read the rule, and continued:—] Having regard to the rule immediately preceding—viz., rule 1 of the same order—I think that in every case under rule 2 the appellant is the person who ought to serve the notice of appeal. But the rule does not say the notice is to be served on all parties affected by the appeal; it is only to be served on all parties "directly affected."

Now, it must be remembered that this rule applies to the Queen's Bench Division as well as the Chancery Division, and, therefore, does not depend solely on the former practice of the Court of Chancery, but it is to govern appeals from both divisions of the High Court.

Now, in common law courts there never could have been such a thing as the introduction of a third party. I think the rule must be construed according to the words used in it, and ought not to be construed as if the word "directly" were struck out and then applying the old rule of practice in chancery, under which all parties interested were served.

I cannot think that a third party, brought in on the ground that he has undertaken to indemnify the defendant, can be properly said to be "directly affected" within the meaning of this rule. The appeal, if successful, would not determine the whole case against him, but only one point in the case.

I have, therefore, though with some doubt, come to the conclusion that the third parties are not, and never can be, "directly affected" by the appeal, and, consequently, that the preliminary objection taken by the defendant fails.

I think, however, that the court, in the exercise of its discretion, ought not to hear this appeal without the presence of the third parties. The plaintiff does not want the third parties here, and therefore it was the defendant—who does want them—that ought to have applied to the Court of Appeal under the latter part of the rule for leave to serve them with notice of the appeal. If the defendant should now make such application, the court will be ready to assist him, but as the defendant, for his own purposes, asks for that which is wholly immaterial to the plaintiff, and solely for the benefit of the defendant, he must pay the costs of the adjournment.

COTTON, L.J.—I differ from the Master of the Rolls, except on the point that the third parties ought to be present when this appeal is argued and decided. It is necessary, in order to carry out the intention of the third-party rules, that the third parties should be present when the court decides, if it should so decide, that the defendant is liable to the plaintiff.

The defendant is said to be liable to the plaintiff for a breach of trust; the defendant denies his liability, but says that if he is liable, the third parties have agreed to indemnify him. The third parties having been summoned, an order was made, on the application of the defendant for directions, "that the third parties be at liberty to appear at the trial." What is meant by "at the trial"? It must mean the trial of the question between the plaintiff and the defendant. It is said that Kekewich, J., refused to allow the counsel for the third parties to cross-examine the plaintiff's witnesses. If counsel for the third parties desired to cross-examine the witnesses on the question of indemnity, which was to be tried afterwards between the defendant and the third parties, I think the judge was right in refusing to allow it. But Kekewich, J., seems to have made use of some expressions which might be construed to mean that he should try the whole case over again between the third parties and the defendant. That would defeat the intention of the third-party rules, and I think, therefore, that the learned judge must have been misunderstood, and that what he meant was this, "When the question of the liability of the defendant to the plaintiff is settled, then I must decide the question of the liability of the third parties to the defendant." The third parties had liberty to appear at the trial, and if they desired to cross-examine the plaintiff's witnesses on the question whether the defendant was liable to the plaintiff, they were, in my opinion, entitled to do so, and Kekewich, J., would have been wrong in refusing to allow them to do that. I do not think, however, that the learned judge intended to do that.

Then as to the question of the service of the notice of appeal. The third parties were present at the trial. The rules, however, contain no direction as to the defendant serving the third party with notice of the trial between the plaintiff and the defendant.

It is the duty of the plaintiff, however, to make his action perfect for trial, and it is his duty to serve all persons who ought to be present at the trial. The plaintiff was not successful at the trial, and he has appealed. The judgment at the trial entirely swept away the case of the plaintiff against the defendant, and with it the case of the defendant against the third parties. On the hearing of the appeal (subject to the rule of the court as to hearing only two counsel on each side) the counsel for the third parties must have the same right, to bring forward any point in favour of the defendant as against the plaintiff, as he would have had at the trial. Who is to see that all persons should appear on the hearing of the appeal? It is the duty of the appellant—in this case the plaintiff—to make his appeal perfect as regards parties, and there being no rule to require a respondent to serve a third party with notice of an appeal, I think it is the duty of the appellant to do so.

I doubt whether rule 2 of order 58 refers to the case of third parties at all. The third-party procedure was new in both divisions of the court, and if I am right in thinking that rule 2 does not apply, then in the absence of any rule we must be guided by this principle—that it is the duty of an appellant to bring before the court those who are necessary to make his appeal perfect. But even if rule 2 of order 58 does apply to third parties, still I think that the third party is "directly" affected by the appeal, for the judgment of the court below has destroyed all foundation for the claim of the defendant against him, and the appeal may possibly restore it. The Court of Appeal ought not to decide the question of indemnity, as it has never yet been tried, but it may send it back to the judge below to be tried.

As regards the costs caused by this objection I think they ought to depend on the result of the appeal.

FRY, L.J.—On this appeal the defendant raises the preliminary objection that the appellant—the plaintiff—has not served the third parties with notice of the appeal. Now are the third parties, within rule 2, order 58, persons "directly affected" by the appeal? Two questions arise in this action. First, whether the defendant is liable to the plaintiff; and secondly, if so, whether the defendant has a right over against the third parties for contribution or indemnity. It is only when both these questions are answered in the affirmative that the third parties become liable. The question of the original liability of the defendant to the plaintiff affects the third

parties only through the intervention of the right over; it is only through the intervention of the right over that the first question becomes material to the third parties. Therefore, I think the third parties are only indirectly affected by the appeal. The language of rule 2, order 58, is emphatic; it not only says that the notice of appeal is to be served on all parties directly affected by the appeal, but it adds that it "shall not be necessary to serve parties not so affected"; it also provides that "the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party." I think the proper course was for the plaintiff to serve with notice of the appeal the defendant, who was directly affected by the appeal, and then the defendant, if he wished to preserve his rights over against third parties, should apply to the Court of Appeal for leave to serve them.

The scheme of the rules appears to me to be to make proceedings against third parties independent proceedings in which the defendant is really to be the actor. It is he who serves the third parties, obtains judgment, and gets execution against them.

I am, therefore, of opinion that the preliminary objection fails; but if the defendant desires to have the third parties here, the appeal will stand over, he paying the cost of the adjournment.

At the request of the defendant Uppleby's counsel, the appeal stood over to allow the defendant to serve notice of the appeal on the third parties, and it came on for hearing again on the 18th and 19th of June, 1889.

Hall, Q.C., and *P. Stokes*, for the plaintiff, the appellant.

Warmington, Q.C., and *J. G. Wood*, for the defendant Uppleby.

Desimus Sturges, for the third parties.

The arguments appear sufficiently from the judgments.

The following cases were referred to on behalf of the appellant:—*Macleod* v. *Annesley*, 1 W. R. 250, 16 Beav. 600; *Fry* v. *Tapson*, 33 W. R. 113, 28 Ch. D. 268; *Smithurst* v. *Hastings*, 33 W. R. 496, 30 Ch. D. 490; *Olive* v. *Westermann*, 34 Ch. D. 70, 35 W. R. Dig. 213; *Life Association of Scotland* v. *Siddall*, 9 W. R. 541, 3 De G. F. & J. 58; *Francis* v. *Francis*, 5 De G. M. & G. 108; *Knott* v. *Cottee*, 16 Beav. 77; and *Ex parte Norris*, 17 W. R. 452, L. R. 4 Ch. App. 280.

For the defendant, *Thornton* v. *Stokill*, 1 Jur. N. S. 751, 4 W. R. Ch. Dig. 101; *Mant* v. *Leith*, 15 Beav. 524; and *In re Godfrey*, 23 Ch. D. 483, 31 W. R. Dig. 205, were relied on.

COTTON, L.J.—This is an appeal by the plaintiff from a decision of Kekewich, J., dismissing an action brought against Uppleby, a former trustee of the will of Eliza Salmon, to make him responsible for an improper investment.

There are two questions to be considered. The first is, whether the investment in question was wrongful. The investment was an investment of part of the testatrix's property on a mortgage of freehold estate, and an investment of that kind was authorized by the terms of the trust; so far, therefore, it was in accordance with the terms of the trust, and if the trustee took the ordinary precautions as to the sufficiency of the investment there would be no breach of trust, even though the investment ultimately proved insufficient. The case, therefore, differs from that of an investment not within the terms of the instrument, which is, of itself, necessarily a breach of trust. The only question we have to consider is whether Uppleby took proper care in seeing to the sufficiency of the security.

As regards the rule, which has been much discussed, as to the amount which may be lent on a given security, I cannot do better than read what was said by Lord Watson as to that, in *Learoyd* v. *Whiteley*, 36 W. R. 721, 12 App. Cas., p. 733: "As a general rule, the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply. The courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which the trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept."

That statement recognizes the rule—which has been impeached by Mr. Warmington and Mr. Wood—as to the amount which ought to be advanced, *primâ facie*, on agricultural land and on buildings respectively. In the present case the value of the property was mainly derived from buildings. I do not think the valuation of the property has been successfully impeached. The valuation was £1,750, and the amount advanced on the property by the trustees was £1,300. Now, we must have regard, not only to the value of the property and the amount advanced, but we must also consider the nature of the property. It consisted of small house property occupied by small weekly tenants attracted there by the labour at the docks at Hull. In my opinion it certainly was not a prudent act of the trustee to lend £1,300 on property only valued at £1,750 when much of that value depended on the fact of labourers being employed in that part of Hull and living there. The investment, therefore, in my opinion, was not a proper investment.

The second point raised is new, and no authority is to be found on it. It was contended that, as the plaintiff was cognizant of, and took part in, the sale of the mortgaged property by the new trustees, he could not call on the former trustee to make good any deficiency arising, because he did not give that trustee the opportunity of taking the mortgaged property for himself and paying the trust fund the amount lent on it.

If that be the law, the former trustee is not liable. But there is a fallacy in this argument; it is founded on treating the mortgage as not being part of the trust estate. In my opinion, however, that view is wrong. The money was invested according to the terms of the trust, though without due care, and the mortgage was from the first a part of the trust estate; then the former trustee handed over this investment so made, to the new trustees to be held upon the trusts of the will, but, unless their acceptance of it exonerated the old trustee from his liability for taking an insufficient security, I do not see how he was exonerated from the consequences of his neglect of duty.

The case is entirely distinct from that of an invest-

ment unauthorized by the terms of the trust, which the *cestuis que trustis* must accept or reject, and which could only be rejected when the *cestuis que trustis* ascertained the circumstances under which the investment was made. The realization of the property was merely a carrying out of the authority handed over by the former trustee to the new trustees in respect of this mortgaged property.

It is like a sale of mortgaged property by the mortgagee under a power, without the concurrence of the mortgagor. If the sale is improperly made, it may be impeached, but the mortgagor is bound by it if made with reasonable prudence, and is answerable for what remains due on the mortgage after deducting the proceeds of sale.

In my opinion in this case the former trustee handed over what was really trust property to the new trustees, with this power of sale, and therefore no duty arose in the *cestuis que trustis* to say whether they would accept or reject it, and the former trustee is liable for the deficiency.

Thornton v. *Stokill* was referred to in support of the case of the former trustee. In that case a testator, who had been a trustee, had invested part of the trust funds in buying cottage property, which was entirely outside the scope of his power of investment. The *cestuis que trustis* wanted to take the cottage property at a certain sum and prove against the estate for the residue of the trust funds. Lord Hatherley held that they had a claim to the houses as against general creditors, but that they had no right to set a value on them and then prove for the deficiency. That case has no bearing on the present case.

In my opinion the former trustee remained liable for the deficiency, though no notice was given to him by the *cestuis que trustis* that they would hold him liable.

Again, the plaintiff is not open to the objection raised against him that he directed a sale. He did not, in fact, direct a sale. The trustees referred to him, and he merely said he could not suggest anything better than a sale by auction. He was merely passive. I cannot, therefore, agree with the view taken by Kekewich, J., and there must be a decree against the former trustee for the loss occasioned to the plaintiff by this improper investment.

FRY, L.J.—I have been requested by Bowen, L.J., to deliver judgment before him.

The first question we have to consider is whether the investment was proper? whether it was one which a prudent man would make? I am of opinion that it was improper. A trustee who disregards the well-known rules of court as to the amount which may be lent on mortgage of a property—though they are not hard and fast rules—takes upon himself a considerable amount of risk.

The investment here was in cottage property, and the trustee invested on mortgage of it more than two-thirds of its value, as ascertained by his own valuer. Again, the character of the property was such that it depended for its value on shifting circumstances—*e.g.*, the character of trade in the locality; and the fact that at the time of the mortgage some of the houses were unfinished and unlet strongly corroborates the view that the investment was improvident.

The second question is whether the plaintiff has in any way lost his *primâ facie* right to call on the defendant to make good the loss.

Two arguments were brought forward to show that he had. First, that the plaintiff had become a purchaser of the interest of one of the *cestuis que trustis* with full knowledge of the investment, and, therefore, could not impeach it. The facts hardly support this argument. The plaintiff was a mortgagee before the investment was made, and he only bought the equity of redemption afterwards, and the only information he had even then was that contained in the letter of the 30th of January, 1883, which only told him what the trust funds were then invested in, and which gave him no reason for questioning the propriety of the investment. I think, therefore, there is no reason for holding that, on this ground, the plaintiff is deprived of any right he had.

Secondly, it is urged that the plaintiff was a party to the sale, and that he concurred in the sale of April, 1887. I do not think he did anything of the sort. What took place was this: the solicitor of the new trustees informed the plaintiff's solicitor of their intention to offer the property for sale, and, on the 19th of April, wrote to the plaintiff's solicitor that they would do so "unless you can suggest some other course"; and to this the plaintiff's solicitor replies:—"As we presume there is no prospect of the property in question improving in value, we presume the best course will be to offer it for sale by public auction." There is nothing in that; the plaintiff was not a person who was bound to concur or who was asked to concur in the sale, and what was done merely amounted to a consultation between the solicitors, and did not make the plaintiff in any way a party to the sale. The substratum on which the judgment of the learned judge was based is, therefore, erroneous.

But then it is said that the conduct of the new trustees has released the former trustee from his liability, because, as it is urged, a return—or an offer of return—of the property to the former trustee, who had improperly invested upon it, is a *sine qua non* if it be sought to make him liable for the investment. In my opinion, however, a defaulting trustee has no such right, nor can the right of the *cestuis que trustis* be lost in that way. I think that the liability of the defaulting trustee is to make good the loss sustained by the improper investment. How that is to be made good depends on the circumstances of each particular case.

In some cases justice will be best done by realising the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the full amount and let him take the benefit of the security; but there is no general principle as to a preliminary condition for relief.

In the present case all the new trustees did was this. The former trustee had lent on a mortgage which contained a power of sale. On his retirement he transferred that mortgage to the new trustees, who afterwards exercised the power of sale. How can it be said that they thereby debarred the *cestuis que trustis* from claiming relief against the former trustee? They sold under the power which the former trustee had himself given them by transferring the security to them.

BOWEN, L.J.—I am of the same opinion, and I do not propose to add anything as to the law of the case, because I am of opinion that the question of law decided by Kekewich, J., does not arise at all. I do not see that there is any evidence that the plaintiff directed the sale or did anything more than merely stand by.

I do not, however, differ from anything said as to the law by the Lords Justices, but I am myself clearly of opinion that the question of law does not arise.

Solicitor for the plaintiff, *H. Hocombe.*

Solicitors for the defendant Uppleby, *Hicks & Son*, for *Brown & Son*, Barton-on-Humber.

Solicitors for the new trustees and the beneficiaries, *T. H. Bird*, for *H. C. Lisle*, Nantwich.

From Q. B. Div. Nov. 21.

GLASSCOCK v. BALLS. (a.)

Promissory note—Discharge—Indorsement—Bonâ fide holder for value.

The defendant gave W. a promissory note as security for a debt due by him to W. He subsequently gave W. a collateral security for the same debt, which W. transferred for value. W. subsequently indorsed the promissory note to the plaintiff, who had no notice of the collateral security, to secure a debt due from W. to the plaintiff.

Held, that the note was not discharged, and that the plaintiff was a bonâ fide *holder for value entitled to sue the defendant on the note.*

Appeal from the decision of Lord Coleridge, C.J.

The action was brought upon a promissory note for £239 9s. 9d., made by the defendant on the 11th of October, 1882, in favour of one Ephraim Wayman or order, and indorsed by Wayman to the plaintiff.

It appeared that in May, 1883, the defendant was indebted to Wayman to the extent of £641 11s. 9d., as security for part of which sum Wayman held this promissory note. He, however, required further security, and the defendant, on the 11th of May, executed a mortgage to him of certain property as a security for the whole debt, which by the mortgage deed he also covenanted to pay. A memorandum was made stating that the mortgage was an extra security for the amount of the promissory note.

On the 12th of May, 1883, Wayman transferred by a statutory transfer, this mortgage to a man named Hall for £700, which was then paid to him by Hall.

In 1884 Wayman was indebted to the plaintiff to the extent of £200, and on the 6th of May he indorsed the promissory note to him as security for this debt. Subsequently Wayman paid the plaintiff £60, and the present action was brought to recover the balance of £140.

Lord Coleridge, C.J., gave judgment for the plaintiff, and the defendant appealed.

Tindal Atkinson, for the appellant.—The payment by Hall on the transfer of the mortgage to him, extinguished the note. Therefore, although the plaintiff is a *bonâ fide* holder, the note cannot be sued upon. The indorsement to the plaintiff by Wayman was really a reissue of the note, and could pass no title to sue: *Freakley* v. *Fox*, 9 B. & C. 130; *Bartrum* v. *Caddy*, 9 Ad. & E. 275.

He also cited *Roberts* v. *Eden*, 1 B. & P. 398; *Beck* v. *Robley*, 1 Hy. Bl. 89n; *Thorogood* v. *Clarke*, 2 Stark. 351; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 86 (3).

Horace Browne, for the respondent, was not called upon to argue.

Lord ESHER, M.R.—In this case the plaintiff sues as the indorsee of a promissory note made by the defendant and payable on demand. It is admitted that the plaintiff was a *bonâ fide* indorsee for value without notice of anything that had occurred. At the trial it was said that he must be taken to have had notice, because he was suing on a note which he had taken when it was overdue. The note, however, is not shown to have been overdue. It is not shown that payment of it was ever demanded, and the law is clear that such a note is not to be treated as overdue merely because it is a note to pay on demand and bears date some time back. Under these circumstances, therefore, *primâ facie* the indorsee is entitled to recover against the maker of the note, and in order to escape this *primâ facie* liability the defendant must bring himself within some recognised principle of law which would prevent the plaintiff from suing. No doubt it has been held that where the maker of a note has paid it and it has come back into his hands, and he reissues it, a *bonâ fide* indorsee for value cannot sue on the note so reissued. But that does not rest on any merits on the part of the defendant. It rests entirely on the provisions of the Stamp Acts. The provisions of those Acts were evaded by the reissue of the note. The effect of that reissue was as if it had been issued without a stamp, and, therefore, it was no longer a negotiable instrument and did not pass by indorsement. The defence raised there, therefore, only turned on the Stamp Acts. The principle so laid down would only be applicable if there were a reissue of the note, and there can be no reissue unless the note comes back into the power and control of the maker of the note. It might be sufficient if it came into the hands of the agent or servant of the maker, but it must, in order to be reissued, come into the maker's power or control. If the note is still current, even though it has been paid, there is nothing to prevent a *bonâ fide* indorsee for value from suing upon it. In this case there is nothing which could amount to a plea of payment.

It is said that, although the note had not been paid, it had been extinguished. I cannot understand that suggestion. I think, therefore, that the defendant fails to bring himself within the *ratio decidendi* of *Bartrum* v. *Caddy*, and that, therefore, he is liable to a *bonâ fide* holder for value. I think, therefore, that the Lord Chief Justice was right, and that this appeal must be dismissed.

LINDLEY, L.J.—In this case there seems to me to be, on the facts, no defence, either at law or in equity. It is true that the defendant gave Wayman a collateral security for his debt in May, 1883; but the memorandum that was then made prevented any merger from taking place. That mortgage has never been realized. It certainly was not realized by the transfer to Hall, and therefore, in no sense of the word, has there been any payment of this promissory note. No doubt, as between the defendant and Wayman, the latter could not effectively sue the former upon the note, because, by the transfer to Hall, he had parted with all his interest in the defendant's debt to him. The only capacity in which he could sue on the note would, I think, be in that of trustee for Hall, and he might be restrained from suing in any other capacity. In my opinion, the decision of the Lord Chief Justice is perfectly right, and must be affirmed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *F. & T. Smith & Sons*, for *W. Peed*, Cambridge.

Solicitors for the respondent, *Torr, Janeways, Gribble, & Oddie*, for *Lyon*, Cambridge.

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

From Prob. Div. and Adm. Div. July 10, 1889.

"THE CALLIOPE." (a.)

Ship—Damage—Negligence of wharfowner—Obstruction in bed of river leading to wharf.

It is the duty of wharfowners to keep the frontage of their wharf, over which vessels must necessarily pass in order to lie at their wharf, in a reasonably safe condition, or to warn vessels using the wharf of its danger.

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

Appeal from the decision of Butt, J.

The ship *Calliope*, which was the property of the plaintiffs, was chartered by the Decido Iron Ore Co. to load a cargo of iron ore and take it to Newport, Mon., and deliver it when and as directed by the consignees or their agents. By the bill of lading, which incorporated all the conditions of the charter-party, the cargo was to be delivered to the Decido Iron Ore Co. or their assigns. They indorsed the bill to the defendants, who were the owners of a wharf on the River Usk at Newport and the leaseholders of the part of the river fronting the wharf.

On the arrival of *The Calliope* at Newport on the 29th of May, 1886, the defendants ordered her to their wharf to discharge her cargo. The captain was, however, informed that there would not be sufficient water to reach the wharf, and delayed till the 31st of May, when he was directed by a man named Griffith at the wharf that he could bring the vessel in with safety. He then endeavoured to bring *The Calliope* alongside, but she grounded on a ridge of mud, which had been raised between the two berths at the wharf by the action of vessels lying in the berths, and sustained serious damage, for which this action was brought.

Butt, J., gave judgment for the defendants, and the plaintiffs appealed.

Barnes, Q.C., and *Robson*, for the plaintiffs.—The defendants were liable as wharfingers to have the approaches to their wharf in a safe condition: *The Moorcock*, 37 W. R. 439, 14 P. D. 64.

Finlay, Q.C., and *Joseph Walton*, for the defendants.—*The Moorcock* only referred to the actual place in which a ship lies, and not to the approaches to it.

LORD ESHER, M.R.—In this case the action is an action of negligence, and not merely one for misrepresentation by a person for whom the defendants are responsible. It is necessary, therefore, for the plaintiffs to establish a duty on the part of the defendants and a breach of that duty. The defendants, who were the assignees of the bill of lading, ordered *The Calliope* to go to their wharf. If they had ordered her to go to a place to which she could not get they would have been liable to pay demurrage, but they ordered her to go to their wharf. They were leaseholders of the bed of the river in front of the wharf. The frontage of a wharf which is necessary to a wharf consists of that part of the river through which vessels must necessarily come to the wharf, and of the space in which they lie. In this case there were two berths at the wharf, one close against the side and another outside it. The part between those two berths was necessarily part of the frontage of the wharf. The question then arises as to what is the duty of the owner of the wharf with regard to such frontage. In the case of *The Moorcock* we held that a wharfinger must take care that the front of his wharf is reasonably safe, or that he must warn persons using it that it is unsafe. This case is stronger than *The Moorcock*, because in this case the ship was bound by contract to go to the defendants' wharf. In my opinion the duty of the wharfinger extends, not only to the place close to the wharf, but to places over which the vessel must necessarily go to get into the berth at the wharf, and for these reasons I think that the defendants are liable for the damage caused to *The Calliope*, and that the appeal must be allowed.

COTTON, L.J.—I am of the same opinion. I agree with the Master of the Rolls that the part of the bed of the river on which *The Calliope* grounded must be treated as a portion of the frontage of the wharf, and, therefore, that the defendants had a duty towards people using their wharf to keep it in a safe condition, or to warn persons using it of their danger. The accident happened in consequence of a breach of this duty, and the defendants are therefore liable.

LINDLEY, L.J.—I entirely agree. I think Butt, J., failed to attribute sufficient weight to the fact that the vessel grounded on part of the bed of the river which was leased by the defendants. That part of the bed was liable, as the defendants knew, to become uneven from the action of vessels lying in the berths on either side of it, and it was their duty to remove the inequality thus caused.

Appeal allowed.

Solicitors for the appellants, *Downing, Holman, & Co.*

Solicitors for the respondents, *Pritchard & Son.*

High Court of Justice.

Chan. Div. Kay, J. } May 3; June 5, 1889.

In re THURSO NEW GAS CO. (*a.*)

Company—Voluntary winding up—Right to damages established against company before winding up—Right of creditor to assert the same as against other creditors—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 133, 163.

Section 133 *of the Companies Act*, 1862, *which provides that, on the voluntary winding up of a company, its property shall be applied in satisfaction of its liabilities* pari passu, *has the effect of disentitling a person who has established a right to damages against the company, but has not enforced it by execution, before the date of the winding up, from obtaining priority over the creditors of the company, although, under section* 163 *of the Act, proceedings to recover such damages against the estate and effects of the company would not be void, that section applying only to the case of a company being wound up by the court, or subject to its supervision.*

Adjourned summons.

The company had its registered office in England, but carried on its business at Thurso, in Scotland. In June, 1887, the widow and children of a man who had been killed in the company's employment brought an action in Scotland against the company for damages. In August the company passed a resolution for a voluntary winding up and appointed liquidators. In October the plaintiffs took proceedings in Scotland, by letters of inhibition, to restrain the company from disposing of their real estate to the prejudice of their claim, whereupon the liquidators gave them notice of the winding-up resolution, but the action was proceeded with, and a verdict was given for £850 damages, which was enforced by judgment in January, 1888. In April 1888, letters of arrestment, which had the effect of a writ of attachment, were issued against the company's personal estate in Scotland to prevent the debtors of the company from paying their debts to the liquidators. In June a petition was presented for winding up the company, on which an order was made continuing the winding up under the supervision of the court. The plaintiffs' costs in their action had been ascertained at £138 2s. 5d. There were two summonses before the court—one by the plaintiffs in the Scotch action for a declaration that they had a paramount charge on the estate and debts of the company both for the £850 and the £138 2s. 5d.; the other by the liquidators to restrain the plaintiffs from enforcing the inhibition and arrest

(*a.*) Reported by H. F. AMBRIDGE, Esq., Barrister-at-Law.

ment, and from preventing the liquidators from getting in the property and debts of the company in Scotland.

Renshaw, Q.C., and *R. F. Norton*, for the liquidators.—Although a voluntary winding up is not included in section 163 of the Companies Act, 1862, section 133 has the effect of bringing a voluntary winding up within the principle of section 163. The proceedings on the judgment in the Scotch action are therefore void.

They referred to *Thomas* v. *Patent Lionite Co.*, 29 W. R. 596, 17 Ch. D. 250; Buckley, 5th ed., p. 374.

Martin, Q.C., and *Birrell*, for the plaintiffs in the Scotch action.—Section 163 does not apply; therefore, a creditor may enforce his rights against the company at any time before a winding-up or supervision order. The liquidators should have applied before we obtained the letters of inhibition and arrestment, and we ought now to be allowed to proceed: *Parry's case*, 12 W. R. 139, 4 De G. J. & S. 63; *In re Exhall Mining Co.*, 12 W. R. 727, 4 De G. J. & S. 377; *In re London Cotton Co.*, 14 W. R. 575, L. R. 2 Eq. 53; *Budow* v. *Great Britain Society*, 29 W. R. 585, 17 Ch. D. 600. [Kay, J., referred to *In re Hull Forge Co.*, 15 W. R. 474, and *In re Sablonière Hotel Co.*, 15 W. R. 85, L. R. 3 Eq. 74.] At any rate, our costs should be paid in full out of the assets: *Bailey and Leetham's case*, 17 W. R. 1079, L. R. 8 Eq. 94; *Ex parte Smith*, L. R. 3 Ch. 128; *In re Dominion and Canada Plumbago Co.*, 32 W. R. 425, 27 Ch. D. 33.

Kay, J.—It seems to me that the only result the court can come to upon the Act is simple and clear. [His lordship stated the facts, and continued:—] I have now before me two summonses, one was taken out on the 21st of November, 1888, by the plaintiffs in the Scotch action, asking, in effect, for leave to proceed with the action, the necessity for the application arising from the provisions of section 163 of the Companies Act, 1862, which says that "where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."

Now, the commencement of the winding up of this company was, as I have said, on the 22nd of August, 1887, therefore the letters of inhibition of the 17th of October, 1887, and the letters of arrestment of the 20th of April, 1888, if they are within the words of the section, are "void to all intents." But, notwithstanding that section, it has been held that, under section 87 the court has power to give leave to continue proceedings which were pending at the commencement of the winding up, and that is the reason why this summons was taken out by the plaintiffs in the action.

Is it within the scheme of the Act that the plaintiffs should be allowed to continue their proceedings? Of course the object of the plaintiffs in making this application is to get a priority over every other creditor of the company for their judgment debt and costs. Now, the Act says, in so many words in section 133, "The following consequences shall ensue upon the voluntary winding up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities *pari passu*." If, therefore, the court were, in the exercise of its discretion, simply to permit this action to proceed and execution to be levied, it would be giving to these creditors, the plaintiffs, a priority over other creditors which section 133 says expressly shall not be given. It appears that no proceeding in the nature of execution was taken, no judgment was obtained, and no verdict was obtained against this company by the plaintiffs, until after the actual commencement of the winding up, therefore, *primâ facie*, the scheme of the Act makes it improper that these creditors should have priority. No doubt there are many circumstances which would induce the court not to exercise its discretion by interfering with proceedings continued after the commencement of a winding up, for instance, where there has been great delay or negligence on the part of the company in allowing the proceedings to go on, the court might say it was unreasonable to stay the proceedings, and that it was too late to interfere, or where, in an action for debt, execution had been actually obtained, the court would not, in the exercise of its discretion, interfere. This, however, is not an action for debt, but for damages.

The question whether any damages were payable, and, if so, to what amount, was eminently a question to be determined by a court. Therefore it is quite proper that the action should go on; and if an application were made by the liquidators to stay the action the court would say, "No; it is proper that the action should be tried." But the question whether the court would allow the creditors, the plaintiffs in the action, priority for the fruits of their judgment would be another question. It seems to me that there is no reason why I should stay the action itself, which was a most proper and convenient mode of ascertaining whether damages should be obtained, and, if so, what. This is not a case in which I can say that any creditor of the company has been guilty of negligence in not applying to the court to stay the proceedings. The supervision order, which was made on the 16th of June, 1888, made all proceedings subsequently taken absolutely void, subject only to the power of the court, under section 87, to allow the proceedings to go on. There does not appear to me to be any sufficient reason to induce me to give the plaintiffs priority over other creditors in the face of section 133, which says that, as a consequence of a voluntary winding up, the property of the company shall be applied in payment of its liabilities *pari passu*.

Accordingly, I am of opinion that this is a case in which, in the exercise of the discretion given to the court, I ought not to allow these creditors to obtain priority over the other creditors, or to disturb the imperative rule laid down by section 133.

Then it is said that, whatever the case may be as to the damages, the plaintiffs are entitled to have their costs of the action paid in full. All the cases upon this point are referred to by Mr. Buckley in his work on the Companies Acts, 5th ed., p. 229, where they are summed up as follows:—"The intention of the Act, where there is a resolution passed to wind up voluntarily, is (section 133) that all the creditors shall be paid *pari passu*, and the court will therefore interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. And if a creditor commence or proceed with an action for his debt after the winding up commences, he can at most only add his costs to his debt." Then the authorities are stated in a note. That appears to me to be the rule I must follow in this case—namely, that the plaintiffs must add the costs of the action to their debt.

One of the authorities cited to me on behalf of the plaintiffs was *Parry's case*, in which not only was the action begun before the winding up, but judgment was obtained in the action, execution was issued, and the sheriff went into possession and was about to sell, all before the presentation of the petition to wind up; and on those grounds it was held that the execution creditor ought not to be deprived of the fruits of his execution, because, as it was said, the court, in the exercise of its discretion, would take the state of circumstances into consideration.

In *Smith, Fleming, & Co.'s case*, 15 W. R. 78, L. R. 1 Ch. 538, Turner, L.J., said:—"The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and

amongst the creditors *pari passu;* and this discretion of the court ought, therefore, as I think, to be exercised not for the benefit of any particular creditor or creditors, but for the benefit of the general body of creditors interested under the Act." The case which I think is nearest to the present is *In re Sablonière Hotel Co.*, before Stuart, V.C., where a resolution was passed for a voluntary winding up, and was confirmed on the 28th of August, 1865, and on the same day a creditor commenced an action against the company to recover his debt, and obtained judgment. An application was made to restrain him from proceeding under that judgment. Stuart, V.C., said the "question is whether, having regard to the fact that this is only a voluntary winding up, the court will, in its discretion, interfere. By section 133 of the Companies Act, 1862, the Legislature declares that the effect of a resolution to wind up a company voluntarily shall be that all the creditors shall be paid *pari passu.* Therefore, after the resolution is passed and confirmed, each of the creditors is entitled to a proportionate share of the assets. But to allow one creditor to seize the whole, or an undue share, of the assets of the company for his own benefit, would be in effect to render nugatory the provisions of the statute. The execution must, therefore, be restrained." With every word of that I entirely agree; and that statement of the law has never been dissented from. It appears to me to express precisely what I understand to be the meaning of the statute; it confirms the opinion I form on the case now before me, and it is an authority which I very readily follow.

Then, with regard to the other summons—the summons by the liquidators to restrain the plaintiffs from proceeding to enforce the inhibition and arrestment, and from preventing them, the liquidators, from getting in the property and debts of the company in Scotland—that comes within section 133, and the liquidators are entitled to an injunction unless the plaintiffs remove the obstacles they have imposed to the winding up of the company. I think the proper course is to make one order on both summonses, that, so far as the orders and proceedings in the Scotch action do interfere with the winding up, the plaintiffs shall do all in their power to enable the liquidators to get in the assets of the company in Scotland.

With regard to the costs of these applications, the costs of the plaintiffs are to be added to their debt, and the liquidators will take their costs out of the assets. The plaintiffs will have liberty to prove in the winding up for their debt and costs. The liquidators will, of course, have the carriage of the order.

Solicitors, *Keeping & Gloag; Ridsdale & Son.*

Chan. Div.)
Kekewich, J.) April 12, 15, 1889.

ABERGAVENNY IMPROVEMENT COMMISSIONERS *v.* STRAKER. (*a.*)

Market—Tolls—Penalties—Private Act—Disturbance—Ancient market—Modern market.

The Abergavenny Improvement Commissioners were by certain private Acts (incorporating the Markets and Fairs Clauses Act, 1847) authorized to set up a market and to take tolls for animals sold there, tolls and penalties being imposed on all persons selling such animals within the district, except in their own dwelling-houses or shops or premises in their own occupation.

The defendant, an auctioneer, held sales of such animals in a field in his own occupation.

Held, that this did not constitute a disturbance of the market, though it would have been otherwise but for the special Acts, as the defendant's conduct would have constituted a disturbance of an ancient market.

Trial of action.

By the Abergavenny Improvement Act, 1854 (17 & 18 Vict. c. xlix.), which incorporated the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), except the 30th and 50th sections thereof, the Abergavenny Improvement Commissioners were empowered to hold markets and take tolls as therein mentioned.

By the Act 10 & 11 Vict. c. 14, after conferring upon the undertakers power to open markets, it was enacted that "After the market-place or place for public fairs is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-house or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.

By the Abergavenny Improvement Act, 1871, which incorporated the Act of 1854, the commissioners were (by section 46) empowered to demand and take tolls in respect of the several articles mentioned in the schedule thereto. By the schedule tolls were authorized in respect of horses, cattle, sheep, and pigs sold in or brought for sale to the market therein mentioned.

By section 47 it was enacted as follows:—"If any person shall sell or expose for sale in any place within the town, except in or upon any premises in the occupation of such person, and in respect of which he is or is liable to be rated under the authority of the Improvement Acts, . . . in or upon any premises in the occupation of any other person, any articles in respect of which tolls, rents, or charges are by this Act authorized to be taken in any market, the commissioners may levy and take the same tolls, rents, and charges on all such articles as they might have levied and taken if the same had been sold or exposed for sale in such market."

By section 48 it was enacted that if any person liable to the payment of any toll did not pay the same when demanded, the commissioners might seize and detain all or any of the animals or articles in respect of which such toll was payable, and if the toll and charges were not paid within four days the commissioners might sell the articles seized.

By section 50 it was enacted as follows:—"The commissioners from time to time may grant licences to any person to use during fairs any public grounds, or any private grounds which such person may be authorized to use, other than premises in the occupation of such person and in respect of which he is liable to be rated under the authority of the Improvement Act, for any of the purposes following:—(1) for exhibitions or shows; (2) for public sales, whether by auction or otherwise."

The commissioners had held a market in Abergavenny on Tuesday in every week for the sale of horses, cattle, sheep, and pigs, and had constructed a proper place for holding the market.

In July, 1886, the defendant, James Straker, an auctioneer, in a field of his own at Abergavenny, constructed a market which he called "Mr. James Straker's Smithfield," or "New Smithfield," where sales of animals took place without any tolls being paid to the commissioners. The commissioners attempted to levy tolls in respect of these animals, but found it impossible to do so without a breach of the peace.

The commissioners therefore brought this action, claiming a declaration that "New Smithfield" was a disturbance of their market and an infringement on their rights. They also claimed an injunction and damages.

By his defence the defendant stated that he was rated

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

in respect of his business and premises, and was therefore within the exception mentioned in the Abergavenny Improvement Act, 1871, s. 47, and alleged that no sales had taken place in his field except through his intervention. He further counter-claimed an injunction restraining the commissioners from demanding tolls or stating to his customers that they would be liable for tolls and penalties if they took stock to his field.

The commissioners had, on the 10th of September, 1886, laid an information and complaint before the justices against Straker, alleging that he had on another piece of land unlawfully sold sheep in respect of which tolls were by the Acts authorized to be taken in their market. The justices had dismissed the information and complaint; and on appeal to a divisional court by a special case the determination of the justices had, on the 23rd of March, 1887, been affirmed.

Ambrose, Q.C., Levett, and *R. C. Glen,* for the plaintiffs.—A market is in the nature of a franchise, and the right is not cut down by a regulating Act: *Fearon* v. *Mitchell,* L. R. 7 Q. B. 690, 21 W. R. Dig. 143. Here the Act has said that sheep and cattle may not be sold except in a man's own shop; and a man may not open a place where, whether he intends it or not, people can deal with one another, as that is a market: *Goldsmid* v. *Great Eastern Railway Co.,* 32 W. R. 341, 25 Ch. D. 511: *Elwes* v. *Payne,* 27 W. R. 704, *Ibid.* Dig. 248, 12 Ch. D. 468. An injunction may lie even if the case does not come under the clause as to penalties.

Rigby, Q.C., Finlay, Q.C., and *P. Baylis,* for the defendant.—The case depends on statute: *Mayor of Manchester* v. *Lyons,* 22 Ch. D. 287, 31 W. R. Dig. 119. A common law right is not even alleged. The defendant's liability to tolls and penalties would not justify an action against him for disturbance. And he has been held by the Divisional Court not to be liable to tolls and penalties.

Ambrose, Q.C., in reply, referred to *Mayor of Lichfield* v. *Simpson,* 8 Q. B. 65; *Couch* v. *Steel,* 2 W. R. 170, 3 E. & B. 402.

Kekewich, J.—If this were the case of an ancient market, or of a modern market unrestricted by statutory provisions, I should certainly hold that the defendant had been guilty of the offence of disturbing the market, and on that ground was liable to an injunction. There are several passages in the judgments of the Court of Appeal in the case of *Goldsmid* v. *Great Eastern Railway Co.* which go that length. *Elwes* v. *Payne* goes to show that an auctioneer carrying on his business may, under certain circumstances, be doing that which constitutes a disturbance of a market. As against that it is said that this is not a modern market, but an ancient market. But it has been held more than once, particularly in *Mayor of Manchester* v. *Lyons,* that where you have the old franchise strengthened by statutory provision the privileges of the ancient franchise are gone, and you must look to the statutory provisions only; and, therefore, I regard this as for all purposes a modern market. The first point made by the defendant is that there is a remedy given to the plaintiffs under their Act, or in more than one of the Acts on the subject, and that having that one remedy pointed out by statute they have no other, and are not entitled to maintain an action for disturbing the market. To my mind, it is a serious question whether the rule stated in *Wolverhampton New Waterworks Co.* v. *Hawksford,* 7 W. R. 464, and followed in other cases of the same class, would be applicable here, where there is no remedy given against disturbing the market, but where, if there is any remedy at all, it is only for tolls, or for penalties in lieu of tolls. I do not propose to say any more on that question, which would require a good deal of consideration if it had to be decided in this case, because it seems to me that I ought to deal with the case on another ground, and that a short and simple one.

Section 47 of the Act of 1871, which has been relied on for the defendant, must be construed by the light of the 50th section of the same statute. Those two sections, in conjunction with section 13 of the general Act, came before a Divisional Court, consisting of Mathew, J., and Cave, J., on a claim for penalties by these very Improvement Commissioners against this defendant Straker; and the substance of their judgment is that Straker, doing then what he is doing now, carrying on his business as an auctioneer, though not at that time in the same place, but in another place in the same way, was not liable to tolls or penalties under the Act. The question before them was whether he was liable to a penalty, and, perhaps unfortunately, as it was a claim for penalty, the matter could not be taken to the Court of Appeal. But both judges in giving judgment relied upon the exemption from penalty depending upon the exemption from toll. Both the learned judges gave judgment to that effect.

Now, if the plaintiffs are right in this action, being an action for disturbance of the market, the defendant is not liable either to toll or to a penalty for carrying on his business in this place called "New Smithfield"; the two must stand or fall together according to the judgment of the Divisional Court; and yet the very thing which the Act does not prohibit is to be made the subject of an action for the disturbance of the plaintiffs' market. It seems to me that it would be an absurd conclusion to say that this defendant is specially exempt from both tolls and penalties in order that he might be stopped altogether by an action. I could not construe the statute in that way without stultifying myself in any judicial decision on the statute; and accepting, as I, of course, do, without even inquiring whether it is right or wrong, the decision of the Divisional Court, I think I am bound to decide in favour of the defendant in this case.

Then the defendant has a counter-claim, which is to restrain an interference with his business, which I hold to be a legitimate business, and one that therefore ought not to be interfered with. It by no means follows that, because it is an interference which would justify an injunction, it would also justify damages being given. I do not think damages have been proved here. Certainly they are not capable of being assessed, because, although two of the witnesses have said that they have avoided going to the defendant's New Smithfield because they did not wish to be mixed up in law, still, it has not been brought down to a question of pounds, shillings, and pence; and it would be impossible to say that any particular amount of damage has been suffered. But I have it in evidence that these plaintiffs have endeavoured to divert persons from going to the defendant's New Smithfield by insisting upon their right to tolls, and, in fact, have thus prevented him from carrying on what I hold to be his lawful occupation. What I propose, therefore, to do, is to grant an injunction to prevent the plaintiffs, by their agents and so forth, from interfering with the conduct by the defendant of his business as an auctioneer on the premises mentioned; and, having expressed my opinion as to what is an interference, the plaintiffs will continue to do what they have been doing at their own risk. The defendant, having succeeded both in the action and on the counter-claim, must have all his costs.

Solicitors for the plaintiffs, *J. T. & G. F. Marshall,* for *Gabb & Walford,* Abergavenny.

Solicitors for the defendant, *Crowders & Vizard,* for *Corner & Corner,* Hereford.

Q. B. Div. (Huddleston, B., and Mathew, J.) Oct. 28.

THORNTON *v.* CLEGG AND OTHERS (JUSTICES). (*a.*)

Licensed house—Neglect of occupier to apply for renewal of licence—Refusal to transfer—Jurisdiction of quarter sessions on appeal—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 75, *schedule* 2.

A licensee, convicted of an offence under the Licensing Acts, declined to quit until the last day of the adjournment of the general annual licensing sessions. J., a new tenant, obtained a temporary licence, and applied at the next special sessions for a transfer of the former licence under section 14 *of the Licensing Act*, 1828, *on the ground that the former holder had "wilfully omitted or neglected to apply" for a renewal at the general licensing sessions. The licensing justices refused the application, and, on appeal, the justices at quarter sessions held that they had no jurisdiction to hear the appeal, on the ground that the application was one for a new licence and not for a transfer, and that the powers of appeals in that respect were repealed by the Licensing Act*, 1872, *s.* 75, *schedule* 2.

Held, that the application was one for the transfer of a licence, as contemplated by sections 4 *and* 14 *of* 9 *Geo.* 4, *c.* 61, *and that the justices had jurisdiction, as it came within the exception contained in the Act of* 1872, *s.* 75, *schedule* 2.

Appeal from the justices of the West Riding of Yorkshire, sitting at quarter sessions, dismissing an appeal from the licensing justices in special session, refusing an application for a licence.

A licensee for 1887-8, being convicted of an offence during that period, was ordered by the owner to quit the licensed premises, but refused to do so until the day of the last adjournment of the general annual licensing sessions. The landlord subsequently agreed with Thornton, the present appellant, that he, having obtained a temporary licence up to October 10, should become the tenant, and Thornton applied, under section 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61), to the special sessions held on that day for the transfer of the licence, on the ground that the occupier had "wilfully omitted or neglected to apply" for a renewal of the licence at the general quarter sessions.

The licensing justices refused the application.

Upon appeal to the quarter sessions the justices held that they had no jurisdiction to entertain the appeal, on the ground that the application was not properly one for a transfer, but for a new licence, and that for such, the powers of appeal given by sections 27, 28, and 29 of the Licensing Act, 1828, were repealed by schedule 2 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

Thornton appealed.

J. Paterson, for the respondents, the justices, took a preliminary objection.—The justices have not heard the merits of this case, but dismissed the application on the preliminary ground that they had no jurisdiction to entertain the appeal. Assuming that the court held that there was jurisdiction in the justices, there can be no order on this motion to compel them to hear this application, and without such order it could only have been heard by the justices at the last quarter sessions as being the next after the special licensing sessions. The court will not hear cases stated merely for the consideration of points of law for the benefit of the justices' guidance generally: *Reg.* v. *Sutton Coldfields Overseers*, 22 W. R. 324, L. R. 9 Q. B. 153.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

The COURT overruled the objection as immaterial to the present motion.

R. S. Wright and *Asquith*, for the appellant.—Sections 27, 28, and 29 of the Act of 1828 are repealed in the schedule to the Act of 1872 only "except in so far as the three last-mentioned sections relate to the renewal of licences, or to the transfer of licences under sections 4 and 14 of the same Act." By section 74 of the Act of 1872 the interpretation of "the transfer of a licence" is stated to mean a transfer made in special sessions in exercise of the power granted to justices by section 4 of the 9 Geo. 4, c. 61." That section refers to section 14 of the same Act for the provisions under which transfers can be applied for. This is exactly a case contemplated by section 14—namely, where "an occupier of any licensed house, being about to quit the same, shall have wilfully omitted, or shall have neglected, to apply at the general annual licensing sessions . . . for a licence to continue to sell exciseable liquors," power is given to the justices at the special sessions to grant the licence so neglected to have been applied for. The marginal note refers to these sessions as "special sessions for transferring licences," and the plain meaning of both sections applies to such transfers. It is immaterial that the licence has in fact expired before the application is made; the justices in special sessions have jurisdiction to treat it as for a transfer: *Reg.* v. *Justices of Liverpool*, 32 W. R. 20, 11 Q. B. D. 638.

J. Paterson and *C. S. Hunter*, for the respondent justices.—The appellant applied to the special sessions for what is really a renewal of the former licence, though called a transfer. But the licence had already expired. He could only apply for a new licence. Such licence did not come under section 4 of the Act of 1828 at all, and section 14 is confined to applicants coming under the provisions of section 4, so that the appellant cannot claim the benefit of appeal given under section 28, &c., in reference to cases under section 14, and so far unrepealed by the schedule of the Act of 1872. If the application is held to be on the subject of the transfer of a licence, it is not such a transfer as is included with section 4 of the Act of 1828. The former licensee never intended to apply for a renewal. The owner should have applied for a renewal under 37 Vict. c. 49, s. 15, on account of the conviction of the occupier for a misdemeanour: *Reg.* v. *Yorkshire West Riding Justices*, 11 Q. B. D. 417, 31 W. R. Dig. 109.

HUDDLESTON, B.—I think the order of the justices in this case, dismissing the appeal to them on the ground of their lack of jurisdiction to entertain it, must be quashed. I think they had jurisdiction. The question depends upon the effect of the repeal in schedule 2 of the Licensing Act of 1872. Powers of appeal to the quarter sessions in respect, among other matters, of the transfer of, or refusal to transfer, licences were given by sections 28, 29, and 30 of the Act of 1828. These sections are stated to be repealed "except in so far as they relate to the renewal or transfer of licences under sections 4 and 14 of the Act of 1828." Was the present application one coming within those sections? I think it was the very case contemplated by section 14 of the Act of 1828. The holder of the licence misconducted himself, and put the landlord in peril in regard to the further licensing of the premises. He refused to quit until it was too late for the landlord to apply for a renewal of the licence. The landlord secures another tenant for the premises, who, at the earliest opportunity, applies for the renewal of the licence which the late licensee had wilfully omitted or neglected to do. That is an application for a transfer, and seems to come exactly within the circumstances contemplated by the framers of section 14, and for which a remedy was made possible.

MATHEW, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellant, *Pitman & Sons*, for *Chambers & Son*, Sheffield.

Solicitors for the respondents, *Peacock & Goddard*, for *Vickers, Son, & Brown*, Sheffield.

Court of Appeal.

From Chan. Div. Nov. 27.

ALEXANDER v. SIMPSON. (a.)

Company—Special resolution—Extraordinary general meeting—Validity of notice—Companies Act, 1862, s. 51.

The construction of a notice convening an extraordinary general meeting of shareholders is not a technical matter. It is of the greatest importance that such notices should be perfectly clear, and bear the sense in which the business men to whom they are addressed would reasonably understand them.

The articles of association of a company provided that seven days' notice in writing, specifying the place, day, and hour of meeting, and, in the case of special business, the general nature of such business, should be given to the members before any general meeting. On the 3rd of July, 1889, *notice was sent to the shareholders that an extraordinary general meeting would be held on the 12th of July at a given hour and day, for the purpose of passing special resolutions for the voluntary liquidation and reconstruction of the company, and adding that, "should such resolutions be duly passed, the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company which will be held on the 29th of July*, 1889, *at the same time and place." The first meeting having been held and the resolutions duly passed, a financial newspaper, containing a full report of the meeting (the report being specially marked to call attention to it), was, on the 15th of July, sent by post to every shareholder.*

Held (affirming the judgment of Chitty, J.), *that the notice ought to be construed in the sense in which business men in the position of the shareholders to whom it was addressed would, as reasonable men, understand it at the time they received it; that such men would understand from the notice in question that the second meeting would only be held in the event of the proposed resolutions being passed at the first meeting; that the notice was therefore a notice conditional upon an uncertain future event, and that such a notice was not sufficient; that the subsequent sending of the newspapers did not cure the defect or make a good notice; and the resolutions were therefore invalid, and the injunction ought to be granted.*

Judgment of Chitty, J., *affirmed.*

Appeal from Chitty, J.

This was an appeal by the defendants from an order of Chitty, J., made on a motion for an injunction, restraining them from carrying out the voluntary liquidation and reconstruction of a company in pursuance of special resolutions passed at an extraordinary general meeting of the shareholders. The company was called the Lisbon-Berlyn Gold Fields (Limited).

On the 3rd of July, 1889, a notice was sent to the shareholders of an extraordinary general meeting to be held on the 12th of July, for the purpose of passing resolutions for the voluntary liquidation and reconstruction of the company. The notice went on to state that, should the resolutions be duly passed, they would be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company to be held on the 29th of July, 1889, at the same time and place. The first meeting was duly held, and the resolutions passed. The company, then, on the 15th of July sent to every shareholder by post a copy of a newspaper, containing a full report of the meeting, the recipient's attention being called to the report by a special mark placed against it.

The plaintiff, one of the shareholders, moved for an *interim* injunction to restrain the directors and voluntary liquidator from carrying the resolutions into effect, on the ground that the notice was invalid as to the second meeting.

Chitty, J., held that the fair meaning of the notice was that the second meeting would be held if the resolutions were passed at the first meeting; that that was a conditional notice, and that a conditional notice was not a good notice; that the subsequent sending of the newspapers to the shareholders did not cure the defect, not being a notice emanating from the company's office. He accordingly held that there was no good notice of the second meeting, and that the resolutions were consequently invalid, and granted the injunction.

The defendants appealed.

Rigby, Q.C., and *J. T. Prior*, for the appellants.—No objection was made at the time, or for some time afterwards. The new company has been formed, and the shares have gone from hand to hand, so that it would be extremely inconvenient and inequitable now to upset the whole transaction on a technical point. Besides, the notice, according to its true construction, is sufficient in itself. The true construction is the literal one—that the meeting would be held on such a day, and the words "should such resolutions be duly passed" were only intended as notice of the business to be dealt with at the second meeting when it took place. Even if that were not so, the second notice by itself would be sufficient.

Romer, Q.C., and *Bramwell Davies*, for the respondent, were not called on.

BOWEN, L.J.—It is impossible for us to give effect to this appeal, which, in my opinion, must be dismissed, with the usual consequences. The order appealed against is an order of Chitty, J., granting an injunction at the instance of the plaintiff suing on behalf of himself and other members of the company, which is the Lisbon-Berlyn Gold Fields (Limited), to restrain the defendants (who are the managing director and secretary and two of his colleagues) from carrying into effect, or giving any further effect to, two resolutions passed at two meetings of the shareholders held on the 12th and 29th days of July, 1889. The application for an injunction is based on the supposition that one at all events of these two meetings was not properly convened within the provisions of the company's articles of association. The meetings in question were meetings which were governed generally by the 51st section of the Companies Act, 1862, but it is not necessary for us to discuss that, because the real point in this case is whether the articles of association, and in particular the 52nd article, have been complied with so far as regards the summoning of these two meetings. No objection has been taken to the validity of the proceedings at the first meeting. We have, therefore, to consider whether the meeting of the 29th of July, which is the second of the extraordinary general meetings, and which was proposed to be held to satisfy the resolutions passed at the first meeting, was in fact properly convened by the notice which is before us. The 52nd article of association provides that seven days' notice in writing, specifying the place, the day, and the hour of meeting, and, in

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

case of special business, the general nature of such business shall be given to the members before every general meeting." The question, therefore, which we have to decide is a question of construction. We have to construe the notice that was issued on the 3rd of July, and which is a compound notice, the earlier portion of which is directed to notice of the first of the two meetings, while the later portion deals with the meeting of the 29th of July, the validity of which is now in question. It is a question of construction, and Mr. Rigby has asked us to put what may be called a benevolent construction upon this notice, so as to give effect to transactions which were honestly and *bonâ fide* carried through at this second meeting, and which it would be a pity, and perhaps injurious to the company, to disturb.

It seems to me it is impossible for us to adopt the view that a benevolent construction ought to be put on commercial notices. What we have to consider is, not what in the result is to be the construction, but what was the meaning which persons of the character of those to whom this notice was addressed as reasonable men would attach to it at the time they received it. It is hardly necessary to dilate upon the difficulty in which we should be placed if we were to consider that a document was capable of two constructions—one being the proper construction to be placed on it at the moment it is received, and another being a subsequent construction of a more benevolent character to be placed upon it, in the event, by a court of law anxious not to disturb matters that have already passed. The test is, what is the fair business-like construction which business men in the position of shareholders would place on this document when they received it? The paragraph is as follows:—"Should such resolutions be duly passed" (that is, the resolutions which it was proposed to bring before the first extraordinary general meeting), "the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday, the 29th of July, 1889, at the same time and place." If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held in the event of the passing of the resolution at the former meeting, it is obvious that it would not be a good notice, because it would leave the shareholders in ignorance whether the second general meeting was to be held or not. They would only know that it would be held in a particular contingency, but they would not know whether that contingency would occur or not. That uncertainty could not be cured by subsequently acquiring information from the sources open to them that the resolutions had in fact been passed. The point is not what the notice in time became when it was perhaps too late for it to be valid under the articles, but what it was at the time when it was received by the shareholders, and while it was still in time to give proper notice.

Mr. Rigby has argued that this paragraph is capable of another construction, which is this—that an extraordinary general meeting would at all events be held, but that the words "should such resolutions be duly passed" are words which only applied to what was to be done at the subsequent meeting of the company when it took place. Of those two opposite constructions, which is the plain and business-like one? Is this really a notice that an extraordinary general meeting would be held, whether it was necessary to hold it or not?—because that is what Mr. Rigby's construction comes to—or is it to be read in the more obvious way, that if the resolutions which required a subsequent extraordinary general meeting to be held were passed at the former meeting, then, and in that event only, the extraordinary general meeting would be held? It seems to me that a shareholder would consider that the extraordinary general meeting of the 29th of July was only to be held in the event of its being necessary—that is to say, in the event of the resolutions being passed at the former meeting, because, if he took any other view, he would have to conclude that the directors of the company were summoning a meeting which, in one contingency, would bring the shareholders from all parts of London, or, for anything I know, from all parts of England, for no purpose at all, and when there was no business at all to be transacted. It does not seem to me to be business-like or reasonable to suppose it was intended by this general notice that an extraordinary general meeting should be held on the 29th of July, whether there was any business for it or not, when apt words are to be found in the paragraph which, in their ordinary grammatical sense, imply that the extraordinary general meeting of the 29th of July would only be held in case it was wanted. I regret very much that our decision is a decision which will cause a great deal of trouble in the affairs of this company, but it is not a technical matter at all. The difficulty cannot be properly described as a technical one. The construction of a notice convening an extraordinary general meeting of a company is not a technical matter at all, and I agree entirely with what Chitty, J., has pointed out—the extreme importance that these notices should be so plain that those who run may read, and that they should be construed in a sense in which business men to whom they are addressed would understand them. Great as is the inconvenience, we are bound to put on this document the true construction which all the shareholders would put upon it at the time they received it, and to dismiss this appeal, as, in my opinion, it ought to be dismissed, with costs, while regretting that any business inconvenience may result from a flaw in the notice which has been sent.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *Powell & Burt; Snell, Son, & Greenip.*

From Chan. Div. Nov. 8, 12, 13.

In re DAVID.

BUCKLEY *v.* ROYAL NATIONAL LIFEBOAT INSTITUTION. (*a.*)

Charity—Mortmain—Assignment of rates, tolls, rents, &c.—Bridge tolls—Mortgage of the general undertaking—Interest in land—9 Geo. 2, c. 36.

Trustees, incorporated by a special Act for the purpose of managing a harbour, were empowered (amongst other things) to demand certain rates for the use of the harbour, to levy toll for the passage over certain bridges, and to lease any of the rates, dues, and tolls at a rent; and also to borrow, for the purposes of the Act, money, not exceeding a certain specified sum, "on mortgage of the several tolls, rates, and dues" by the Act authorised, the mortgagees being empowered to enforce payment of arrears of interest by appointing a receiver. All the moneys received by the trustees were to be paid to the credit of the harbour fund, and it was provided that the moneys from time to time carried to the credit of the harbour fund should be applied, first, in paying the interest on moneys borrowed under the Act and certain previous Acts; secondly, in maintaining the harbour, &c.; thirdly, in paying certain rent-charges; and fourthly, in paying sums required to be set apart to form a sinking fund to pay off the sums borrowed.

The approaches to, and the land under, the bridges belonged to the trustees.

The trustees borrowed under the Act money upon the security of bonds by which, in consideration of the pay-

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

ment of the amount expressed to be secured by the bonds respectively, the trustees granted and assigned to the persons named therein, their executors, administrators, and assigns, "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £ doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys, to hold to the said [assignee] until the said sum of £ , with interest at per cent. per annum, shall be lawfully paid and satisfied," &c., &c.

Held, that the bonds amounted to an assignment specifically of the rates, tolls, and dues expressed to be assigned by them (which included the bridge tolls), but not to an assignment of the entire harbour fund, or (what is the same) an assignment of the general undertaking of the harbour trust; that the bridge tolls were payments made for permission to pass over the bridges, and therefore (the land leading to and supporting the bridges being the property of the trustees) over land belonging to the trustees, which land might, moreover, be had recourse to under the mortgagees' power of appointing a receiver; that such tolls were therefore an interest in land; and that, consequently, the bonds assigning them were within the mischief of 9 Geo. 2, c. 36, and could not be given to a charity.

Knapp *v.* Williams, 4 *Ves.* 430n, *discussed.*

In re Christmas, 34 *W. R.* 8, 33 *Ch. D.* 332, *and* Gardner *v.* London, Chatham, and Dover Railway Co., 15 *W. R.* 325, *L. R.* 2 *Ch.* 201, *distinguished.*

Judgment of North, J. (37 *W. R.* 613, 41 *Ch. D.* 165), *affirmed.*

Appeal from North, J.

This was an appeal from a judgment of North, J., on an originating summons taken out under order 55 of the Rules of the Supreme Court for the opinion of the court on certain points. The case is reported below at 37 W. R. 613, 41 Ch. D. 168, where the facts and the pertinent parts of the Act of Parliament are somewhat more fully set out.

It appeared that by a deed of August 8, 1882, John David and his wife appointed certain funds over which they had a power of appointment (subject to their own life estates) to trustees upon trust to pay the income to another person for life, and after her death upon trust to sell and convert, and out of the proceeds to pay certain sums to specified charities, including £1,000 to the Royal National Lifeboat Institution, and to pay or retain the residue to or for the plaintiff for her own use and benefit. The trust property included £2,000 secured by Swansea Harbour bonds, which were issued under the Swansea Harbour Act, 1854 (17 & 18 Vict. c. 126), by the Swansea Harbour trustees, who were incorporated by that Act. The bonds, in consideration of £ paid, &c., purported to grant and assign to the persons named therein, their executors, administrators, and assigns "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £ doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, and rents, and other moneys, to hold to the said, &c., from this day until the said sum of £ with interest at per cent. per annum, shall be lawfully paid and satisfied, the principal sum to be repaid at the end of seven years from the day of," &c.

The Act provided for the appointment, election, and incorporation of a body to be called the "Swansea Harbour Trustees," and gave them power to purchase, take, hold, and dispose of land and other property for the purposes, and subject to the restrictions of the Act, with power in all respects to carry it into effect.

The purposes of the Act were the construction and maintenance of docks, basins, quays, locks, and other works, and the conservancy of the bay and harbour of Swansea. Among other general Acts the Commissioners' Clauses Act, 1847 (10 Vict. c. 16), except certain specified clauses thereof, was incorporated by the local Act, and the bonds now in question followed the form of mortgage given in schedule (B), and authorized by section 75 (one of the incorporated sections), of the general Act. That form includes the word "rents" among the things to be assigned, as it purports to assign "such proportion of the rates, rents, profits, and other moneys," &c. As will be seen below, section 99 of the special Act, which authorizes the trustees to mortgage tolls, rates, and dues, does not include the word "rents" among the things on mortgage of which the trustees may borrow.

Section 43 of the special Act vested in the trustees all property of or to which certain other trustees were possessed or entitled under former Acts, which were repealed by the present one.

Section 99 empowered the trustees, for the purpose of enabling them to construct the works authorized by the Act, to borrow any sum not exceeding £80,000 "on mortgage of the several tolls, rates, and dues by this Act authorized," and section 102 provided for a certain amount being set apart "annually out of the rates, dues, and tolls" as a sinking fund, to be applied in paying off the principal sums from time to time secured on mortgage.

Section 104 authorized mortgagees under the Act to enforce payment of arrears of interest due to them by appointing a receiver.

Section 108 provided that all the rates, dues, and other moneys received by the trustees should be paid to the credit of the "Swansea Harbour Fund."

Section 110 enacted that "the moneys from time to time carried to the credit of the Swansea Harbour Fund shall be applied, first, in paying the interest on moneys borrowed under" the Act and certain former Acts; secondly, in maintaining and regulating the harbour and the navigation thereof; thirdly, in payment of certain rent-charges secured under the Act; fourthly, in payment of the sums by the Act required to be set apart to form a sinking fund; and that the surplus, if any, should be applied for such of the purposes of the Act as the trustees should from time to time think fit.

Section 136 empowered the trustees to erect and maintain toll-gates upon or adjoining certain bridges, and section 137 to demand certain tolls in respect of vehicles, beasts, and foot passengers passing over the bridges.

Section 152 authorized them to lease any of the rates, dues, and tolls by the Act authorized, at a rent to be agreed upon, for any term not exceeding three years. The Act contained no power for the trustees to mortgage any land vested in them.

The surviving trustee, under the deed of August, 1882, took out an originating summons as plaintiff against the charities as defendants, asking (*inter alia*) for a declaration that the sum of £2,000, secured by the bonds, was an interest in, or a charge or incumbrance affecting, or to affect, land within the meaning of the Mortmain Act.

The charities were not authorized to hold land. The summons was adjourned into court.

North, J., held that the bonds created a charge on the particular things (*i.e.*, rates, tolls, rents, &c.) expressed to be comprised in them, and did not amount to a mortgage on the general undertaking of the Swansea Harbour Trustees; that the bridge tolls were an interest in land within the Mortmain Act; and that the charities, therefore, could not take the bonds.

The defendants appealed.

Vaughan Hawkins and *Dibdin*, for the appellants.—These bonds are pure, and not impure, personalty, and

the gift, therefore, is not invalid under the Statute of Mortmain: *In re Christmas*, 34 W. R. 8, 33 Ch. D. 332. First, our main point is that these dues and rates assigned by the bonds are not interests in land within the statute. Secondly, even if they are, the charge is not on the interests themselves, but on the general fund of which they form a part, and, therefore, is not within the statute: *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201. The judge below decided against us, on the ground that *Knapp* v. *Williams*, 4 Ves. 430n, is a binding authority, and lays down a general rule as to these cases. But that case was questioned in *In re Christmas*, which, at all events, restricted the generality of its application. The Swansea Harbour Fund includes the income from land, penalties, and other sources of income, besides the rates, dues, and tolls; and the charge is on the whole fund and undertaking. [Lord COLERIDGE, C.J.—You admit part of the fund comes from land?] Yes. In any case *Knapp* v. *Williams* is distinguishable, for *Myers* v. *Perigal*, 1 W. R. 57, 2 De G. M. & G. 599, at p. 619, shows that the bonds in the former case contained an actual assignment of real estate. So bonds given by a railway company which owns land are pure personalty: *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337. Apart from authority, can it be said that any of these rates, dues, or tolls are an interest in land of the nature of real estate? Are they not merely taxes? Why is the toll for going over a public bridge more an interest in land than dues for ships coming into harbour? Tolls are of two classes—tolls "thorough" and tolls "traverse." [FRY, L.J.—Will you define a toll thorough?] It is a toll taken of men for passing through a vill in the high street, or for passing over a public ferry or a public bridge: Williams on Prescriptive Rights, p. 299; Comyn's Digest, 5th ed., vol. 7, pp. 457—459. Toll traverse is a payment made for the right of going through another person's property. Toll thorough is really a tax—something that does not come out of the dominant or servient tenement, but is granted by the Crown or Parliament, as here. *Knapp* v. *Williams* was referred to in *Finch* v. *Squire*, 10 Ves. 41, in which case Sir W. Grant held that the right to collect the tolls there in question gave no interest in the land. [FRY, L.J.—Does the soil in the approaches to the bridges, or the soil in the water underneath them, belong to the trustees?] The Act does not vest the soil in the trustees. The Duke of Beaufort appears to have some interest in the soil. The trustees might have been directed by their Act to build a public bridge on public land vested in the Corporation of Swansea or some other public body. [*Everitt, Q.C.*—By a local Act (6 & 7 Will. 4, c. 126), s. 5, the trustees are directed to purchase land and build bridges, &c.] We cannot say they did not buy. We will assume the trustees are entitled to the land. In *In re Christmas* the principle of *Knapp* v. *Williams*, so far as it can be ascertained, is disapproved. There is another point. Sections 108—110 say everything is to go into the Swansea Harbour Fund. Therefore there is no power to disintegrate the fund by mortgaging the tolls, &c., separately from the entire fund: *Attree* v. *Hawe; Gardner* v. *London, Chatham, and Dover Railway Co.* [COTTON, L.J.—Here the first thing to be paid is the interest on the debt, but there it was the expense of keeping up and working the railway.] The mortgagee may have the first claim for his interest, but it is not so with the principal. [FRY, L.J.—If the interest is charged on land, is not the principal an interest in land within the decisions?] No. [They also referred to *Fripp* v. *Bridgewater and Taunton Canal Co.*, 1 W. R. 477, 11 Ha. 241; *Howes* v. *Chapman*, 4 Ves. 542; and *Blaker* v. *Herts and Essex Waterworks Co.*, 37 W. R. 601, 41 Ch. D. 399.] To sum up, this is a mortgage on the whole Swansea Harbour Fund. The Act says the tolls are to be paid into the fund, and that the mortgagees are to be paid out of the fund. The security is on the fund, and not on the tolls, and the case is therefore within *In re Harris*, 29 W. R. 119, 15 Ch. D. 561. It is not a case of receivership, but management: *In re Manchester and Milford Railway Co.*, 14 Ch. D. 645, 28 W. R. Dig. 190. The case of *Gardner* v. *The London, Chatham, and Dover Railway Co.* really altered the law. This is not a security on land, but on a fund only part of which comes, and that only indirectly, from land. It is not a security which would enable the mortgagees to get at, or have recourse to, the land directly or indirectly—it is only a security on fruit fallen.

Everitt, Q.C., and *G. Cruickshank*, for the respondent, were not called on.

Lord COLERIDGE, C.J.—In this case we have to determine whether a set of bonds, a specimen of which is before us (I presume they are all worded alike), are, or are not, so far connected with land, and the possession and use of land, as to be within the mischief of the Statute of Mortmain.

The bonds are bonds the power to issue which was created by the Swansea Harbour Act, 1854. This bond is in the form given in the schedule to the Commissioners' Clauses Act, 1847, and the bond states that it assigns or mortgages to the bondholder "such proportion of the rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act, as the said sum of £100 doth, or shall, bear to the whole sum which is, or shall be, borrowed upon the credit of the said rates, tolls, rents, and other moneys," which are the words used in the form in the schedule to the general Act. The Swansea Harbour Act, 1854, leaves out in section 99 the word "rents," and empowers the trustees to borrow any sum, not exceeding £80,000, "on mortgage of the several rates, tolls, and dues by this Act authorized." Therefore, the words differ in respect of the word "rents," which occurs in the bonds, though it does not seem to be in terms authorized by section 99 of the special Act. But though you might say, therefore, that to that extent the bond was not such a bond as was authorized by the special Act, yet one of the clauses of the general Act—the Commissioners' Clauses Act (which is incorporated by the special Act)—does seem to authorize the terms of the bond, and empower the trustees to mortgage "rents." But it is not necessary to discuss that, because, assuming that the word "rents" was not authorized, the bond would still be good as to "rates, tolls, and dues," and then the question would arise whether those rates, tolls, and dues are, or are not, an interest in land within the Mortmain Act.

There has been a great deal of discussion on a case heard before Lord Loughborough in 1798—*Knapp* v. *Williams*. That case is certainly open to the observations made on it in subsequent cases, and especially by my learned brother, Cotton, L.J., in the case of *In re Christmas*. If *Knapp* v. *Williams* is right and binding on us, there is an end of Mr. Hawkins's argument and of the appellant's case, because in that case bonds not distinguishable from these were held to be within the Statute of Mortmain. But that case is interesting as showing the now well-established distinction between two sorts of toll, of which one is so intimately connected with the possession of land, and so bound up with land that a grant of such tolls would be clearly within the statute, but a grant of the other sort, not arising out of the possession of land, would not be within the statute. The correctness of that distinction has not, I suppose, been doubted by anyone of those who have commented on the case. The question is of which sort are these tolls here. It would have been more satisfactory to my mind if we could have had a clearer idea of the physical position of these bridges in respect of the use

of which these tolls arise. But, according to the best judgment I can form, these tolls are really money paid for the actual use of land by those who go over the bridges and the approaches to them, and, therefore, money so intimately connected with land and arising from its possession that a mortgage of such tolls is within the mischief of the Statute of Mortmain. That seems to me to be sufficiently and reasonably clear to show that the tolls here are of that kind which is within the mischief of the statute.

That, in one sense, disposes of the case, but Mr. Hawkins has raised a second point. He says the true effect of this bond is not to mortgage these tolls only, or to mortgage exclusively the rates, dues, and tolls only, but that, because of certain sections of the special Act, such as especially the 102nd, 103rd, 108th, &c., it will be seen that this is really a mortgage, not of the tolls, but of the whole undertaking—*i.e.*, of everything that comes into the hands of the trustees, and that it is therefore really a mortgage on the Swansea Harbour Fund, which is the same thing as the undertaking of the trustees, and that it is therefore within the distinction drawn in *Gardner* v. *London, Chatham, and Dover Railway Co.* and similar cases. That makes it a mortgage on the general undertaking, and distinguishes it from a mortgage of tolls arising out of land, and brings it within the protection of the many cases which draw a distinction on the ground that it is a mortgage, not of the land itself, but of that which comes from the land after it is severed from it. If that were made out, I suppose it would be a good point, because it would be supported by cases binding on us; but I do not think it has been made out. These clauses undoubtedly give directions to the trustees that they are to keep down the interest on the mortgage and create a sinking fund to put an end to it out of all the funds that come into their hands. But it seems to me those clauses are really orders to the trustees as to the fund out of which these payments are to be made, which is a very different thing from directions to mortgage the moneys. Therefore the second point, when one comes to look at the sections in question, also fails.

I think, therefore, that the judgment of North, J., was right, and must be affirmed, and that this appeal must be dismissed.

COTTON, L.J.—I am of the same opinion, and I will take Mr. Hawkins's second point first, because, if it can be sustained, it will be unnecessary to decide whether a charge on the bridge tolls is within the Mortmain Act. That second point was that this was not a charge upon any specific tolls or dues, but upon the general undertaking—that is, upon the money after it has been received by the trustees. If that were so, the charge would not be an interest in land, from whatever source the moneys came originally. The mortgage or debenture is given under the powers of section 99 of the special Act of 1854, with which is incorporated the general Act of 1847. Section 99 gave power to charge the tolls, rates, and dues. Mr. Hawkins said that, having regard to the terms of the bonds, what was meant to be charged was not the specific tolls, rents, and dues, but the general undertaking of the Swansea Harbour Trust. He did not call our attention to the fact that the charge was created under the powers of the Commissioners' Clauses Act as well as under the special Act. We do find that under the form in the schedule to the former Act mortgages are to be given on such rates, rents, profits, and other moneys accruing under the said Act.

To my mind that very much explains why this language (including the word "rents") is introduced into the debentures—it is not introduced for the purpose of showing that, although the power under section 99 is to charge specifically tolls, it intends to give, or purports to give, a charge only on the general undertaking—that is, on the moneys, from whatever source received, when they come into the coffers of the trustees. But even on Mr. Hawkins's argument, if there is a charge here specifically on tolls, what he must contend is that any debentures or mortgages granted under the Act are charges on the general undertaking only, and not on the specific tolls which are referred to in the security; and he did so contend, relying on the case of *Gardner* v. *The London, Chatham, and Dover Railway Co.* But, in my opinion, that case does not apply, the debentures and charge there being of an entirely different character from these. The charge was in accordance with the Companies Clauses Act, and assigns to Gardner the general undertaking of the company as defined by that Act, and all the tolls or sums of money arising upon or out of the said general undertaking. Although there is there a reference to tolls or sums of money arising upon or out of the general undertaking, yet the court construed that as a charge, not on tolls specifically, but only as a charge on the general undertaking mentioned in the Act; and that Act did require and direct that the railway should be kept up and maintained, and therefore the court said that it was not a charge which enabled the mortgagee to take any particular land, or any particular money arising from the undertaking, without regard to the undertaking being carried on. It was a mortgage of the undertaking as defined by the Act—that is, a mortgage subject to the obligations cast upon the railway company by Act of Parliament. That entirely differs from the present case, because here, though there is power to charge generally the undertaking of this harbour, it is only a power to do so in this manner—to charge the particular sums of money arising from that undertaking, and in the direction which is given as to the application of the general fund, which comprises various sums of money which come into the trustees' chest, the first direction is to pay the interest on their debentures, which is entirely different from the directions contained in the Railway Act, and entirely inconsistent with the views taken in the case of *Gardner* v. *London, Chatham, and Dover Railway Co.* by the Court of Appeal with reference to the Railway Acts. That, to my mind, prevents it being said that the cases on which Mr. Hawkins relies apply to the present case, and we have to consider, therefore, what is the effect of giving a charge, in the way this is done, under the provisions of the Act, upon tolls, and among others, the bridge tolls. That was the first point raised in the argument—what is the effect of charges specifically on the bridge tolls.

The Lord Chief Justice has referred to the case of *Knapp* v. *Williams*, which we considered in *In re Christmas*. There is a passage in the former case which shows the principle to be applied in considering whether this toll is a toll "thorough" or a toll by which an interest in the land is given. Mr. Hawkins admitted that part of the approaches to the bridges, and the land supporting them, belonged to the trustees alone, and that the bridges over their land, and the passage over the bridges, was connected with the use of their own land. In my opinion, therefore, these tolls are sums of money connected with the land and which the trustees are entitled to be paid for the use of their land. They have power by Act of Parliament to prevent anyone passing without paying the tolls. They are not at all like tolls to be taken without reference to the use of the land. In *In re Christmas* the money was in no way connected with the use of the land; so that it could not be said that the right to receive it was an interest in land. Here the money was only to be received from those who used the land, and the bridges constructed, or partly constructed, on the land, belonging to the trustees. In my opinion it would be wrong to hold in this case that the right to receivor this money is not connected with land. It is money paid for the use of land, and it comes out of

the land. I think this appeal fails, and the judgment of North, J., was right.

FRY, L.J.—The local Act in question, 17 & 18 Vict. c. 126, incorporates the Commissioners' Clauses Act, 1847, and incorporates those clauses of it which contain and authorize the form of mortgage. Those clauses and that form authorize the mortgaging of the rents as well as the rates, tolls, and dues. Section 99 of the local Act authorizes the mortgaging of the tolls, rates, and dues. But the bond comprises rents, rates, tolls, and dues. If the word "rents" is rightly put in, the bond is clearly within the Mortmain Act, but if the word "rents" ought to be omitted, then we are driven to inquire whether the tolls, rates, and dues are so connected with the land as to fall within the mischief of the statute as incorporeal hereditaments. The cases of *Knapp* v. *Williams* and *In re Christmas* have drawn and confirmed the distinction between the two kinds of tolls, of which the one is so connected with the land and the other is not. Whether that distinction was rightly drawn in *Knapp* v. *Williams* with reference to the particular tolls there, is quite immaterial for our present purpose. It is enough that decisions binding on us have drawn the distinction, and we are therefore bound to inquire to which kind these tolls belong. They are tolls which are to be levied for passing over a bridge. By section 137 the trustees are empowered to demand and take at every one of their gates which they may erect the tolls in question before any persons or cattle are permitted to pass through. There is also power for the mortgagees to appoint a receiver of the tolls, or of such part of them as may be necessary. The receiver must, therefore, I think, be empowered to occupy the toll-house, and therefore to go on the land, shut the gates if necessary, and take the tolls. The mortgage, therefore, carries a right to have recourse to the land itself. The bridges also, having regard to the admissions of Mr. Hawkins, or a substantial part of the land connected with them, must be the property of the trustees, and, therefore, are comprised in the security. These tolls, therefore, are part of the usufruct of the land, and consequently so connected with land as to be an incorporeal hereditament, and accordingly within the Mortmain Act. Mr. Hawkins argued that this was only a charge on the floating balance for the time being of the fund, and not on the tolls, rates, and dues. In my opinion it is impossible validly to contend that that is the true meaning of the mortgage—a mortgage which charges the tolls and enables a receiver of them to be appointed cannot be a mere charge on the floating balance of the fund, of which the toll is only one constituent. The true effect of the Act is very much as if the trustees had created a mortgage of real estate, accompanying it with a direction to their bankers to pay the interest on the mortgage out of their balance from time to time. I think the judgment of North, J., is quite right, and that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Clayton, Sons, & Fargus.*

Solicitors for the respondents, *Murray, Hutchins, & Stirling.*

From Q. B. Div. July 24, 1889.

EDWARDS *v.* SALMON. (*a.*)

Local government — Officer — "Allowance" — Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 189, 193.

The defendant was clerk to an urban sanitary authority at a fixed salary. Subsequently to the fixing of the defendant's salary the authority promoted a sewage scheme, in connection with which a large amount of extra labour, which was not in contemplation when the defendant's salary was fixed, was thrown upon him. On the completion of the works the authority resolved that he should be paid a sum of money for his services in connection with the scheme.

Held, that the defendant, in accepting this sum, did not render himself liable to the penalties imposed by section 193 *of the Public Health Act,* 1875, *on officers or servants of local authorities accepting, under colour of their office or employment, any fee or reward other than their proper wages, salaries, or allowances.*

Semble, *the word "allowances" in section* 193 *of the Public Health Act,* 1875, *includes extra payment for extra work.*

Appeal from the decision of Pollock, B.

The action was brought to recover a penalty of £50 under section 193 of the Public Health Act, 1875.

The defendant was town clerk of Bury St. Edmunds, and also clerk to the town council as the urban sanitary authority.

By a resolution in 1879 the town council fixed his salary at £365 per annum, "to include all legal charges, except for contentious business matters, travelling expenses, and payments out of pocket."

In 1883 the town council, as urban sanitary authority, promoted a drainage scheme which after some opposition was carried out. A large amount of extra work, which was not contemplated when the defendant's salary was fixed, was thrown upon the defendant in connection with carrying out this scheme, and after the completion of the works the town council, on December 6, 1885, at the recommendation of the irrigation committee resolved that the defendant should be paid 500 guineas for his services in respect of the scheme, to include everything except payments out of pocket, which sum the defendant accordingly received.

By section 189 of the Public Health Act, 1875, the urban authority may pay to its officers and servants such reasonable salaries, wages, or allowances as it may think proper.

By section 193, if any officer or servant, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of £50 "which may be recovered by any person with full costs of suit by action of debt."

At the trial, which took place without a jury, Pollock, B., gave judgment for the defendant.

The plaintiff appealed.

Candy, Q.C., and *Slee*, for the appellant.—The defendant, by accepting the sum of 500 guineas voted by the town council, has brought himself within the section. The payment was neither salary, wages, nor allowances: *Burgess* v. *Clark*, 33 W. R. 269, 14 Q. B. D. 735; *R.* v. *Mayor of Ramsgate*, 37 W. R. 781, 23 Q. B. D. 66.

Channell, Q.C., and *Poyser*, for the respondent, were not called upon to argue.

Lord HALSBURY, C.—In my opinion this is a frivolous and vexatious action, and the appeal ought to be dismissed with costs. It is not necessary I think to give a large exposition of the section, because the facts in this case are far outside any possible construction of it. There is no colour or pretence for the allegation that has been made against the defendant. The section prohibits officers and servants of the sanitary authority from exacting or accepting any fee or reward other than their proper salaries, wages, and allowances under colour of their office or employment. Now what are the facts

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

here. The salary of the defendant was fixed by resolution at a certain amount. Some time afterwards an extensive scheme for sewage works, which was not in contemplation at the time the defendant's salary was fixed, was entered upon, and the amount of labour thrown upon the defendant was consequently very largely increased. Then in the face of day, and by the proper authorities, an extra amount of money is regularly voted to him. What part of the section has been infringed? The policy of the section is clear. It is to prevent officers and servants of a local authority from having any interest in any contract or bargain made with their employers for the purposes of the Act. No doubt there are some provisions of the statute which a person acting perfectly *bonâ fide* might nevertheless infringe, but the point of this particular action is that the defendant exacted or accepted this money under colour of his office or employment. In my opinion the language of the section points to a transaction altogether outside the determination by the local authority of the remuneration to be paid to their officers and servants. However, whether that be so or not, there was in the present case every element to give the local authority jurisdiction to vote the defendant this sum.

It becomes, therefore, immaterial to consider whether or not this sum would come under the head "allowances." For my own part I cannot concur with the view expressed by Cotton, L.J., in *Burgess* v. *Clark*, and adopted by Field, J., in *R.* v. *Mayor of Ramsgate*, that the meaning of the word is confined to "the use of a room or coals or candles or articles of the like kind or an allowance for the payment of them."

Whatever the true meaning of the word may be it obviously includes extra payment for extra work, and this case comes exactly within it. It would be paying too great a compliment to this frivolous case if I were to expound the section more fully.

The appeal must be dismissed.

Lord Esher, M.R.—I am entirely of the same opinion, and I will only add that I do not alter one word of what I said in *Burgess* v. *Clark* as to the meaning of the word "allowances." "It is a payment beyond the salary of the officer for additional services rendered by him."

Lindley, L.J.—I agree.

Solicitor for the appellant, *Alexander Pope.*

Solicitor for the respondent, *G. Robins.*

High Court of Justice.

Chan. Div. Kay, J. } Nov. 11—13, 18—21, 25; Dec. 3.

Bourke v. Davis. (a.)

*River—Right of way—Boating—Recreation—*Cul-de-sac *—Highway — Dedication — Evidence — Affidavits — Commissioner to administer oaths—R. S. C., ord. 36, r. 34.*

Action to restrain the defendant from interfering with posts and chains which the plaintiff, the owner of the bed of the river under a title derived from the Crown, had placed in the River Mole to stop the waterway. Counterclaim by the defendant, who was not a riparian owner, for an injunction to restrain any hindrance to the passage of his boats. He based his claim on a public right of highway over part of the river, not on a right of recreation. The evidence showed that the reach in question was not tidal; that it could not be approached by boats from below; that its depth was artificial, and depended on mill dams; that it had never been used for purposes of commerce, or as a way from one public place to another; that there was no public access to it at one end, and it was doubtful whether there was any public access to it for boats at any point; that no one except the mill-owners had done anything towards maintaining it as a waterway; that there had been a considerable amount of boating on the reach by riparian owners and by others in boats brought from a distance, chiefly for fishing, but that no right to fish was claimed, and that persons boating had hardly ever been interfered with.

Held, that the user had been permissive, and not of right, and that the defendant must be restrained from removing the obstruction.

Observations on the manner in which affidavits are sworn before commissioners to take oaths.

Trial of action.

This action was brought to decide whether there was a public right of boating on the River Mole between Esher and Cobham. It was commenced by the plaintiff as riparian owner of both banks, but he subsequently bought the bed of the river from persons who had obtained it by grant from the Crown, and was permitted to issue a new writ relying upon the title thus acquired. Adjournment under R. S. C., ord. 36, r. 34, was waived, the actions were consolidated, and the hearing proceeded with, reserving the question of costs.

A large number of witnesses were examined, and the facts were found by Kay, J., as follows:—

The River Mole runs under Cobham Bridge and some miles further on under Esher Bridge into the Thames near Hampton Court. It is not tidal. Extraordinary high tides have been known to affect the Thames as far as Hampton Court, but the highest known tide would not, as the levels show, if there were no obstruction, raise the water of the Mole much beyond its mouth, and not nearly so far as Esher Bridge. But there are obstructions. Some distance from the Thames the Mole divides into two streams, one of which takes the name of the Ember. Across the Mole, at a point where these two streams again approach one another, about 800 yards from the Thames, is a mill which completely stops the waterway. Higher up is another obstruction, and again before reaching Esher Bridge the river is dammed by some mills which formerly were paper mills, which were burnt about 1853, and remained unoccupied for many years until they were used for the manufacture of linoleum. It is proved that if the sluices at these mills were drawn the river between Esher and Cobham Bridges could not be used for boating, except in times of flood. It would be merely a string of pools united by a shallow stream. But thus dammed up there is water enough to float canoes, punts, and skiffs nearly up to Cobham Bridge. For 100 yards or thereabouts below that bridge, however, the river is very shallow, and occasionally it is difficult to get up further. Above Cobham Bridge, I understand, the river is dammed up again. This waterway has not been used for purposes of commerce. Once when a railway bridge was being built some bricks were brought down over part of it, and on another occasion some poles cut by the side of the stream were floated down on a punt; but except these instances there has been no traffic on it other than boats for pleasure, with occasional fishing. There is no access for boats from the Thames without taking them out of the water and carrying them over the land of private persons past the mill dams I have mentioned. An attempt has been made to prove a right of access for boats from the road over Esher Bridge by the side of that bridge. That attempt has not been successful. I am satisfied that there is no public right of access for boats from the road to the river at that point. At the

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

paper mills lower down a road leads under a railway arch and thence parallel with the railway on the Esher side of the river to the paper mills. At this point boats have occasionally been brought on trolleys and launched into the mill dam.

It is disputed whether this road is public for vehicles. A footpath crosses the river, but the cart road stops at the mill. There is no evidence of any wayfarer having used the river as a continuation of this road. Higher up the public highway approaches the river at two points. One is where the defendant keeps some boats. The road is separated from the river by posts and rails having at one end a space 2ft. wide through which a man can pass, but boats can only be got from the road to the river by passing them over or under the rails, and across a narrow strip of land between the rails and the river. Again, at a place called the Shrimper the road is railed off in like manner, leaving, however, a space through which cattle can be taken to the river to water. This place, however, does not seem to have been used much, if at all, as an access for boats. There is a lane running down to the river called Water-lane, which it is suggested led to a ford in former times before a bridge was built at Esher. There is no evidence that anyone ever brought a boat by this road and put it on the river at this place. A great effort has been made to prove that there was a public access to the riverside at Cobham Bridge. This has entirely failed. The road to that bridge cannot be reached from the river without crossing the land of private owners, over which there is no right of way. The result is that the River Mole from Cobham Bridge through Esher Bridge to the dam at the paper mill is a natural stream, whose depth, if the dam were removed, would not be sufficient even for a canoe to pass between the two bridges. Its depth is entirely artificial, and upon this depends its capacity for boating traffic. It is not, and never was, a way from Esher to Cobham, or from any one public place to another. It is, in fact, a long pond approachable by a high road at one or more points along its course. It has never been used as a waterway, except for purposes of pleasure and recreation. The defendant has let boats for hire for about eight years. He is not a riparian proprietor. The house he occupies is at some little distance from the river. He keeps his boats by the river at the place I have described, which does not belong to him. He has no right of occupation there. The plaintiff is owner of an estate which lies on both sides of the river, and for some distance includes the opposite banks. He has recently stopped the waterway with posts and chains. These the defendant broke down. Hence arose this litigation. The plaintiff sues to prevent his obstruction being interfered with. The defendant counter-claims for an injunction to restrain any hindrance to the passage of his boats. Originally the plaintiff sued as riparian proprietor, claiming that the bed of the river where his land came down to it on both sides, and half the bed where only on one side, was his property. At the hearing this claim was abandoned and the new one set up by purchase, since the commencement of the action, of the soil and bed of the river all the way from Cobham Bridge downwards from persons who had obtained it by grant from the Crown in 1820. Since that time the property so granted has been in settlement, and has practically belonged to successive tenants for life till the last few years. As the real question is the public right of using the river, the plaintiff was permitted to issue a new writ relying upon the title to the bed of the river thus acquired derivatively under the Crown grant in 1820, the question of costs being left to the court.

Rigby, Q.C., *Renshaw, Q.C.*, and *Levett*, for the plaintiff, referred to *Hargreaves* v. *Diddams*, 23 W. R. 828, L. R. 10 Q. B. 582.

Harris, Q.C., *Nasmith, Q.C.*, and *Oswald*, for the defendant.—The public have access to the river at various points, and have boated on it as of right for many years. They have thus acquired a right of way by user even if they cannot land on the banks or get out at the other end without trespassing. Other riparian owners used the whole of the river, and they could only do that as representing the public. The bed of the river was in the Crown, so the public had the right of navigating it, and the Crown could not interfere with that right: Hargrave's Tracts, pp. 6, 8; *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Miles* v. *Rose*, 5 Taunt. 705; *Murphy* v. *Ryan*, 16 W. R. 678, 2 Ir. Rep. C. L. 143; Phear on Watercourses, pp. 90, 95; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Macpherson* v. *Scottish, &c., Society*, 13 App. Cas. p. 750, 37 W. R. Dig. 156; *Mercer* v. *Woodgate*, 18 W. R. 116, L. R. 5 Q. B. 26; *Mann* v. *Brodie*, 10 App. Cas. 378, 33 W. R. Dig. 179; *Marshall* v. *Ulleswater Co.*, 20 W. R. 144, L. R. 7 Q. B. 166; *Young* v. *Cuthbertson*, 1 Macq. 455; *Rugby Charity* v. *Merryweather*, 11 East, 375 n.; *Arnold* v. *Blake*, 19 W. R. 1090, L. R. 6 Q. B. 433; *Trotter* v. *Harris*, 2 Y. & J. 285; Goddard on Easements, 3rd ed., p. 355; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339. [Kay, J., referred to *Dickens* v. *Shaw*, Hall on the Seashore, 2nd ed., app., p. 45.]

Rigby, Q.C., in reply.—No right of way from one place to another has been proved. The riparian owners have at most acquired private rights attached to their tenements, but we say that all boating was permissive. There was no dedication to the public: *Dyce* v. *Lady James Hay*, 1 Macq. 305; *Campbell* v. *Lang*, 1 W. R. 538, 1 Macq. 451. Since 1820 there has never been an owner against whom dedication could be presumed.

Cur. adv. vult.

Dec. 3.—Kay, J., stated the facts, and proceeded:—The defendant justifies his acts as one of the public. His case is that the river from Cobham Bridge through Esher Bridge to the paper mills is a highway. He makes no claim for a right of recreation by custom. Such a claim is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district: *Fitch* v. *Rawlings*, 2 H. Bl. 393; *Earl of Coventry* v. *Willes*, 12 W. R. 127. For all the purposes of this case the right claimed is similar to a right of highway on land not covered by water. In *Orr-Ewing* v. *Colquhoun* Lord Hatherley, C., speaking of the River Leven, a non-tidal river in Scotland, says:—"There are two totally distinct and different things—the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way." Lord Blackburn in the same case says:—"There was evidence of user in this waterway by vessels, such that similar evidence, if the question had been as to the user of a land-way by carriages, would have established the public right." I must treat the claim of the defendant, therefore, as if it were a claim to establish a right of highway on dry land.

Now, in the case of such a claim, a very material consideration is, By whom has the roadway been metalled, repaired, and maintained in order? In a dispute as to the alleged right, the answer to this question may be decisive. Here there has been no maintenance of the waterway by anyone, except that the mill-owner, I suppose to insure the flow of water to his mill, seems to have employed men to dredge out the silt or ballast as it is called. The width and direction are defined by the banks of the river. I asked during the argument if there was any authority for saying that a lake in private grounds, touched at one part only by a public road, could be subjected to a right which would make it a highway by persons launching boats from the road and boating on it for pleasure.

No such authority has been produced. But reference

was made to *Marshall* v. *The Ulleswater Co.* That case, however, was one in which the right of navigation in the Ulleswater Lake was admitted, although the soil of the bed of the lake was said to be vested in the plaintiff. How the right was acquired does not appear, nor does the actual decision touch any of the questions which have to be decided in this case. The nearest analogy in the case of a way claimed on dry land would be to suppose a track determined by an avenue of trees some miles long in the park or other land of a private owner, to which there was no public access save from a road crossing it at right angles, and to suppose that persons driving along that road had been accustomed, when they pleased, to turn into one or other part of this avenue and drive up and down it for pleasure. Would that user, however long continued, make that avenue a highway? or would the legal inference be that such use, being merely for amusement, had always been permissive, which, of course, could not grow into a right? When it is sought to establish a right by evidence of user it is not enough to say that such a right might be the subject of an actual grant. Lord St. Leonards, C., said, in *Dyce* v. *Lady Hay*: "That it does not follow because a right may be granted—*i.e.*, because it is grantable by law—therefore it may be prescribed for." Another important fact is that the way claimed is not a way from one public place to another. In *Campbell* v. *Lang* Lord Cranworth, C., said that, speaking generally, "A public right of way means a right to the public of passing from one public place to another public place. It was suggested that, by the law of Scotland, there might be a public right of way from a given public place, but neither terminating in a public place nor leading to a public place. I doubt whether that can be the law of Scotland any more than it is the law of England." The only portion of the way in dispute in that case was across the park of the appellant to the confluence of the rivers Clyde and Cart. But the Lord Chancellor said:—"The abstract question whether the confluence of two rivers can be a *terminus a quo* or a *terminus ad quem* of a public right of way does not in the present case arise. The question here is as to a public right of way up to, and which may extend beyond, the confluence—a right to go further on so as ultimately to reach a good *terminus ad quem*." I have referred to the report of the case in 13 Sess. Cas., 2nd series, 1180, where it is stated that the claim was to a footpath to the confluence of the Clyde and Cart, and communicating with a path along the east bank of the Cart leading to Inshinnan Bridge."

In *Young* v. *Cuthbertson* the question arose upon an issue directed whether there existed a public right of way through the appellant's land to Starleyburn, and the appeal was from the disallowance of exceptions to the directions of the Lord Justice Clerk who tried the case. Lord Cranworth, L.C., said:—It was said that the issue was objectionable for this reason, that Starleyburn is not a public place; but even supposing that Starleyburn is not a public place, still if the right of way went beyond it, that would be sufficient. If, indeed, Starleyburn had been a mere private house to which the public had been in the habit of going from Burntisland and returning back again, I believe the case would not have properly come within the description of a public right of way; for the owner might destroy the house and shut up the way, and then there would be an end of it. But here the right of way extended further. It had a public terminus at each end. If Starleyburn were not a public place, then, in order to prove a public right of way, the party must prove that the road to Starleyburn and beyond Starleyburn on to Aberdour was a public road. So held the learned judge and I quite agree."

The right claimed by the defendant in the present action does not, as I have pointed out, fulfil this condition. There is no public access to the river at Cobham Bridge or navigable waterway beyond. Nor do I think there is any public access at Esher Bridge, and it is doubtful if there is at the paper mill. The right claimed is therefore a right of boating up and down in a part of a river which has no public access at one end at any rate.

But it is argued that a *cul-de-sac* may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. Lord Cranworth instances Connaught-place, which opens into the Edgware-road (*Young* v. *Cuthbertson* and see *Rugby Charity* v. *Merryweather*). But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended. This is one obvious objection to the defendant's claim. I have examined the evidence in this case with care. Many of the witnesses were labourers, many were very old persons, speaking from obviously defective recollection. Very many broke down completely under cross-examination. The true result of the evidence is this. As far back as anyone can recollect there has been boating on this part of the River Mole. Originally it was only by the owners and occupiers of land on the banks who kept punts, and then some few boats for the use of themselves and their workmen, and lent them occasionally to friends. Then by degrees, and at first quite secretly, a few persons occupying land on the river bank began to take remuneration for lending their boats. They did not make any charge, but received what the borrower chose to give. In one case, it is said, a shoulder of mutton was given by a butcher for the use of a boat, though the alleged recipient denies it. In another case the boat-owner, meeting a man who had borrowed it, suggested to him that he had made no payment, and apologized for the suggestion by saying that it was a perquisite for his son, who took care of the boat. The persons who so began to let boats were chiefly the successive occupants of a cottage near Esher Bridge. This cottage had a garden which went down to the river, and within the garden was a creek leading from the river next to the bridge road, in which boats were kept. These cottagers were intrusted with the care of boats belonging to private owners; and by degrees acquired one or two boats of their own, and let or lent these in the manner I have described. Besides this, adventurous persons from the neighbourhood of Walton or Thames Ditton, and sometimes from London, have hired canoes and sometimes boats from boat builders on the Thames, and sent them on to the Mole, generally, by the road to the Paper Mill, for a day's excursion in the summer time, and this practice has been more frequent of late years till somewhat interfered with by the defendant's letting of boats. This growing practice of boating for pleasure, including fishing, has not been effectively interfered with till the plaintiff put his obstruction across the stream. There is some evidence that Mr. Spicer, who owned land below Esher Bridge, made objection to persons who were not landowners on the river. One of these owners, Sir Richard Frederick, also made objection, and since 1864 there has been a notice fixed up near the river, in one part of this section of it, warning persons against trespassing in boats for fishing or otherwise. Probably the riparian owners did not care to interfere with one another in boating, if they had the right to interfere, and it was not easy to distinguish strangers. The real owners of the bed of the stream under the Crown grant in 1820 had no land on this part of it. They did not interfere.

How does this evidence establish that the river is a highway? On the one hand, the court would be reluctant to interfere with a healthy recreation for the people, especially in a populous district like Esher, and

within reach of such a city as London. On the other, care must be taken that private property is not unduly invaded. If the defendant is right, he or any other person in England may launch any number of canoes, boats, barges, steam-launches, or the like upon this river, fill it with a crowd of pleasure-seekers, and utterly destroy the privacy of those who have houses on the stream. The use at present made of it by the public is very inconsiderable, and an interference will do very little harm to anyone except to the defendant in his business of letting boats. I cannot overlook these considerations, though they do not determine the questions of law involved in this dispute.

Upon these questions my opinion is against the defendant. His claim is to impose on land a new servitude, or rather to establish a highway under conditions which are inconsistent with a right of that kind. I think the true inference from all the evidence is that the use made of the river has been permissive, and not of right. It is material to that question that much of the evidence shows that those who boated on this river did so in many cases for the purpose of fishing. There is no pretence that there is any public right of fishing, or any evidence that could establish such a right. The fishing, then, must have been permissive, and it is difficult to say that boating for that purpose could have been of right. Moreover, the mode in which those who let boats took remuneration shows they were aware it would probably be objected to, if known, and that they clearly understood that strangers only boated there by tolerance. It is possible that the riparian proprietors may be able to establish a private right of way, or a right of boating for recreation for themselves and their friends by custom.

I do not give any opinion on the question whether there is any such right or custom. Neither would entitle the public to boat on the river or support the claim that it is a highway. Even if the boating of the public, so far as they have used it, was not permissive, I am of opinion, for the reasons I have given, that the defendant has not proved that this part of the River Mole is a highway, and, as his claim is that and nothing else, I dismiss his counter-claim with costs. As the defendant is not a riparian proprietor, and only claims as one of the public, he had no right to remove the obstruction placed by the plaintiff in the river. But I must take it to be clear that the plaintiff, when he placed that obstruction in the river, was acting under a supposed right to the bed of the river as riparian proprietor, which he now admits he had not. Under the grant from the real owners, he has since obtained the soil of the river bed, and may now maintain that obstruction against the defendant at any rate. There must, therefore, be an injunction to restrain the defendant from interfering with it. I give no costs of the plaintiff's action, but order him to pay the defendant's costs of it up to the time when the new writ was issued. I think the evidence should all be treated as taken on the counter-claim, except the proof of the plaintiff's title; and the costs of the evidence, with that exception, must be paid by the defendant. The summons by the defendant to have this action tried by a jury I refuse with costs. There must be the usual directions for set-off. I desire to call the attention of the profession to a matter of importance, which has been forcibly brought to my notice in this case—I mean the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit. In this case certain witnesses contradicted the statements made by them in affidavits sworn in this cause in such a startling manner that I required an explanation of the mode in which those affidavits were sworn. The commissioner before whom they were sworn attended in court, and in answer to questions from me he informed me that he went with a solicitor in the cause to the houses of the several witnesses; that the affidavits were not read over in his presence, and that he took no means to ascertain whether the witnesses knew to what they were swearing. I was told by counsel that this mode of performing the duty of a commissioner to administer oaths was not uncommon. I must express my strong disapproval of such a practice. The commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by anyone but the witness himself. For this reason it has been the rule since the time of Lord Hardwicke that the court does not accept an affidavit sworn before the solicitor in the cause, nor his clerk, although he may be a commissioner: *In re Hogan*, 3 Atk. 813; *Wood* v. *Harpur*, 3 Beav. 290; *Hopkin* v. *Hopkin*, 1 W. R. 275, 10 Hare App. 2; *Duke of Northumberland* v. *Todd*, 26 W. R. 350, 7 Ch. D. 780. The court requires the security of an independent commissioner, and it is obvious that he ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit. Where, as in this case, many of the witnesses are in a humble position of life, I do not see how the commissioner can be satisfied without having the affidavits read over in his presence. If an educated man says to him, "I have read over this affidavit, to the truth of which I am going to swear," and all the statements are accurate, that may in some cases be sufficient. But I confess I wish that it was made incumbent upon the commissioner in every case to go through the affidavit with the witness, and to refuse to take his oath until he was satisfied that the witness understood and intended every statement in it. A great deal of false swearing would be prevented if this were done.

Solicitors, *Lewis & Lewis; Thomas Noton.*

Chan. Div.
Chitty, J. } July 19; Aug. 2, 1889.

In re ROBERTSON (A SOLICITOR). (*a.*)

Solicitor—Taxation of costs—Third party—Delivery of bill—Petition of course—Service of order—Attorneys and Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 38.

The common form allegation in a petition of course that the solicitor "delivered to your petitioners his bill of fees and disbursements" is a material allegation which is not satisfied by a merely constructive delivery.

The ordinary practice as to delivery of bills of costs by mortgagees' and by trustees' solicitors, stated.

Motion.

Certain copyholds belonging to two co-owners were sold in September, 1888, to a purchaser named Frere. Robertson and Bird, solicitors, acted jointly in the sale, though Bird had the actual conduct of the sale. In October, 1888, Frere wrote to Bird, whom he believed to be sole solicitor for the vendors, requesting him to arrange for the enfranchisement of the copyholds, so that they might be conveyed as freehold, and saying that he would pay Bird the charges and expenses. Bird informed Robertson of the letter, and asked him to take the necessary steps for the enfranchisement so far as Robertson's clients were concerned.

In May, 1889, Robertson was requested by Bird to send all his costs to him, and he made out his bill relating to the enfranchisement, addressed to his clients, amounting to £17 7s., which he sent to Bird, who sent it on to Frere. In sending the bill to Bird, Robertson

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

wrote saying he was not aware of the nature of the undertaking as to costs between the purchaser and vendors, and was doubtful what costs could be properly included; on the next day he wrote to Frere, stating that he had sent his bill of costs to Bird, but that as he did not know the terms of the undertaking he feared some of the costs might prove inaccurate. Frere disputed the bill of costs, and Robertson then offered to withdraw it, and make out a fresh bill strictly as against the purchaser, or to obtain payment of his costs from Bird, leaving him to obtain them from Frere. This Frere declined.

On the 17th of June, 1889, Frere obtained an ordinary third-party order for taxation on the usual petition of course by a third party, containing the usual allegation that on or about the 28th day of May the said solicitor "delivered unto the petitioner his bill of fees and disbursements which the petitioner is liable to pay," under which, in Robertson's absence, the bill was taxed down to £5 3s. Robertson alleged that he had never been served with the order to tax, though he admitted notice of two appointments had been sent him from the taxing master's office.

Robertson now moved that all further proceedings under this order might be stayed, and that it might be discharged as irregular.

Oswald, for the motion.—First, Robertson was never served with the order to tax. Secondly, Robertson never delivered any bill of costs to Frere: *In re Carven*, 8 Beav. 426; *In re Grundy, Kershaw, & Co.*, 29 W. R. 581; 17 Ch. D. 108.

Farwell, for Frere, *contrà* [Chitty, J., referred to *In re Brown*, 15 W. R. 1030, L. R. 4 Eq. 464].

Oswald replied.

Chitty, J.—In this case Mr. Frere has obtained the common third-party order to tax, and the order contains what seems, from the various forms that I have been able to look at, to be the usual and common allegation in a third-party order, that the solicitor has "delivered" the bill "to the petitioner," the person whose right to tax of course arises under the 38th section. The facts in the present case, however, show no direct delivery to Mr. Frere. [His lordship, after referring to Robertson's statement that he was not aware of the exact terms of the purchaser's undertaking as to the costs of the enfranchisement, to the fact that the purchaser was not aware that there was more than one solicitor acting in the matter, and to Robertson's offer to deliver a fresh bill of costs, continued:—] Now I am going to decide this case on what, after all, may well be rather a narrow ground, but what I am satisfied, in point of law, is the correct ground. There are several ordinary, or what I may call "typical," third-party cases—cases where the mortgagor is liable to pay the costs of his own mortgagee. In such a case as that, where the bill is taxed as between the mortgagor on the one hand and the mortgagee's solicitor on the other, the mortgagor is entitled to stand in the position of the mortgagee himself.

Now the delivery in the ordinary practice by the mortgagee's solicitor of his bill of costs is not to his own client, but it is to the mortgagor or to the mortgagor's solicitor, and consequently one finds that in the common form in the orders there is an allegation that the mortgagor has had the bill delivered to him by the mortgagor's solicitors. I think, for the reasons which I am now about to state, that that is a material allegation, because there are cases in which the bill which the solicitor delivers to his own client, the mortgagee, is a bill which would be absolutely right as between himself and the mortgagee, though possibly not so between himself and the mortgagor. The mortgagee might have told his solicitor to do certain things; the solicitor might have explained, in his ordinary course of duty, "I will do that for you, but recollect, if it is done, you cannot charge the mortgagor." The mortgagee might say, "Well, I will have it done," and then the solicitor delivers his bill to the mortgagee, which is a proper bill as between the two. That bill is not delivered, I will assume, in point of fact, to the mortgagor or his solicitor. Can the mortgagor obtain taxation of it upon an allegation that the bill has been "delivered to him"? In my opinion he cannot. I think the delivery of the bill cannot mean a constructive delivery of the bill, and there would be no constructive delivery of the bill in the case which I have just put.

So also in the case of a trustee and *cestuis que trust*, where the trustee employs his own solicitor. That is an ordinary typical case. In that case the trustee may have given special instructions to the solicitor which would warrant him and justify him as between himself and his individual client, the trustee, in making certain charges; upon that the solicitor might draw out his bill and send it in to the trustee, but I think that that could not be called a "delivery." Certainly it cannot be said in point of fact to be delivery to the *cestuis que trust*, and I think in the case I am putting it would not be right to hold that constructively it was a delivery of the bill to the *cestuis que trust*. There may be cases, of course, in which the bill has been paid, as was the case in *In re Brown*—a case in which the bill had been paid out of the trust estate. I am not putting that case at all, I am putting the case of the unpaid bill, but I think justice would be done to the solicitor in such a case as that, and that he would be entitled to charge his own individual client with the work which he had done, though he would not have a right to charge, and could not charge, the same bill as against the estate.

I am not prepared to assent to the proposition of constructive delivery. Of course there may be upon the facts such a case as I am going to state, that the bill is sent to the mortgagee simply for the purpose of his handing it over to the mortgagor in such a way that, upon the facts, the court might fairly hold that it was a delivery, and upon the particular facts before me there is certainly some ground for saying in the first instance that this bill of Mr. Robertson's was sent with that view. But then I must look at all the circumstances of the case, and it appears to me that there was a right on the part of the solicitor in this case, as between himself on the one hand and Mr. Frere on the other, to withdraw the bill and to recast it. There is, of course, one of the points in dispute. Where there has been a delivery of a bill the solicitor cannot withdraw it for the purpose of escaping taxation. That is the established law on the matter, and, if the bill had been actually delivered to Mr. Frere, Mr. Robertson could certainly not have withdrawn the bill; but, in the circumstances of this case, I think the allegation in the petition is not made out in point of fact, and that, as I have explained, it is a material allegation, and, therefore, though I wish to make no unnecessary reflection on either side, the case is, in my opinion, one in which I ought first to discharge the order, on the ground that there was that mistake in the obligation as to delivery; and, secondly, I think, having regard to all the circumstances of the case, and to what I consider the trumpery and trifling nature of the whole thing, the justice of the case will be met if I discharge the order without costs.

Solicitors, *Harold A. Farman; Frere & Co.*

Chan. Div. Stirling, J. } May 29; June 4, 1889.

In re PAUNCEFORT.

CORPORATION OF THE SONS OF THE CLERGY *v.* CHRIST CHURCH, OXFORD.

University—College—Exhibitions—Conditions of tenure—"Holy orders"—College statutes—Universities Tests Act, 1871, *ss.* 2, 3—*Universities of Oxford and Cambridge Act*, 1877, *ss.* 2, 12, 14, 17, 51.

P., who died in 1726, *by his will, dated in* 1723, *gave certain property to a corporation upon trust that the income thereof should "be equally divided between ten of the servitors of Christ Church College in Oxford, such as the dean, two of the canons, and six of the senior students of the said college shall recommend under their hands for their sobriety, diligence at their studies, and of parts fit for a minister of the Gospel and designed for holy orders."*

By the Universities of Oxford and Cambridge Act, 1877, *commissioners were appointed, who were empowered to make new statutes for any college* (inter alia) *for altering or regulating the conditions of eligibility or appointment to any emolument or office held in and connected with a college. The Act also provided for appeals against such statutes when made, and enacted that, in framing them, the commissioners should have regard to the original intention of the founder. Under this Act the commissioners made certain statutes for Christ Church, one of which provided that the P. foundation should be applied to the support of college exhibitioners, who should be elected after examination in such subjects and in such manner as the governing body should determine. No appeal was made by the corporation against this provision.*

Held, that the commissioners had power under the Act to make this provision, and that, inasmuch as no appeal against it had been made by the corporation, it was now binding, and that the P. exhibitions must now be regulated thereby, without regard to the provision contained in the will relative to the fitness of the exhibitioners for ministers of the Gospel and designed for holy orders.

Adjourned summons.

Edward Pauncefort, who died in 1726, by his will, dated the 26th of May, 1723, directed his executors out of his personal estate to purchase land and hereditaments of good fee simple estate of the clear yearly value of £100, and when purchased to convey the same to the Corporation of the Sons of the Clergy and their successors, upon trust by and out of the annual rents and profits of the said lands to pay to eight ministers' widows of honest repute and known industry £5 per annum each as therein mentioned, and "upon further trust that the residue of the rents and profits of the lands that shall be so purchased and settled shall be equally divided between ten of the servitors of Christ Church College in Oxford, such as the dean, two of the canons, and six of the senior students of the said college shall recommend under their hands, for their sobriety and diligence at their studies and of parts fit for a minister of the Gospel and designed for holy orders, the same to be paid yearly on the feast-day of the Sons of the Clergy." The Corporation of the Sons of the Clergy above mentioned was incorporated by Royal Charter in 1678 for the purpose of receiving and distributing funds for the benefit of the widows and children of clergy of the Church of England, and they hold various properties and funds, some of which are applicable for special trusts.

In pursuance of the directions contained in the will, the executors, shortly after the death of the testator, purchased certain lands, and the rents whereof were applied as directed down to 1856, when they were sold and the proceeds invested in Consols in the name of the corporation.

Since this trust came into operation down to the year 1887 it had been the practice of the corporation to pay over the income of the fund which represented this benefaction upon a certificate signed by the dean, two of the canons, and six of the senior students of Christ Church, certifying that the persons named in that certificate were servitors of Christ Church, and possessed the qualifications which were mentioned in the will of the testator. But recently the question had arisen whether that course ought any longer to be pursued, and whether, in point of fact, the qualifications which were attached by the testator to this benefaction ought to be regarded as any longer in force or required in order to entitle the servitors, or the exhibitioners who had taken their place, to the benefit of the charitable trust declared by the will.

The present summons was, therefore, taken out by the corporation against the Dean and Chapter of Christ Church and others, and it asked for the determination of the questions: (1) Who were entitled to the residue of the income of the trust estate by the will directed to be divided as therein mentioned? (2) Whether the plaintiffs ought to pay the residue of the income to the defendant corporation for division amongst persons recommended by the dean, two of the canons, and six of the students without such persons having been recommended as of parts fit for a minister of the Gospel and designed for holy orders? (3) What conditions (if any) were attached to the gift, and what certificate or recommendation the plaintiffs were entitled to demand before payment of the residue of the income to the defendant corporation?

The statutes and ordinances dealing with college emoluments and foundations, so far as they are material to the present question, are the following:—

By the Oxford University Act, 1854 (17 & 18 Vict. c. 81), commissioners were appointed who were empowered to make ordinances in the events thereby provided.

By section 26 of one of these ordinances it was provided: "It shall be lawful for the dean and chapter to alter in such manner as they think fit the designation of the servitors, and to apply the exhibitions of the foundation of Archbishop Boulter for servitors, Mr. Pauncefort, Dr. Gardiner, Bishop Frampton, Dr. Cotton, and Mrs. Paul, to the support of the persons bearing altered designations."

By the Christ Church, Oxford, Act, 1867, two ordinances, dated respectively the 9th of January and 16th of April, 1858, which had been made for Christ Church by the commissioners under the Act of 1854, were repealed and the ordinance set forth in the schedule to the Act was substituted therefor. The latter part of the first clause of such new ordinance provided that "the servitorships existing within the house shall be maintained either under that designation, or under such new designation as the governing body hereinafter mentioned may determine; and the exhibitions of the foundation of Archbishop Boulter for servitors, Mr. Pauncefort, Dr. Gardiner, Bishop Frampton, Dr. Cotton, and Mrs. Paul, may, in the latter case, be applied to the support of persons bearing such altered designation."

By the University Tests Act, 1871 (34 Vict. c. 26), s. 2, the word "college" includes the cathedral or house of Christ Church in Oxford; and "office" includes (*inter alia*) every "studentship, tutorship, scholarship, and exhibition, and also any office or emolument not in this section specified, the income of which is payable out of the revenues of any of the said universities"—*i.e.*, Oxford, Cambridge, and Durham—"or any college within the said universities, or which is held or enjoyed by any member as such of the said uni-

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

versities, or of any college within any of the said universities."

By section 3 it is provided that persons taking lay academical degrees or holding lay academical or collegiate offices are not to be required to subscribe any formulary of faith, &c. "Provided that (1) Nothing in this section shall render a layman or a person not a member of the Church of England eligible to any office or capable of exercising any right or privilege in any of the said universities or colleges, which office, right, or privilege, under the authority of any Act of Parliament or any statute or ordinance of such university or college in force at the time of the passing of this Act, is restricted to persons in holy orders, or shall remove any obligation to enter into holy orders which is by such authority attached to any such office."

By the Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48), two bodies of commissioners were appointed, for a limited period, for the purpose of revising the statutes of the Universities of Oxford and Cambridge and their respective colleges and halls, and for making new ones.

The more material parts of the statute are the following:—

By section 2 "college" is defined as including the cathedral or house of Christ Church in Oxford; and "emolument" as including, among other things, "servitorship, sizarship, sub-sizarship, or other place in the university, or a college or hall, having attached thereto an income payable out of the revenues of the university, or of a college or hall, or being a place to be held and enjoyed by a head or other member of a college or hall as such, or having attached thereto an income to be so held and enjoyed, arising wholly or in part from an endowment, benefaction, or trust."

By section 12 power is given to the commissioners to make statutes for the university and for any college or hall.

By section 14 "the commissioners, in making a statute affecting a university or college emolument, shall have regard to the main design of the founder, except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act."

By section 17 "the commissioners, in statutes made by them for a college, may from time to time make provision for the following purposes relative to the college, or any of them:—

"(1) For altering and regulating the conditions of eligibility or appointment, including, where it seems fit, those relating to age, to any emolument or office held in or connected with the college, the mode of election or appointment thereto, and the value, length, and conditions of tenure thereof, and for providing a retiring pension for a holder thereof: . . .

"(8) For modifying the trusts, conditions, or directions affecting any college endowment, foundation, or gift, or any property belonging to the college, or the head or any member thereof as such, as far as the commissioners think the modification thereof necessary or expedient for giving effect to statutes made by them for the college."

The Act further contains provisions (section 44) for the constitution of a committee to be styled the Universities Committee of the Privy Council; (section 45) for the submission by the commissioners of statutes made by them to the Queen in Council; and (section 46) for petitions to the Queen in Council by governing bodies and others directly affected by such statutes for their disallowance.

By section 51, "Every statute or part of a statute made by the commissioners, and approved by Order in Council, shall be binding on the university, and on every college and hall; and shall be effectual, notwithstanding any instrument of foundation or any Act of Parliament, Order in Council, decree, order, statute, or other instrument or thing constituting wholly or in part an instrument of foundation, or confirming or varying a foundation or endowment, or otherwise regulating the university, or a college, or hall."

By section 57 nothing in the Act is to be construed to repeal any provision of the Universities Tests Act, 1871; and by section 58, "Where the commissioners, by any statute made by them, erect or endow an office declared by them in the statute to require in the incumbent thereof the possession of theological learning which (notwithstanding anything in this Act) they are hereby empowered to do, provided the office be not a headship or fellowship of a college, then the Universities Tests Act, 1871, shall, with reference to that office, be read and have effect as if the statute had been made before and was in operation at the passing of the Universities Tests Act, 1871."

Under the last mentioned Act the Oxford Commissioners made certain statutes for Christ Church, of which clause 23 was as follows:—

"The exhibitions of the foundations of Archbishop Boulter for servitors, Mr. Paunceefort, Dr. Gardiner, Bishop Frampton, Dr. Cotton, and Mrs. Paul, shall be applied to the support of college exhibitioners, who shall be elected after examination in such subjects and such manner as the governing body shall determine. Notice of each election shall be given in the same manner as that prescribed above for the election of open scholars, and the exhibitioner shall be elected at first for two years only, the tenure of these exhibitions being renewable in the same manner as that allowed for scholarships, and on the same terms. No person shall be appointed to one of these exhibitions unless he shall give sufficient proof to the dean of his need of such assistance to enable him to obtain the benefit of a university education."

Clause 22 dealt with open scholarships, and it provided:—"There shall be an election to five open scholarships in every year; they shall be tenable for two years from the day of election, if the person elected be already a member of the university, if otherwise, from the Midsummer Day next following, and (at the expiration of such two years) shall then determine unless the governing body have by resolution declared themselves satisfied with the industry and good conduct of the scholar, in which case the scholar's tenure shall be renewed for a further term of two years."

Rigby, Q.C., and *Dibdin*, for the corporation.—Assuming that this is an emolument within the Act of 1877, the commissioners, in framing the statutes for Christ Church, had no jurisdiction to disregard the express design of the founder, which was to impose a religious qualification upon the holders of his exhibitions. We submit, however, that this is not an emolument within the Act, and that the exhibitioners are not holders of any "office" within the meaning of the Universities Tests Act, 1871.

Buckley, Q.C., and *Kingdon*, for the Dean and Chapter of Christ Church and the exhibitioners.—The exhibitioners are holders of an "office" within the Act of 1871. Further, the commissioners had power to make these statutes under the Act of 1877, which have been duly approved as required by the Act. No appeal was ever made against them, and they are therefore now binding. The corporation cannot, therefore, now require that the recipients of this benefaction shall be designed for holy orders.

They referred to *Attorney-General* v. *Sidney Sussex College*, L. R. 4 Ch. 722, 18 W. R. Ch. Dig. 148; *Reg.* v. *Hertford College*, 27 W. R. 347, 3 Q. B. D. 693.

Ingle Joyce, for the Attorney-General, supported the contention of the other defendants.

June 4.—STIRLING, J., stated the will and continued:—Now, that benefaction is one which had in contemplation that the recipients of it should be intended for holy orders in the Church of England. It also appears, I think, plainly enough on the face of this will that poverty was to be an element in the qualification of the person to whom the benefaction was to be made. [His lordship then stated the facts and the provisions of the various statutes and ordinances above set forth. With reference to clause 26 of the statutes made under the powers contained in the Act of 1854, his lordship observed that it clearly did not in any way affect the conditions of tenure or eligibility to this benefaction, but simply provided that if the clergy saw fit to alter the designation of the servitors the exhibitions on the foundation might be applied for the persons bearing the altered designation. As to the Universities Tests Act, 1871, it did not appear to his lordship to be necessary for the decision of the case that he should express any opinion as to the effect of that Act on the tenure of those exhibitions, and, therefore, he desired to abstain altogether from in any way expressing any opinion on the construction of the statute. His lordship then referred to the Act of 1877, and continued:—] Now, first of all, what is the meaning of clause 23 of the statutes of Christ Church? It seems to me that the commissioners who framed the statute have thereby declared that these exhibitions of the foundation of Mr. Pauncefort are to be applied to the support of college exhibitioners, to be elected after examination in such manner as the governing body shall determine, the notice of election to be given in the same manner as that prescribed for the election of open scholars, and the tenure of the exhibitions is to be for two years only, but renewable in the same manner as the scholarships, and on the same terms; and they have attached to the tenure of these exhibitions this condition, that the holder shall give sufficient proof of his need of such assistance to enable him to obtain the benefit of a university education. I confess I cannot bring my mind to doubt but that the framers of the statutes intended that the conditions laid down in the 23rd clause of the statutes should be the conditions, and the only conditions, of eligibility for the tenure of these exhibitions.

Then the next question is, Had they power to make such an ordinance with reference to the exhibitions? I think they had. The first part of section 17 of the Act of 1877 seems to me to be enough to determine the question. It provides that "The commissioners, in statutes made by them for a college, may from time to time make provision for the following purposes relative to the college or any of them:—For altering and regulating the conditions of eligibility or appointment, including, where it seems fit, those relating to age, to any emolument or office held in or connected with the college, the mode of election or appointment thereto, and the value, length, and conditions of tenure thereof." Is this an emolument held in or connected with the college? The definition of "emolument" includes an exhibition, and by a series of statutes, one of which has received the express sanction of the Legislature, this benefaction is described as an exhibition of the foundation of Mr. Pauncefort. It seems to me this was an exhibition, and therefore an emolument and held in Christ Church. It was held nowhere else certainly. That would seem to me to be enough. But the commissioners have also power to make provision "for modifying the trusts, conditions, or directions affecting a college endowment, foundation, or gift"; and, again, it would seem to me that it would fall under those words, and that they have power under those words to do what they have done.

But then it is said that section 14 requires them to have regard to the main design of the founder "except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act." It is not for me to criticise what the commissioners have done. The commissioners, as it was pointed out during the argument, were men of the greatest possible eminence. They were dealing with the endowments of the Universities and Colleges of Oxford and Cambridge as a whole, and they had probably means of judging which are not open to me. But, however that may be, no doubt the Legislature thought that difficult questions might arise as to which different opinions might fairly be entertained, and for that purpose they provided that the decision of the commissioners with reference to such matters should not be final, but that there should be an appeal to the Universities Committee of the Privy Council; and it is enough for me to say that, having looked as carefully as I can at the documents in this case, I think the Corporation of the Sons of the Clergy might very fairly have laid before the commissioners, or before the University Committee of the Privy Council, the facts which they have laid before me on this summons, and might have urged that these exhibitions ought to be devoted for what they have termed the professional education of clergymen, and might have asked that regard should be paid to the intention of the founder as shown in his will. However, that course was not taken, and the statutes as a whole have been approved. I think, therefore, that section 51 of the Act of 1877 applies, and that this statute is binding on the college, and is effectual, notwithstanding any instrument of foundation.

It seems to me, accordingly, that the 23rd clause of the statutes framed by the commissioners for Christ Church now regulates the conditions of eligibility to these exhibitions and their tenure, and that the corporation can no longer require from the dean, canons, and students of Christ Church a certificate in the form in which they have hitherto been in the habit of giving one, but that they are bound to pay over the fund in question for division among the persons who are entitled to the funds as exhibitioners under the 23rd clause of the present statutes, and that a certificate to that effect is all that the corporation can at present require.

Solicitors, *Bridges, Sawtell, Heywood, & Co.; Baker, Folder, & Upperton; The Solicitor to the Treasury.*

Chan. Div. }
Kekewich, J. } June 5, 1889.

In re BACH'S DESIGN. (*a.*)

Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 47—*Design—Registration in a different class of design already registered—New material—Novelty.*

A design which was already registered in one class was registered in another class for a similar article, but made of a different material.

Held, that the difference of material did not make the design "new or original" within section 47 *of the Patents, Designs, and Trade-Marks Act,* 1883, *and that it must be removed from the register.*

Le May *v.* Welch, 33 *W. R.* 33, 28 *Ch. D.* 24, *followed.*

Motion to rectify the register of designs under the Patents, Designs, and Trade-Marks Act, 1883.

F. W. Bach on the 1st of April, 1886, registered in Class 4 (No. 46,391) the design of a lamp shade made of

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

porcelain in the form of a rose for fairy lamps or night-lights. In 1888 he commenced an action in the Queen's Bench Division against the Army and Navy Co-operative Society for damages and for an injunction to restrain the infringement of his copyright in the design.

The defence of want of novelty was set up, and a motion was made on behalf of the defendants in the Chancery Division for rectification of the register by the removal therefrom of the plaintiff's design, on the ground that it was neither new nor original. This was the hearing of the motion. The defendants showed that on the 22nd of January, 1886, one W. H. Reed had registered in Class 12 a linen shade in the shape of a rose for lamps and candles, and that these shades had been sold immediately after the registration by Reed and by the defendants. Lamp shades of porcelain in the form of flowers had also been sold before the date of the plaintiff's registration.

Aston, Q.C., and *Macrory*, for the motion.—The only claim that Bach can make to novelty or originality in this design is that the material used is different from that used by Reed; but that is not enough: *Le May* v. *Welch*, 33 W. R. 33, 28 Ch. D. 24; *Smith* v. *Hope*, 6 Rep. Pat. Cas. 200.

Chadwyck Healey and *Munroe*, for Bach.—The difference of material is important here, china being non-inflammable. Our registration is in a different class, and therefore we are protected by sub-section (4) of section 47.

They cited *Walker, Hunter, & Co.* v. *Falkirk Iron Co.*, 4 Rep. Pat. Cas. 390; *Holdsworth* v. *M'Crea*, 16 W. R. 226, L. R. 2 H. L. 380; *Harrison* v. *Taylor*, 4 H. & N. 815, 8 W. R. C. L. Dig. 18.

KEKEWICH, J.—The appeal in a case of this kind is, as has been said in argument, both in the first instance and in the last resort, to the eye, and on that appeal my eyes are against the respondent. Mr. Reed designed a lamp shade in the form of a rose, and registered it in a particular class. Mr. Bach tried to improve upon that, and in one sense he has improved upon it, for his shade, made of china, is not open to the obvious objection which affected the linen shade of Mr. Reed. He was thus enabled to make further improvements by narrowing the aperture, and, as is suggested, increasing the illuminating power. But the real question is, did he or did he not adopt the design of Mr. Reed? For the Act says, section 4, that what may be registered is "any new or original design not previously published in the United Kingdom."

I may dismiss the question of publication here, for there is no evidence of publication in the sense of sale before the date of Bach's registration; but apart from that, the design must be new or original. I find a principle upon which to base my decision in the judgment of Fry, L.J., in *Le May* v. *Welch*. He says:—"The meaning of the words 'novel or original' is this, that the design must either be substantially novel or substantially original having regard to the nature and character of the subject-matter to which it is to be applied." "Subject-matter," as used in this passage, does not mean the material, but the purpose, of the design, and here in each case the purpose was to produce a lamp-shade; the subject-matter was identical. Dismissing the second alternative, "substantially original," I ask, What is there here that is "substantially new"? If I look at the specimens before me of Mr. Reed's and Mr. Bach's roses I see distinctions, but not more than the difference of material would naturally produce. But I am entitled to look also at the design which was actually registered by Mr. Bach, and taking that and comparing it with Mr. Reed's production, the similarity is so great that it is difficult to distinguish the one from the other. As a matter of eyesight the design is precisely the same.

A Scotch case which was cited, *Walker, Hunter, & Co.* v. *Falkirk Iron Co.* shows that you may have a design used for cabinet doors and yet well registered as applied to kitchen range doors. But that is not like the present case. Here we have a design applied, not to a different purpose, but to the same purpose as the previously registered design. As to sub-section (4) of section 47 it is quite true that a design may be registered in one class for particular goods although it has been already applied to goods of an entirely different character in another class. But that sub-section does not say, and cannot have intended to say, that by selecting a different class a man may register, as applied to certain articles (such as lamp shades), a design which has already been registered as applied to the same articles, merely varying the material in which the articles are made.

It seems to me that there is no novelty in this design it has, therefore, not complied with the provisions of the statute, and the application must be granted, with costs.

Solicitors for the applicants, *Tyrrell, Lewis, & Co.*

Solicitors for the respondent, *Alsop & Co.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Oct. 30, 1889.

Ex parte COLLINS.
In re YARROW. (*a.*)

Bill of sale—Hiring agreement—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

In 1887 *a dissolution of partnership was agreed upon between the bankrupt and J. F. W., who had previously carried on business together as saw mill proprietors, and, in order to provide the sum of* £365 *required to pay out the retiring partner, the bankrupt applied to W. W., his partner's brother, who was a solicitor, to advance him* £650. *An agreement was come to between the bankrupt and W. W., by which the bankrupt sold to W. W. certain of his machinery in consideration of* £650. *The machinery was to remain in the possession of the bankrupt upon certain terms, and the* £650 *was to be repaid by instalments extending over ten years. A receipt was given by the bankrupt for the* £650, *which was specified to be in full payment for the engine, boiler, and machinery agreed to be sold at that price on the termination of the partnership, and a hire-purchase agreement was drawn up, purporting to be made between W. W., called the "owner," and the bankrupt, called the "hirer," whereby the said machinery was let to the bankrupt upon the terms and conditions therein specified. Neither the receipt nor the hiring agreement were registered under the Bills of Sale Acts, and, the bankrupt having filed his petition, the machinery was claimed by his trustee as forming part of the bankrupt's estate.*

Held, that there was no document which required to be registered as a bill of sale, and that the trustee was not entitled to the proceeds derived from the sale of the machinery.

Application by the trustee in the bankruptcy for an order declaring that a certain receipt given by the bankrupt to one William Weymouth, and a certain hiring agreement made between the bankrupt and William Weymouth, were, under the Bills of Sale Acts, void against the trustee, and that the sum of £279, being the proceeds of the sale of the goods covered by the agreement, belonged to him.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

The bankrupt was a saw mill proprietor, carrying on business at Upper Holloway, and in 1883 he took into partnership one J. F. Weymouth, who brought the sum of £500 into the business, which was afterwards carried on under the style of Yarrow & Co. In 1887 J. F. Weymouth was desirous of dissolving the partnership, and he agreed to take for his share the sum of £365 which was then standing to the credit of his capital account in the books of the firm. In order to provide that sum the bankrupt applied to William Weymouth, the brother of his partner, who was a solicitor, to advance him a sum of £650, and, after some negotiation, an agreement was come to between the bankrupt and William Weymouth by which the bankrupt sold to William Weymouth certain of his machinery in consideration of the sum of £650. The machinery was to remain in the possession of the debtor, and the £650 was to be repaid by certain instalments as provided by a hiring agreement to be entered into.

Prior to the execution of the agreement William Weymouth paid to the bankrupt two sums of £50 and £25 respectively on account of the £650, for which I. O. U.'s were given, and also the sum of £575, making in all the sum of £650, and on May 9, 1887, the partnership was dissolved, the sum of £365 being paid, as agreed upon, to J. F. Weymouth by the bankrupt.

On May 16 the following receipt was handed by the bankrupt to William Weymouth:—"Dear Sir,—I beg to acknowledge the receipt of your cheque for £575, making, with £50 and £25 already paid me by you, the sum of £650, in full payment for the engine, boiler, and machinery which I agreed to sell you at that price on the termination of my partnership with your brother.—J. T. YARROW."

Immediately after the dissolution of partnership was gazetted an agreement was drawn up which purported to be made between William Weymouth (called the "owner") and the bankrupt (called the "hirer"), whereby, after reciting that after the dissolution of the partnership the several articles mentioned in the schedule were purchased by and now belonged to the owner, and are admitted to be of such value that the amount thereof, if paid by instalments extending over ten years, with interest, would be £1,005, and that it had been agreed to enter into the arrangement hereafter contained, the hirer thereby agreed to pay the owner by way of rent for the articles £50 half yearly, to pay all rent for the saw mills where the articles remained, and not to part with the possession or remove the articles, or to assign the mills; on non-payment of any instalment or breach of any of the conditions of the agreement by the hirer, or on seizure of the articles, the agreement was to be determined, and the owner or his agents might re-enter and re-take the articles, and all payments made were to be forfeited to the owner; when the hirer had paid £1,000 he might, on giving notice to the owner and on paying an additional £5, purchase the articles; until the whole £1,000 and £5 were paid the articles were to remain the property of the owner, and are only let on hire by him, but on payment as above they were to become the property of the hirer.

Neither the receipt nor the agreement were registered under the Bills of Sale Acts.

The debtor failed to pay the instalments under the agreement, and on December 20, 1888, he filed his petition in bankruptcy.

The machinery was sold, and realized £279 after deducting expenses, which sum the trustee claimed as belonging to the bankrupt's estate.

Herbert Reed, for the trustee.—The whole transaction here amounted to a bill of sale, and as there was no document registered under the Bills of Sale Acts, the money belongs to the trustee. Of course, if transactions such as these are separate and distinct, the Bills of Sale Acts will not apply. In this hiring agreement there was a licence to seize as security for the payment of the debt, and it ought to have been registered. There was no real transfer of the property here. The case is covered by *Gapp* v. *Bond*, 35 W. R. 683, 19 Q. B. D. 200, reported only on another point, but the shorthand writer's note shows that these questions were decided. The point is whether it can be said that the real transaction was one of loan secured by the hiring agreement on these chattels.

He also referred to *In re Shane*, 29 SOLICITORS JOURNAL, 70; *Ex parte Odell, In re Walden*, 27 W. R. 274, 10 Ch. D. 76; *Ex parte Cooper, In re Baum*, 27 W. R. 298, 299, 10 Ch. D. 313.

H. Greenwood, for the respondent.—The case of *Gapp* v. *Bond* is inconsistent with *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.*, 37 W. R. 305, 13 App. Cas. 554. A hiring agreement is not a document which requires to be registered under the Bills of Sale Acts: *Yorkshire Railway Wagon Co.* v. *Maclure*, 30 W. R. 761, 21 Ch. D. 309. Here there was no equity of redemption in Yarrow.

He also referred to *Redhead* v. *Westwood*, 59 L. T. N. S. 293.

CAVE, J.—The question in this case is one of a class which it is always most difficult to decide. There is no darker page in the annals of English jurisprudence than the law of bills of sale. Although it is a recent enactment it is most illogical, uncertain, and full of doubt and difficulty, and the particular question to be decided here is a very good illustration of those doubts and difficulties.

The first matter to be determined is whether there was in this case a loan, or whether there was a sale, followed by a hire and purchase agreement. In order to determine that question it is necessary to see in what sense the question is put. If it is asked in what form the transaction was, the answer is that in form it was a sale followed by a letting on hire. If it is asked what it was in substance—or, in other words, what was the result which the parties intended to arrive at—the answer is, the same result as would have been arrived at by a loan and a mortgage of property. Which is the right answer to give in the present case it is almost impossible to say with any degree of certainty, because the courts, and especially the Court of Appeal, have decided that question in two different ways.

In *Yorkshire Railway Wagon Co.* v. *Maclure* they seem to have had regard to the form, in the sense which I have attached to it above, and not to the substance in the meaning I have attached to it. In *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.*, some members of the House of Lords expressed a similar opinion, and that case went upon the ground that the Blacker Co. had nothing to part with. They had an interest, but they had forfeited it, although the owners did not choose to enforce it. Still I cannot shut my eyes to the fact that Lord Macnaghten is reported to have said the result would be the same if the Blacker Co. had been the owners of the wagons. The same view was taken by Kay, J., in *Redhead* v. *Westwood*, while the other opinion was held by Mathew, J., in *Gapp* v. *Bond*, which was supported by two judges in the Court of Appeal.

Another question which arises is, assuming that this was a transaction in the nature of a mortgage, is there here any document which requires to be registered as a bill of sale? It does not follow that every document signed in a mortgage transaction must necessarily be a bill of sale. There, again, the highest authorities are at issue. In *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 35 W. R. 443, 447, 35 Ch. D. 191, Cotton, L.J., says that a purchase and hire agreement itself could, under no circumstances,

require to be registered as a bill of sale given by the hirer, and the same view was adopted by Kay, J., in *Redhead* v. *Westwood*. On the other hand, in *Gapp* v. *Bond* the opposite view appears to have commended itself. Lord Esher, M.R., does not say so in so many words, but it is difficult to see how his judgment can be supported on any other footing; and, according to the shorthand writer's notes, Fry, L.J., actually does say so. Here we have the judges of the Court of Appeal expressing directly opposite views on a point of law, and it is very difficult to reconcile these conflicting decisions.

Having regard to the weight of authority, I think it the safer course to adopt the view put forward by the Lords Justices and Lord Macnaghten in *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.*, which is subsequent to *Gapp* v. *Bond*, and has been treated as the ruling authority by Kay, J., in *Redhead* v. *Westwood*. It is true that *Gapp* v. *Bond* was not cited in that case, but I think the only thing to do is to follow *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.* and *Redhead* v. *Westwood*, and to hold that there are not here any documents which require registration, and that the respondent is entitled to the amount paid into court. If this case should be taken to the Court of Appeal I only express the hope that some definite opinion may be given which will be of service in guiding us to come to a right conclusion in any future cases of the same nature.

Application refused.

Solicitors for the trustee, *Goldberg & Langdon.*

Solicitor for the respondent, *W. T. Weymouth.*

Court of Appeal.

From Chan. Div. Dec. 3, 4, 6, 7.

EDEVAIN *v.* COHEN. (*a.*)

Practice—Pleadings—Amendment—R. S. C., 1883, *ord.* 19, *r.* 15; *ord.* 28, *r.* 1.

One of two defendants in an action of tort applied, at the trial of the action, for leave to amend his statement of defence by pleading, as a bar to the action, a prior judgment obtained by the same plaintiffs against other joint tort-feasors in respect of the same tortious act. The application for leave to amend was made after the evidence of the plaintiffs and of the other defendant had been given.

Held, that the merger of the cause of action in the prior judgment was a matter which ought to have been pleaded by the defendant, and that, having regard to the nature of the case, and to the time when the application was made, leave to amend ought not to be given to the defendant.

Decision of North, J. (*reported* ante, *p.* 8, 41 *Ch. D.* 563), *affirmed.*

Appeal from the decision of North, J., reported *ante*, p. 8, 41 Ch. D. 563.

The action was for the delivery up to the plaintiffs of certain furniture alleged to have been wrongfully taken away by the defendants Morris Cohen and F. W. Cook, and for damages.

Prior to the action being brought the same plaintiffs had recovered judgment in an action in respect of the same tortious act against tort-feasors other than the defendants to the present action.

The defendant Morris Cohen, by his statement of defence in the present action, pleaded that he had nothing to do with the acts complained of, but neither he nor the other defendant, F. W. Cook, by their pleadings raised the point that the judgment in the former action against the other joint tort-feasors was a bar to the present action. At the trial of the present action, after evidence on behalf of the plaintiffs and on behalf of the defendant Morris Cohen had been given, counsel for the other defendant, F. W. Cook, asked leave to amend his pleading by raising the abovementioned point, and counsel for the defendant Morris Cohen then for the first time made the same application.

North, J., refused to allow either of the defendants to amend, and on the merits of the case he gave judgment in favour of the plaintiffs.

The defendant Morris Cohen appealed.

The point of practice as to pleading is the only point on which the case on appeal calls for a report.

Oswald, for the appellant.—A judgment against one of two joint tort-feasors is a bar to an action against the other for the same cause: *Brinsmead* v. *Harrison*, 19 W. R. 956, 20 *Ibid.* 784, L. R. 6 C. P. 584, 7 *Ibid.* 547, and *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; following and approving of *King* v. *Hoare*, 13 M. & W. 494. The judgment in the former action was a matter known, of course, to the plaintiffs in this action, and it could not, therefore, be a surprise to them for the defendant to rely on it as a bar. It is only necessary to plead as grounds of defence matters which, if not pleaded, would take the other side by surprise: ord. 19, r. 15; it is necessary to plead the Statute of Frauds and the Statute of Limitations, only because the rule expressly says so. The judgment in the former action appeared from the evidence given by the plaintiffs themselves, and that fact is sufficient to cause it to operate as a bar without its being pleaded by the defendants: *Coote* v. *Judd*, 31 W. R. 423, 23 Ch. D. 727. Assuming, however, that the defendant Morris Cohen ought to have pleaded this matter, I submit that liberty to amend ought to have been given him on his paying all costs occasioned thereby: ord. 28, rr. 1, 12; North, J., distinguished *Colletts* v. *Goode*, 7 Ch. D. 842, 26 W. R. Dig. 177, on the ground that the defendant Morris Cohen knew of the previous action, but such knowledge, I submit, is immaterial when there was no evidence that he knew of the previous judgment, for it is the previous judgment, not the previous action, which operates as the bar.

He also referred on the point as to liberty to amend to *Tildesley* v. *Harper*, 27 W. R. 249, 10 Ch. D. 393; *Laird* v. *Briggs*, 29 W. R. 197, on appeal, 19 Ch. D. 22; *Cropper* v. *Smith*, 33 W. R. 60, 26 Ch. D. 700, at p. 710.

Cozens-Hardy, Q.C., and *George Henderson*, for the respondents, were not called on.

COTTON, L.J.—In dealing with this case I will first of all consider what the appellant is entitled to raise on this appeal having regard to the pleadings. It has been contended that a former judgment obtained in another action by the same plaintiffs against other tort-feasors engaged in the same tortious act was a bar to this action, and that the appellant was entitled to raise that point without any amendment of the pleadings. But when ord. 19, r. 15, is looked at it appears to me it is impossible to come to that conclusion. [His lordship read the rule, and continued:—] The point sought to be raised in my opinion comes within the terms of that rule. That is material because if the appellant were allowed to raise this point the plaintiffs would have been entitled to amend by showing that, notwithstanding the judgment in the previous action, they were entitled to maintain this action.

The contention of the appellant, however, is, that this

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

is only raising a point of law. But that is not so, it is raising facts to enable a point of law to be introduced and relied on, and therefore, according to the rules, those facts ought to have been pleaded by the appellant.

Then it is said that the appellant ought to have liberty to amend his pleadings. An application to that effect was made to North, J., and the learned judge refused leave to amend after hearing the evidence. That was done by the learned judge in the exercise of his discretion, and that alone is a strong reason, to my mind, to induce us now to refuse the appellant leave to amend. Again, I do not think that this amendment is necessary for the determination of the real question in issue between the parties in this action. I think the amendment is sought merely to enable the appellant to avail himself of what I may call a technical rule of law supported by the cases which have been referred to.

Further, this objection was not taken or insisted upon at once by Morris Cohen, the present appellant; it was first mentioned and the objection was first taken by counsel who then appeared for another defendant, and it was only raised and insisted on on behalf of Morris Cohen after all the evidence had been taken, and after he had taken his chance of the evidence turning out favourably to him.

I, therefore, quite agree with what was done by North, J., when he refused this defendant liberty to amend, and I think it was well within his power to come to the conclusion at which he arrived.

BOWEN and FRY L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *M. Nordon.*

Solicitors for the respondents, *Morris & Rickards.*

From Lancaster Palatine Ct. of Chan. } June 6, 1889.

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.

Ex parte GRAHAM. (*a.*)

Company—Winding up—Grant of land in consideration of a rent-charge—Covenant by grantee for payment—Mortgage by grantee's assignees to company—Mortgagees in possession—Arrears of rent-charge—Liability of liquidators of company in possession of land for arrears of rent-charge accrued after commencement of winding up—Obligation existing at date of winding-up order for future payments, whether provable as a debt in the winding up—Covenant running with land.

G. conveyed land to the use that an annual rent-charge should be paid thereout to himself, his heirs and assigns, with powers of distress and entry in case of default, and subject thereto to the use of L. in fee, and L. covenanted for himself, his heirs and assigns, for payment of the rent-charge. A building society having become mortgagees in fee in possession of the land, leased it to W., who sub-let it to a tenant. The society was now being wound up as an unregistered company under section 203 of the Companies Act, 1862, and the assets having, by an order of the court, been vested in the liquidators, they continued for some time to receive the rent from the tenant and pay the rent-charge. Finding that they were paying more than they were receiving for the land, they got the permission of the court to dispose of it, and gave notice both to the tenant and to G. that they renounced their possession of, and interest in, the property. They afterwards conveyed it to a person for a nominal consideration. G. having died, the executors and trustees of his will brought in a claim to prove in the winding up for arrears of the rent-charge accrued due between the dates of the notice to renounce and the conveyance for a nominal consideration.

Held, that, at the time of the commencement of the winding up, there was no liability for future payments of the rent-charge capable of being valued and proved as a debt in the winding up within section 158 of the Companies Act, 1862; that the society were only liable to pay the rent-charge as long as they were holders of the land; that the notice to renounce was sufficient to put, and did put, an end to their holding of it; and that the covenant to pay the rent-charge did not run with the land.

Thomas *v.* Sylvester, 21 *W. R.* 912, *L. R.* 8 *Q. B.* 368, *explained.*

Appeal from the Vice-Chancellor of the County Palatine of Lancaster.

This appeal was brought by the personal representatives of the late Rev. Philip Graham from an order of the Vice-Chancellor by which he refused to vary the certificate of the registrar disallowing a proof or claim made in the winding up of the Blackburn and District Benefit Building Society.

The claim was for £89 10s., being the difference between £139 10s.—the amount due under a rent-charge on a piece of land at Over Darwen, in Lancashire—and £50 which had been paid under a distress put in against the occupier.

The land had been conveyed by the Rev. P. Graham by deed of June 20, 1872, to the use that an annual rent-charge of £59 2s. 9d. should be paid thereout to himself, his heirs and assigns, by equal half-yearly payments, with powers of distress and entry in case of default in payment, and subject thereto to the use of two purchasers named Joshua Leach and John Leach as tenants in common in fee.

The purchasers also covenanted for themselves, their heirs and assigns, for punctual payment of the rent-charge. They subsequently conveyed the land, subject to the rent-charge, to the Cotton Hall Brick and Pipe Co., who, on the 25th of March, 1875, mortgaged it in fee to this building society. The mortgaging company having been wound up in 1878, their liquidator disclaimed the property, and the building society remained in possession as mortgagees. In May, 1880, they leased the land to one Wray for five years, and Wray sub-let it to one Grimes.

On the 23rd of July, 1881, a petition was presented in the Palatine Court for winding up the building society as an unregistered company, and a winding-up order was subsequently made on that petition.

In February, 1882, an order was made vesting the society's assets in the official liquidators. Grimes paid his rent to the liquidators, and they paid the rent-charge up to the expiration of Wray's lease in May, 1885.

In the following month, the income from the property being insufficient to pay the rent-charge, the liquidators obtained an order giving them liberty to assign the land to any person for any or no consideration, or to quit possession upon such terms as they might think advisable. They thereupon gave notice to Grimes and to Mr. Graham that they renounced their possession of and interest in the land, but, though negotiations were entered into as to a reconveyance to Mr. Graham, and he was willing to accept one, no written agreement or reconveyance was in fact ever made. Mr. Graham having died on the 7th of May, 1887, the official liquidators then applied to the executors and trustees of his will, and gave them notice to the same effect as they had given Mr. Graham in his lifetime.

On the 7th of September, 1887, the liquidators

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

executed a conveyance of the property to a person named Clough for a nominal consideration.

On the 26th of December, 1887, the executors and trustees of Mr. Graham's will put in a distress against the occupier, Grimes, for arrears of the rent-charge, and £50 was then paid by him.

In January, 1888, the trustees issued their writ in the Queen's Bench Division against the liquidators personally for the arrears of the rent-charge.

The liquidators successfully applied to the Divisional Court to stay the action, on the ground of the leave of the court not having been obtained under section 87 of the Companies Act, 1862. It was held on appeal that the action against the liquidators personally was groundless, and ought to be stayed. The case is reported as *Graham* v. *Edge*, 36 W. R. 529, 20 Q. B. D. 538, 683. The trustees then carried in a claim for the balance of the rent-charge from the 1st of November, 1885, to the 8th of September, 1887, amounting to £89 10s. That having been disallowed by the registrar, they obtained an order on the 19th of October, 1888, that, notwithstanding the certificate of the registrar, they should be at liberty to go before the judge and establish such claim as they could.

The Vice-Chancellor affirmed the decision of the registrar.

The trustees appealed.

Buckley, Q.C., and *T. Clarkson*, for the appellants.—*Graham* v. *Edge* was decided on the ground that the liquidators were not personally liable, and the case on the merits was left entirely open. After the order made in June, 1885, the liquidators informed Graham that they did not want the property any more, and after he died, on the 7th of May, 1887, they told the trustees the same. On the 7th of September, 1887, the liquidators executed a conveyance of the property to a pauper named Clough, in order to get rid of their liability. The claim is made on the footing that as from the day on which the society ceased to hold the land they are not answerable. Down to that time they were liable through their sub-tenant. The Vice-Chancellor said they had no power to disclaim, though the creditor ought to have acceded to their request and taken the property off their hands. The liquidators could not disclaim without the leave of the court, and the company was liable for the rent-charge till the land was actually conveyed to someone else: *Gooch* v. *The London Banking Association*, 32 Ch. D. 41, 34 W. R. Dig. 38. *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368, is an authority for the proposition that the liquidators are liable for such a debt. [FRY, L.J.—Does it go further than this—that they can maintain an action against the same person that they can distrain against?] The covenant to pay the rent-charge runs with the land: *Austerberry* v. *Corporation of Oldham*, 33 W. R. 807, 29 Ch. D. 750, 781.

They also referred to *Lillingston's case*, 4 Co. Rep. 38a, p. 126; *In re London and Colonial Co., Horsey's claim*, 16 W. R. 577, L. R. 5 Eq. 561; *In re Haytor Granite Co.*, 14 W. R. 186, L. R. 1 Ch. App. 77; *In re Gartness Iron Co.*, 18 W. R. 1103, L. R. 10 Eq. 412. Lord ESHER, M.R., referred to *Whitaker* v. *Forbes*, 24 W. R. 241, L. R. 10 C. P. 583, 1 C. P. D. 51, and *Macfarlane's claim*, 17 Ch. D. 337, 29 W. R. Dig. 47.

Neville, Q.C., and *Snow*, for the official liquidators, were not called upon.

Lord ESHER, M.R.—In this case there is an appeal from the Vice-Chancellor of the Palatine Court who refused to admit a claim for arrears of a rent-charge. The society is being wound up, and the representatives of Mr. Graham have made a claim, not at the commencement of the winding up but a long time afterwards, to prove for a specific sum of money, which they said was due as rent-charge at the time the winding-up order was made. But I think they have brought it as a claim which was not due at that time, but became due in the subsequent course of the liquidation. They put their claim either on that view or on the alternative view, that there was a claim existing at the commencement of the winding up which could have been then valued. Therefore they are now proving for a specific sum. We must consider first of all what this claim was. It was made in respect of a rent-charge. The conveyance of the property was made reserving a rent-charge to the grantor. As a matter of fact at the commencement of this winding up all the rent that was then payable had been paid—none of the rent-charge was in arrear. It is said there was then a claim under the Companies Act, 1862, s. 158, against the society's estate for a rent-charge since accrued due. But a claim does not mean what anyone asks, but it must mean a legal claim resting on a liability or obligation. Was there any such claim with respect to the rent-charge on the property of the society aforesaid at the commencement of the liquidation? The case of *Thomas* v. *Sylvester* is said to be an authority for this claim because it decides that the liability for rent-charge is a debt. It does not decide anything of the sort. It only decided that there was in that case a claim arising from an interest which a tenant has in the land in respect of the possession and the profits of it at the time when the rent-charge accrues due. It was so much a right in respect of the land that there was formerly, before the Common Law Procedure Act did away with it, a real action to enforce it, not brought on contract, but on a right arising out of the land. What was decided in *Thomas* v. *Sylvester* was that, though the old remedy was gone, another remedy remained—that is, the court held that an action of debt would lie for arrears of a rent-charge, but the court did not say the rent-charge itself was a debt. An action of debt was not confined to what was properly a debt, but might be brought for anything that had become payable before action brought. For example, if a person had incurred a penalty of £50 under an Act of Parliament, you might bring an action of debt for it, but that was not founded on a contract. But if there was no debt due there could be no action of debt, though there might be an action on the contract. What the court said in *Thomas* v. *Sylvester* was that that was not an action of covenant arising out of the land, but that it was a case in which there would be an action of debt if there was a debt. They said that a man is liable, whilst he is actually the pernor of the profits, for non-payment of a rent-charge created by a former tenant in fee, and therefore that it was an action arising out of the possession of land.

In *Whitaker* v. *Forbes*, where the same question arose, and that case (*Thomas* v. *Sylvester*) was considered, the action was brought for a rent-charge which was due at the time, but the land was in Australia. It was held that it was an action arising out of the possession of the land, and that it would not lie in England. In that case I said that "In an action of debt the venue is *primâ facie* transitory, but I think that, though that is so, we are bound by the authority of the decisions cited in the note to *Thursby* v. *Plant* in 1 Williams Saunders, Sir E. Williams' Edition, p. 238, to hold that in some actions of debt the venue is not transitory, as, for instance, in actions for penalties. There the statute makes the venue local, but the note is also authority for saying that where there is no contract or covenant, but the debt only arises by reason of privity of estate—that is to say, when the liability depends on the defendant's being in possession of the estate charged, and not on privity of contract—then the venue is local, and the action must be brought in the locality where the land is situated." And so it was held by the court. That is our authority for saying that a claim to recover a rent-charge arises, not out of contract, but out of

privity of estate. There is authority for the proposition that if a person who did not create the rent-charge, and had not covenanted to pay it, was in possession of the land out of which it issues, he is liable for breach of duty in not paying it while he is in possession of the land, but that, unless and until he has been in possession whilst the rent-charge accrued due, there is no claim against him. If that be so, then, these arrears of rent-charge not having accrued due when this society was in possession at the commencement of the winding up, and they not having covenanted to pay the rent-charge, there was no duty on them to do or pay anything in respect of a rent-charge coming due in the future. There was, therefore, no liability upon them, as they were not in possession when these payments became due. I have no doubt, therefore, that you cannot bring in section 158 of the Companies Act, 1862, to make them liable at the commencement of the winding up. The claim must be one arising out of a legal liability. Then, with respect to any liability arising after the commencement of the winding up, the only way you can get at the liquidators is to say they have taken the estate after the liquidation commenced, for the benefit of the liquidation, and that they must, therefore, take it with its burdens. But that was not made out. They only took the estate so far as they could not help taking it. But they found the thing would be an injury to the creditors, and so they went to the court and asked to be allowed to get rid of what was a white elephant. The court said, Yes, if anyone will give you anything for it. Then they went to the grantor, and told him they did not want the land, but he said, No, I will not take it—I will leave you to pay the rent-charge. So they went to the tenant and said, Remember, you are no longer our tenant. That is in point as to the argument that they were in possession by their tenant.

The Vice-Chancellor found as a fact that they were out of possession. He said: "How can I fix them with the possession of the estate when they did everything in their power to get rid of it?" Therefore, there being no liability at the commencement of the winding up, and no liability established by anything they have done afterwards, there is no liability at all, and the appellants cannot prove for these arrears in the winding up.

I think, therefore, that the judge was right, and that this case is governed by the two cases I have referred to. The case decided by Bacon, V.C. (*In re Gartness Iron Co.*), is no authority as regards English law.

COTTON, L.J.—This is an appeal from a judgment of the Vice-Chancellor of the Duchy of Lancaster affirming the disallowance by the registrar of the appellant's claim.

This land was originally conveyed to some people of the name of Leach, who covenanted to pay a rent-charge, and the land was afterwards conveyed to this society, now in liquidation.

The society were not under any obligation by the contract to pay this rent-charge. Their liability, if any, depends entirely upon their possession of the land, though the liability of the original purchasers upon their covenant may still exist. The claim simply depends on any right the grantor may have through the existence of the rent-charge by virtue of the society being in possession by themselves or their tenant.

By an order made in the winding up this property became vested in the liquidators. The representatives of Mr. Graham, the grantor, brought an action against the liquidators personally in the Queen's Bench Division. That was stayed by the Court of Appeal, without prejudice to a proof being brought in in the winding up. After that order the only question really is whether any debt has been shown against the society.

But we may also decide whether the appellant has any claim against the liquidators to this £89 10s. by reason of their having had the benefit of the property during the winding up.

Debts can only be proved against the company if they existed as debts at the time of the winding-up order. The liquidators got an order to dispose of the property. They went to Graham and to Grimes and said they wished to get rid of it, and they offered to reconvey it. That, in my opinion, would entirely prevent any claim being made against the liquidators for rent-charge accrued due during the subsequent portion of the winding up.

Then we come back to the real question. Is there any debt here that was a debt at the commencement of the winding up? An action of debt can undoubtedly now be brought for a rent not due by contract, but arising out of land. The holder of land is liable for payments of rent-charges that accrue due while he holds: *Thomas* v. *Sylvester*. The question is whether there is any liability on these liquidators in respect of the rent-charge since the date of the winding-up order. No doubt they were in possession, but their holding does not seem to have been a beneficial one. It is said it comes under section 158 of the Companies Act, 1862; but that section only applies to obligations existing at the commencement of the winding up. Cases have been quoted and referred to for the purpose of showing that that is not the true construction at all, but that this claim could be brought within the section.

The only two cases I need refer to are *In re Haytor Granite Co.* and *In re Gartness Iron Co.* In the former the lessee had covenanted to pay all the rent. That was an obligation by contract existing at the time of the winding-up order, and the amount was estimated by calculating how much the company would become liable for under the covenant. In the latter, the case before Bacon, V.C., in which the company were assignees of land in Scotland subject to feu duties, the court treated the company as if they had contracted to pay the feu duties, and the cases cited from the Scotch law were admissible to show what their liabilities were under the law of Scotland. It has no bearing on the present case, and adds nothing whatever to the *Haytor case*, but appears to turn on the relations in which, by the contract, the parties stood to each other. If that was not the ground of the decision of Bacon, V.C., I do not think we are bound to follow it. The cases which decide that an action of debt may be brought where there is an obligation not by contract but by law, do not in any way justify the court in admitting this claim when, at the time the liquidation began, there was no rent payable from the society under this rent-charge. One other point put to us by Mr. Buckley was that the covenant to pay the rent-charge ran with the land. *Thomas* v. *Sylvester* is against that contention. In that case the two judges who gave an opinion on the point (I was not one) evidently considered that the covenant did not run with the land, as they decided the case upon the point whether the owner of the rent-charge could sue the assignee as the holder of the land in an action of debt. I think the Vice-Chancellor was right, and that this appeal must be dismissed.

FRY, L.J.—I am of the same opinion. The first point was that there was a debt or obligation existing at the commencement of the winding up; and the second was that it was said the company have enjoyed the benefit of the property since the winding up began, and that they must, therefore, take the liability to which it was subject.

As to the first point, there being no contract between the company and the owner of the rent-charge, the only right of the appellants would be as to the rent-charge which accrued due while the company were in possession of the land and the profits of it. Then it was said

the covenant was one which runs with the land. I agree with Cotton, L.J., that there is no liability except for rent accrued due while the assignees were in possession of the land.

As to the second point, that they must pay for the benefit they have had, the facts entirely repel that argument. They, in fact, enjoyed no benefit from the land, and took every means in their power to get rid of it. I agree, therefore, that this appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Pritchard, Englefield, & Co.*, for *Charles Costeker*, Over Darwen.

Solicitor for the liquidators, *Frith Needham*, for *Danger & Neville*, Liverpool.

From Q. B. Div. Nov. 23, 25.

MAYOR, &c., OF BURTON-ON-TRENT *v.* ASSESSMENT COMMITTEE OF THE BURTON-ON-TRENT UNION AND OTHERS. (*a.*)

Poor rate—Rateable value—Sewage farm and pumping station — Hypothetical tenant—Parochial Assessment Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

The Corporation of Burton-on-Trent were the owners of a sewage farm and a pumping station for the purpose of disposing of the sewage of the town, in respect of which the corporation were assessed to the poor rate. It was impossible to work the sewage farm except at a loss so long as it remained a sewage farm, and if the corporation wished to let it as a sewage farm, no one would be found to take it even at a nominal rental. The pumping station, while used as part of the sewage system, was incapable of yielding a profit, and could not be used beneficially for any other purpose. If the sewage farm and pumping station belonged to a private owner, the corporation would be willing to hire them at a yearly rent sufficiently high to support the present rates.

Held (*reversing the decision of the* Queen's Bench Division), *that, in ascertaining the rateable value, the corporation must be taken into account as possible hypothetical tenants, and the rent that they would give for the sewage farm and pumping station as a sewage farm and pumping station if they were not the owners in occupation must be taken into account in ascertaining the rateable value, and that, therefore, the rates must stand.*

Reg. *v.* Metropolitan Board of Works, 17 *W. R.* 527, *L. R.* 4 *Q. B.* 15; Metropolitan Board of Works *v.* West Ham, 19 *W. R.* 246, *L. R.* 6 *Q. B.* 193; *and* London School Board *v.* St. Leonard, Shoreditch, 34 *W. R.* 583, 17 *Q. B. D.* 738, *discussed.*

Appeal from the judgment of the Queen's Bench Division on two special cases stated by an arbitrator under 12 & 13 Vict. c. 45 on appeal to quarter sessions.

FIRST CASE.

This appeal was against a poor rate for the parish of Egginton, in which the appellants' sewage farm was rated at £2,000 gross estimated rental and £1,800 rateable value.

The sewage farm had been acquired, laid out, and worked at considerable cost by the Corporation of Burton-on-Trent under the provisions of the Burton-on-Trent Corporation Act, 1880 (43 & 44 Vict. c. cxxxix.), and the sewage was delivered on to the farm through a main from a pumping station in the parish of Stretton. It was impossible to work the sewage farm except at a loss as long as it remained a sewage farm, and if the corporation desired to let it as a sewage farm they would be unable to find anyone to take it, even at a nominal rental; but if disconnected from the sewage system of which it formed a part it might be let to a tenant for ordinary agricultural purposes at the same rate per acre as similar land in the neighbourhood, which would represent £400 gross estimated rental and £310 rateable value. The corporation were content that it should be assessed and rated at these amounts. The corporation laid out and worked the sewage farm suitably and economically, and could not carry out their statutory duties at any smaller expense elsewhere. If the sewage farm with its present appliances belonged to a private owner he would let, and the corporation would hire, it as a sewage farm at a yearly rent sufficiently high to support the present rate.

The corporation contended that the sewage farm, being incapable of beneficial occupation in its present condition, was not rateable, or that, if rateable, it should be rated at the value for which it would let to a hypothetical tenant from year to year, supposing it were not used as part of the sewage system, but were entirely disconnected therefrom and used for ordinary agricultural purposes.

The Assessment Committee contended that it was not necessary to rateability that the premises as actually occupied and utilized should yield or be capable of yielding a commercial profit; it was sufficient if they could be let and would command a rent from any possible hypothetical yearly tenant, and that the corporation ought to be taken into account as one of the possible hypothetical yearly tenants; and that the present rate was right and reasonable, inasmuch as it was found and admitted that the corporation, if they were not occupying owners, might reasonably be expected and would actually be willing to pay for the said premises a yearly rent sufficient to support the present rate.

SECOND CASE.

This appeal was against a poor rate for the township of Stretton, in which the appellants' land and sewage pumping station were rated at £1,050 gross estimated rental and £840 rateable value.

The land and pumping station formed part of the land and works acquired and erected by the Corporation of Burton-on-Trent, under the provisions of the Burton-on-Trent Corporation Act, 1880. For the purpose of dealing with and disposing of the sewage of Burton-on-Trent, it was necessary to have a pumping station, with all necessary engines and machinery, to pump the sewage on to the sewage farm in the parish of Egginton. The machinery, buildings, and works at the pumping station were specially designed for that purpose, and could not be used beneficially for any other purpose. The mains, land, and pumping station were suitable and necessary to enable the corporation to dispose of the sewage, and all the works were carried out efficiently and economically for that object, but they would be of no substantial value to anyone except to the corporation for the above object. The land and pumping station, while used as part of the sewage system, were incapable of yielding a profit or advantage, except that they enabled the corporation to carry the sewage on to the sewage farm, but the corporation would not be able to carry out their statutory duties as to the disposal of the sewage at any other place at a smaller expense. If the land and pumping station belonged to a private owner, he would let, and the corporation would hire, them at a yearly rent sufficiently high to support the present rate. Except for the purposes of the sewage system, the value of the land and pumping station would be £100 gross estimated rental and £75 rateable value.

The corporation contended that the land and pumping station, being only capable of beneficial occupation if

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

used for other than sewage purposes, should be rated at the value for which the same would let to a hypothetical tenant from year to year supposing they were not used as part of the sewage system, but were entirely disconnected therefrom and applied to such useful purposes as they might be made available for.

The contention of the assessment committee was the same as that set out in the first case.

If the court should be of opinion that the contention of the corporation was correct, the appeals should be allowed, and the gross and net rateable value appealed against should be reduced to £400 and £310 respectively in the first case, and to £100 and £75 respectively in the second case.

If the court should be of opinion that the contention of the assessment committee was correct, the appeals should be dismissed.

The Queen's Bench Division (Lord Coleridge, C.J., and Stephen, J.) held, in the first case, that the sewage farm was not rateable, as it was not the subject of beneficial occupation, and, in the second case, that the land and pumping station were rateable at the value for which they would let to a tenant from year to year supposing they were entirely disconnected from the sewage system, upon the principle adopted in *Metropolitan Board of Works* v. *West Ham*, 19 W. R. 246, L. R. 6 Q. B. 193. (See 58 L. J. (M. C.) 187.)

The assessment committee appealed.

Fullarton (*Sir Richard Webster, A.G.*, with him), for the assessment committee.—The case of the *London School Board* v. *St. Leonard, Shoreditch*, 34 W. R. 583, 17 Q. B. D. 738, shows that the occupying owner is not to be excluded from consideration as a hypothetical tenant. If it is shown that any tenant, not excluding the occupying owner, would pay a rent for the premises, then that rent must be taken into account in ascertaining the rateable value. The motive for taking the premises and the question of profit are both immaterial. Here it is stated in the case that the corporation, if they were not the owners, would be willing to become tenants of the sewage farm and pumping station at a rent sufficiently high to support the present rates. In *Reg.* v. *Metropolitan Board of Works*, 17 W. R. 527, L. R. 4 Q. B. 15, and *Metropolitan Board of Works* v. *West Ham*, 19 W. R. 246, L. R. 6 Q. B. 193, sewers were held not to be rateable, and in the latter case the pumping station was held to be rateable at the value for which it would let to a tenant if severed from the main-drainage scheme. Those cases, however, are not consistent with the *London School Board case*, and must be taken as overruled. *Owens College* v. *Chorlton-upon-Medlock*, 35 W. R. 236, 18 Q. B. D. 403, is distinguishable, as the college were prohibited by statute from becoming tenants of the site and buildings. The corporation here might, by their Act, have become tenants of the sewage farm.

Bosanquet, Q.C., and *Etherington Smith*, for the corporation.—For the purposes of the present case the corporation are satisfied to contend that the sewage farm can only be rated at its agricultural letting value. The decision in *Reg.* v. *Metropolitan Board of Works* and *Metropolitan Board of Works* v. *West Ham* is that until the works are disconnected from the sewage system no one can make any profit out of them, and it is only on the basis of disconnection that they can be rated. As long as these premises are part of the sewage system they are incapable of yielding a profit, and are struck with sterility. As they can only yield a profit by being disconnected from the sewage system they can only be rated at their value when so disconnected. In *London School Board* v. *St. Leonard, Shoreditch*, the subject-matter was a large building capable of profitable occupation without any disconnection, and a tenant could be found to pay a rent for it if the school board vacated it. That case was not intended to overrule the *West Ham case*. [They also referred to *Corporation of Worcester* v. *Droitwich Union*, 25 W. R. 336, 2 Ex. D. 49, and *Guest* v. *East Dean*, 20 W. R. 332, L. R. 7 Q. B. 334.] Further, this case comes within the decision in *Owens College* v. *Chorlton-upon-Medlock*, as the corporation, being owners of the premises under their Act, cannot now part with it, and, therefore, cannot become tenants of it.

Sir Richard Webster, A.G., in reply.—In the *West Ham case* there was no finding that the Board of Works would have been willing to become tenants at a rent if they had not been owners. Therefore the question was not raised or decided.

He also referred to *Reg.* v. *West Bromwich School Board*, 32 W. R. 866, 13 Q. B. D. 929.

Lord ESHER, M.R.—The decisions in rating cases have been progressive. The courts, in dealing with rating cases, have wisely confined themselves to answering the questions put to them in each case, and have disregarded any other questions that might have arisen, or that might have been taken. New points would, therefore, continually be raised as each case was decided, and, in that sense, the decisions may be said to be progressive. Looking at the cases with that gloss upon them, it is no use to say that the question now before us might have arisen in the earlier cases, for, if the question was not specifically put to the court, the court would not answer it. It is true that in some of the earlier cases this very point might have been raised, but, for the reason I have given, we cannot from that draw the conclusion that the court has decided it. The question whether the occupying owner of premises should be regarded as a possible hypothetical tenant in my opinion was never raised before the case of the *London School Board* v. *St. Leonard, Shoreditch*. No case has been cited to us where such a point has been expressly raised before. It was said that the point might have been raised in *Metropolitan Board of Works* v. *West Ham*. In that case there was this peculiarity: that the court had power to draw inferences of fact. Hence, even if it is to be taken that the point was raised, the court shut themselves out from deciding it, for they drew the inference of fact that it would be impossible to find any tenant for the property proposed to be rated—namely, the sewers. That is the direct contrary of the finding in the *London School Board case*, where it was stated that the school board, if they had not been the owners of the school, would be willing to pay a rent for it as tenants. Nor in the *Mersey Docks* v. *Llaneilian Overseers*, 33 W. R. 97, 14 Q. B. D. 770, was the question ever raised or even glanced at. The question, therefore, seems to have been raised for the first time in the *London School Board case*. The ground of that decision was that by the Act the court is to look for any tenant who is willing to pay rent for the premises. If any such tenant can be found, he is to be taken into account as a possible hypothetical tenant. If the school board, who were the owners in occupation of the school, would be willing to become tenants of the premises used as a school at a rent, supposing they were not the owners, then they could not be excluded from consideration, even though no other person would be willing to become tenant of the premises subject to the restrictions then placed upon their use. The question does not depend upon whether there is a profitable occupation; it depends upon whether there is a beneficial occupation, and as soon as a tenant can be found who is willing to pay rent for the premises for any reason whatever the premises become the subject of a beneficial occupation. Mr. Bosanquet tried to show that the judgment of Bowen, L.J., differed in its reasoning from the

judgments of the rest of the court. I myself cannot see that he differed in any way, and this still more clearly appears when the report in the *Law Journal* (55 L. J. M. C. 169) is looked at.

The point raised in *Owens College* v. *Chorlton-upon-Medlock* was anticipated and guarded against in the *London School Board case*—namely, that if the occupying owner could not, by statute or otherwise, become a tenant at all, then he must be excluded from consideration as a possible hypothetical tenant. That point was expressly decided in the *Owens College case*, but it was distinctly said that if the college had not been prohibited by statute from becoming tenants of the premises they must have been taken into account as hypothetical tenants willing to pay a rent.

In the present case the Burton Corporation were authorized by their Act to buy or rent land for the purpose of carrying out their sewage works. They might, therefore, have rented this sewage farm. That seems to me to bring the case exactly within the last two decisions. The fact that they are not prohibited from renting the farm shows that they cannot be excluded from consideration as hypothetical tenants. There is an express finding in the case that if the sewage farm, with its present appliances, belonged to a private owner, the corporation would hire it as a sewage farm. That being so, the case comes within the decisions, and these occupying owners, who would have paid a rent for the sewage farm to be used as a sewage farm, must be taken into account as possible hypothetical tenants. The same reasoning applies also to the pumping station. In my opinion the higher rent which the corporation would give is the rent which is to be taken into account in ascertaining the rateable value, though not absolutely conclusive of it. We have nothing to do with any question of figures; we only answer the question put to us, and say that both rates must stand.

Lindley, L.J.—This question turns upon the true construction of section 1 of the Parochial Assessment Act, 1836, which enacts that the rate must be made upon an estimate of the rent at which the property might reasonably be expected to let from year to year free of tenants' rates and taxes, and deducting the cost of repair, &c. We have to apply that enactment to this case. We must consider whether a person, who is compelled by law to take the premises, and who can make no profit out of them, is to be taken into consideration as a hypothetical tenant in ascertaining the rateable value. The question has not arisen for the first time. The question was raised and solved in the case of the *London School Board* v. *St. Leonard, Shoreditch*, where it was held that if a tenant could be found who, whether under stress of statutory requirements or otherwise, would take the premises, the rent that tenant would pay must be taken into account, and that the occupying owner must not be excluded from consideration as a possible tenant. I cannot find that the question was ever raised before.

No doubt it might have been raised in the two cases of *Reg.* v. *Metropolitan Board of Works* and *Metropolitan Board of Works* v. *West Ham*, and also in the *Mersey Docks* v. *Llanellian Overseers*, but in those cases there was no finding such as there is in this case, that if the sewage farm with its present appliances belonged to a private owner he would let, and the corporation would hire, it as a sewage farm at a yearly rent sufficiently high to support the present rate. That seems to me to be the only way in which the two *Metropolitan Board cases* can stand beside the *London School Board case*. That finding appears to me to bring this case exactly within the *London School Board case*. The case of *Owens College* v. *Chorlton-upon-Medlock* would have been decided in the same way as the *London School Board case* had it not been that the court came to the conclusion that Owens College could not have become tenants of the site and buildings. The rate, therefore, for the higher amount must stand. Our decision as to the pumping station rests upon the same principle.

Lopes, L.J.—This case seems to me to be covered by the *London School Board* v. *St. Leonard, Shoreditch*, and, therefore, the corporation must be taken into account as hypothetical tenants of the sewage farm. Having regard to the finding in the case (which the Lord Chief Justice in his judgment seems to have overlooked) that the corporation, if they were not occupying owners, would become tenants at a rent sufficiently high to support the present rate, the corporation must be assessed on the higher value. At the same time I feel a difficulty in reconciling the *London School Board case* with the *West Ham case*. I quite see that the point was not clearly raised in the *West Ham case*, but I cannot help thinking that the judges did decide the point, and in a way not reconcilable with the latter case. If this is the true view the only result would be that the *West Ham case* is overruled by the *London School Board case*. Speaking for myself, had it not been for the *London School Board case* and *Owens College case* I should have doubted whether a tenant who was subject to certain statutory conditions and must take the premises to perform a statutory duty was the kind of tenant contemplated by the Parochial Assessment Act. I should have thought that the statute contemplated an ordinary tenant and not a tenant who was forced to become a tenant at a loss. I am bound, however, by the decision in the *London School Board case*. I agree also as to the pumping station.

Appeal allowed.

Solicitors for the corporation, *Geare, Son, & Pease*, for *J. & W. J. Drewry*, Burton-on-Trent.

Solicitors for the assessment committee, *J. & C. Robinson & Wilkins*, for *H. Goodger*, Burton-on-Trent.

High Court of Justice.

Chan. Div. Kay, J. — Nov. 13, 14

Case v. Case. (a.)

Married woman—Marriage between Englishman and foreigner — Contract — Foreign law — English real estate—Incapacity to alienate—Restraint on anticipation—Doubt—Family arrangement.

In 1834 a domiciled Englishman, tenant in tail in possession of real estate in England, married in Turkey a subject of the then Kingdom of the Two Sicilies. By a contract executed before marriage he gave half of all his revenues and real and personal estate as an irrevocable donation in augmentation of her dowry. The evidence showed that, if the husband's land had been in Sicily, this contract would have transferred half of it at once for the benefit of the wife without further conveyance, that that half would have been inalienable during their joint lives, and that the contract was irrevocable. No steps were taken to carry out the contract. In 1846 the husband disentailed all his property and sold part of it, and in 1847 he and his wife executed a deed, by which, after reciting that doubts had arisen as to the effect of the contract, the rest of the property was settled. The husband died in 1887, and this action was brought by the tenant in tail under the deed of 1847 to have the

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

trusts of that deed carried into execution, and for a declaration that a deed executed in 1886 *by the husband and wife, purporting to annul the deed of* 1847, *was void. The wife defended the action, and at first alleged undue influence and want of consideration and independent advice, but she subsequently withdrew these allegations. Her case was that in* 1847 *the land comprised in the contract was inalienable, and that a capacity to alienate could not be obtained by arrangement. She brought a cross-action to have the deed of* 1847 *declared void.*

Held, that in 1847 *there was a serious doubt as to the rights of the parties, and that the settlement of that year was a family arrangement, with which the court would not interfere after the lapse of forty years.*

Trial of action.

The question in this case was whether in 1847 one-half of certain land was so clearly inalienable that a deed of family arrangement of that year, based upon doubts as to the rights of the parties, must be set aside or declared to be void.

On the 11th of January, 1834, Thomas Case, being then aged twenty-three, a domiciled Englishman and tenant in tail in possession of certain estates in Lancashire and Staffordshire, subject to incumbrances, entered into a contract of marriage with Alexandrina Mavromatti, a young lady aged sixteen, the daughter of a father who in the early part of the century left Messina, in Sicily, and had since lived at Therapia, in Turkey, and had died there. Alexandrina Mavromatti, who was then living at Therapia with her mother, was entitled to some small property, part of which was to be used for her expenses, trousseau, and so on, and another part of which she would come into possession of on the death of her mother, under the will of her father. The contract, which was in the Italian language, was entered into in Turkey, and the original, and also a sworn translation of it, were produced in court. So far as material the contract was to the following effect. It provided that Mr. Thomas Case was engaged to Alexandrina Mavromatti, and that the engagement was accepted by her; her mother engaged to provide a trousseau of the value of 9,520 piastres, and that, inasmuch as her late father by his will constituted his wife usufructuary of all his inheritance, with the obligations that after her death it should be divided between his sons and daughters under certain conditions, the mother engaged that that portion of the paternal inheritance which would come to Alexandrina should be her dowry, only to come into possession after the death of the mother; and Mr. Thomas Case gave "by this present act *irrevocabiliter inter vivos*" to his said betrothed "half of all his revenues and of all his possessions both real and personal that he now holds, or may at any time hold, wherever they may exist or be situated," "under the following conditions and rights," the first of which was that the donation was to be regarded as an increase of such constituted dowry, and in any case he was to hand over that same dowry, "and the wife may dispose of it in a similar manner as she may dispose of the dowry itself, with which the said gift forms one sole capital, her exclusive and sole property." Thomas Case was to retain the said half as her trustee and administrator, holding it in the name of the receiver of the donation; and to guarantee the said dowry "he charges and mortgages both jointly and severally all his possessions over and above the legal mortgage without any exception, and all included." It did not appear that T. Case had any personal estate.

On the 18th of January, 1835, the marriage was solemnized at Therapia, and on the 28th of May, 1835, there was a remarriage at Constantinople, and of that marriage two children were born, one on the 27th of July, 1839, named Charles Case, who had since died leaving children who were parties to this litigation, and another later on the 20th of September, 1843, named George Alfred Case; Charles Case married in 1863, and the plaintiff in the first action was his eldest son who under the deed of 1847, which it was sought to set aside, was tenant in tail of the Lancashire estates.

On the 7th of December, 1846, Thomas Case disentailed both the Staffordshire estates and the Lancashire estates, and became tenant in fee in possession. In the year 1846 the Staffordshire estate was sold, and the money was applied in discharging the mortgages upon the Staffordshire estate, and also upon the Lancashire estate. On the 17th of June, 1847, the deed which the second action sought to set aside, and which was stated to form part of the same transaction as the disentailing deeds, was made between Thomas Case, the husband, of the first part, and Alexandrina Case, the wife, of the second part, and was duly executed and acknowledged by them under the Fines and Recoveries Act; the other parties to it were trustees of various terms. It recited the title of Thomas Case to the Lancashire estates, the result of which was that, subject to a jointure of £800 a year to his mother, Eliza Case, he was tenant in tail in possession of, and had disentailed, the estate, and it recited the contract of the 11th of January, 1834; that the marriage was solemnized and again solemnized, and that there had been issue of the marriage Charles Case and George Alfred Case; the barring the entail by Thomas Case, and then it recited that, whereas the hereditaments intended to be thereby conveyed were held with other hereditaments, subject to a term of 300 years, and to the yearly rent-charge of £800 payable to Eliza Case during her lifetime, and to a sum of £12,000 due to Colonel Charles Wood and interest, and to a term of 500 years on certain trusts, and also to the income of which the said Alexandrina Case was entitled therein under or by virtue of the thereinbefore-mentioned marriage articles or instrument in writing bearing date the 11th of January, 1834, but save as aforesaid they were not subject to any charge, except certain leases, and that Thomas Case was entitled to the hereditaments in fee simple: "And whereas doubts are entertained as to the true construction and effect of the said articles or instrument of the 11th of January, 1834, and whereas the said articles or instrument contained no provision for any payment or allowance to or for the benefit of the said Alexandrina Case during the lifetime of the said Thomas Case, nor any provision for the children or issue of the marriage; and whereas the parties to these presents are respectively desirous that such doubts should be avoided, and all occasions for dispute removed, and that provision should be made in manner hereinafter mentioned for payment of an annual sum by way of pin money to the separate use of the said Alexandrina Case, and a further annual sum for her benefit during her life in case she survives her husband, and that provision should be made as hereinafter mentioned for the children of the said Thomas Case and Alexandrina his wife." Then a settlement was made by the deed which contained a provision for £100 a year pin money for Alexandrina Case during the joint lives of herself and her husband; and a jointure of £400 a year for Alexandrina during the life of Eliza, which £400 upon the death of the latter was to be increased to £600. It contained a power for Thomas Case to raise £6,000, and appoint it as he should think fit, and various other powers and provisions, subject to which the estate was settled in the usual way to Thomas Case for life, and his and their sons in tail, with large powers to raise portions for his younger children, and power to his eldest son to jointure the widow of that eldest son.

In 1858, 1861, and 1862 the sum of £1,900 was raised and paid to Thomas Case, the husband, in part

of the £6,000. In 1868 part of the property was taken by a railway company and a large sum of money was paid for it, and in 1869 that money was applied in paying off some of the mortgages left upon the estate, and £1,100 more to Thomas Case in part payment of his £6,000. A mortgage was made in 1869 to secure him £3,000, the remaining part of the £6,000 which had not been raised, and in 1882, on the 23rd of March, he appointed that £6,000 one-half to his son, Edwin William Case, who had been born after the date of this deed of 1847, absolutely, the other half upon trust for George Alfred Case for life, with remainder to Edwin William Case absolutely. On the 17th of August, 1882, Charles Case, the eldest son, appointed a jointure of £300 to his wife, and portions for his younger children. He died in September of that year, and therefore the plaintiff in the first action, his eldest son, became tenant in tail in possession.

On the 9th of June, 1886, a deed was executed between Thomas Case of the first part, Alexandrina Case of the second part, and Alexandrina Case and G. F. Cole, trustees, of the third part, which recited the marriage, the marriage contract, that part of the property was sold and the purchase-money applied in paying off incumbrances, and that, by a deed of the 17th of June, 1847, a settlement was made; that the said Thomas Case and the said Alexandrina Case were advised that, according to the Italian law, after the solemnization of the said marriage the marriage agreement could not, during the marriage be revoked or varied by the parties thereto, and that accordingly the settlement of 1847, so far as the same affected the moiety of the estate which, under the marriage agreement, became part of the dotal property, was invalid; and Thomas and Alexandrina Case then conveyed "the dotal property" to such persons as Alexandrina and Edwin, the son, should appoint, to pay the income to Thomas Case, the father, for life, with an annuity of £250 to George Alfred Case for life, with remainder to Alexandrina for life to her separate use, and then to Edwin absolutely if he should survive, with further provisions in case he should not survive.

Thomas Case made a will dated the 10th of June, 1886. He confirmed the original agreement of 1834 and the settlement of the 9th of June, 1886, and gave all the real estate of which he should be seised or possessed at his death, and not comprised in the said settlement of the 9th of June, 1886, to George Fitzroy Cole, upon trust to pay the rents, profits, and income thereof, or of the investments representing the same, to Alexandrina Case for her life, and after her decease in trust for Edwin William Case, absolutely charged with an annuity of £250 per annum to George Alfred Case, and he appointed Alexandrina Case and George Fitzroy Cole executrix and executor of his will. He died on the 23rd of July, 1887.

On the 8th of September, 1887, Thomas Elphinstone Case, an infant, the eldest son of Charles Case, and tenant in tail of one moiety of the property, at any rate under the deed of 1847, and, if the deed of 1847 was altogether good, tenant in tail of all the property, instituted the first action to have the trusts of the deed of 1847 carried into execution, and to have it declared that the deed of 1886 was void. Alexandrina Case, the widow, thereupon issued the writ in the second action claiming that the deed of 1847 was void and ought to be rectified or set aside. In her statement of claim she alleged that she was not consulted as to the preparation of the deed of 1847, that it was not explained to her, that she had no independent legal advice, that she executed it under the influence of her husband, that she believed it was merely to carry out the marriage contract, that she never received any consideration, and that she was not aware of the contents of the deed till 1886. All these allegations were subsequently withdrawn.

Renshaw, Q.C., and *Wilkinson*, for T. E. Case, the plaintiff in the first action, referred to *Wilton* v. *Hill*, 4 W. R. 66, 25 L. J. Ch. 156.

A. a'B. Terrell, for persons in the same interest, cited Addison on Contracts, 8th ed., pp. 204, 465; *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 24 W. R. Dig. 222; and *Bartlett* v. *Pentland*, 10 B. & Cr. 760.

Marten, Q.C., and *G. Henderson*, for Mrs. Alexandrina Case.—There was, really, no doubt as to the construction of the contract, and it was irrevocable. The Court of Chancery would have given effect to it by settling half the estate on Alexandrina without power of anticipation. So in 1847 there was no power in anybody to dispose of that half, and the settlement of 1847 is void to that extent. A family arrangement cannot confer a capacity to convey: *Di Sora* v. *Phillipps*, 10 H. L. Cas. 624, 11 W. R. H. L. Dig. 6; *Studd* v. *Cook*, 8 App. Cas, 577, 32 W. R. H. L. Dig. 176; *Baggett* v. *Meux*, 1 Coll. 138, 1 Ph. 627; *In re Tippett's and Newbould's Contract*, 36 W. R. 597, 37 Ch. D. 444; *Wall* v. *Rogers*, 18 W. R. 203, L. R. 9 Eq. 58.

Robinson, Q.C., *R. J. Parker*, and *Gaskell*, for other defendants, supported the same contention.

Renshaw, Q.C., in reply, cited *Stapilton* v. *Stapilton*, 1 Atk. 2, 2 W. & Tud's. Eq. Cas. 920, and *Gordon* v. *Gordon*, 3 Swans. 400.

Kay, J.—I will deal, in the first place, with the second of these two suits. It is a suit instituted by a lady named Alexandrina Case, a widow, and seeks, according to the claim in the statement of claim, to have an indenture, dated the 17th of June, 1847, declared void and of no effect, so far as it purports to convey more than one moiety of the hereditaments comprised therein, and an order directing the same to be rectified accordingly.

Now this action was commenced by writ dated the 13th of September, 1887—that is, full forty years after the date of the deed. The statement of claim contained these paragraphs. [His lordship referred to the allegations stated above and their withdrawal, and continued:—] That is a very proper proceeding by those who put it in. Those who pleaded it found they could not substantiate it, therefore they withdrew it. Counsel at the bar tell me quite frankly that they adhere to that withdrawal. The consequence is that I am to decide this case on the assumption that she did know what she was doing, that she had independent advice, that there was ample consideration, and that she was not under any undue influence; in fact, the contrary to all those statements in those paragraphs is now to be the basis of the decision of the court.

Then what is the law? So far as this action of Mrs. Alexandrina Case seeks equitable relief, to come forty years after to have a deed rectified is hopeless. She was bound to come by the rule of this court at the earliest possible period. One of the allegations made, which she now gives up, was that she did not know the fact. She gives that up, she did know the fact, she knew really what she was doing, she had competent advice, she was not under any kind of undue influence, and, therefore, there was no reason why, the day after she had executed this deed, she could not have sued. She might perfectly well have had the deed rectified at any time between that year 1847 and this present year. Now the law of this court is very strict upon that point. In equity you cannot come for equitable relief, like setting aside or rectifying a deed, unless you come with the utmost possible diligence. I quite agree if this had been a case of undue influence exercised upon her by her husband, there is plenty of authority for saying that that influence is considered paramount so long as the marriage lasts, and, therefore, when the husband dies,

she would be treated as at liberty to come when she was first relieved from that influence to have the deed rectified. That is exactly why I refer to this. She says, "I was not under any undue influence"; therefore, there is no reason whatever why she should not have come to ask for the equitable relief she was entitled to at any time after the deed of 1847 was executed.

Now, that is quite fatal, apart from any claim made by her for equitable relief. But it may be said, though the argument has not been advanced, part of this relief which is asked is not equitable. It is true there is a prayer that the deed may be rectified, but also the claim is that it may be declared to be void, and, if it be void, the mere declaration that it is void would not be treated as equitable relief within the rule. [His lordship stated the facts, and continued:—] The case she makes—I am still dealing with the second action—is this, she says it may be that I am debarred by lapse of time from equitable relief, but I am not seeking equitable relief. What I ask is a declaration that this deed is void (that seems to me the most favourable way to her of putting her case), and it is void, because I was incapacitated from executing that deed at the time. The way that is arrived at is this. It is said that she was in 1834, when the marriage contract was entered into, and at the time of the marriage, a domiciled Sicilian, that, by the law of Sicily, any land in *Sicily* (I emphasize that) which belonged to the intended husband, or was in any way added to her dowry and made to become part of the dowry and incorporated with the dowry, as by this contract of 1834 was purported to be done, would have all the incidents of the dowry according to the law of the two Sicilies, and that the law of the two Sicilies was this, which I take from the expert's evidence. [His lordship read the evidence, and continued:—] So that I may take it as very clearly proved that if this real estate were situated in Sicily, and husband and wife had both been domiciled in Sicily, and the real estate were part of her dotal estate, the husband and wife could not, under the circumstances that occurred, have alienated it during the marriage.

Now, what are the postulates which it is necessary to assume in order to make out that that law applies to this property in England? First of all, that the lady was domiciled in Sicily, and as to that there is no very good evidence, but in particular doubts have been raised which certainly would have some strength, according to our law, that her father, having left Sicily in the early part of the century, and having lived from that time until his death in Turkey, at Therapia, having died there, having left his wife and children there, whether he had not become domiciled in Turkey. However, I do not give any opinion upon it. For the present purpose I assume that the domicile of the lady was, notwithstanding all that, in the Kingdom of the Two Sicilies. The next thing is this. This document of 1834 purports to be an actual disposition of one-half of the property of Thomas Case, and, as I understand the expert evidence, that would have this effect if the land were in Sicily; without any other deed or conveyance or anything else it would be an actual disposition of the property. But beyond all question it would not be an actual disposition of the property in England. That is not argued. Therefore, it could not have effect in England, according to the Sicilian law. That is quite plain.

But it is said, true, it could not have effect upon English real estate according to the Sicilian law, but it was a contract in consideration of marriage, and the mode of enforcing it would be by instituting proceedings in England to have that contract given as much effect to as the English courts would think right to do, and although it could not be a disposition of the English property, it might and should be treated by the English courts as a contract at any rate, and being treated as a contract it would be a contract to impose upon the English property precisely the same rights, or as nearly as possible the same rights, for the benefit of the wife which would have been imposed upon the property if it had been Sicilian property. It is said there is no such thing as dotal property of that nature in England; those words have no meaning in England—at least, no such meaning as would be given to them by the Sicilian law, but an English court, in carrying that contract into effect, it is said should approach the same position as nearly as it can, and therefore, as I understand the argument, should decree a conveyance of one-half the real estate of Thomas Case in England to the wife or to trustees for her absolutely for her separate use, without power of anticipation. That is said to be the nearest equivalent which the English law can provide for the dotal property of the lady in Sicily. Now it is said that that is so certain and clear that I am bound to say that the lady had no capacity to alter that, no capacity to enter into the settlement of 1847 at all; that she was wanting in capacity, because that is obviously and certainly the decision to which an English court would come in such an action as I have supposed to carry into effect the ante-nuptial contract of 1834. I shall give no opinion on it at all. Sufficient for me to answer that it is a very doubtful question. I cannot tell, and I should require very grave consideration before I determined, how that contract should be carried out if an application had been made to carry it out before the deed of 1847. I agree that the parties at the time of that deed of 1847 were very well advised indeed when they were told that the effect of that ante-nuptial contract of 1834 upon the real property of Thomas Case in England was a very doubtful question, and it seems to me this court need go no further in the matter, because, if it was doubtful, that deed of 1847 has every element of a family arrangement, one of those things which, in the eyes of the Court of Chancery, has always been considered one of the most sacred transactions possible, and one which it most carefully avoids interfering with unless it is obliged. Am I obliged, forty years after, at the instance of a lady who, during those forty years, by her confession, has thoroughly acquiesced in this arrangement, and has had all the benefit of it, when the whole family has lived upon the faith that the transaction in 1847 was a valid transaction, was one which everyone would abide by—am I bound at this time to say it was so certainly bad that even now the court would say the whole thing must be ripped up and undone, and that family arrangement treated as a void transaction. In my opinion to do so would be to go counter to a series of some of the very best considered decisions of this court of equity.

Suppose that the title to the land in the year 1847 had depended upon whether a certain individual, living or dead, it does not matter, was at a particular date of the age of twenty-one or not, that individual having executed a deed on which the title depended, and his power of executing that deed depending upon whether he was of the age of twenty-one, or had survived a particular individual, or any other thing of that kind, and supposing the deed of 1847 had as party to it, amongst others, that individual, then of the age of twenty-one, and that it had been recited that it was doubtful whether, at the time of the particular deed, he was twenty-one or not, but in order to compromise that, and to prevent litigation, the deed of 1847 had been entered into on the theory that he was or was not, I care not which, twenty-one—is it to be said that, forty years after, that individual might come and say, I was twenty-one, or I was not, and therefore the transaction must be set aside? In my opinion it is not. I should say no, even then. The essence of a family arrangement is that where there was a reasonable doubt at the time, the court will not enter into the matter and say now, if the matter be sub-

mitted to the court, the court would have proceeded in this way or that way. It is quite enough to see that there was a doubt, and if there was a doubt, and the settlement, or whatever the act was, proceeded upon that doubt, and was for the purpose of settling that doubt, the court of equity says, "We will not enter into the doubt at all; there was a doubt, that is quite enough for us; it will not do for people to come forty years after and say, We say now there was not a doubt, and therefore the court must unrip the whole transaction, because there was no doubt that one of the parties was incapacitated from entering into it." That was the very question. The very question here was, what the effect of that document of 1834 was, and the question was whether the property was so bound by that document that she could not deal with it, and that it was irrevocably devoted to her so that it could not be dealt with at all. That was the very doubt, the very reason why the deed of 1847 was executed. The deed of 1847, looked at as I have endeavoured to look at it, was a very reasonable arrangement to come to, and a very proper settlement. The lady was amply provided for. Looking to the nature and value of the property as far as I can make out, she received a very ample provision, and she admits now she had full consideration for what she did. I have entered into this, I desire it to be understood, after giving it as full a consideration as I could in the time it has been before me, and I am clearly of opinion that the transaction of 1847 was a family arrangement which this court would be most reluctant to interfere with, and which, in my opinion, it would be going counter to well-settled principles of equity to attempt to interfere with.

There is another point behind, to which I have not yet adverted, and which it may be as well to mention. I have no doubt myself at all that the disentailing deed of 1846, under which the Staffordshire property was sold, and the money applied in paying off the mortgages on the Lancashire property, was part of the transaction which resulted in the settlement of 1847. The whole thing hangs together plainly enough, and it appears on the face of the documents that they were transacted by the same solicitor in the same solicitor's office. Therefore, I do not know that if it had not been for this transaction Thomas Case would have barred the entail. I am not sure whether he would or not. No doubt if it were necessary to carry out the contract of 1834 this court would have the power to compel him to carry it out. I do not doubt that, but the court would not have power to compel him to disentail. That has been settled in many cases, and it came recently before the Court of Appeal in *Bankes* v. *Small*, 35 W. R. 765, 36 Ch. D. 716. Therefore, if I were now to proceed in this extraordinary litigation to upset the transaction, it seems to me the disentailing deed must go with it, and at this moment it would be impossible to compel the executors of Thomas Case to execute another disentailing deed. That again would mean the application of money, and other obligations would arise if I were induced to grant the relief asked. As far as Mrs. Alexandrina Case's suit is concerned, I dismiss it with costs. That, of course, will not include the costs of those defendants who have tried to support her case. They must pay their own costs. With regard to the other action, if you please you may take a declaration that the deed of 1886 was invalid, and I do not know that you want any other relief.

Solicitors, *Venning, Son, & Mannings; Bircham & Co.; Ford, Banken, Ford, & Ford.*

Chan. Div. } Nov. 22.
Chitty, J. }

Francesco v. Barnum. (a.)

Infant—Apprenticeship—Covenant—Injunction.

An infant cannot be sued upon a covenant purporting to be entered into by the infant in an apprenticeship deed, and therefore an injunction will not be granted to restrain an infant from committing a breach of a negative stipulation contained in a deed of apprenticeship executed by the infant.

Fellows v. Wood, 59 *L. T. N. S.* 513, *explained and distinguished.*

This was a motion by the plaintiff raising the question whether the court would restrain an infant by injunction from committing a breach of a covenant contained in a deed of apprenticeship.

By an indenture dated the 6th of December, 1886, and made between the defendant Ada Parnell, an infant of twelve years of age, and thereinafter called "the said apprentice" of the one part, the defendant Elizabeth Parnell, widow, thereinafter called "the parent" of the second part, and the plaintiff of the third part, the said apprentice (with the parent's consent) put herself apprentice to the plaintiff, to learn his art and with him (after the manner of an apprentice) to serve from the 6th of December, 1886, until the end and term of seven years from thence next following, and by this indenture it was provided *inter alia* that during the term the said apprentice should her said master faithfully serve, his secrets keep, his lawful commands everywhere obey, that she should do no damage to her said master nor see it to be done of others, but that she, to the utmost of her power, should forthwith give warning to her said master of the same, that she should neither contract professional engagements nor accept such, unless with the written consent of her said master, that she should not absent herself from her said master's service unlawfully, but in all things as a faithful apprentice she should behave herself toward her said master and all his during the said term. And that the plaintiff, in consideration of the faithful services of the said apprentice, should teach and instruct the said apprentice as therein mentioned. The indenture also contained mutual covenants between the plaintiff and the parent that the plaintiff, in conjunction with qualified assistants, would instruct the said apprentice in the higher branches of the choregraphic art for the term of seven years, and would make certain payments for all dancing engagements in London and the suburbs during the said term, and that in the event of the nonfulfilment by the parent of any of the terms of the deed, or if, amongst other things, the said apprentice should misconduct herself in or out of school, or decline the plaintiff's engagements, or should accept any engagement without having previously obtained the written consent of the plaintiff, or practise the art of stage dancing under the direction of any other teacher, the plaintiff might, by notice in writing to the parent, determine the apprenticeship, and the parent should thereupon pay to the plaintiff the sum of £50 as liquidated damages. This indenture was executed by the defendants Ada and Elizabeth Parnell, and another indenture of even date and with similar provisions was executed by the defendant Elizabeth Parnell and the defendant Helen Maude Parnell, an infant of fourteen years of age.

In August, 1889, the defendants Ada and Helen Maude Parnell arranged with the defendant Paravicini, the agent of the defendant Barnum, to perform as stage dancers at Olympia, at a salary of 21s. per week each.

(a.) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

On the 7th of November the plaintiff became aware of the above arrangement, and thereupon commenced this action against the defendant Barnum, his agent Paravicini, and the other defendants, Elizabeth, Ada, and Helen Maude Parnell, for an injunction to restrain the defendants Ada and Helen Maude Parnell from performing, and the other defendants from permitting or allowing them to perform, without the plaintiff's permission.

The plaintiff now moved for an *interim* injunction to restrain the defendants Barnum and Paravicini from inducing or allowing the defendants Ada and Helen Maude Parnell to perform as stage dancers at Olympia without the written permission of the plaintiff, and to restrain the two last-mentioned defendants from performing, and the defendant Elizabeth Parnell from allowing them to perform, at Olympia or otherwise, without the consent of the plaintiff, in violation of the above-mentioned indentures.

Romer, Q.C., and *Kalisch*, for the plaintiff, referred to *Gilbert* v. *Schwenck*, 14 M. & W. 488; *Fellows* v. *Wood*, 59 L. T. N. S. 513; Simpson on Infants, pp. 91, 92; Burn's Justice, Tit. Apprentices in General, p. 183; *Gylbert* v. *Fletcher*, Cro. Car. 179, 1 Eq. Cas. Ab. 6, Tit. Account; *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229, 26 W. R. Dig. 139; *Wood* v. *Fenwick*, 10 M. & W. 195; *Lylly's case*, 7 Mod. 16; *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235; *Lumley* v. *Wagner*, 5 De G. & Sm. 485.

Byrne, Q.C., and *Lemon*, for Mr. Barnum, the infants, and their parent, referred to *Flight* v. *Bolland*, 4 Russ. 298; *Argles* v. *Heasman*, 1 Atk. 518; *Gylbert* v. *Fletcher*; *Reg.* v. *Lord*, 12 Q. B. 757; *Cornwall* v. *Hawkins*, 20 W. R. 653, 41 L. J. Ch. 435.

Romer, Q.C., replied.

Wilkinson, for the defendant Paravicini, took no part in the argument.

CHITTY, J.—In this case the plaintiff asks for an injunction against Mr. Barnum, two young ladies, and their mother, and in substance the injunction asked for is to prevent the young ladies dancing at Mr. Barnum's entertainment at Olympia. It appears that they and their mother (they are still infants, and the mother, being a widow, is by law their legal guardian) have entered into a contract with Mr. Barnum for certain performances to be given there.

The plaintiff's claim for an injunction is based upon two indentures, one relating to one infant and the other to the other infant, each relating separately to one of the infants, and each infant has executed the apprenticeship instrument and the mother also. The plaintiff is the master of an establishment of high reputation. Each indenture is separable into two parts. The first part contains the contract on the part of the master with the apprentice, and the apprentice in terms with the master; and the second part of the instrument contains an agreement between the master and the mother, who was, I think, in 1886, but it is quite immaterial, the legal guardian of the children, the parent, in fact, she being the only parent at the time.

Now this deed is an apprenticeship deed, and it was decided in the time of Charles I. that no action would lie on an apprenticeship deed against the apprentice himself. The statement in the case (*Gylbert* v. *Fletcher*) which is reported in Croke Car., p. 179, is this: "Covenant against an apprentice for departing from his service without licence within the time of his apprenticeship. The defendant pleaded at the time of making the indenture he was within age, and thereupon it was demurred. It was argued at the bar that the indenture should bind the infant, because it was for his advantage to be bound apprentice to be instructed in his trade. He is also compellable, by the statute of 5th Elizabeth, c. 4, to be bound out as an apprentice. But all the court resolved that, though an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years, may have the benefit to use his trade, yet neither at the common law nor by any words of the 5th Elizabeth, c. 4, shall the covenant or obligation of an infant for his apprenticeship bind him. If he misbehave himself the master may correct him in his service or complain to a justice of the peace and have him punished according to the statute, but no remedy lieth against an infant upon such a covenant, therefore it was adjudged for the infant." There were sitting in the King's Bench when that case was decided Sir Nicholas Hyde, C.J., Sir William Jones, Sir James Whitelock, and Sir George Croke.

That case has never been questioned from that time to this, and the case is cited in the various text-books as an authority. It is in Simpson on Infants, and it is in Burn's Justice (I refer to the edition of 1841) treated as an authority, and no question whatever raised. Other cases are cited in Burn's Justice as being to the same effect. So that ever since the time of Charles I. it has been established that you cannot sue an infant even upon the covenants which he purports to enter into during his infancy in an apprenticeship deed.

Now the covenant on which the plaintiff is relying for the present purpose is a covenant on the part of the infants that they, during the apprenticeship, which is for a term of seven years—one of the young ladies was fourteen and the other was twelve when they entered into the apprenticeship—shall neither contract professional engagements, nor accept such, unless with the full written permission of their said master. That is, therefore, on the face of it, a covenant on the part of the apprentice during the apprenticeship. That is the only part of the indenture which purports to bind her, to which I will now refer, and it follows, from what I have read, unless that authority can be overruled, that the infant, without inquiring into the question whether the contract is for the benefit of the infant or not, cannot be sued. That being so, if the infant cannot be sued on covenant, how can the infant be sued for an injunction? Because the right to an injunction depends upon the legal right to sue, and if there is no legal right to sue, which appears to be the result of the authority which I have cited, there can be no right to an injunction. Injunction in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause, and, secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there can be no right to an injunction.

That is the case, therefore, against the infants.

But the case with regard to the infants does not rest there for the purposes of this injunction, for, without criticizing the terms of this instrument, the present state of things appears to be this. The plaintiff is not under any obligation to provide employment or wages or remuneration for the infants, and it may be—for I see nothing whatever to affect the good faith of the plaintiff in this case—it may be, or it may not be, that between this and the hearing of this action, if it ever should be heard, he will provide some employment for the young ladies. But at the present moment there is none, and they have come to that age when their services, and very likely from the training that they have received from him, are of value, and at the present moment they have this engagement with Mr. Barnum, under which they will receive their 21s. a week. But now, exercising a discretion, as I am entitled to do with regard to an interlocutory injunction, I think it would not be fitting to grant an injunction which might leave these

two young women until the trial without any remuneration or without any employment whatever, I think, on the balance—for I am now going to put it in a legal form—of convenience and inconvenience, it would be wrong to act adversely to the infants at present. Therefore, leaving the various questions as to the reasonableness or unreasonableness of the terms of some parts of this apprenticeship indenture open, I think that I ought not to grant, and I decline to grant, any injunction against these young women.

That being so, for similar reasons I ought not to interfere with Mr. Barnum. I ought not, for the reasons that I have last given on the question of convenience, to interfere as against Mr. Barnum, because if I restrain Mr. Barnum from employing the young women, they will be just in the same position as if I restrained them from going on with their performances at Olympia.

Then it would be idle, as I refuse the injunction against the infants, to restrain the mother.

I think it better to leave the rest of the case with as little prejudice from any judgment of my own at the present moment as can be. I am acting as I ought to act, with reference to the immediate motion which is before me, and I think, under the circumstances of the case, I ought not to grant, and I refuse to grant, any injunction. But as there may be some matters to be tried, I will make the costs, costs in the action. I ought to say a word about the case of *Fellows* v. *Wood*, which was cited as an authority for an injunction against an infant where the infant had entered into a contract. On carefully reading the report I am persuaded that the defendant was not an infant at the time when the injunction was granted, and it was not a contract of apprenticeship; it was a mere contract of service. There is ground for thinking (I am not sure whether I am right) that after the infancy had terminated the defendant did continue to serve, and then, although he might have vacated the employment at a fortnight's notice, what he did was to go away, and then, in breach of an article to be found in the contract of employment, he served the plaintiff's customers for his own benefit. That is what he was doing and that is what he was restrained from doing. As I say, having given that case considerable attention, I think as a fact that the injunction was not granted against an infant, but it was granted against a man of age who, to a certain extent, appears to have acted upon the contract—whether he adopted it or ratified it afterwards I cannot say—after the infancy had terminated. But that is a contract of service, and in order that I may show what I have decided on the present motion clearly, I have decided this case upon the footing of it being an apprenticeship deed.

In the case of *Fellows* v. *Wood* there could have been no ground for avoiding this contract not to serve the plaintiff's customers as being an unlawful restraint of trade. Apart from this being an apprenticeship deed, there would be ground at any rate for saying that this general stipulation not to contract any professional engagement whatever without the licence of the plaintiff was a restraint of trade, seeing that there is not a continuous employment on the part of the plaintiff. I have only added this to show that I have proceeded on the footing that the instrument was an apprenticeship instrument.

Motion refused.

Solicitors, *Brandon & Nicholson; Campbell, Reeves, & Hooper; H. Levy.*

Chan. Div. }
North, J. } July 5, 1889.

In re GOODALL'S TRADE-MARK. (*a.*)

Trade-mark—Registration—Resemblance calculated to deceive—Descriptive words common to the trade—Disclaimer of exclusive right—Disclaimer after application for registration—Patents, Designs, and Trade-Marks Act, 1875, *ss.* 72, 74.

An application to register a trade-mark, consisting of a heart having within it "No. 176," *with the words "Goodall's Cream-Wove Parchment Bank" above it, and the words "Note Paper: Charles Goodall & Son, London," below it, the whole being enclosed in a rectangle, was refused, on the ground that there was already on the register a trade-mark consisting of the words "Pirie's Parchment Bank," and that there was such resemblance between them as was calculated to deceive.*

A disclaimer of any right to the exclusive use of a common particular, under section 74 (2) *of the Patents, Designs, and Trade-Marks Act,* 1875, *must be made in the application to register the trade-mark containing the common particular.*

Summons.

This was a summons under the Patents, Designs, and Trade-Marks Act, 1883, by Charles Goodall & Son that the Comptroller-General of Trade-Marks might be ordered to proceed with their application for registration of a trade-mark, notwithstanding the opposition of Alexander Pirie & Sons, who were cited by the summons.

Messrs. Goodall & Son had, on the 17th of February, 1888, applied for the registration of a trade-mark for paper (other than wall paper) and envelopes. The trade-mark consisted of the figure of a heart having within it "No. 176," with the words "Goodall's Cream-Wove Parchment Bank" above it, and the words "Note Paper. Charles Goodall & Son, London," below it, the heart and surrounding words being enclosed in a rectangle. Their application, however, did not contain a disclaimer of any right to the exclusive use of the words "parchment bank."

Their application was opposed by Messrs. Pirie & Sons, who had previously, in the year 1885, registered a trade-mark for paper and envelopes consisting of the words "Pirie's Parchment Bank" placed in order one over the other.

The evidence adduced by Messrs. Goodall & Son showed that the word "parchment" had been long used in the trade as descriptive of a hard paper, and that the word "bank" had been long used in the trade as descriptive of a thin paper, as bank notes were printed on thin paper. Also that they had used those two words in combination to denote a particular kind of paper from the year 1883. The result of their evidence was that all the words of the trade-mark they wished to register were descriptive except "No. 176" and their name.

Messrs. Pirie's evidence was to the effect that the words "parchment" and "bank" in combination were not descriptive and in common use, but had been used by them from the year 1880 to denote a particular kind of paper sold by them.

E. S. Ford (*Aston, Q.C.*, with him), for the summons.—All the words of the applicants' trade-mark, except their names, are descriptive and in common use in the trade, the words "parchment bank" in combination denoting paper both hard and thin. But these words can be registered as an addition to a trade-mark: The Patents, Designs, and Trade-Marks Act, 1883, s. 74 (1) (*b*). The design of a heart with (No. 176)

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

inside, is the portion which might be registered separately as a trade-mark, of the applicants' trade-mark. The appearance of the applicants' trade-mark is so different from that of the respondents' trade-mark that no one could be misled by it.

Cozens-Hardy, Q.C., and *Willis Bund*, for the respondents.—The applicants have included in their trade-mark the whole of the respondents' trade-mark, except their name, and this is calculated to deceive: *In re Horsburgh & Co.'s Application*, 53 L. J. Ch. 237. The words "parchment bank" in combination are not descriptive and common to the trade, but denote particular paper sold by the respondents. But as the applicants allege that their trade-mark contains words common to the trade, they ought to have disclaimed in their application the right to the exclusive use of those words: The Patents, Designs, and Trade-Marks Act, 1883, s. 74 (1) (2).

E. S. Ford, in reply.—The words common to the trade used by the applicants are descriptive, not distinctive, so that no disclaimer is required. If necessary, the applicants are quite willing to make a disclaimer, and will undertake to do so. Such disclaimer will be in time: *In re Swift Specific Co.'s Trade-Mark*, 6 Rep. Pat. Cas. 352.

North, J.—I do not see my way to accede to the application in this case. The applicants apply to have a trade-mark registered containing within a rectangular border "Goodall's Cream-Wove Parchment Bank, No. 176, Note Paper. Charles Goodall & Son, London." The respondents oppose on the ground that they have already registered "Pirie's Parchment Bank." Pirie being the name of the person who has registered it. Therefore, "parchment bank" is the only other part of the respondents' mark. It is the most important part of Pirie's trade-mark. That trade-mark is on the register, and there is no application to take it off.

The present application by Messrs. Goodall & Son is to put on the register the trade-mark which I have just referred to. That contains this very material part of Pirie's mark, "parchment bank." The words "Goodall's Cream-Wove Note Paper" are not words that are material. They are merely descriptive beyond all question. All that is left is "parchment bank" and "No. 176." It seems to me impossible to say that when what is Pirie's whole trade-mark, excepting his name, is proposed to be incorporated into the applicants' trade-mark, it is not a case which comes within the 72nd section of the Act, which requires that the comptroller "shall not register with respect to the same goods, or description of goods, a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods, or description of goods, as to be calculated to deceive." [His lordship then decided on the evidence that the respondents had made use of the words "parchment bank" to describe a particular paper in 1880, before the appellants adopted these words, and continued:—]

It is stated in reply that the term "parchment bank" is common to the trade, and that it is used by many people. That may be the fact. I do not say it is not. That evidence is uncontradicted, and, as far as I can judge from that, it probably is the fact, that it has been used by other persons as common in the trade. But it is clear to me that it is used in the respondent's trade-mark as a distinctive mark. And, in my opinion, that brings it within the 74th section of the Act, which provides:—"(1) Nothing in this Act shall be construed to prevent the comptroller entering on the register in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade-mark—(*a*) in the case of an application for registration of a trade-mark used before the 13th day of August, 1875, any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made; (*b*) in the case of an application for registration of a trade-mark not used before the 13th day of August, 1875, any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made. (2) The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register."

I do not find that the application here is an application of the sort referred to in that section. I do not see how it can be said that the requirement of the Act that the disclaimer shall be in the application can be waived by anything that I do.

Stirling, J., had a similar question before him the other day, but he did not decide it. If it is important for me to decide it now, I hold that, for the application to be made under that section, it must comply with the requirements of the section, and, if so, the offer to disclaim must be made in the application, which is not the case here. Under these circumstances I must refuse the application.

Solicitors, *Robbins, Billing, & Co.; Paddison, Son, & Fullilove.*

Q. B. Div. (Mathew and Wills, JJ.) — Oct. 31; Nov. 5, 11.

London Steamship Owners' Mutual Insurance Association *v.* Grampian Steamship Co. (*a*)

Marine insurance—Lloyd's "running-down clause"—Further "protecting clause"—Collision where ships equally to blame—Indemnity to assured.

The steamship B., *belonging to the defendant company, had been fully insured by them at Lloyd's on a policy containing the usual running-down clause to the effect that "the shipowner should be insured against three-fourths of the sum he might have to pay the owner of another vessel for damage done to it by his vessel coming into collision with it." The defendant company had also insured the steamship* B. *with the plaintiff association on a policy containing a protecting clause, by which the plaintiffs "undertook to indemnify the defendant company against loss or damage to any other ship so far as such loss or damage is not covered by the usual form of "Lloyd's running-down clause."*

The steamship B. *collided with another steamship,* K. *Both ships were admittedly to blame, and both were damaged, but* B. *was more damaged than* K. *The respective owners agreed to equalize the loss by the payment by the owner of* K. *to the owners of* B., *the defendant company, of a sum of money for the excess of damage to* B. *The plaintiff association brought an action to recover this sum of money, and the defendant company claimed to be entitled to retain it, on the ground that they were liable to pay a share of the damage under the agreement to the owners of* K., *and were entitled to an indemnity for this from the plaintiff association under the protecting clause of their policy with them.*

Held, that the defendant company had not become liable in fact to pay any sum in consequence of the collision within the meaning of Lloyd's running-down clause, and that, therefore, they were not entitled to retain the said sum as an indemnity from the plaintiff association.

(*a*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Special case stated.

The action was for money received, and the facts, as stated in the case, were as follows:—

The plaintiffs are a limited mutual marine insurance association, composed of several different classes or clubs. By class 1, "The London," the plaintiffs insure against the ordinary marine risks the hulls of the ships of the members of that class, and by class 5, "The Protecting," they undertake to indemnify the members of that class against (*inter alia*) "loss or damage to any other vessel . . . so far as such loss or damage is not covered by the usual form of Lloyd's policies with the clause commonly known as the 'running down clause' attached." A copy of the rules of the plaintiff association, including the rules of class 1, "The London," and class 5, "The Protecting," accompanies and forms part of this case. The foregoing quotation is from rule 6, sub-section (*b*), of the rules of class 5, "The Protecting."

The defendant company was at all material times the owner of the steamship *Balnacraig*.

On December 10, 1886, *The Balnacraig* was insured in the said class 1, "The London," for £1,000, and was also entered in the said class 5, "The Protecting," of the plaintiff association in respect of a portion of her tonnage, and the defendant company was duly registered as a member of the plaintiff association in respect of such entries.

The following is the clause commonly known as the "running-down clause" referred to in rule 6, sub-section (*b*), of the rules of the said class 5, "The Protecting":—"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the said ship."

The Balnacraig was at all material times fully insured by policies in the usual form of Lloyd's policy with the said running-down clause attached.

On December 10, 1886, and while *The Balnacraig* was entered as aforesaid in class 5, "The Protecting," and was also insured as aforesaid, she came into collision with the steamship *Karo*, whereby both ships received damage, but the damage sustained by *The Balnacraig* largely exceeded that sustained by *The Karo*.

Both ships were to blame for the collision, and if there had been cross-actions or claim and counter-claim by the owners of the respective vessels the decree which would have been pronounced by the Admiralty Division of the High Court of Justice on a finding or admission that both vessels were to blame would, in the usual form, have adjudged that the damage arising from the collision ought to be borne equally by the owners of both ships, and would have condemned the owners of *The Karo* in half the damage sustained by *The Balnacraig*, and the owners of *The Balnacraig* in half the damage sustained by *The Karo*. As a matter of fact the owners of *The Karo* paid to the defendants, as owners of *The Balnacraig*, a sum equal to the difference between half the amount of the damage sustained by *The Karo*, and half the amount of the damage sustained by *The Balnacraig*, that being the sum for which the defendants, as owners of *The Balnacraig*, would have been entitled to issue a monition if a decree of the Admiralty Division had been obtained as aforesaid.

The defendants have in their hands £51, being moneys which they have received for the use of the plaintiffs. Before action brought the plaintiffs applied to the defendants to pay the said sum, which the defendants declined to do, alleging that they were entitled to set off against the said sum a like sum of £51 claimed to be due to the defendants from the plaintiffs in respect of the entry of *The Balnacraig* in class 5, "The Protecting," as the proportion of the damage done to *The Karo* in the collision, for which the defendants were liable, and which, as the defendants contend, was not covered by the policies on *The Balnacraig* with "running-down clause" attached. The sum of £51 so sought to be set off by the defendants is arrived at on the footing that the defendants became liable to pay half the damage of *The Karo*, and did pay that amount by deduction from half the amount of their own damage; that three-fourths of the sum so alleged to have been paid is recoverable by the defendants under the "running-down clause" in their policies on ship; and that the remaining fourth is therefore recoverable from the plaintiffs under the indemnity provided by rule 6, sub-section (*b*), of class 5, "The Protecting." If this is the correct view of the rights of the parties, the plaintiffs admit that £51 is the correct measure of their liability to the defendants under the said indemnity, and that that sum is properly set off against the like sum belonging to the plaintiffs in the defendants' hands.

The plaintiffs, however, contend that inasmuch as the damage done to *The Balnacraig* in the said collision exceeded the damage done to *The Karo*, the defendants, as owners of *The Balnacraig*, were not liable to pay, and did not pay, anything to the owners of *The Karo*, and that the only liability arising out of the said collision was a liability on the part of the owners of *The Karo* to pay to the defendants, as owners of *The Balnacraig*, one-half of the difference between the amounts of the damage sustained by the two ships respectively, and that consequently the plaintiffs are not liable to the defendants under the indemnity provided by the rules of class 5, "The Protecting."

The question for the opinion of the court is—In the events which have happened, are the plaintiffs liable, under the indemnity provided by rule 6, sub-section (*b*), of the rules of class 5 of the plaintiff association, to pay the defendants any sum in respect of the damage to *The Karo* sustained in the collision.

If the court shall be of opinion that the plaintiffs are so liable, then judgment is to be entered for the defendants, with costs. If the court shall be of opinion that the plaintiffs are not so liable, then judgment is to be entered for the plaintiffs for £51, with costs.

Cohen, Q.C., for the plaintiffs.

Gorell Barnes, Q.C., for the defendants.

Cur. adv. vult.

Nov. 11.—The judgment of the COURT (MATHEW and WILLS, JJ.) was delivered by

MATHEW, J.—The special case was so stated as to make it difficult to discover what the parties were disputing about; but it appears upon the argument that what was really in controversy was the mode of dealing correctly with a loss due to a collision of two ships as between two sets of underwriters—viz., the members of a mutual insurance association on the one hand, and underwriters of Lloyd's on the other. As the difference arose out of a transaction of ordinary occurrence the case is one of general importance. We are indebted to the learned counsel on each side, who argued with equal ability, and apparently with equal consequence.

The action was brought to recover a sum of £51, for which it was admitted the defendants are liable. The question in the case was whether a cross claim for the same amount made by the defendants could be maintained.

The defendants were the owners of a steamship called *The Balnacraig*, which they had insured at Lloyd's under a policy in the ordinary form with a collision clause annexed in the following terms:—"And it is further

agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, any sum or sums not exceeding the value of the said vessel hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the said ship."

The liability to contribute one-fourth under this clause was insured by the defendants with the plaintiff association under the following rule:—"The risks, events, and occurrences under which members shall be entitled to protection are (*inter alia*) loss of or damage to any other vessel . . . or to any property on board such other vessel so far as such loss or damage is not covered by the usual form of Lloyd's policy with the clause commonly known as the running-down clause attached." *The Balnacraig*, while covered by these insurances, came into collision with the steamship *Karo*. Both vessels were to blame, and the loss, which in each case was for damage to ship only, had to be borne equally. *The Balnacraig* was damaged more than *The Karo*, and the loss was equalized between the two vessels in the usual way by the payment of a sum of money to the owners of *The Balnacraig* by the owners of *The Karo*.

The case for the plaintiffs was that the defendants had not become liable to pay any sum in respect of the collision, and therefore had no claim to an indemnity under their insurance with the plaintiffs.

The defendants, on the other hand, contended that they had become liable to contribute a sum of £51 to the loss occasioned by the collision, and that the plaintiffs were bound to indemnify them to that amount.

Now it is quite clear that without the collision clause the underwriters on ship would not have been liable under any circumstances to pay any portion of the damage payable by the assured in consequence of a collision. This was settled by the case of *De Vaux* v. *Salvador*, 4 Ad. & E. 420. The clause came into existence in consequence of that decision. With such a clause, where the ship insured is solely to blame, the owner is entitled to call on his underwriters, not merely to pay the cost of repairs, but also to bear three-fourths of his liability to the other ship. Where the insured ship is free from blame, the owner is entitled to call upon his underwriters to repair, but the whole amount received for the damage done to the insured ship passes to them by subrogation.

It was contended for the plaintiffs that the same principle must apply where both vessels are in fault, and where a balance to equalize the loss is paid to the assured. He is entitled, it was said, to call on his underwriters to repair the damage done to his ship, and must surrender to them any part of the balance paid him which may be applicable to the repairs of the vessel insured. But there is no need in such a case, where the assured receives and does not pay, to have recourse to the collision clause; and neither the insurers nor the insured become liable to pay, or, in fact, pay anything.

Again, if, in order to balance the loss, the assured had made a payment to the other shipowners, he would upon this principle be entitled, in addition to the cost of repairs, to call on his underwriters to pay three-fourths of that amount and no more.

Accordingly the plaintiffs contended that in this case the defendants were under no liability to make any payment under their Lloyd's policy, and that they therefore had no claim under their insurance with the plaintiffs. The loss from the collision should be dealt with, it was said, on the footing of what was called in the argument a single liability—viz., the liability for any balance which the assured had to pay.

But the defendants, on the other hand, acting as they were entitled, if not bound to do, in the interests of the underwriters of the ship, insisted that they had become liable to contribute under the collision clause, and were therefore entitled to an indemnity from the plaintiffs. In other words, the defendants contended that a proper adjustment of the case required a contribution from the plaintiffs' association to the defendants' underwriters at Lloyd's.

It was stated in support of this view that some average adjusters dealt with a loss like this upon the theory, as it was described, "of cross liabilities," and it was argued that this was the true principle. The claim against the insured ship was treated, according to this system, as if it were actually paid by her owner to the owner of the other vessel; and to that payment his underwriters under the collision clause thus became liable to contribute three-fourths, while the owner was bound to contribute one-fourth. The sum that the assured received from the other ship passed, it was said, by subrogation to his underwriters on ship. As the underwriters on ship and under the collision clause were the same persons, they, in the result, remained liable to pay three-fourths of the claim of the other ship for the collision, while the owner or his underwriters paid the other one-fourth. Thus, suppose each ship to be damaged to the extent of £1,000, the underwriters under the collision clause would pay £750, and the owner £250, while in respect of the damage to ship the underwriters on ship would receive by subrogation as much as they had to pay. As against this practice of settlement by the theory of cross liabilities, it must be admitted that its application assumes that a payment is made which is not made in point of fact. It is not correct to say that the owner of the assured ship pays the damage done the owner of the other ship. He only does so on the condition that he is paid his claim by the other shipowner. Neither in fact nor in law is the owner of the assured ship liable to pay, or entitled to receive, more than the balance which equalizes the loss: see *The Khedive*, 31 W. R. 249, 7 App. Cas. 795.

This balance would therefore seem to be the amount upon which the collision clause was intended to operate, and it can only operate according to its terms in those cases where the assured has had to pay. To construe the collision clause to apply to anything else would be to substitute a far-fetched theory for plain facts. The form of the clause seems to forbid any such construction. The words "become liable to pay, and shall pay," point to a real and not to some imaginary outlay.

But the supposed principle of adjustment by cross liabilities was sought to be supported by the argument that a settlement upon the footing contended for by the plaintiffs, might in some cases lead to results which would be unjust and contrary to the true principles of insurance law. Cases were put where the damage to the ship insured was made up of claims for detention during repairs or loss of freight or damage to cargo.

It was said that the underwriters on ship ought not to receive by subrogation a balance arrived at after the allowance in account of such claims. This is quite clear, and was not disputed by the counsel for the plaintiffs.

But it does not follow that the adjustment in this case, as contended for by the plaintiffs, is wrong, or that the theory of cross liabilities should be adopted in every case of collision. There is, however, a view of the matter which seems to us to demonstrate that the plaintiffs are right in this case, and that the theory of adjustment by cross liabilities is fallacious.

The contention of the defendants seems to lead inevitably to this conclusion, that the assured with a collision clause in his policy might incur a greater liability than if he had none. The clause was annexed to the ordinary policy, not to diminish, but to increase the protection afforded the assured, and any construction which made the assured liable for a loss which otherwise would have fallen on his underwriters would defeat the object with

which the insurance in this form is effected. Let us suppose the case already put where the damage to each ship is the same amount, say £1,000. Where the policy contains no collision clause the underwriters on each ship would pay the cost of repairs—viz., £1,000. Now suppose the policy to contain a collision clause, and the claims to be adjusted on the footing of cross liabilities. The underwriters under the collision clause would have to pay three-fourths of the £1,000—viz., £750, and the owner or his underwriter one-fourth—viz., £250. The underwriters on ship would have to pay £1,000 for repairs of the assured ship, but they would receive by subrogation £1,000 from the other ship. In the result the owner would be liable for £250, and so to that extent worse off than if there were no collision clause in his policy.

Our judgment is that the defendants have not become liable to pay any sum in consequence of the collision within the meaning of the collision clause, and therefore that their defence cannot be maintained.

We give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Parker, Garrett, & Parker.*

Solicitors for the defendants, *Waltons, Bubb, & Johnson.*

Court of Appeal.

From Chan. Div. Nov. 6.

BLAKEY *v.* LATHAM. (*a.*)

Practice—Appeal—Time for appealing—Interlocutory or final order—Order for working out declarations of right in final judgment—R. S. C., 1883, *ord.* 58, *r.* 15.

An order in an action, made, after final judgment in the action, for the purpose of directing how the declarations contained in the final judgment are to be worked out, is an interlocutory order, so far as regards the time for appealing from it.

Appeal from an order of Kay, J. (see 37 W. R. 569, 41 Ch. D. 518).

In 1886 R. Blakey brought an action against E. S. Latham and T. Lowden (trading as Latham & Co.) with reference to a trade-mark, and in 1887 the same plaintiff brought an action against the same defendants for infringement of a patent. The trade-mark action was tried before Chitty, J., in February, 1888, and judgment given against the defendants with costs. The patent action was tried before Kay, J., in April, 1888, and the action was dismissed with costs to be paid by the plaintiff. The plaintiff had appealed in the patent action, and on November 10, 1888, before the appeal had been heard, Kay, J., upon the plaintiff's motion in the patent action, made an order allowing the plaintiff to set off the costs of the trade-mark action payable by the defendants against the costs of the patent action payable by the plaintiff.

On December 20, 1888, the defendant Lowden was ordered to pay to the plaintiff the costs of a motion to commit in the trade-mark action.

On February 19, 1889, the plaintiff's appeal in the patent action was heard, Lowden appearing separately on the hearing of the appeal, and the appeal was dismissed as against Lowden, with costs to be paid by the plaintiff.

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

On May 10, 1889, on a motion made in the patent action by the plaintiff, the defendant Lowden and his solicitor Green being the respondents, Kay, J., made the order now appealed from, whereby he declared the plaintiff entitled to set off against the costs payable by him under the order of February 19, 1889—*i.e.*, the order of the Court of Appeal in the patent action—(1) the costs of the motion of November 10, 1888; (2) also (but subject to the lien, if any, which the taxing master should find Green to have, as solicitor for Lowden, for costs in the patent action) the costs of the motion to commit of December 20, 1888 (see 37 W. R. 569, 41 Ch. D. 518).

The order of May 10, 1889, was passed and entered on June 27, and on August 9, 1889, Green gave notice of appeal from that order.

On the appeal being opened

S. Woolf, for the plaintiff, took the prelimary objection that the appeal was out of time, the order appealed from being interlocutory: *Collins* v. *Vestry of Paddington*, 28 W. R. 588, 5 Q. B. D. 368.

T. T. Fillan and *C. E. E. Jenkins*, for the appellant.—The order now appealed from, is only a supplemental order made for the purpose of working out the final decree made in the patent action of *Blakey* v. *Latham*, and therefore it must be regarded as part of that final decree, and therefore as a final order: *The City of Manchester*, 5 P. D. 221; we rely on the observations of Brett, L.J., in *Standard Discount Co.* v. *La Grange*, 26 W. R. 25, 3 C. P. D. 67, at p. 71, as to what constitutes a final order.

Nov. 6.—COTTON, L.J.—The only question is whether the order appealed from is or is not interlocutory. In my opinion it is clearly interlocutory. It is true that Brett, L.J., in the case of *Standard Discount Co.* v. *La Grange*, used expressions which have been relied on to show that this must be a final order; his lordship said that no order, judgment, or other proceeding can be final which does not at once affect the *status* of the parties, for whichever side the decision may be given, so that if it is for the plaintiff it is conclusive against the defendant, and if for the defendant conclusive against the plaintiff; but he did not say that every order which does so settle the *status* of the parties is a final order for the present purpose.

In one sense every order comes to an end when judgment is delivered, but it does not come to an end so far as working out the directions contained in it is concerned. Any order, so far as it does not deal with the final rights of the parties, but merely deals with the manner in which final rights are to be worked out, is, in my opinion, interlocutory, just as an order made before judgment is interlocutory where it gives no final decision on the matters in dispute, but merely directs how the parties are to proceed in order to obtain that final decision.

The judgment of February 19, 1889, gives costs to the defendant Lowden, and the other two judgments give costs to the plaintiff.

The order appealed from (I do not at all enter into the question whether it was right or wrong) directed how the declarations in the final judgments were to be worked out. That, in my opinion, is an interlocutory, not a final order, and, therefore, the appeal ought to have been brought within the time limited for interlocutory appeals. It is admitted it was not so brought, and therefore the objection taken must prevail.

FRY, L.J.—I am of the same opinion. I will not attempt to give an exhaustive definition of what is meant by "interlocutory," but of this I am satisfied, that where a final judgment has been given, and subsequently an order has been obtained for the purpose of working out that final judgment, that supplemental

order has always been deemed, and rightly deemed, to be interlocutory. This is such an order, and therefore the notice of appeal was given too late.

Solicitors, *A. V. Green; Salaman.*

Jenkins v. Bushby (1891) 1 Ch. 486

From Chan. Div. Dec. 9.

ATTORNEY-GENERAL *v.* VYNER. (*a.*)

Practice—Action commenced in Chancery Division—Trial by jury.

If a plaintiff who has commenced an action in the Chancery Division desires afterwards to have it tried by a jury, the onus *is upon him to show some reason why it should not be tried in the manner in which it would, in the ordinary course, be tried in that division. If he does not discharge that* onus, *an application by him to have the action tried by a jury will be refused.*

Decision of Kekewich, J., *affirmed, but on different grounds.*

Appeal from Kekewich, J.

The action in which the present application was made was brought by the Attorney-General at the relation of the Wallasey Local Board against Robert de Grey Vyner and the Seacombe, Hoylake, and Deeside Railway Co. for a declaration that certain footpaths were public highways and for an injunction to restrain the defendants from obstructing them. The relators were the urban sanitary authority for the parish and district of Wallasey in the county of Chester, and the footpaths in question lay within their jurisdiction. The defendant Vyner was the owner in fee simple of part of the land through which the alleged paths ran, and other parts of such land belonged to the defendant company, who had purchased them from Vyner for the purposes of their railway. It was alleged that the defendant company had obstructed the footpaths at various points in their passage through their land. Both defendants denied the existence of any public right of way.

The relators took out a summons asking that the action might be tried by a special jury, and on the 29th of November, 1889, an order was made at chambers for the trial of the action by a special jury of the county of Lancaster.

The defendants moved to discharge this order, and the motion was heard by Kekewich, J., who discharged the order on the ground that, as the plaintiffs by their pleading had alleged a public right of way over the ways and footpaths in question and a dedication of the same as highways to the public by the defendants and their predecessors in title, and as such allegations raised questions of law, the case was one which could not properly and effectually be dealt with by a jury.

From this decision the plaintiff appealed.

S. Hall, Q.C., for the appellant.—The question in this case depends on R. S. C., 1883, ord. 36, rr. 3 and 4. Assuming that the case comes within rule 4 the rule laid down by Kekewich, J., was too wide; what he decided in fact came to this, that a case of this kind can never be tried by a jury.

O. L. Clare (*Warmington, Q.C.*, with him), *contrà.*—This is a case which could have been tried by a judge under rule 4. [COTTON, L.J.—You need not argue that.] Then the judge has exercised his discretion, and that will not be interfered with. Furthermore, the *onus* is upon the plaintiff to show some reason why the case should not be tried by the Chancery Division in the ordinary course, and no such reason has been shown. But even if the case is one which ought to be sent for trial by jury, then, inasmuch as it has excited a great deal of local irritation, it is most important for the defendants that, at all events, it should not be tried in the neighbourhood.

S. Hall, Q.C., in reply.

COTTON, L.J.—This is an application to discharge an order made by Kekewich, J., discharging a previous order made in chambers for the trial of this case before a judge and a special jury.

The action has been commenced in the Chancery Division, and I think it was an action which might properly be commenced in the Chancery Division, because it is one which before the Judicature Act could have been tried by the Court of Chancery. It would therefore come for trial by a judge alone without a jury. The plaintiff chose to proceed in the Chancery Division, where the trial is by a judge without a jury. In my opinion, therefore, the *onus* is upon him to show that for some special reason the action ought not to be tried in the ordinary way by the tribunal which he has selected. There may be many cases in which that may be made out, but here I can see nothing which enables the plaintiff to say that he has discharged the *onus* which I think is upon him. If he likes to come to the Chancery Division (and I cannot object to his preference for that tribunal) he must take the consequences, and must accept the ordinary course of trial in that division unless he can show that there are sufficient reasons for substituting for that, another mode of trial—that is to say, the mode adopted at common law. In the present case I think it highly probable that the questions will not be such as to require a jury to decide whether the witnesses on the one side or on the other are right, but for the judge to lay down the law to the jury as to what is the proper legal consequence of certain facts which are proved before him. I must not be taken as agreeing with the grounds expressed by Kekewich, J., so far as we see them from the note of his judgment before us, but I decide it on the ground that, the application being by the plaintiff to obtain a mode of trial different from that which is the ordinary mode in the Chancery Division, the *onus* of showing sufficient reason for the change is upon him, and that he has not discharged that *onus.*

BOWEN, L.J.—I am of the same opinion. The ground of our decision is a very narrow one, but I think one of good sense. Here is an action which might well have been brought on the common law side, in which case it would have been tried in the ordinary way with a jury at the Liverpool Assizes. It is a perfectly plain case, I should have said, and very like other right of way cases which have been tried ever since I have been in the profession, and for hundreds of years before, on the common law side. But then this is also an action which can perfectly well be brought in the Chancery Division. The ordinary course there is, that it should be tried before a judge. It is a case which may properly be tried before a judge. Right of way cases had been tried by a judge for many, many years before I ever saw a Court of Chancery. Now under these circumstances what ought to be done? The plaintiff elected, in the first instance, not to bring his action on the common law side, in which case it would have been tried by a jury in the ordinary way, but he selected that tribunal which tries without a jury and by a judge alone. He must have had some reason for that, and, although I am not going to disclose my secret convictions, I think I know why he chose the Chancery Division. However, he did choose it, and, having chosen it, he cannot eat his cake and have it too. He cannot have the advantages of the Chancery Division as long as he wants to have them, and then, at the last moment, without a word of

(a.) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

reason, turn round and pretend that this is a case in which no tribunal except a jury could adequately do justice. That will not do. That is blowing hot and cold. If he chooses to select the Chancery Division let him stick to it, unless for good reason. If he could show, in spite of his having chosen the Chancery Division, that this was not an action which could properly be tried at all in that division, and could only be tried at common law, that would be enough; but this is an action which can be tried on either side. He has chosen the Chancery Division; let him abide by his choice. That is my view. I do not at all agree with the reasons given by the learned judge below. I think he assumed that it was not a case which could be tried by a jury, and I cannot say I agree with him in that. I put my decision entirely on the ground I have stated.

FRY, L.J.—I am of the same mind. I am not uninfluenced by this fact, that the matter comes before us on appeal, and that this court has always been very unwilling to interfere with the discretion of the learned judge of first instance as to the mode of trial. It may, of course, be made out that his discretion has been wrongly exercised, but without saying that I should have arrived at the same decision if I had been the judge of first instance, there is, I think, a conflict of considerations which renders it undesirable and improper that we should interfere with the discretion of the learned judge, even although, in arriving at his decision, he treated the matter in a way in which I should not have treated it. This appeal therefore fails, and must be dismissed, with costs.

Solicitors, *Frith Needham*, for *Danger & Nerille*, Liverpool; *Meredith, Roberts, & Mills*, for *Birch, Cullimore, & Douglas*, Chester.

App. Bankruptcy. Nov. 22.

Ex parte HARRIS.
In re HARRIS. (*a.*)

Bankruptcy—Appeal against any receiving order being made—Service of notice of appeal on official receiver unnecessary — Bankruptcy Rules, 1886, *r.* 134—*R. S. C.*, 1883, *ord.* 58, *rr.* 2, 15; *ord.* 64, *r.* 7.

*Where the ground of an appeal is that no receiving order ought to have been made, service of notice of appeal need not be made on the official receiver, nor need he be brought before the court in any way.**

Appeal by the debtor against a receiving order made by Mr. Registrar Hazlitt.

Preliminary objection was taken that the official receiver had not been brought before the court by service of a notice of the appeal.

H. Reed, for the respondent, cited *In re Webber*, 34 S. J. 35; *Ex parte Ward*, 29 W. R. 206, 15 Ch. D. 292; *Ex parte Dixon*, 32 W. R. 837, 13 Q. B. D. 118 (*per* Baggallay, L.J., at p. 126); *In re Fletcher*, 4 Morrell, 113.

Sidney Woolf and *Cannot*, for the appellant.—*In re Webber* was decided since the notice of appeal in this case. The practice has not been settled, and the other cases cited are not binding authorities.

The COURT retired to consult the other Lords Justices

LORD ESHER announced the judgment of the whole Court of Appeal as follows:—In this case the appeal from the registrar is based upon the ground that no receiving order should have been made. Notice of appeal on such a ground acts as a stay of all proceedings. The official receiver could not move further in the matter so long as the making of any receiving order at all was under appeal. We are all of opinion that, under such circumstances, the official receiver does not require to be served with a notice of the appeal or to be brought before the court in any way. Whether, under all circumstances of appeals against a receiving order, this rule can be laid down we are not yet prepared to say. That requires further consideration. In this case, however, we hold that he need not be served with notice.

Preliminary objection overruled.

Solicitor for the appellant, *J. B. D. Lewis.*

Solicitor for the respondent, *Howell Thomas.*

[Upon the hearing of the appeal the receiving order was discharged upon terms.]

App. Bankruptcy. Dec. 20.

Ex parte WEBBER.
In re WEBBER. (*a.*)

Bankruptcy—Appeal against receiving order—Service of notice of appeal on official receiver—R. S. C., 1883, *ord.* 58, *rr.* 2, 15—*Bankruptcy Rules*, 1886, *rr.* 130, 134.

In all cases of appeals against receiving orders, notice of appeal must be served on the official receiver within twenty-one days.

Application for leave to appeal from an order of a divisional court.

On the 22nd of May, 1889, a receiving order was made against the debtor in the Barnstaple County Court. On the 11th of June notice of appeal was served on the petitioning creditor. On the 18th of June—that is, more than twenty-one days after the making of the order—notice of appeal was served on the official receiver. The Divisional Court (Cave and Charles, JJ.) held that it was necessary to serve the official receiver within the twenty-one days, and, considering that the appellant was not entitled to any indulgence, dismissed the appeal, and refused leave to appeal to the Court of Appeal (see 34 S. J. 65).

Hindmarsh, for the applicant debtor.—The Divisional Court thought that, on the authority of *Ex parte Fletcher*, 4 Morrell, 113, and *Ex parte Ward*, 29 W. R. 206, 15 Ch. D. 292, it was essential to serve the official receiver. But, though he may be entitled to notice as an officer of the court, it is not a condition precedent to the hearing of the appeal that he should be served. *Ex parte Ward* was a case of a trustee, not of an official receiver.

H. Reed, for the petitioning creditor

Guiry, for the official receiver.

LORD ESHER, M.R.—In this case the Divisional Court refused to proceed with an appeal, because the official receiver had not been served with notice, in accordance with a rule of practice laid down by the Divisional Court. That rule is that appeals from receiving orders made by county courts are not to be heard unless notice of the appeal has been served on the official receiver within the time specified for service upon the petitioning creditor. Whether the official receiver is a party "directly affected" within the meaning of R. S. C., 1883, ord. 58, r. 2, is a doubtful question, and one not necessary for us to determine. But if he is not,

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* See *Ex parte Webber, In re Webber* (*ubi infra*).

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the court of appeal—that is, in this case, the Divisional Court—may order notice to be served on persons who are not parties. The Divisional Court, therefore, has power to lay down a rule that, in the case of appeals from receiving orders, notice must be served on the official receiver within the time limited for service on the petitioning creditor. Now can we say that this is a wrong rule? I have spoken to Cave, J., and he has convinced me that it is an advisable rule to adopt. It is true that the Divisional Court might, under ord. 58, r. 15, have gone on and heard the appeal, or might have adjourned it. But that was a matter for the discretion of the Divisional Court; the court were not bound to extend any indulgence to the appellant, neither do I see any reason why we should do so. Therefore the application must be dismissed.

We said lately in *Ex parte Harris* (*ubi suprà*) that we would consider what rule to follow in this court with regard to appeals against receiving orders. I have said that I think the rule laid down by the Divisional Court is a good rule, and it seems desirable to have the same rule with regard to appeals in this court. For the future, then, whether there has or has not been a stay of proceedings, notice must in all cases be served on the official receiver. Of course we reserve to ourselves the right to deal with particular cases under ord. 58, r. 15. Neither is this to interfere with the rules we have laid down as to the practice to be followed by the official receiver. If he has anything material to communicate to the court, he is right to appear at the hearing of the appeal, but not otherwise. He ought never to act as a partisan, but only to see that right is done to all parties.

LINDLEY and LOPES, L.JJ., concurred.

Application refused.

Solicitors for the applicant, *Morice, Toller, & Blakesley*, for *Toller & Roberts*, Barnstaple.

Solicitors for the petitioning creditor and the official receiver, *Church, Rendell, & Co.*

From Q. B. Div. Dec. 19.

FALCK *v.* AXTHELM. (*a.*)

Practice—Time for pleading—Peremptory order to plead—Subsequent order for particulars—R. S. C., 1883, *ord.* 19, *r.* 8.

Upon an application by the defendant for an extension of time to plead, the master, on the 1st of August, made an order giving the defendant a "month peremptory" for pleading. On the 9th of August the defendant obtained an order for particulars of the plaintiff's claim, and these particulars were delivered on the 21st of August. On the 5th of September the plaintiff signed judgment for want of a defence. The defendant applied to set aside the judgment, on the ground that, under ord. 19, *r.* 8, *he had the same time for pleading after the delivery of the particulars that he had at the return of the summons.*

Held, that the effect of the "peremptory" order was that the pleading must be delivered within the specified time unless the order itself was expressly altered by a subsequent order; and that ord. 19, *r.* 8, *which was inconsistent with it, did not apply so as by implication to extend the time for pleading; and that, therefore, the judgment was regularly signed.*

Appeal from the judgment of a divisional court of the Queen's Bench Division (Huddlestone, B., and Stephen, J.).

The action was one commenced by specially indorsed writ.

The defendant, having obtained extensions of time to deliver a defence, took out a summons for further time to plead, and on the 1st of August the master made an order giving "a month peremptory, pleading as of the 12th of August."

On the 9th of August the master, upon a summons taken out by the defendant, made an order that the plaintiff should deliver particulars of his claim within fourteen days, and the particulars were delivered on the 21st of August.

On the 5th of September the plaintiff signed judgment for the amount claimed, the defendant not having delivered a defence.

The defendant applied to set aside the judgment on the ground that under ord. 19, r. 8, he had the same length of time for pleading after the delivery of the particulars that he had at the return of the summons, and that, therefore, the time did not expire until the 12th of September.

The Divisional Court (Huddleston, B., and Stephen, J.), affirming the order of the master and the judge in chambers, dismissed the application. The defendant appealed.

Lynden Bell, for the defendant.—Under ord. 19, r. 8, the time allowed for pleading was suspended during the time occupied in delivering the particulars, that is for twelve days. The order giving a "month peremptory" to plead meant a month according to the rules, one of those rules being that the time occupied in delivering particulars is not to count. The word "peremptory" makes no difference. It was only the expression of the opinion of the master at the time. He referred to *Beazley* v. *Bailey*, 16 M. & W. 58.

Horne Payne, Q.C., and *G. S. Bower*, for the plaintiff, were not called upon.

Lord ESHER, M.R.—The order of the Divisional Court must be affirmed. The construction of ord. 19, r. 8, which has been pressed upon us would be perfectly correct if there had not been an order of the court inconsistent with it, which order of the court would be altered and its effect done away with if the contention of the defendant were adopted. The defendant, who is either in default or thinks he will be, applies for an extension of time to plead, and an order is made giving him "a month peremptory." We have to consider what is the meaning of the word "peremptory" in such an order. It was contended that the word meant nothing at all, that it was only the expression of the opinion of the master at the time, and the case of *Beazley* v. *Bailey* was cited in support of that contention. My view of the meaning of such an order is that the pleading must be delivered within a month unless the order itself is altered or varied. In *Beazley* v. *Bailey* the contention was that the judge who made the peremptory order could not alter it. That contention went too far. In the present case the peremptory order was made, and no application was made to alter it, and so the order stood. Therefore the defendant had a month peremptory from the 1st of August to plead, which meant that if he did not plead by the 1st of September the plaintiff might sign judgment, unless the order was altered. The defendant in the meantime applied for and obtained an order for particulars, and the effect was that he took the new order subject to the previous peremptory order. He did not ask the master to alter the peremptory order to plead, and so he did not get any further time. It was said that it lay upon the plaintiff to ask the master to insert something into the order for particulars showing that the time for pleading was not to be suspended. In my opinion it lay upon the defendant to ask the master to alter the peremptory order to plead, and as he did not do it, the second order did not alter or suspend the previous order. The peremptory order therefore stood unaltered, and the judgment was rightly signed.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

LINDLEY, L.J.—I am of the same opinion. The defendant having taken out a summons for further time to plead, on the 1st of August the master made an order giving him a "month peremptory." What is the meaning of the word "peremptory" in that order? It does not mean that under no circumstances can the order be varied. It means that the time so granted is not to be extended unless under special circumstances a further order is made varying the previous order. I do not think the order can be varied by implication; the master's attention must be called to it. In the present case the defendant applied for particulars without calling the master's attention to the peremptory order, and he obtained the order without reference to it. It would be contrary to all reason to construe ord. 19, r. 8, as altering a previous peremptory order of the court which was inconsistent with it. The appeal must therefore be dismissed.

LOPES, L.J.—It seems to me that ord. 19, r. 8, does not apply where it is inconsistent with an order previously made. That rule, if applied, would be inconsistent with the previous peremptory order to plead. The word "peremptory" in the order means that the extension of time to plead is final unless special circumstances are brought before a master to induce him to alter the order.

Appeal dismissed.

Solicitors for the plaintiff, *Emanuel & Simmonds.*

Solicitors for the defendant, *Hughes, Masterman, & Rew.*

From Q. B. Div. Nov. 25, 26.

BARTON *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Company—Stock—Transmission in consequence of death—Stock registered in the names of executors as such—Transfer by one executor—Forged transfer—Estoppel—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 16), *s.* 18.

One of two executors cannot make a valid transfer of shares or stock registered in their names under section 18 *of the Companies Clauses Consolidation Act,* 1845, *though their names are entered in the register as executors.*

Railway stock was registered in the names of two executors as such. One of them sold certain portions of the stock without the knowledge of the other, and executed transfers to the purchasers, to which he forged the signature of his co-executor, and these transfers were duly registered by the company. On discovering the frauds, the executor whose signature had been forged brought an action against the company to compel them to replace the stock.

Held, that, under section 18 *of the Companies Clauses Consolidation Act,* 1845, *the two executors in whose names the stock was registered became joint shareholders in respect of such stock, notwithstanding that their names were entered in the register as executors; and that the stock could only be transferred by a transfer duly executed by both, and that, therefore, the transfers were void.*

Upon the occasion of the last forged transfer, the company sent the plaintiff notice that the transfer was at their office, and would be registered unless the company received notice to the contrary. The plaintiff, acting on the advice of her co-executor, did not answer this notice.

Held, that the plaintiff was not thereby estopped from alleging the invalidity of the transfer.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from the judgment of Manisty, J., at the trial.

The plaintiff, Ann Barton, and one Thomas Barton were the executors and trustees of the will of Samuel Barton, deceased. Samuel Barton died possessed of £12,000 worth of stock in the defendant company. Probate of the will was lodged with the defendants, and the defendants entered the names of the executors in their register of shareholders in respect of this stock as follows:—"The executors of Samuel Barton, Thomas Barton and Ann Barton." Thomas Barton at various times sold portions of the stock and executed transfers, forging the signature of Ann Barton thereto, and also the signature of the attesting witness. The transfers were registered by the defendants in the ordinary way, and on each occasion notice in writing was sent to Thomas Barton, whose name stood first on the register, that the transfer was at the defendants' office, and would be registered unless the defendants heard from him to the contrary. Upon the occasion of the last forged transfer, however, a similar notice in writing was also sent to Ann Barton, but she, upon the advice of Thomas Barton, did not answer this notice. The dividends upon the stock were paid to Thomas Barton, who accounted for them to the persons entitled thereto.

The forgeries having been discovered, Ann Barton and a new trustee appointed in the place of Thomas Barton, who had absconded, brought this action claiming that the defendants should be ordered to appropriate or purchase, and to transfer to and register in the name of the plaintiffs, the amount of the stock so transferred. Manisty, J., gave judgment for the plaintiffs.

The defendants appealed.

Sir Richard Webster, A.G., and *O. L. Clare,* for the defendants.—This stock was registered in the names of executors, and one executor can execute a transfer. The question turns upon the Companies Clauses Act, 1845. Section 7 makes the shares personal property. Section 18 relates to the transmission of interest in shares by death or otherwise. When persons are entered on the register as executors, they are not shareholders, their title being only a representative one. Their names are put on for the purpose of sending them notices and dividends. There is nothing in the Act to change the ordinary position of executors. Under section 24 of the Companies Act, 1862, an executor can transfer shares before he is registered as a shareholder. In *Barton* v. *North Staffordshire Railway Co.,* 36 W. R. 754, 38 Ch. D. 458, which also arose out of forged transfers of stock by Thomas Barton, the question was decided by Kay, J., against the company, but it seems doubtful whether the executors were registered as executors or not. [They referred to *Buchan's case,* 4 App. Cas. 594 (judgment of Lord Selborne), 28 W. R. Dig. 41; *Simpson* v. *Gutteridge,* 1 Mad. 609, 615; *Charlton* v. *Earl of Durham,* 17 W. R. 995, L. R. 4 Ch. App. 433; *In re Tahiti Cotton Co.,* 22 W. R. 815, L. R. 17 Eq. 273; *Spence's case,* 17 Beav. 203; Williams on Executors, 8th ed., 916.] Again, as to the last forged transfer, the plaintiffs are estopped from denying the validity of the transfer, as notice in writing of the transfer was sent to Ann Barton, and she never answered the letter.

Rigby, Q.C., Winch, Q.C., and *Whitaker,* for the plaintiffs.—Section 18 of the Companies Clauses Act, 1845, is positive, and prescribes what is to be done in the case of transmission of interest. Executors must first be registered before they can execute a transfer or receive any dividends. By section 24 of the Companies Act, 1862, the executors of a member can transfer shares, although they are not themselves members of

the company. There is no such provision in the Companies Clauses Act, 1845.

Lord ESHER, M.R.—This action is, in substance, brought for a declaration that the defendant company, having been led innocently into registering the names of other persons in the place of the plaintiffs, should be ordered to correct the register by inserting the plaintiffs' names in the register as owners of this stock, or an amount of stock equivalent thereto. The company contend that they were entitled to do what they did, inasmuch as one executor is entitled to make a valid transfer, and that the company were bound to recognize the transfers. The argument of the company, therefore, is that Thomas and Ann Barton were co-executors, and that one executor can dispose of personal property (and this stock is personal property) without the concurrence of the other. It was said, on behalf of the plaintiffs, that that argument was true as regards personal property in general, but that this property consists of stock in a company which is regulated by the Companies Clauses Act, 1845, and that, under that Act, where the names of executors are inserted in the register as such, they are inserted as the legal owners of the shares; that executors must have their names entered on the register if they wish to deal with the shares; and that, when once the names of two executors are on the register, the company have no right to register a transfer without the signature of both. In my opinion this argument is a sound one. Were, then, these two executors on the register as shareholders? That depends upon the true construction of section 18 of the Companies Clauses Act, 1845. That section provides that "if the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder . . . such transmission shall"—that means "may," if the parties want the company to act upon the transmission of interest—"be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors may require; and every such declaration shall state the manner in which, and the party to whom, such share shall have been so transmitted." This cannot be done without giving the names of the persons to whom the shares are transmitted—in this case the names of the executors. The section goes on: "And such declaration shall be left with the secretary"—here, again, executors are not bound to leave it with the secretary, but they must do so if they wish to make their rights against the company effective—"and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders." Therefore, when the declaration is left with the secretary, his duty is to enter the name in the register of shareholders.

In the present case the two executors made a declaration in the proper form, stating their names and the transmission of the stock to them as executors. The declaration was left with the secretary, and he entered the names in the register of shareholders. I shall assume that the executors, at any rate, desired their names to be entered in the register so as to limit their liability, but, in my judgment, though this were done with that intent both by the executors and by the secretary, it would have no legal effect to limit the liability. The names being on the register, the executors are shareholders, and the limitation falls to the ground. It is admitted that if the executors were on the register as shareholders, a transfer by one would not be sufficient. The company, therefore, were misled by the forgery into supposing that they had authority to register the transfers. They had no such authority, and the plaintiffs are entitled to the remedy they ask for.

Certain *dicta* of Lord Selborne in *Buchan's case* were cited as tending to support the opposite view, and I need hardly say that I regard the deliberate *dicta* of Lord Selborne as of almost equal weight to a judgment. But they do not seem to me to be in point. That case arose under the Companies Act, 1862, and it is clear that Lord Selborne had heard the speech of Lord Cairns and took the same view. That view was that, under that Act executors might make a contract of sale of shares before their names were on the register, and would have a right to go to the company and have the name of the transferee inserted in the register instead of their own, and by doing so executors would not become shareholders, and could not be made personally liable for calls. In that case the House of Lords said that the executors had not done that, but had their names inserted in the register as shareholders, and whether they were executors or not they were liable for calls. That was not a decision, that under the Companies Clauses Act, 1845, executors can sell their shares before their names are on the register so as to be entitled to call upon the company to register the name of their transferee. The Act of 1845 contains no such clause as section 24 of the Act of 1862. Executors can, of course, make a contract for the sale of shares before they are on the register, but before they can transfer those shares under the Act of 1845 so as to entitle them to call upon the company to register the transferee they must first get their names inserted in the register. It seems to me therefore that there is nothing in *Buchan's case* to compel us to construe section 18 of the Companies Clauses Act, 1845, otherwise than in its ordinary meaning.

It was then said that, as regards the last transfer of stock, the plaintiffs were estopped from denying its validity by reason of Ann Barton not replying to the letter sent her by the company notifying the transfer. It was further suggested that even if the plaintiffs were not estopped, as the plaintiffs were claiming equitable relief, and as Ann Barton had not acted fairly in not answering the letter, she was not entitled to such relief. The plaintiffs, however, are not claiming equitable relief, but a legal remedy to compel the company to keep their register correct. As to the estoppel, I cannot see that the case comes within any of the well-known legal grounds of estoppel. The appeal must, therefore, be dismissed

LINDLEY, L.J.—This case shows that it would be advisable that all companies should be regulated by one statute. We have now different provisions of separate Acts regulating and governing different companies. In this case we have to deal with the Companies Clauses Act of 1845. Section 18 is the section we have construe. Before construing that section, it is proper to refer to the provisions of sections 7, 8, 9, and 14, and then we come to section 18 relating to the transmission of shares in a company, which means the transmission without a deed, as by bankruptcy, death, &c. Transmission is used in contradistinction to transfer, and that really is the key to the whole section. Bearing that in mind in construing the section, it is clear that executors may leave the shares alone, but in that event they cannot transfer them or claim any dividends on them, though they may be sued as executors for calls. In that state of things the company has no remedy against the executors except in respect of calls. If the executors wish to deal with the shares or to receive the dividends, they must get their names put on the register, and once on the register they are shareholders in their own names, and whether they are called executors or not makes no difference. The names of the two executors here were placed upon the register, and transfers were executed by one, the name of the other being forged. The legal effect of that is that the transfers were void. The case presents no difficulty when once the provisions of the Act are understood. As to the question of estoppel, I do not think there is anything in it.

LOPES, L.J.—I am of the same opinion. I shall add a very few words upon the important question whether these executors became shareholders in the company. The company is governed by the Companies Clauses Act, 1845. The effect of section 18 is that executors must be themselves registered as shareholders before they can transfer the shares. Whether their names are registered simply or with the addition of "as executors" seems to me to make no difference. The addition cannot qualify the extent to which they are shareholders. In this case the executors were in fact entered in the register as shareholders, and the transfers by one were therefore void.

Appeal dismissed.

Solicitors for the plaintiffs, *Stephens & Stephens*, for *H. Hand*, Macclesfield.

Solicitor for the defendants, *C. H. Mason*.

High Court of Justice.

Chan. Div. Kay, J. } Dec. 6, 7.

In re HUISH.

BRADSHAW *v.* HUISH. (*a.*)

Will—Debt—Legacy to creditor—Direction to pay debts only—Satisfaction.

A direction in a will to pay debts only is sufficient to rebut the presumption of satisfaction of a debt by a legacy.

Testatrix gave a bond to her nephew (to whom she was not in loco parentis), to secure payment to him of £1,000 within twelve months after her death if he should be then living, or to his executors, administrators, or assigns if he should be then dead leaving issue, with interest from the day of her death. By her will she left him a freehold estate, a legacy of £3,000, and certain chattels. By a codicil she directed that all her funeral expenses and lawful debts should be paid at once.

Held, that the debt was not satisfied by the legacy.

Adjourned summons.

The point in this case was whether a debt of £1,000 payable by the testatrix or her estate within twelve months of her death was satisfied by a legacy of £3,000 bequeathed by her to the creditor.

On the 15th of March, 1878, Margaret Huish executed and gave to Marcus Bourne Huish a bond in the sum of £2,000 conditioned to be void if "the executors or administrators of the said M. Huish shall within twelve calendar months next after her decease pay to the said M. B. Huish, if he shall be then living, or to his executors, administrators, or assigns in case he, the said M. B. Huish, shall have died leaving issue him surviving, but not otherwise, the sum of £1,000, together with interest for the same after the rate of £5 per cent. per annum from the day of the death of the said M. Huish."

By his marriage settlement of the same date M. B. Huish assigned the bond to trustees upon certain trusts. There was evidence that Margaret Huish intended that the bond should be included, and knew that it had been included, in the settlement.

Margaret Huish made a will, dated the 11th of January, 1887, and thereby devised a freehold estate to M. B. Huish, bequeathed to him a legacy of £3,000, left certain articles as heirlooms to trustees for him for life, with remainders over, and gave him various pictures and ornaments absolutely. All legacies were to be paid free of legacy duty.

On the same day the testatrix made a codicil to her will which contained this direction: "I wish all my funeral expenses and all just and lawful debts that I may owe to be paid at once."

Margaret Huish died on the 21st of March, 1889. She was the aunt of M. B. Huish, but not *in loco parentis* towards him.

Cann, for the executors.

Methold, for residuary legatees.—The debt is satisfied by the legacy of £3,000. A direction to pay debts alone is not enough to rebut the presumption of satisfaction, and the direction in this case only refers to the time of payment, it was not intended to alter the rights of the parties: *Wathen* v. *Smith*, 4 Mad. 325; *Cole* v. *Willard*, 6 W. R. 712, 25 Beav. 568; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525, 34 W. R. Dig. 165. [KAY, J., referred to *Edmunds* v. *Low*, 5 W. R. 444, 3 K. & J. 318.]

Renshaw, Q.C., and *Grosvenor Woods*, for M. B. Huish.—There is no satisfaction. The testatrix knew of the settlement, and she has not given the legacy to the persons to whom the bond is payable under the settlement. The bond bears interest from her death and the legacy does not; there is a direction that all legacies should be paid duty free; she gave him several legacies, so no intention can be inferred that one was a satisfaction more than another. A direction to pay debts is sufficient: *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; *Lord Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71; White & Tudor's Eq. Cas., vol. 2, 6th ed., 408; *Rowe* v. *Rowe*, 2 De G. & S. 294; *Hales* v. *Darell*, 3 Beav. 324; *Pinchin* v. *Simms*, 30 Beav. 119, 10 W. R. Ch. Dig. 106; *Charlton* v. *West*, 9 W. R. 884, 30 Beav. 124; *Dawson* v. *Dawson*, L. R. 4 Eq. 504; *Paget* v. *Grenfell*, 16 W. R. 820, L. R. 6 Eq. 7; *Carr* v. *Eastabrooke*, 3 Ves. 561.

Marten, Q.C., and *Butcher*, for parties not interested in this point.

Methold replied.

KAY, J.—I think it most expedient to abide by broad general rules in cases of this kind. By making fine distinctions in every case the law is left in an embarrassed and doubtful condition. Here is the case of a lady who in her lifetime gave a bond to Marcus Bourne Huish for £1,000 payable to him in certain events which have happened, and on her death, which has also happened. After the bond she made a will and gave him various different benefits, real estate, chattels, and a legacy of £3,000. She said nothing in her will about the bond. The bond was really given to him to be made the subject of a settlement which was then about to be executed, as she knew. She made a codicil to her will and thereby directed that her debts should be paid after her death. That is a direction to pay debts at once, but it affects this particular debt because the bond would not otherwise be payable for twelve months after her death. She may have had the terms of the bond in her mind when she gave that direction, but, however that may be, there is, what is not strictly necessary, a direction for payment of debts. It has long been settled that in cases where a debt is owing by a testator, and the testator afterwards makes a will and gives a legacy of the same or a greater amount to the creditor, and then in his will directs that his debts and legacies should be paid, that direction rebuts the presumption of the satisfaction of the debt by the legacy. What is the difference between a direction to pay debts only and a direction to pay debts and legacies? There is none, for the gift of a legacy is in itself a direction that the legacy shall be paid. So all that is material for this purpose is that the

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

will should contain a direction that debts should be paid. If after giving a legacy to his creditor a testator says I direct my debts to be paid, that means that he thinks he has given a legacy to the creditor, and he directs that the debt to him should be paid too. It adds nothing to that, that he directs his legacy to be paid. Accordingly I think that *Edmunds* v. *Low*, which appears to have drawn a distinction between a direction to pay debts and legacies and a direction to pay debts only, was not sufficiently considered, and I find that the balance of authority is against it. Indeed the same learned judge, in a later case of *Dawson* v. *Dawson*, after referring to several other decisions, seems to have come to the conclusion that a direction to pay debts only was sufficient to rebut the presumption of satisfaction. I think it better to abide by that broad rule which is easy to understand. If the testatrix knew anything of law she may have put in the direction on purpose. It was not necessary to insert a direction to pay debts at all, and it may have been done in order to prevent any suggestion of satisfaction of this debt which she owed to Marcus Bourne Huish. I hold that there was no satisfaction of the debt, and that the debt and the legacy must both be paid to him.

Solicitors, *Frith Needham*, for *T. Hamilton Urry*, Ventnor; *W. E. Tyer; Rowcliffes, Rawle, & Co.*

Chan. Div. }
Chitty, J. } Dec. 4.

PRATT v. INMAN. (*a*.)

Practice—Sequestration—Duty—Death of contemnor—Administration action.

Where a writ of sequestration was issued to compel the performance of a duty, and the sequestrators obtained an order for sale of the contemnor's chattels, but, before the sequestrators sold, the contemnor died, and a creditor obtained an order for the administration of the contemnor's estate, which was alleged to be insolvent and not proved to be solvent,

Held, that, an order having been made for the continuance of the sequestration proceedings against the legal personal representative of the contemnor, the death of the contemnor was no ground to restrain the sequestrators from selling.

This was a motion which raised the question whether the death of a contemnor determined proceedings under a writ of sequestration.

On the 6th of May, 1889, an order was made in an action of *In re Shephard, Shephard* v. *Shephard*, whereby Mark Shephard, as surviving trustee of a will therein referred to, was, on the application of his *cestuis que trustent*, ordered within a certain time to pay the sum of £2,000 into court on account of a breach of trust committed by him.

The money was not paid into court, and on the 21st of June, 1889, a writ of sequestration issued, and on the 27th of June, 1889, an order was made that the sequestrators should be at liberty to sell certain chattels belonging to Mark Shephard. Shortly after this order was made an arrangement was entered into between Mark Shephard and the sequestrators, whereby the latter, in consideration of payments by Mark Shephard, agreed to delay making a sale under the writ of sequestration and order for sale.

On the 17th of August, 1889, Mark Shephard died intestate, and immediately afterwards an action *In re Shephard, Atkins* v. *Shephard*, was commenced by a creditor for the administration of the real and personal estate of Mark Shephard, and on the 21st of August, 1889, H. J. Pratt was appointed *interim* receiver of the personal estate of Mark Shephard.

On the 17th of September, 1889, letters of administration of the estate and effects of Mark Shephard were granted to Stuart Shephard, who was also the heir at law of Mark Shephard.

On the 21st of September, 1889, an order was made in the action of *In re Shephard, Shephard* v. *Shephard*, that the further proceedings in that action should be carried on against Stuart Shephard.

On the 25th of September, 1889, the judgment in the action of *In re Shephard, Atkins* v. *Shephard* was made, directing the usual accounts and inquiries, and continuing H. J. Pratt as receiver of the personal estate of Mark Shephard, and of the rents and profits of his real estate.

On the 9th of October, 1889, H. J. Pratt and Stuart Shephard, as plaintiffs, instituted this action against the sequestrators to restrain them from selling the chattels of Mark Shephard, and alleged in their statement of claim that Mark Shephard's estate was insolvent. They now moved for an injunction to restrain the sequestrators from selling.

The defendants waived the point that the plaintiffs in *In re Shephard, Shephard* v. *Shephard* were not made parties in this action, and did not attempt to disprove the allegation by the plaintiffs in the present action that the estate of Mark Shephard was insolvent.

Byrne, Q.C., and *Dibdin*, for the motion, referred to *Ward* v. *Shakeshaft*, 8 W. R. 335, and *Johnson* v. *Burgess*, 21 W. R. 453, L. R. 15 Eq. 398.

Romer, Q.C., and *Clydesdale, contra*, referred to *Tatham* v. *Parker*, 1 W. R. 491, 1 Sm. & Giff. 513; *The Marquess of Carmarthen* v. *Hawson*, 3 Swans. 294 (n); *Burdett* v. *Rockley*, 1 Vern. 58, 118; *Hyde* v. *Greenhill*, 1 Dick. 106; *Rowley* v. *Ridley*, 2 Dick. 626.

Byrne, Q.C., replied.

CHITTY, J., after stating the above-mentioned facts, continued:—The writ of sequestration is a process for contempt—for example, to compel a defendant to answer or to perform a duty such as the payment of money.

In *Hyde* v. *Greenhill* a sequestration had issued to sequester the personal estate and the rents and profits of the real estate of the defendant. The defendant then died, and the suit was revived against his residuary devisee and legatee, who applied to the Lord Chancellor to discharge the sequestration. The Lord Chancellor, Lord Hardwicke said that a sequestration covered the personal estate, and that the court would direct a sale for a duty. Now in that case the Lord Chancellor declined to discharge the sequestration, inasmuch as it was issued for a duty and the suit had been revived. Accordingly, if this motion had been made in the first action, *In re Shephard, Shephard* v. *Shephard*, the court would not have discharged the sequestration. There is, therefore, no ground for this motion, and it must be refused, and as the parties have agreed to treat the hearing of this application as the trial of the action, the action must be dismissed with costs.

Solicitors, *R. J. Witty; Coode, Kingdon, & Cotton.*

(*a*.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Chan. Div.
North, J.

Nov. 15, 22.

GROSVENOR v. WHITE. (a.)

Practice—Striking out pleadings—Reasonable cause of action—Preliminary trial of question of law—Rules of Court, 1883, ord. 25, r. 4; ord. 34, r. 2.

A testator left £20,000 to trustees for G. for life, with remainder to her younger children, which was invested by the trustees in India Four per Cent. Stock. The Secretary of State for India gave notice to the holders of that stock offering equal amounts of India Three and a Half per Cent. Stock in exchange, and announcing his intention to pay off at par such of the holders of Four per Cent. India Stock as did not accept his offer. The trustees did not accept this offer, and were paid off at par, and they then allowed the sum received in payment to remain at the bank uninvested for seven months, after which they invested it in railway stock. The India Three and a Half per Cent. Stock stood in the market at a premium from the date of the offer of the Secretary of State for India down to the time of the investment by the trustees in railway stock.

An action was brought by G. and her younger children against the trustees, claiming in the writ (1) the loss of income occasioned by the delay in investment of the sum received in payment off of the Four per Cent. Stock; (2) the loss of capital incurred by the neglect of the trustees to accept the offer to take Three and a Half per Cent. Stock in exchange for the Four per Cent. Stock, with further relief. J., one of the trustees, paid into court the sum claimed for loss of income, which was taken out of court by G. The statement of claim stated the facts, including the payment into court by the defendant J. and the taking of the money out of court by G., and claimed (1) for loss of capital incurred by the neglect of the trustees to accept the offer of Three and a Half per Cent. Stock instead of Four per Cent. Stock; (2) costs.

The defendant J. then moved, under ord. 25, r. 4, that the statement of claim might be struck out as against him, on the ground that it disclosed no reasonable cause of action.

Held, that, as the statement of claim disclosed a cause of action for loss of income, which the defendant J. had admitted to be reasonable by his payment into court, and also asked for the costs of the relief sought in the action, it could not be struck out under ord. 25, r. 4, even supposing the claim for loss of capital was bad; but leave was given to amend the notice of motion so as to apply for the determination of the question of law under ord. 34, r. 2.

The notice of motion was accordingly amended as follows:—"Whether (assuming, for the purposes of the arguments of such question, that the allegations in the statement of claim are true) there was any such duty on the part of the defendants or of the defendant J. to accept India Three and a Half per Cent. Stock as in the 9th paragraph of the claim alleged, and whether the defendants or the defendant J. were or was guilty of any negligence or breach of duty in not accepting such stock, and whether the defendant J. is under any liability to make good to the capital of the trust funds in the claim mentioned"—the loss therein mentioned. The defendant J. did not admit that he had in fact received the above-mentioned notice from the Secretary of State for India.

Held, that, as the notice of motion only assumed, for the purposes of the argument of the question, that the allegations in the statement of claim were true, and left it open to the defendant J. to raise other defences if the question were decided against him, that it would not be convenient to decide the question on the motion.

Motion.

Lord Annaly, by his will, dated the 29th of July, 1872, gave to C. W. White and W. L. Joynt a sum of £20,000 upon trust to invest as therein mentioned, and pay the income to Emilie B. Grosvenor for life for her separate use, with remainder to her younger children.

The testator died on the 3rd of September, 1873, and the trustees on the 9th of March, 1875, invested £19,800, the balance of the legacy after deducting the duty thereon, in the purchase of £19,141 19s. 8d. India £4 per Cent. Stock, which was redeemable at par on and after the 10th of October, 1888, upon one year's notice by the Secretary of State for India.

In April, 1887, the Secretary of State for India gave notice to the holders of that stock that he was prepared to grant them equal amounts of £3½ per cent. stock in exchange for the £4 per cent. stock; and that those who accepted the offer would on the 6th of July, 1887, receive interest at £4 per cent. on their old stock up to that date, and also 10s. on their old stock in advance up to the 10th of October, 1888, this being the difference for that period between the interest at the old rate and the interest at the new rate, and that the offer must be accepted by the 1st of June, 1887. The Secretary of State for India also announced at the same time his intention of giving notice to pay off on the 10th of October, 1888, at par such of the holders of the £4 per cent. stock as did not accept his offer.

It was alleged by the plaintiffs in the action in paragraph 8 of their statement of claim that C. W. White and W. L. Joynt, the trustees, who were the defendants, received this notice; but this allegation was not admitted by W. L. Joynt.

The trustees, C. W. White and W. L. Joynt, did not, however, accept the offer, and on the 10th of October, 1888, the sum of £19,141 19s. 8d. was paid them by the Secretary of State in pursuance of a notice to pay off given on the 4th of October, 1887.

The trustees, C. W. White and W. L. Joynt, allowed this sum to remain in a bank uninvested until the 14th of May, 1889, when they invested it in railway stock.

From April, 1887, the date of the offer of conversion, until the 14th of May, 1889, when the investment in railway stock was effected, the £3½ per Cent. India Stock stood at a premium in the market.

The action was brought in July, 1889, by Emilie B. Grosvenor and her younger children against the trustees, C. W. White and W. L. Joynt. The writ claimed (1) payment to Mrs. Grosvenor of the sum of £326 12s. 2d., the amount of income lost through the neglect of the trustees to find an investment for the sum of £19,141 19s. 8d. from the 10th of October, 1888, to the 14th of May, 1889; (2) that the defendants should, out of their own moneys, invest in their names upon the trusts of the will the sum of £1,818 9s. 8d., being the difference between the sum of £19,141 19s. 8d. and the market value of an equal amount of £3½ per Cent. India Stock on the 14th of May, 1889; and (3) consequential relief.

On the 1st of August, 1889, the defendant, W. L. Joynt, who was the acting trustee, paid into court the sum of £326 12s. 2d., in satisfaction of the claim by Mrs. Grosvenor for loss of income, which sum was taken out of court by her.

The statement of claim in the action, delivered in October, 1889, set out the above-mentioned facts, including the payment into court by the defendant W. L. Joynt, and the taking out of court by the plaintiff, Mrs. Grosvenor, of the sum of £326 12s. 2d. in satisfaction of the claim for loss of income, and alleged

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

that that loss of income, and also loss of capital to the amount of £1,818 9s. 8d., had been occasioned by the negligence of the defendants, and their breach of duty in not accepting the offer of the Secretary of State for India for conversion of the 4 per Cent. India Stock into 3½ per Cent. Stock, and claimed (1) that the defendants should be ordered to invest out of their own moneys the sum of £1,818 9s. 8d. upon the trusts of the will; (2) payment of costs by the defendants; and (3) further or other relief.

This was a motion by the defendant, W. L. Joynt, under ord. 25, r. 4, that the statement of claim might be struck out as against him, on the ground that it disclosed no reasonable cause of action; that the action might be stayed or dismissed as against him; that judgment might be entered accordingly for him; and that the plaintiffs might be ordered to pay his costs incurred since the date of the payment into court by him. The object of the motion was the determination of the legal question whether the defendants were liable to make good the loss of capital above mentioned.

Napier Higgins, Q.C., and *Upjohn*, for the motion.—The only remaining cause of action is in respect of the loss of capital disclosed by the facts set out in the statement of claim. This raises the question of law whether the defendants are liable to make good the loss of capital which has occurred, which can be decided in the quickest and least expensive way upon this motion. [They referred to ord. 25, r. 4.] The plaintiffs can recover their costs incurred in respect of the claim for loss of income under ord. 22, r. 7.

Cozens-Hardy, Q.C., and *Elgood*, for the plaintiffs, were not called upon.

NORTH, J.—In the writ of summons there are claims against the defendants in respect of alleged breaches of duty by them as trustees, one for loss of capital occasioned by their not accepting the offer of India £3½ per Cent. Stock instead of India £4 per Cent. Stock held by them, and another for loss of income in neglecting for some time to invest trust funds in their hands. These are separate and independent claims. The claim for loss of capital raises a point of law, which, in the interests of all parties, ought to be decided at the earliest date. The Rules of Court provide several ways by which a decision might be obtained. Thus ord. 25, r. 2, provides that any party may raise by his pleading any point of law, and that any point so raised may, by consent of the parties or by order of the court or a judge, be set down for hearing and disposed of at any time before the trial. It is said to be doubtful whether a point of law is raised by a party by his pleading unless the opposite party has pleaded to the point. I am not going to decide this. It was open to the defendant Joynt to raise the point by his pleadings and then proceed under that rule, but he has not done so. Then ord. 34, r. 2, provides that if it appear to the court or a judge that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact tried, the court or judge may make an order accordingly, and may direct such question to be raised for the opinion of the court either by special case or in such other manner as the court or judge may deem expedient. The defendant Joynt might have applied under that rule, but he has not adopted that course. He makes this motion under ord. 25, r. 4, which provides that "the court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action," and he moves that the statement of claim in the action may be struck out. But the statement of claim discloses two causes of action—one in respect of loss of capital, and the other in respect of loss of income. It alleges that a sum of money was paid into court by the defendant Joynt in satisfaction of the latter claim, and that that sum has been taken out of court by the plaintiff, Mrs. Grosvenor, and is, therefore, no longer recoverable in the action.

It has been contended that this has been mentioned in the statement of claim merely as part of the history of the case; but it is stated as one of the grounds of the relief which was sought, and which relief comprises the costs of the whole action.

The statement of claim, therefore, discloses two causes of action, one of which has been admitted by payment of money into court. If, therefore, after hearing the arguments on the motion, I came to the conclusion that the other cause of action disclosed is not reasonable, I could not order the statement of claim to be struck out. But as it is for the interest of all parties that the point should be decided, I will give leave to amend the notice of motion so as to enable this to be done. [His lordship then granted leave to amend the notice of motion by asking that, pursuant to ord. 34, r. 2, the point of law might be decided before any issue of fact was tried, stating the point of law, and asking that all further proceedings against the defendant Joynt might be stayed, and that such order might be made as to the costs of the action as the judge might think fit.]

Nov. 22.—The question of law now came on for argument as defined by the amended notice of motion—viz., "whether (assuming, for the purposes of the argument of such question, that the allegations in the statement of claim are true) there was any such duty on the part of the defendants, or the defendant W. L. Joynt, to accept India 3½ per Cent. Stock, as in the 9th paragraph of the claim alleged, and whether the defendants, or the defendant W. L. Joynt, were or was guilty of any negligence or breach of duty in not accepting such stock, and whether the defendant W. L. Joynt is under any liability to make good to the capital of the trust funds in the claim mentioned the sum of £1,818 9s. 8d. therein mentioned."

Napier Higgins, Q.C., and *Upjohn*, for the motion referring to the allegations in the statement of claim, stated that they did not admit that the notice of the Secretary of State for India was received by the defendant W. L. Joynt, as alleged in paragraph 8 of the statement of claim. [NORTH, J.—If you do not admit the facts the question of law may never arise: *The Republic of Bolivia* v. *The National Bolivian Navigation Co.*, 24 W. R. 361. If the point were stated thus, were the defendants liable for the loss of capital (1) if they did receive the notice, and (2) if they did not receive the notice?; and if both (1) and (2) were decided the same way, there would be an end to the question; but if one was decided one way and one another, there would remain only the issue of fact did the defendants receive the notice or did they not.]

Cozens-Hardy, Q.C. — The question whether the defendants received the particular letter or not would not be sufficiently exhaustive, as they might be affected with notice without actually receiving the letter.

Higgins, Q.C., and *Upjohn*.—The plaintiffs' deduction of law from their statement of facts is bad. If so, there is an end of their case. If not, the issue of facts must be decided. The point of law can be decided on this motion. The case of *The Republic of Bolivia* v. *The National Bolivian Navigation Co.* is not applicable to the present case.

They referred to *Tattersall* v. *The National Steamship Co. (Limited)*, W. N., 1884, p. 32.

NORTH, J.—I cannot at this stage of the action decide the point of law. There is a question which will be left open. If it were one which I could dispose of by putting the question of law in an alternative form,

I should decide the question of law. But here, if I were to decide that the defendant Joynt was not liable if he did not receive the written notice of the Secretary of State for India, the plaintiff will say that, although the defendant did not receive that particular letter, he had notice of the offer in some other way. There is no way of disposing of all the alternative questions which may have to be decided between the parties; and, therefore, I do not see my way to exercise the discretion given me by ord. 34, r. 2. That rule provides that, "If it appear to the court or a judge that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, . . . the court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court either by special case or in such other manner as the court or judge may deem expedient." That is, if the judge sees his way to do so he may do it.

No statement of a point of law has been made, as I suggested when the motion was before me last week, and the notice of motion does not supply the deficiency. It only assumes, for the purposes of the argument of the question, that the allegations in the statement of claim are true. That is, the defendant Joynt intends, if I decide against him, to raise other defences upon the facts. I do not see my way to trying a question now which is raised by the defendant Joynt in such a way as to keep open points unless I decide in his favour. I do not think it would be convenient to decide the question of law before the issues of fact are tried. I think that the principle laid down in the case of *The Republic of Bolivia* v. *The National Bolivian Navigation Co.* is applicable to this case, although the facts there are different. I can make no order on the motion, except that the costs be reserved to be dealt with at the trial of the action.

Solicitors, *Clarke, Woodcock, & Ryland; Tyrrell, Lewis, & Co.*

Chan. Div. } Kekewich, J. } Nov. 16.

In re Jones. (*a.*)

Practice—Originating summons—Appointment of new trustee—Vesting order on motion, validity of—Rules of Supreme Court, 1883, *ord.* 55, *r.* 13*a* (*Dec.,* 1888)—*Judicature Act,* 1875, *s.* 17—*Trustee Act,* 1850, *ss.* 35, 43.

An order appointing new trustees, made on motion in proceedings instituted by way of an originating summons, may also vest in the trustees a right to call for the transfer of stock under section 35 *of the Trustee Act,* 1850.

Motion.

In May, 1889, proceedings were commenced by an originating summons intituled "In the matter of the trusts of the will dated the 25th day of June, 1878, of John Richard Jones, deceased, and in the matter of the Trustee Act, 1850." This summons was issued under ord. 55, r. 13*a*, of December, 1888, and under certain sections of the Trustee Act, 1850, and asked for the appointment of a new trustee of Mr. Jones' will, in the place of a trustee who was out of the jurisdiction, and for an order vesting the trust estate in the continuing trustee and in the new trustee jointly. On June 22, 1889, Kekewich, J., made an order on motion, in the proceedings thus commenced by summons, appointing a new trustee and vesting the trust property as desired by the applicants. The order vested the right to call for a transfer of a sum of Consols standing in the names of the trustees, but the Bank of England being advised that the order was invalid, declined to act upon it. The present application was that the Bank of England might be ordered to act in accordance with the order of June 22.

Neville, Q.C., and *P. O. Lawrence,* for the applicants.

Farwell, on behalf of other parties, supported the application.

Latham, Q.C., and *T. Howard Wright,* for the Bank of England, stated their objections to the order.

Kekewich, J.—Ord. 55, r. 13*a*, of December, 1888 (the order in existence when the previous motion was made, but for which there is now substituted ord. 55, r. 13*a*, of June, 1889), provided that "in all cases in which the court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and new trustees thereupon appointed." I must assume that that rule and the one substituted for it have been properly made, no slip or want of compliance with any formality having been shown. This is strictly a question of "practice or procedure" within the meaning of section 17 of the Judicature Act, 1875, and therefore comes directly within the power of the Rules Committee, and the rule made, therefore, is good. Finding thus a rule under which, where a trustee might formerly be appointed on petition, he may now be appointed on summons, I turn to section 35 of the Trustee Act, 1850, which enables the court, on appointing a new trustee, by the same or a subsequent order to vest the right to call for a transfer of stock. That section must be read with section 43 of the same Act, which provides that "whensoever, in any cause or matter, . . . the facts necessary for an order under this Act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter, to make such order under this Act." The order must be made in some way pointed out by section 43. I think that, although proceedings commenced by originating summons have been held to be an action, they are not a "cause" within the meaning of section 43. But in this case there has been a motion, not in a cause, but in a "matter" commenced in the manner pointed out by the rules of court, and therefore, the Act has been complied with. There has been a proper appointment of trustees, a motion in that matter, and a vesting order, and it is difficult to see how that order could be bad. If, under the old practice, when trustees had been appointed on petition, a vesting order could be made on motion in that matter, why cannot the order be made on motion where the initiatory step is a summons instead of a petition? The objection of the bank must be overruled.

Solicitors, *Venn & Co.; Pritchard, Englefield, & Co.; Freshfields & Williams.*

(a.) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 6.

PROUT v. GREGORY.
SHARP (*Garnishee*). (*a.*)

Practice—Attachment for debts—Dividend payable in bankruptcy—Garnishee order on official receiver—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 125—*R. S. C.*, 1883, *ord.* 45, *r.* 1.

A dividend payable in a bankruptcy cannot be attached in the hands of the official receiver to answer a judgment obtained against the creditor to whom it is payable.

Appeal from an order of a master referred by Grantham, J., to the court.

The plaintiff, having obtained judgment against the defendant, made an application at chambers under ord. 45, r. 1, and obtained an order that all debts owing or accruing from one Sharp to the defendant should be attached to answer the judgment. Sharp was an official receiver, and as such was conducting the administration in bankruptcy of the estate of a deceased debtor, under section 125 of the Bankruptcy Act, 1883, in which administration the defendant had proved as a creditor. On cause being shown why the garnishee should not pay to the judgment creditor the amount due to the judgment debtor in the administration, the master discharged the order. On appeal, Grantham, J., referred the case to the court.

Percy Gye, for the execution creditor.—This is an attachable debt. In a bankruptcy, under section 125, sub-sections (5) and (6) of the Act of 1883, the official receiver is to realize and distribute the property of the debtor in accordance with the provisions of the Act. By section 58, sub-section 1, "subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts." But if any such debt is attached, it is the duty of the trustee to pay in accordance with the order of the court. The Act does not take away the liability to obey an order of a court competent to deal with the debt. [Lord COLERIDGE, C.J.—The Act prescribes a code, by which it seems to be intended to secure an equal and unpreferential distribution. MATHEW, J.—There is no debt due from the official receiver. A creditor in a bankruptcy could not sue the official receiver for the debt.]

Muir Mackenzie, for the official receiver, was not called upon to argue.

Lord COLERIDGE, C.J.—We have to deal with a statute which provides for the administration of estates in bankruptcy. It lays down provisions for the distribution of such estates, and we cannot depart from them. The appeal must be dismissed.

MATHEW, J.—I am of the same opinion. It is clear that there is no debt owing from the official receiver to the judgment debtor.

Appeal dismissed.

Solicitors for the execution creditor, *J. and C. Robinson & Wilkins*, for *H. Goodger*, Burton-on-Trent.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 4, 5.

STAREY v. CHILWORTH GUNPOWDER CO. (*a.*)

Trade-marks—Sale of goods by firm of manufacturers—Name of firm attached—Goods not manufactured by firm—"False trade description"—Meaning of "intent to defraud" in Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-sections* 1, 2.

The defendants, a firm of gunpowder manufacturers, had contracted to deliver to her Majesty's Government a large amount of gunpowder, which they were in the habit of manufacturing under the trade name of "R. L. G. No. 4." Being prevented by an explosion from manufacturing the required amount, they imported similar gunpowder from Germany. This they placed in the barrels ordinarily supplied by the Government, and labelled the same "Chilworth Gunpowder Co., Ltd. R. L. G. No. 4"; and so delivered them to the Government. Upon an information being laid against them under the Merchandise Marks Act, 1887, *for "having unlawfully applied a false trade description" to the said gunpowder, the magistrates found that the name of the firm had been placed on the label where the name of the contractor was required to be inserted by the Government; that there had been no intent by the defendants to defraud the Government; and that there was no stipulation between the parties that the gunpowder to be supplied should be of English manufacture; but that the defendants were in fact manufacturers of gunpowder, and the gunpowder so delivered was not in fact manufactured by them.*

Held, that, upon such facts, the magistrates ought to have convicted the defendants, under the Merchandise Marks Act, 1887, *of the offence of applying to or selling goods with a false trade description with intent to defraud, inasmuch as such a description as was attached implied that the defendants were delivering gunpowder of their own manufacture when, in fact, it was not such; and that an intent to defraud under this Act did not necessarily imply an intent to cheat a customer as to the quality of the goods delivered, nor any fraud in a pecuniary sense, but that such intent is implied from the fact that the manufacturer or vendor supplies something else than that which the customer, from the description given to the goods, thought he was getting.*

Case stated by the magistrates of Essex at petty sessions.

An information had been laid against the Chilworth Gunpowder Co. (Limited) by John Starey, the secretary of the Trade-Mark Owners' Protection Association (Limited) to the following effect—that the said company on the 7th and 11th of February, 1889, and other days, at Purfleet, in Essex, "did unlawfully apply, or cause to be applied, a false trade description, to wit, the letters, figures, and words 'Gunpowder, Chilworth G.P. Co. (Limited), R. L. G. 4,' to goods—namely, gunpowder—contrary to the statute 50 & 51 Vict. c. 28, s. 2."

Upon the hearing the following facts were proved:—

The respondents are an English company limited by shares and registered under the Joint-Stock Companies Acts, 1862 to 1886. They are manufacturers of gunpowder, and have mills at Chilworth, in Surrey, and at Fernilee, in Derbyshire, and general offices in the City of London.

In May, 1888, the respondents entered into a contract with her Majesty's Government for the supply of 5,000 barrels of gunpowder of a description known as R. L. G. 4 (Rifle Large Grain, No. 4).

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

The said contract contained stipulations that the said gunpowder should be delivered on certain specified dates, and that in default of such delivery the respondents should be liable to a fixed penalty of 2½ per cent., and to be charged with the difference in price if H.M.'s Government should buy the gunpowder elsewhere. There were no stipulations in the said contract that the said gunpowder should be of the respondents' own manufacture, or that it should be of English manufacture; and it was proved that in other contracts between the same parties such express stipulations were inserted.

The respondents are manufacturers of the kind of gunpowder mentioned, and at the making of the contract intended to manufacture the gunpowder which they had agreed to supply, but they were prevented from carrying out their intention by two explosions at their mills. H.M.'s Government pressed for the delivery of the said gunpowder, and in order to fulfil their contract the respondents arranged with a German firm, and imported the whole of the said gunpowder from Germany in cylinders bearing a label "Manufactured in Germany."

By reason of having so to import the said gunpowder the respondents sustained a loss of 3s. or 4s. per barrel.

Upon receipt of the said gunpowder at their mills at Chilworth the respondents took it out of the cylinders and placed it in barrels supplied to them by H.M.'s Government according to a provision in the contract that it should be delivered in barrels supplied by the Government.

The respondents affixed or applied to each of such barrels the following label:—

"Gunpowder. 110lbs. Chilworth Gunpowder Co., Ld. R. L. G. 4. March, 1889. Bag waterproof. Lot 179. T. R. 28."

This label is in the form which the Government prescribe for their barrels, the words "Chilworth Gunpowder Co., Ld." being inserted in the place where the name of the contractor is required to be inserted.

There was no indication upon the said label or otherwise upon the barrels that the said gunpowder was of German manufacture, but the description of the gunpowder was accurately stated as R. L. G. 4, and it was equal in quality to powder of that description manufactured by the respondents.

The said gunpowder was accepted by the Government in fulfilment of the contract without complaint that it was inferior in quality, or that it did not answer the description of gunpowder contracted for, but it was admitted that no communication was made to the Government upon delivery or otherwise that the said gunpowder was of German manufacture.

Upon the facts aforesaid the magistrates found that the said label was not a false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the respondents, and therefore dismissed the information.

The question for the opinion of the court is whether, upon the facts, we ought to have convicted the respondents.

Fletcher Moulton, Q.C., and *McKenna*, for the appellant, representing the Trade-Mark Owners' Mutual Protection Association (Limited).—The label complained of conveyed a false description of the place of manufacture—that is a "false trade description" within the meaning of the Merchandise Marks Act, 1888. The true description was on the labels fixed upon the cylinders. The Act was specially devised against marks of English manufacture being applied to foreign goods, such as Sheffield marks upon foreign cutlery. The magistrates have merely found that the respondents did not intend to cheat or defraud the Government as to the quality of the gunpowder; that is admitted. The special defence allowed by the Act, of there being "no intent to defraud," must be applied to the matters dealt with by the Act—*i.e.*, trade-marks or trade description which would tend to deceive the public and give a wrong impression of the place of manufacture. The blank in the label was intended to show the place of manufacture as well as the contractor's name, where he was not himself the manufacturer.

Poland, Q.C., and *R. S. Wright*, for the respondent company.—There was no complaint by the Government of their having been defrauded in their contract with the respondents, and the magistrates have in fact found that there was no intent to defraud. The barrels as labelled were not to be dealt with in commerce, but merely for delivery. The magistrates find that the name of the company was inserted in the label where the contractor's name is required, and that it did not imply that they had manufactured the gunpowder. The actual meaning of the label is a question of fact for the magistrates, and they find that the label only implied that the company were the contractors delivering the gunpowder, and that with such a meaning attached to the company's name on the label there was no "false description" within the Merchandise Marks Act, 1887. The offence charged was "the application of a false trade description": section 2, sub-section 1 (*d*). The *onus* of rebutting the charge of fraud is on the respondents, and this they have done by the finding of the magistrate that there was no intent to defraud. If it be held that there was a false trade description in fact applied to this gunpowder, the respondents are still entitled, under sub-section 2 (*c*), to be acquitted if they "acted innocently." That they did so act is shown by the findings, that there was no stipulation in their contract that the gunpowder should be of English manufacture, and that there was no intent to defraud the Government in the delivery of what was in fact German gunpowder. "To deceive" in the Act means to intend to cheat a customer as to the quality of the goods offered for sale. Such an intention is a question of fact for the magistrates, and they have found in the respondents' favour: *Gridley* v. *Swinburne*, 52 J. P. 791.

Lord COLERIDGE, C.J.—In this case our first impression was that, if anything could be gained by our sending back the case to the magistrates in order that certain facts might be more specifically found, the case ought to go back, as it is one of great importance; but upon consideration we are both of opinion that nothing would be really gained by such a proceeding, and that we have enough stated before us upon which to come to the conclusion which I will presently state.

The facts as stated are as follows:—The respondent company consists of a large firm of gunpowder manufacturers. This company had a large contract with the Government to deliver 5,000 barrels of gunpowder. The Government presumably had confidence in the firm, and so far approved of their manufacture as to intrust them with this large order for the particular gunpowder known in the trade as "Rifle Large Grain No. 4," or shortly described by traders as "R. L. G. No. 4." The manufacturing company unfortunately had an explosion at one of their places of business, whereby their mills were rendered useless. Owing to this accident they found that they would be unable to fulfil their contract with the Government unless they could obtain gunpowder elsewhere. By their contract they were bound to deliver the whole amount of gunpowder required by a specific time, and if they failed to do so the Government could buy in elsewhere against them and recoup themselves from the respondent company by penalties to be exacted for their failure to deliver. It is admitted that the company would have had great difficulty in procuring a sufficient amount of such gunpowder in England elsewhere than from their own works had these been in good working order. They were, therefore, in a

great difficulty as to how to fulfil their contract. They thereupon chose to obtain the required amount of gunpowder from Germany. They obtained it in barrels marked with a trade-mark of the locality of its manufacture sufficient to satisfy the Custom House authorities. Upon its arrival at the company's works they transfer the powder to barrels supplied by the Government and put upon them labels also supplied from the same source, but with a blank left for the name of the firm supplying the article in question. The whole question before us turns upon this label, which ran as follows:—"Gunpowder. 110lbs. Chilworth Gunpowder Co., Ld. R. L. G. No. 4," with certain immaterial addenda.

In regard to this point the magistrates find that (1) "the label is in the form which the Government prescribe for their barrels"; and (2) "the words 'Chilworth Gunpowder Co., Ld.,' were inserted in the place in which the name of the contractor is required by the Government to be inserted." Upon that I will observe that the word "contractor" is manifestly ambiguous. It may mean a person who is the manufacturer but not the vendor, or a vendor who is not the manufacturer, or one who is both manufacturer and vendor of the goods so labelled. Where, as in this case, it is extremely important to know whether the defendants were manufacturers only of the article so labelled with their name, and whether the label implied that they were so, the word "contractor" is obscure.

If this were not shown in the case itself it would be necessary to ascertain what their name on the labels did mean on this occasion, and to send back that to be specifically found by the magistrates; but the case does supply us with sufficient information on this point. The Chilworth Gunpowder Co. (Limited) are found in the case to have been manufacturers of gunpowder, and in a sense manufacturers only. It may be said that in this case they sold the gunpowder, not as manufacturers, but as vendors; but it is found as a fact that they never had, except in this instance, sold gunpowder not of their own manufacture—I mean in the course of this contract with the Government they had never done so. When they used the phrase "Chilworth Gunpowder Co. (Limited)" on the labels they must be taken, unless in this special instance, to have meant that they were the manufacturers of the gunpowder in the barrels so labelled. But in this instance they were, in fact, not the manufacturers of the gunpowder in the barrels so labelled. It is clear from that, to my mind, that such a description, under such circumstances, came within the meaning of a false trade description within the Merchandise Marks Act, 1887.

The cogency of this is enforced by the case cited by my brother Mathew—*Johnson* v. *Raylton*, 30 W. R. 850, 7 Q. B. D. 438. In that case the Court of Appeal held that where a person buys goods from a manufacturer, there is an implied warranty that the goods so supplied are of his own manufacture. Notwithstanding the dissent of Bramwell, L.J., that decision was assented to without an appeal to the House of Lords. It affords, therefore, a strong confirmation of our present decision that the magistrates were wrong upon their findings of fact in not holding that the defendant company had committed an offence under the Act cited. We hold that they had committed such offence.

But Mr. Poland has argued that that is not enough to secure their conviction, because in sub-sections 1 and 2 of section 2 of the Act they have a sufficient answer to the offence charged, if, under sub-section 1, there is proved to have been "no intent to defraud," or, under sub-section 2 (c), the defendant is proved to have "acted innocently." It is not necessary elaborately to go into the exact meaning of these sub-sections. They deal with different offences, and the language therefore naturally varies. Substantially the language is the same, and it varies only so far as the subject-matter to be dealt with is distinguishable. Sub-section (1) relates to the application of false trade descriptions to goods which may be defended by proof of no "intent to defraud." Sub-section 2 deals with the case of the sale of goods with a false trade-mark or such as is "calculated to deceive," but where the defendant is proved to have otherwise "acted innocently." It was once very sagely observed in regard to definitions that "if persons are once convinced by a definition that they understood differently what they meant by the same words, controversy on those words becomes superfluous or useless." In this case controversy becomes superfluous if once we are certain of the meaning. If "fraud" is interpreted in what I may call the money sense—*i.e.*, if there is an intent to put off a purchaser with something else less valuable, or to take more money than what the purchaser understood to be agreed upon—in that sense I wish emphatically to state there is no evidence against the respondent company. Indeed, the contrary is expressly found by the magistrates. There has been no fraud or intent to defraud in the money sense. But that sense of fraud is not quite the true construction of these sections. What is pointed at by the Act is the wrongful use of a trade-mark—a putting off on the public of something which is not necessarily of less value, but of what the public would be less inclined to buy, or had not stipulated directly or indirectly to buy. There might, as has been said, be no difference in quality or substance between A.'s or B.'s fish sauce; but if A. gets people to buy his sauce, which is precisely as good as, or the same as B.'s, but which the public would not buy if they did not believe it was B.'s fish sauce, that is an intent to make the purchaser take something which he might not take if he knew it was not the maker's whose he thought it was. Some such sense must be taken to be the true meaning of the provisions of this Act. In that sense only we must hold that there was here on the part of the defendants an intent to defraud. It is clear, I think, that the defendants wanted to save their contract, and so escape the penalties for its default. That is a perfectly legitimate commercial object. They endeavoured to deliver the amount of "R. L. G. No. 4" contracted for. That "R. L. G. No. 4" was, I may observe, an English trade term for that particular gunpowder. They take similar gunpowder out of German barrels and put it into the barrels supplied them by the Government, and label it for delivery exactly in the same manner and for the same contract as the gunpowder of their own manufacture so contracted for, and they thereby avoid the penalties and other serious consequences entailed by the Government buying in gunpowder against them had they failed to deliver the full amount. However legitimate and genuine their endeavour might be, the defendants would seem to have broken the Act in using a similar trade-mark for such gunpowder as they used for gunpowder of their own manufacture, and they must be held to have done so with an intent to defraud within the meaning of the Act in that they left the Government to believe that they had got an article which the Government had, in fact, not got. I agree that there was no pecuniary fraud in the supply of this article, but I must hold, nevertheless, that in so doing they committed an offence under this Act.

Upon the third point, that the magistrates are said to have found as a fact that there was no fraud, and that, therefore, we cannot question their finding of fact, I hold that what the magistrates have left to the court is whether, upon such facts as they have found, they ought to have convicted the respondents of an intent to defraud. If they had found as a fact that there was no such intent to defraud or deceive as stated in the Act, the respondents were entitled by the Act to be acquitted. The magistrates cannot be taken to have left for us the

question whether they ought to have convicted the respondents upon facts under which by the Act they were entitled to be acquitted. If their finding was conclusive on this fact the argument was a good one, but their finding does not go far as that. They only ask whether, upon such facts as they find, they were bound to convict the respondents of fraud under the Act. We hold that they were.

MATHEW, J.—I am of the same opinion. The Merchandise Marks Act, 1887, strikes at transactions with goods the place of the manufacture of which is misstated or concealed. That is the offence. Was this a misstatement of the place of manufacture? The statement on the label used was exactly such a statement as that which the respondents used in the ordinary course of business, and must be taken to have conveyed to the Government that the article supplied was, as was usual, manufactured by the respondents as "R. L. G. No. 4." The respondents thereby clearly committed an offence under section 2 of the Act. But it is said there are limitations put to any conviction for such offence under the subsections of section 2. There was no intent to defraud. I will only add to what my lord has said that I admit unreservedly that there was no intent to palm off on the Government any inferior goods. There was, however, in all probability an intention to avoid the consequences of failure to fulfil their contract, consequences which might have been avoided by a more carefully framed contract in regard to any exceptional circumstances preventing them fulfilling the contract in time. The respondents' intention was to save their contract—a perfectly fair mercantile intention. I assume that the Government got the quality of article it intended to get. But I do not think that the words in the Act are limited to mean, as Mr. Poland would have us to say, that the guilty intent must be "to cheat customers." The Act purposely creates a new offence—namely, the use of a particular trade-mark which tends to deceive without necessarily any intent to cheat purchasers in so doing.

On the last point I think that the magistrates only ask us what they ought to have done upon such facts as they have found. We hold that they ought to have found the defendants guilty of the offence.

Appeal allowed.

Solicitors for the appellants, *McKenna & Co.*

Solicitors for the respondents, *Bircham & Co.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 3.

REG. *v.* COWPER. (*a.*)

County court—Costs—Particulars to be signed by solicitor—County Court Rules, 1889, *ord.* 6, *r.* 10—*Appendix on Costs* (*Lower Scale*), *rr.* 1, 2.

Under ord. 6, *r.* 10, *of the County Court Rules*, 1889, *read with the Appendix on Costs, rr.* 1, 2, *the particulars required to be indorsed by a solicitor must be signed in writing by the solicitor, otherwise the costs stated in the Appendix will not be allowed. A lithographed form of signature on forms for particulars ready prepared is not a compliance with the rule as interpreted by the Appendix.*

Semble, *a county court judge is at liberty to appear in the superior court against a rule calling upon him to hear and determine a matter, though he may not be entitled to have his costs for such appearance.*

Rule calling upon Fitzroy Cowper, Esq., the deputy-judge of the county court at Croydon to show cause why he should not hear and determine a matter in an action entered in the county court.

The facts of the case were as follows:—Upon the issue of a summons in the Croydon County Court in an action of *Rees* v. *Tassell* a lithographed form of copy of particulars was indorsed, "Claim, £2 16s. 5d.; court fees, 4s.; solicitors' costs, 4s.," and the name of the firm of solicitors acting for the plaintiff was lithographed below the indorsement. The defendant paid the whole sum into court minus the 4s. for costs. The registrar accepted the amount so paid in minus the solicitors' costs, on the ground that the solicitors had not signed the particulars as required by the County Court Rules, 1889, ord. 6, r. 10, and Appendix "Costs on the Lower Scale," r. 1.

The deputy-judge upheld this ruling, and refused leave to appeal.

The plaintiff thereupon obtained a rule to show cause why the judge should not hear and determine an application for such costs.

Jelf, Q.C., and *Muir Mackenzie*, for the deputy-judge, showed cause against the rule.

Crump, Q.C. (*E. Lewis Thomas* with him), for the plaintiff Rees, took the preliminary objection that the judge had no right to be represented except on an appeal as to jurisdiction: *Reg.* v. *Marylebone County Court Judge*, 50 L. T. N. S. 98, *per* Day, J.

The COURT held that the judge might appear if he chose to do so, though it may not be the usual course, and though the result might be that he would not be entitled to any costs, but that there was no rule against his so appearing.

Crump, Q.C., subsequently further objected that counsel for the judge were instructed by the Treasury, who had no right to intervene.

The COURT held that the Treasury were entitled to defend a judge whose exercise of his duty was being attacked.

Jelf, Q.C., and *Muir Mackenzie* showed cause.—This is either an attempt to appeal without leave, in an action for less than £20, against the provisions of section 120 of the County Courts Act, 1888, or else it is a review of the registrar's taxation of costs, for which other procedure is laid down in section 119 of the same Act; *Jonas* v. *Long*, 36 W. R. 315, 20 Q. B. D. 564.

Crump, Q.C., and *E. Lewis Thomas*, for the plaintiff.—There is no question of taxation here. The claim for these costs has never been adjudicated upon. The registrar has only taken into consideration the rule as interpreted by him. What is the true construction of the rule has never been adjudicated.

The COURT held that the matter was one of public importance, and that it was advisable for the defendant to allow the question to be argued upon its merits and to waive the technical objection, which, however, the court were, as at present advised, inclined to hold a valid one.

Jelf, Q.C., consented to waive the objection and to argue the case upon the merits.—The costs are strictly limited in principle in the county courts, and the solicitors must conform strictly to the conditions imposed for the recovery of costs. Ord. 6, r. 10, of the County Courts Act, 1889, requires the particulars to be indorsed

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

by the solicitor, and the Appendix on Costs says they are to be signed, and the note adds: "No other costs are to be allowed than the above where the amount does not exceed £10 unless the judge certifies otherwise." The costs here are only recoverable when the particulars are signed by the solicitor. He cannot sign by anticipation or only in blank, as on a bill of exchange. He must certify by signing that the particulars are such as are described above his signature. The costs are for work done in setting out the particulars. Someone else might have done the work if a great number of these lithographed forms are available for use. This is not a case of a facsimile signature being stamped on after the particulars have been completely set out.

Crump, Q.C.—Where the solicitor has fulfilled the requirements of ord. 6, r. 10, by indorsing the particulars with his name and address, he has fulfilled the conditions entitling him to costs. He has certified the genuineness of the document. Stamped signatures have been held good under the Wills Act and the Registration Acts. A lithographed form of signature is analogous.

Lord COLERIDGE, C.J.—I yield to the objection taken by the defendant to this appeal on its merits with great reluctance. If rule 10 of order 6 of the County Court Rules, 1889, stood alone, I should decide against the objection without hesitation, and say that indorsement included other modes of signature than that in writing. But the order refers to the appendix to show what costs are recoverable and under what circumstances. The order and the appendix must be read together, and we must give effect to statutory words when they are clear, as these are. Ord. 6, r. 10, enacts that "the costs of entering the plaint by the solicitor shall not be allowed unless he shall indorse on the particulars his name, or firm, and place of business." What are these costs? For these you must turn to the "Appendix as to Costs on the Lower Scale." There you find that "where the particulars and copies are signed by a solicitor, and the amount claimed exceeds £2, and does not exceed £5 (as is the case here), there may be entered upon an ordinary summons, and upon a default summons, four shillings." This regulation of the appendix must be incorporated with, and read into, the rule above mentioned, and, that being so, the word "indorsement" in the rule must mean "signature." I yield to the objection, therefore, urged against the lithographed indorsement, though reluctantly, yet without hesitation, looking at what is the really plain meaning of the rule and the appendix taken together. They mean simply what they say, and they clearly say that the required indorsement is to be by the signature of the solicitor.

MATHEW, J.—I am of the same opinion. I should certainly have been disposed, had the rule stood by itself, to have said that this very technical objection had no real force, but unluckily there can be no ambiguity in the construction of the word indorsement in the rule when the appendix is referred to. There it is expressly stated that "where the particulars and copies are signed by a solicitor" the costs allowed are recoverable. And the same phrase is used in the case of costs on the higher scale—viz., "Preparing particulars, &c., provided such particulars and copies are signed by the solicitor," and "Preparing further particulars, &c., when signed by the solicitor." I agree, therefore, that we are coerced to limit indorsement in ord. 6, r. 10, to the meaning of signature. There will be no costs allowed on this rule.

Rule discharged.

Solicitors for the plaintiff, *Aird & Hood.*

Solicitors for the deputy-judge, *Carter & Simpson.*

Prob. Div. & Adm. Div. } Divorce. } July 2, 1889.

WOOD v. WOOD AND WHITE. (a.)

Divorce — Question as to property — Procedure — Order to be made by court or judge—Inquiry before registrar — Report — Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

In a divorce suit a registrar has no jurisdiction to determine questions between husband and wife as to property under section 17 *of the Married Women's Property Act,* 1882. *Such questions must be determined by the court or a judge.*

Where the registrar on summons made an order against the husband that he should deliver up certain articles, the court discharged that order and referred the question to the registrar for inquiry and report.

Motion to discharge a registrar's order made on the 13th of June, by which the husband, the petitioner in the suit, was ordered to deliver over to his wife, the respondent, or to her solicitor, certain articles which she claimed as her separate property. The husband alleged that the property was joint, as they were wedding presents.

The order was made on the hearing of a summons taken out by the respondent in the suit. The suit was by the husband for dissolution of the marriage on the ground of his wife's adultery.

Deane, in support of the motion.—The registrar had no jurisdiction to make this order. It is only a judge or the court who can do so, and that power is given by section 17 of the Married Women's Property Act, 1882.

Middleton, for the respondent.

BUTT, J., held that the registrar had no power to make the order, which must, therefore, be discharged, and he directed the registrar to make an inquiry whose property the articles were, and to report to the court.

Solicitors for the petitioner, *Lewis & Lewis.*

Solicitors for the respondent, *Chester & Co.*

[See also *Philips* v. *Philips,* 37 W. R. 224, 13 P. D. 220.]

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). } Feb. 25, 26, 28; April 8, 1889.

COWPER ESSEX *v.* LOCAL BOARD FOR ACTON. (*a.*)

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 49, 63 — *Compensation for "injuriously affecting" lands held therewith—Severance from other lands held therewith.*

Where land is compulsorily taken under the Lands Clauses Act, 1845, *the owner is entitled to compensation for depreciation of the value of his other lands, though such depreciation is due to the anticipated legal use of works to be constructed upon the land taken.*

When the unity of ownership of parcels of land conduces to the advantage of the property as one holding, they are held together within the meaning of section 49 *of the Lands Clauses Consolidation Act*, 1845, *and actual contact is not essential.*

Reg. *v.* Chester Clerk of Peace (Stockport case), 12 *W. R.* 762, *approved.*

Decision of the Court of Appeal (34 *W. R.* 587, 17 *Q. B. D.* 447) *reversed.*

This was an appeal from a decision of the Court of Appeal, reported as *Reg.* v. *Essex*, 34 W. R. 587, 17 Q. B. D. 447.

The facts are set out in the report below, and are also summarized in the judgments of Lords Watson and Macnaghten.

Sir Horace Davey, Q.C. (*C. H. Anderson, Q.C.*, with him), for the appellant.—The existence of these sewage works would depreciate the value of the land not taken, so as to be matter for compensation: *Reg.* v. *Chester Clerk of Peace* (*Stockport case*), 12 W. R. 762; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; *Caledonian Railway Co.* v. *Ogilvy*, 2 Macqueen, 229; *Caledonian Railway Co.* v. *Walker's Trustees*, 30 W. R. 569, 7 App. Cas. 259; *City of Glasgow Union Railway Co.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78; *Reg.* v. *Sheward*, 28 W. R. 506, 9 Q. B. D. 741. As to what constitutes severance see *Holt* v. *Gas Light and Coke Co.*, L. R. 7 Q. B. 728, 735, 21 W. R. Dig. 126.

Sir R. E. Webster, A.G., and *E. H. Pollard*, for the respondents.—This is not a matter for compensation. *In re Penny and South-Eastern Railway Co.*, 5 W. R. 612, 7 E. & B. 660, 671; *Hammersmith and City Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4 H. L. 171; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Rex* v. *Pease*, 4 B. & Ad. 30; *Vaughan* v. *Taff Vale Railway Co.*, 8 W. R. 549, 5 H. & N. 679, were referred to.

Sir Horace Davey, Q.C., replied.

The House took time for consideration.

April 8, 1889.—HALSBURY, C.—For some time I was doubtful whether the question mainly argued in this case properly arose, since the direction of the under-sheriff, if I were to suppose it had been acted upon by the jury, would have raised another, and, to my mind, more serious, question than that upon which the respondents in this appeal insist.

I should hesitate very much to affirm the proposition that a belief in imaginary injury, though in fact an existing belief, and in fact affecting the marketable value of property, furnished any ground either for damages in an action, or for compensation under the Land Clauses Act.

The under-sheriff appears to have assumed that no possible injury, in the true sense of that word, could arise from the establishment of these sewage works, but that a compensation jury might award a sum of money if they came to the conclusion that a belief, however unfounded, that the sewage works would inflict injury upon the neighbourhood were established to have affected the marketable value of the land in the immediate vicinity of such sewage works. I should hesitate very much to acquiesce in such a view. But we are here discussing a question raised by the issue of a writ of *certiorari*, which writ, as it is expressly taken away by statute, can only issue where the jurisdiction has been exceeded, and if the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone because the jury may have awarded too much, nor because the under-sheriff overstated or understated the result of the evidence given.

Now, upon full consideration, I think there was evidence justifying the jury in awarding something. The account of the proceedings before the under-sheriff, imperfect and fragmentary as it is, nevertheless discloses this: that part of the argument directed to show that no injury would result, rested upon the proposition that if the works were not carefully and properly conducted they could be restrained by injunction as often as any annoyance arose to the neighbourhood from the improper mode of conducting them.

Now, I think that the liability of a neighbourhood to such even occasional and exceptional annoyances is a real injury to property, and not fanciful or imaginary.

It is doubtless attributed to Lord Hardwicke that he once said "the fears of mankind could not create a nuisance." But if Lord Hardwicke ever really did say so it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance: see *Reg.* v. *Lister*, Dears & B. C. C. 209.

The good sense of mankind recognizes the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common-sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if and when the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance. I have, therefore, come to the conclusion that it was open to the jury to find that the appellant's land not taken by the local board would be injuriously affected by the construction and use of the sewage works.

With reference to the main question I have had less difficulty, since I take it that two propositions have now been conclusively established. One is—that land taken under the powers of the Lands Clauses Act, and applied to any use authorized by the statute cannot, by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands,

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

It may seem at first sight a little strange that what is injurious affecting in one case should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use as distinguished from the construction is a particular injury, suffered by the proprietor from whom some portion of his land is taken, different in kind from that which is suffered by the rest of her Majesty's subjects.

It is, however, unnecessary to consider the question as if it were *res integra*, since I think that *Buccleuch* v. *The Metropolitan Board of Works* has established the proposition in such a way as to be binding upon your lordships. I think it is impossible to explain away that case when the question expressly raised was whether the umpire had awarded damages in respect of the future use of the embankment as distinguished from its construction, and when it was admitted that he had awarded damages in respect of the use of the intended road, and your lordships affirmed the right to make such an award.

As I understand the judgment of the Court of Appeal, it proceeds upon the ground that, assuming injury, in fact, by the use of the sewage works and acquiescing in the decision in the *Stockport case*, it, nevertheless, comes to the conclusion that the lands injuriously affected were not "other" lands of the proprietor within the meaning of the statute, because, in the view their lordships entertained, some portion, at all events, of the land injuriously affected had been already severed by a railway.

I am unable to concur in the construction of the statute which that argument assumes. A person lays out a building estate in which unity of design, correspondence of the lines of building, adaptation of roads, open spaces, and the like, all have, or may have, relation to each other. Take the most familiar example: Suppose, in the proprietor's building plan, the roads were intended to take a particular direction, and, by the withdrawal of one piece of land, the whole arrangements of the intended building scheme should be dislocated, would it, in reason and common sense, be any answer to a claim for compensation to say the piece of land taken is at a distance from and even severed by some other construction from the place where you are going to conduct your roads? Many other examples might be given: arrangements for sewers, gas, water, and the like relate to the unity of the estate as one thing, the usefulness and market value of which might be interfered with by the withdrawal of part, and it is in each case a question of fact, dependent upon its own circumstances, whether what I have called the unity of the estate is interfered with. In this case I think it was properly for the jury, and has been lawfully adjudicated upon by them.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored; that the respondents should pay to the appellants the costs of this appeal and in the court below, and I move your lordships accordingly.

LORD WATSON.—The appellant is owner of certain lands at Acton, two parcels of which have been let on long building leases, containing usual covenants prohibiting the erection or alteration of buildings without his consent. In 1866 the respondents, under a provisional order which incorporated the powers of the Land Clauses Acts, gave notice to take about five acres of the lands so demised for the purpose of constructing thereon works for the collection and deodorisation of sewage. Compensation was assessed by a jury, who allowed the appellant £8,737 for the purchase of his interest in the land taken, and also £4,000 for all damage sustained or to be sustained by reason of the injuriously affecting his other lands by the exercise of the respondents' statutory powers.

It was admitted on both sides of the bar that the sum of £4,000 was awarded in respect of damage to the appellant's remaining lands other than those let on building leases. The prospective damage, which the jury took into account in fixing that sum, can only be ascertained from the evidence submitted to them and the directions given them by the under-sheriff in his charge. The inference which I derive from these sources is, that the jury, in estimating compensation for injuriously affecting, were mainly influenced by the consideration that sewage works of the character contemplated by the respondents, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, are nevertheless, even when so conducted, distasteful to householders, and tend to depreciate the market value of building land in their vicinity; and also that negligence in the conduct of the works may occasionally give rise to actionable nuisance. It therefore appears that a considerable part of the compensation awarded in one lump sum by the second finding of the jury covers damage to arise from the future use of the works for statutory purposes.

The respondents are seeking in this suit to quash the verdict in so far as relates to the second finding; and, in the argument addressed to your lordships, they maintained that the jury exceeded their statutory jurisdiction, inasmuch as (1) they took into account damage to arise, not only from the construction of the sewage works, but from their authorized use after completion; (2) the prospective damage, for which they made an allowance, was too sentimental and remote to form the subject of statutory compensation; and (3) the lands in respect of which they gave compensation were not "other lands," or lands held "with" those taken, in the sense of the Lands Clauses Act, 1845.

In the case of a proprietor from whom nothing has been taken by the promoters, it has been settled by a series of decisions in this House that, although his land in the vicinity will necessarily be injured by the use of their works, yet it is not thereby "injuriously affected" within the meaning of the Act of 1845; and that he is not entitled to statutory compensation for injury so occasioned. The respondents argued that, upon a sound construction of the Act, the same rule ought to apply in cases where the promoters have acquired part of the claimant's lands for the purposes of their undertaking. I should have regarded the question thus raised as one of great nicety and difficulty if I had not been of opinion that it has been already determined in *Buccleuch* v. *Metropolitan Board of Works*. The arbiter in that case allowed a large sum by way of compensation for depreciation in the value of the claimant's mansion which he expected to result from the use for traffic, with its attendant dust and noise, of an embankment and roadway formed upon land taken from the claimant; and his award was sustained by Lords Chelmsford, Colonsay, Westbury, and Cairns. Although the noble and learned lords agreed in result, they did not arrive at that result upon the same general construction of the provisions of the Act with respect to compensation. Lords Chelmsford and Colonsay constituted the majority in *Brand* v. *Hammersmith and City Railway Co.*; but Lord Cairns, who constituted the minority, following the opinion which had been expressed by Lord Westbury in previous cases, disapproved of the limited meaning which the House in that case attached to the words, "injuriously affected by the execution of the works."

In *Buccleuch* v. *The Metropolitan Board of Works* Lord Chelmsford, in whose judgment Lord Colonsay concurred, said, with reference to *Brand's case* and the

subsequent case of *City of Glasgow Union Railway Co.* v. *Hunter*:—"In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction, of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise occasioned by passing trains. I do not think that either Lord Westbury or Lord Cairns appreciated the distinction thus taken. These learned lords were prepared to hold that injury arising from the "execution of the works" included in all cases, not only injury occasioned by their structural form, but injury to arise from their subsequent use. That difference of opinion is, for the purposes of the present case, immaterial; the fact remains, that noble and learned lords, entertaining different views with respect to the construction of the statute, concurred in upholding the landowner's right to compensation, not merely in respect of the construction of works upon land taken from him, but of the subsequent use of these works authorized by statute."

In *Caledonian Railway Co.* v. *Ogilvy*, and also in *City of Glasgow Union Railway Co.* v. *Hunter*, land had been taken from the claimants for railway purposes, but the use complained of as injurious was not of that part of the railway constructed on the land so taken, and it was held in both cases to afford no ground for statutory compensation. It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers. The construction of the Act which has been thus adopted by the House had previously been enforced by Crompton, J., in the *Stockport case*.

I can discover no substantial distinction between the circumstances of this case and the facts which were before the House in *Buccleuch* v. *The Metropolitan Board of Works*. The prospective use, in respect of which compensation has been given, is confined to that portion of the appellant's land which the respondents have acquired from him for statutory purposes; and the kind of depreciation which the jury had in view appears to me to be *ejusdem generis* with that arising from traffic upon a public thoroughfare. Neither the use of sewage works nor such traffic amounts in itself to a legal nuisance; but the existence of either may alter the character of land in the neighbourhood, and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling, I think he suffers substantial and not imaginary injury, although the depreciation may be due, in a great measure, to an unreasonable antipathy to such works, on the part of the purchasing or leasing public. These considerations appear to me to dispose of the arguments of the respondents, with the exception of that which relates to the position of the lands for which compensation has been awarded.

The "other lands" in respect of which an owner, who is selling to promoters, can claim compensation if they are injuriously affected, are indifferently described, in the Act of 1845, as "severed" from the land which is the subject of sale, or as held therewith. I cannot assent to the argument that there can be no severance within the meaning of the Act unless the part taken and the parts left were in actual contiguity. I think the expression "the severing," as it occurs in sections 49 and 63, read in the light of the context, merely signifies that what the promoters have acquired is separated from, in the sense that it can no longer be treated by the landowner as part of, the subjects which, until its purchase, he held along with it. What lands are to be regarded as "severed" from those taken is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held "with" each other in the sense of the Act; and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter. But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

Applying these principles to the facts of the present case, I see no reason to doubt that the lands in respect of which compensation has been awarded by the second finding of the jury were "held with" the five acres taken by the respondents. Their purchase has deprived the appellants of their power to regulate the class of buildings to be erected on these five acres, and has enabled the respondents to construct works the use of which, the jury have found, will sensibly diminish the value of the lands on the other side of the Hammersmith Branch Railway. It is quite conceivable that railway works may be of such a character that the value of land on one side of them will cease to have any dependence upon the use made of land on the other side. But that is not the case here.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

Lord Bramwell.—I think it convenient to consider, first, whether the land injuriously affected, or which will be injuriously affected, by the works of the respondents on the lands taken is land held with the land taken within the meaning of 8 & 9 Vict. c. 18, s. 63. I think it is. I shall not attempt an exhaustive definition of those words; I should probably fail; I should leave out something that ought to be included, and include something that ought to be left out, and so give rise to future controversies. The words are not words of art. They are ordinary language, and must be understood with reference to their object. I think the present case is within them. The lands have one owner. I cannot think it matters that they are separated by a railway; I suppose it would hardly be said that one part of a park separated from another part by a railway was not land held with that other part. Here the lands are close; what is done on one part must or might affect what would be done on the other. For example, what I mean is this, Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of opinion that the land in respect of which the claim is made here was land held with the piece taken.

Then as to the next question. We cannot go into the question of *quantum*. If there was any damage which the jury could give, their verdict must stand. Now it is proved, admitted, and is common knowledge that the sewage works on the land taken will be a nuisance to the lands left; not a sentimental nuisance, but a substantial diminution of the comfort and a danger to the health of persons dwelling in houses on the land not taken. Whether if it was of a sentimental character only, as, for example, if the land was taken for

a cemetery or a prison, and it was proved that the value of the other land was thereby diminished, the amount of the diminished value could be recovered, I do not say, either one way or the other. But in this case there is a substantial damage, a lessening of the health and comfort, or will be, to the land left by the taking of the piece, and the exercise of the powers of the Act; and it is admitted that the law is that no action would lie to recover any such damage. Then the case seems within the very words of section 48, and why is it not?

The argument of the Attorney-General, as I understand it, is this: But for the ownership of the piece, the appellant could not, by action or otherwise, recover compensation for damage to this land; if so, there is no reason why he should, because he is owner of the piece. Nay, the Legislature has designedly left persons without compensation by action or otherwise, who are damaged, but none of whose land is taken; therefore, it must be assumed that it meant to leave such cases as the appellant's without compensation, and that the injurious affecting in section 48 means an injurious affecting for which an action would lie if the nuisance was not caused in the exercise of statutory powers, in substitution for which action, compensation is given. He would read, therefore, into section 48 these words, "and for which, but for these powers hereby given, an action would lie." I see no reason for this; I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity. The Legislature could have added these words if it had thought fit. But, further, it seems to me most reasonable that the owner of property should not be made to sell for its mere value a piece of his land the possession of which, and the use to be made of it, will do to the rest of his land damage to ten times the value of that taken. It seems to me that, according to the reasoning of Sir James Hannen, a man ought to be paid a sum which he may reasonably ask, and that a man may reasonably ask the value of what is taken, and a compensation for the damage that will be done on it to what is left. Take the case I put of two houses, each worth £50 a year, but the land on which they stand could be made worth £200 a year by their being pulled down and one house built on their sites. Would it not be contrary to all fairness and justice, would it not be robbery and plunder, if one house was taken rendering improvement of the other impossible, to make the owner take compensation for the loss of £50 a year only. I am unable to agree that the Legislature meant that persons injured where lands were not taken should have no compensation. It has been so held I know, and by this House, and that decision is binding when the case arises, but, for my own part, I cannot construe the statute by the help of what I must think a wrong decision.

Now I do not wish it to be supposed that I have a sort of spite against *Rex* v. *Pease*, and that it is a pet point of mine that it was wrong, but, in support of my present opinion, and with reference to the argument of the Attorney-General, I must make a few remarks upon it. It is very clear how the provisions in the local Act which the court had to consider in *Rex* v. *Pease* came there. By the original Act, 1 & 2 Geo. 4, c. 44, local and personal, "for making and maintaining a railway or tramway," &c., the company constituted had, by section 1, power "to make, complete, and maintain a railway." They had no power to act as carriers thereon. Their so doing would have been *ultrâ vires*. By section 81 "all persons shall have free liberty to use the railway with horses, cattle, and carriages, for the purpose of conveying goods, &c., and to pass with carts, wagons, or other carriages properly constructed." By the subsequent Act, which was before the court in *Rex* v. *Pease*, it was enacted that "it shall be lawful for the company or any person authorized or permitted by them to make and erect such and so many locomotive or movable engines, and use and employ the same for the purpose of facilitating the transport of goods," &c. This provision was necessary to enable the company to act as hauliers, and the provisions as to other persons were necessary to give them powers and rights as against the company.

If these provisions gave a right to commit a public nuisance or private injury, I feel sure they were not intended to do so. But, anyhow, this reasoning, even if it justifies a public mischief for the public good, does not justify a private loss and damage. But, of course, the statute on which the cases of *Vaughan* v. *Taff Vale Railway Co.* and *Brand* v. *Hammersmith Railway Co.* depended, is 8 & 9 Vict. c. 20. Did that authorize the commission of a nuisance public or private? I will not repeat the arguments I have already used in *Brand* v. *Hammersmith Railway Co.*, by all of which I abide, but there are one or two additional remarks I wish to make. In section 86, which authorizes railway companies to act as carriers, the words are: "It shall be lawful for the company to use and employ locomotive engines, or other moving power, and carriages and wagons to be drawn or propelled thereby, and to carry and convey all such passengers and goods," &c. By section 87, "It shall be lawful for the company to enter into any contract with any other company, being owners, &c., of any other railway, for the passage over the railway of any engines, coaches, wagons, or other carriages." But by section 92 it is: "Upon payment of the tolls, &c., all companies and persons shall be entitled to use the railway with engines and carriages." Observe the difference. It is "lawful" for the railway company to use engines, but other companies are "entitled." The words as to the incorporated company are permissive and enabling, "it shall be lawful." As to other companies a right is given, "they are entitled." It is a noticeable thing that, according to the construction put upon this Act, the Festiniog Railway Co. would be liable for damage done on its own line by engines to neighbouring property, but directly it gets on a line to which the railway clauses apply, it would not be liable.

But, supposing *Rex* v. *Pease*, and *Vaughan* v. *The Taf Railway Co.* to be rightly decided, I should draw, not the conclusion that the Attorney-General wishes us to draw, but this: that while the Legislature thought that persons whose lands were injured by the operations on other lands of the same ownership which were taken, should have compensation, that right should not be extended to other cases, as that would give opportunity for vague and unfounded claims.

Now a word as to the authorities. The *Stockport case* is, I think, in point. I hope and think I meant no more than I said about it—viz., that I should like to think the matter over before I agreed to it. I have thought it over, over and over again, and do agree to it. I think also that the *Duke of Buccleuch's case* is in point. It is indeed strange that in that case no reference is made to the *Stockport case*, but I think that the principle is the same. As to *Brand* v. *The Hammersmith Railway Co.*, I own I think it was rightly decided in this House. I said that I thought *Rex* v. *Pease* and *Vaughan* v. *Taff Vale Railway Co.* wrong; that the right of action was not taken away, nor compensation given. I added that if the House agreed with those cases I thought they should affirm the judgment, on the footing that if no action lay there must be a right to compensation, and that as the erection of the railway must be followed by its use, therefore the erection of the works injuriously affected the plaintiffs. The fallacy of the argument is in the last sentence. I am afraid I was influenced by the feeling of the gross injustice and hardship of the case. I think the judgment in this case should be reversed.

Lord FITZGERALD.—The decision of the Court of

Appeal reversing the previous decision of the Divisional Court rested entirely on the ground that the lands alleged to be "injuriously affected" had been on some prior occasion severed from the lands taken by the local board by the construction of a railway, and could not therefore be deemed to be "lands held therewith" within the meaning of the 49th section of the Act or "other lands of such owner" within the 63rd section. That question has been satisfactorily disposed of in the several judgments which have been delivered, in which I concur, and can add nothing with advantage. The decision of the Court of Appeal cannot, therefore, be sustained. But for the supposed distinction in fact between the present case and the *Stockport case* the decision of the Court of Appeal must have been in affirmance of the judgment of the Queen's Bench Division.

The notice to treat coming from the Local Board of Acton claimed a right to take the plot of 5a. 1r. 35p. "for the purpose of providing for the sewerage and the disposal of, and utilization of, the sewage of the district of the local board and the necessary works connected therewith." There can be no doubt on the evidence that the immediate consequence was that the adjoining land of the appellant, which had been laid out for building purposes, and was separated from the land taken by the local board only by the permanent way of the railway, became at once actually "injuriously affected." The injury was no sentimental grievance, but a solid depreciation in the letting value, taking effect not remotely, but immediately. Mr. Baker says, "The mere fact of sewage works coming on that land coloured pink (the land taken) will depreciate the land coloured green 25 per cent. I may say I have had experience which confirms that." There was abundance of other evidence to the same effect. I am not surprised at it. It would only be by a material reduction in letting value of the land that parties might be tempted to build dwelling-houses in the immediate vicinity of a farm for the reception, disposal, and utilization of sewage with its real or supposed tendency to create and foster organisms injurious to human health and life.

There being no doubt that the appellant's building land was thus in fact injuriously affected, the question of law is whether the sheriff's tribunal had jurisdiction under the statute (sections 49 and 63) to assess compensation for the appellant in respect of his lands being thus injuriously affected.

It cannot be doubted that the *Stockport case* is in point on this question of jurisdiction. It was vigorously assailed in the Court of Appeal, and one of the Lords Justices suggested that the rule laid down in that case ought to be considered by the House of Lords with a view to its being probably overruled. That case has been the subject of much adverse criticism, but it has not been overruled, and up to the present moment the rule laid down by it has regulated right and liability in similar cases. It is said to have been adopted in principle in the *Buccleuch case*, and if that is so your lordships should follow the latter case I confess that I have some difficulty in adopting that view of the *Buccleuch case*, and prefer considering the *Stockport case* on its own legal merits.

I feel bound to say that had I been a colleague of Crompton, J., at the time I should probably have come to the conclusion that his interpretation of the statute was correct and in accordance with its language; and now, looking back at that decision through the quarter of a century that has since elapsed, and aided by the light of additional experience, I think that it was a sound decision, and certainly not now to be disturbed.

The anomalies or inequalities that have been pointed out arise from the statute, and not from the *Stockport case*, which follows its very language.

I concur in opinion that the decision of the Court of Appeal should be reversed, and that of the Divisional Court restored, with all the consequences.

Lord MACNAGHTEN.—For the purpose of providing for the sewerage and the disposal and utilization of the sewage of the district of Acton, and the necessary works connected therewith, the Acton Local Board was authorized to put in force the powers of the Lands Clauses Consolidation Act, 1845, with respect to certain lands containing 5a. 1r. 35p., of which the appellant was owner within the meaning of the Act.

The appellant had other lands at Acton adjoining the lands required by the local board. His property there was at the time in course of development as a building estate. Part, including the lands required, was let on building leases for a long term of years; part was let on shorter terms for brickmaking purposes; part was in hand. The property was cut in two by a railway running through it. There was apparently a communication of some sort between the lands thus severed. But there is nothing to be found in the evidence on the appeal to explain the nature of the communication or the configuration of the land bordering on the railway. A notice to treat, stating the purpose for which the lands were required, was served upon the appellant. No agreement was come to, and the question of disputed compensation was submitted to a jury.

The jury assessed the value of the lands taken at £8,737. As to that part of their finding there is no dispute. But they also awarded £4,000 by way of compensation for damage to the appellant's other lands by the exercise of the statutory powers which the local board was putting in force.

A portion of the land in respect of which compensation was awarded was situated on the same side of the railway as the lands taken, but separated from those lands by a piece of ground which was included in a building lease and in respect of which no compensation was claimed. The rest of the lands in respect of which compensation was awarded was on the other side of the railway; part was in hand, part was let for a short term of years.

The first objection to the verdict is that the lands in respect of which compensation was awarded were not lands that could be "injuriously affected" within the meaning of the Act, because they had been already severed from the lands required, and were not held therewith for one and the same purpose. It is difficult to see the force of this objection. Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership may conduce to the advantage or protection of the property as one holding. That condition seems to be implied. Otherwise the owner could hardly sustain injury by reason of the execution of the works on the lands taken.

If this view be correct, the severance created by the railway was not of itself a bar to the claim for compensation. It was a matter to be taken into consideration. But its effect must depend upon the circumstances of the case, including in those circumstances the configuration of the ground and the difficulty or facility of making communications across the railway. In an ordinary case severance by a railway is not a complete separation dividing the property into two distinct and independent holdings. And owners of lands affected by

a railway are authorized, if they consider the accommodation works made by the railway company insufficient for the commodious use of their land, at any time to make such further works for the purpose as they think necessary, subject, of course, to the conditions prescribed by the Legislature.

The other objection is one of general importance. It was argued that the compensation awarded was given in respect of injury anticipated from the use of the works when executed, and not in respect of injury caused by the construction or execution of the works; and it was said that the jury were not at liberty to take into consideration the purpose or probable effect of the works which the local board was authorized to construct.

Speaking for myself, I am not altogether satisfied that the decision of this House in the *Duke of Buccleuch's case* can be treated as determining the question. Upon that point I am rather disposed to agree in the view expressed by Lord Blackburn in a subsequent case. But all the arguments on both sides were so thoroughly discussed in the *Duke of Buccleuch's case* in its different stages that it would, I think, be idle for me to do more than state generally the conclusion at which I have arrived.

I think it is impossible to read the Lands Clauses Consolidation Act without seeing that it was the intention of the Legislature that full compensation should be given in all cases where lands are taken under the powers of the Act for the purposes of a public undertaking. To give one instance of the extreme care shown in providing compensation, I may remind your lordships that, if the lands required are subject to a mortgage for a fixed period, the mortgagee is entitled to the costs of reinvestment in addition to the sum to be paid to him in respect of his mortgage; if the rate of interest secured by the mortgage be higher than can reasonably be expected on reinvestment, he is also entitled to compensation for the loss to be sustained by him by reason of his mortgage money being prematurely paid off. Suppose land let to a builder for the erection of first-class houses, and a mortgage by the lessee for a fixed period; and then suppose that part of the land is required for the purpose of some public undertaking likely to spoil the character of the neighbourhood, the mortgagee would be compensated to the utmost farthing; but if the respondents are right the lessee would be left without compensation. His scheme might be destroyed, his houses might be unsaleable, and he might be ruined, though the Act declares in so many words that he "shall be entitled to recover from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works."

It may be said that an adjoining lessee or owner from whom no land is taken might suffer in the same way, and that he would be without redress. That is true. But I cannot see why a person whose case is within the spirit and within the very letter of the Act should be deprived of the full measure of compensation because his neighbour, who is not within the Act at all, is perhaps hardly dealt with.

Where land is required for public purposes the injury, if any, to the owner's adjoining lands depends mainly on the character of the undertaking. There are various purposes for which local boards may be authorized to take lands. They may take lands for pleasure grounds. They may take lands for sewage purposes. But before putting in force any of the powers of the Lands Clauses Consolidation Act a local board is bound to publish the nature of the proposed undertaking, to define the lands required, and to collect, as far as possible, the views of all persons interested in these lands. Then comes a public inquiry, to be followed in due course by a provisional order, and an Act confirming it. These elaborate provisions, designed apparently for the protection of private as well as public interests, would be something of a mockery if a person from whom land is taken is to be told, when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm.

It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will—ignorance, or prejudice, or fancy—the loss to the owner who may want to sell is not the less real; the result to him is not the less practical. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation.

The promoters of an undertaking can only take lands for the purposes authorized by their Act. When the lands are taken the promoters can only use them for those purposes. It is the purpose of the undertaking, and that alone, which justifies its existence. Without the purposes defined and authorized by the special Act the provisions of the Lands Clauses Consolidation Act are a dead letter. And yet it is said that on a question of disputed compensation the arbitrators or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking, and to make believe that the intended works are some innocent and meaningless folly.

I do not think that there is anything in the Act which leads to a conclusion so absurd and so contrary to common sense. When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences to the other lands of the owner likely to result from the execution of the works on the lands required, and any alteration in the character of his property which those works are calculated to bring about.

The *Stockport case* is precisely in point. It has been much criticized; but I think it has stood the test of criticism. In practice I believe it has always been followed, and I think it is perfectly right.

I am, therefore, of opinion that the judgment of the Divisional Court was right, and that the judgment of the Court of Appeal should be reversed.

Order appealed from reversed; judgment of the Divisional Court restored; respondents to pay to the appellant his costs both in this House and below.

Solicitors for the appellant, *Hedges & Brandreth.*

Solicitor for the respondents, *Alexander Helmsley.*

Court of Appeal.

From Q. B. Div. Dec. 12—14, 17.

Reg. v. Bishop of London. (a.)

Ecclesiastical law—Representation to bishop of illegal church decoration—Discretion of bishop to stop further proceedings—Grounds for application for a mandamus *to bishop—Public Worship Regulation Act,* 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9.

Under the 9th section of the Public Worship Act, 1874, *a representation was made by qualified persons to*

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

the bishop of a diocese to the effect that certain sculptured figures in a reredos erected in the cathedral church of the diocese tended to encourage superstitious ideas and unauthorised devotions. The bishop declined to forward the representation to the ecclesiastical court, on the ground that, having considered all the circumstances of the case, he had come to the opinion that the main question of principle at issue had been already decided in a former case, and that, the difference of detail in the present reredos from that complained of in the former case being of so little importance in principle, further litigation would be mischievous.

Held (*reversing the judgment of the* Queen's Bench Division), *that the bishop, having declared that he had considered all the circumstances of the case, and not having been shown to have declined to consider any circumstance of the case brought before him, nor to have considered and acted upon any circumstance outside the case before him, had acted within his jurisdiction; that this jurisdiction gave him a discretionary power to stay the proceedings; and that the court had no power to review his reasons for the exercise of such discretion, provided he had acted within his jurisdiction.*

Appeal from the judgment of the Queen's Bench Division (Lord Coleridge, C.J., and Manisty, J., *dissentiente* Pollock, B.) making absolute a rule for a *mandamus*.

A rule had been obtained, on behalf of four inhabitants of the diocese of London, calling upon the Bishop of London to show cause why a writ of *mandamus* should not issue ordering him to transmit a copy of the representation of the applicants, dated May 4, 1888, to the persons complained of—namely, the Dean and Chapter of the Cathedral Church of St. Paul, in the City of London, and to proceed therein in accordance with the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).

The applicants, being all persons qualified to do so under the provisions of section 8 of the Public Worship Regulation Act, 1874, on the 4th of May, 1888, duly made a representation in writing to the bishop, stating: "(1) That the Dean and Chapter of the Cathedral Church of St. Paul, in the City of London, within five years before the date thereof—that is to say, in the month of January, 1888—have introduced into the said cathedral church and set up upon the altar-piece or reredos therein an image or sculptured subject representing our Lord upon the Cross, in a conspicuous position immediately above the communion-table, the figure of our Lord being of the height of five feet, or thereabouts;" "(2) that the said image or sculptured subject is so constructed as to have the appearance of such an altar crucifix as was used in the Church of England immediately before the Reformation, and so as to answer the purpose for which such a crucifix was intended;" "(3) that the said dean and chapter, within five years before the date thereof—that is to say, in the month of January, 1888—have introduced into the said cathedral church, and set up upon the altar-piece or reredos therein an image or sculptured subject representing the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position a few feet above the first herein-mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of 5 ft. 3 in., or thereabouts;" "(4) that each of the said images or sculptured subjects tends to encourage ideas and devotions of an unauthorized and superstitious kind, and is unlawful;" "(5) that the said images or sculptured subjects are respectively additions to the fabric, ornaments, or furniture of the said cathedral church, and are decorations forbidden by law."

On the 23rd of May, 1888, the bishop, in pursuance of section 9 of the Public Worship Regulation Act, 1874, delivered his reply to the representation of the applicants in the following terms:—"We, Frederick, by the Divine permission Bishop of London, having, in pursuance of the provisions of the Public Worship Regulation Act, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reasons:—

"The proposed proceedings have for their object the determination of the question whether a reredos showing our Lord upon the Cross in a conspicuous position immediately above the communion-table, and also the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law.

"The main question of principle here at issue has been already decided in the *Exeter case* (*Phillpotts* v. *Boyd*). In that case the reredos showed a figure of our Lord in the act of ascending into heaven in a conspicuous position immediately above the communion-table, and this reredos was held to be lawfully erected."

"The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principles laid down in the *Exeter case*, and whether the reredos erected in St. Paul's is such an exception. It appears to me impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not."

"Litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife; it embitters men's feelings; it inflicts much mischief on the Church and on true religion; and it is only tolerable as a preventive of worse mischief that would otherwise follow."

"It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer it is continued, while the results obtained from it are of exceeding little value."

"I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which must inevitably be inflicted on them by the litigation itself."

The applicants thereupon obtained a rule for a *mandamus*, which was made absolute by a majority of the judges in the Divisional Court, calling upon the bishop to transmit the representation to the official principal of the Court of Arches; against this order the bishop now appealed.

Sir R. E. Webster, A.G., *Jeune, Q.C.*, and *Lewis Coward*, for the Bishop of London, and *Jeune, Q.C.*, and *Lewis Coward*, for the Dean and Chapter of St. Paul's.—It is admitted that the bishop has been given a discretion to refuse to send on a representation made to him under section 9 of the Public Worship Regulation Act, 1874. If that discretion has been exercised judicially and *bonâ fide*, there is no jurisdiction in the temporal courts to review that discretion. The same principle must be adopted as is applied to the review of the discretion given to any inferior court: *Reg.* v. *Boteler*, 12 W. R. 466, 4 B. & S. 959. The bishop has not to decide the legality or illegality of the acts complained of in the representation. His discretion is analogous to that now given to a judge to refuse leave for criminal proceedings against a newspaper for libel: Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8; or to justices in prosecutions for Sunday trading: 34 & 35 Vict. c. 87, s. 1. The bishop's discretion is exercised by "considering the whole circumstances of the case," "forming an opinion on such circumstances,"

and "stating his reasons in writing for such an opinion." If he has considered other circumstances not material to the case, or given his reasons as being based upon some such circumstance, he has not exercised his jurisdiction. The words "the whole circumstances of the case" give the bishop an absolute discretion of a pastoral as well as judicial kind (*per* Lord Thesiger, L.J., in *Reg.* v. *Bishop of Oxford*, 4 Q. B. D. 598, 599, 27 W. R. Dig. 181). The discretionary power given to the bishop under section 9 of the Public Worship Regulation Act, 1874, is not new. It has been held by the House of Lords to be absolute under the Church Discipline Act (3 & 4 Vict. c. 86) in *Julius* v. *The Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214. If the Legislature had intended to limit that power they would have done so in clear and unmistakeable language. That they did not intend to do so may be inferred from Lord Cairns' remarks reported in Hansard and cited by Baggallay, L.J., in *Reg.* v. *Bishop of Oxford*. Assuming a mistaken view of the law or even a mistake of fact by the bishop in his statement of reasons, that is no ground for a *mandamus* if the discretion has been properly exercised. The bishop here is not shown to have made either mistake. His view of the principle of the decision in the *Exeter case*, *Phillpotts* v. *Boyd*, 23 W. R. 491, L. R. 6 P. C. 435, is correct. The principle there laid down was that sculptured images, in such a position or grouping as not to show on the view any tendency to encourage idolatry, are legal. No evidence was offered here to show that idolatrous worship in fact had taken place. The applicants only allege that certain images in the reredos were, in their opinion, likely to encourage such worship. The bishop forms an opinion that they were not. The images form part of a set of representations of historical events in the life of Christ. The application of the principles laid down in *Phillpotts* v. *Boyd* is illustrated by the decisions in *Clifton* v. *Ridsdale*, 1 P. D. 316, 2 P. D. 276, where the image, by its position and surroundings, was held, on the view and in fact, to encourage idolatrous worship, and in *Hughes* v. *Edwards* (the *Denbigh case*), 2 P. D. 361, where a scene of the crucifixion in a reredos was held to be legal for the opposite reason. The decision in the *Exeter case* was a circumstance of the case properly to be considered by the bishop. His other reasons of the evil of litigation upon minor differences between the reredos in question and a similar reredos are all derived from the circumstance of the bearing of the principles of the *Exeter case* upon the present application. They are, therefore, circumstances of the case to be considered. The obligation to put the reasons in writing and to convey them to the parties was to insure that the bishop had properly exercised his discretion and had considered all the circumstances of the case, possibly, also, by way of guidance and regulation upon future similar applications.

Sir W. Phillimore watched the case on behalf of the Dean of St. Paul's.

Sir Henry James, Q.C., *Fletcher Moulton, Q.C.*, and *Danckwerts*, for the respondents.—The Public Worship Regulation Act, 1874, was a new departure in ecclesiastical procedure devised to give proper complainants the right to put the law in force against illegal actions on the part of the clergy. Originally no criminal procedure could be put in force by laymen. Under the Church Discipline Act (3 & 4 Vict. c. 86) power was given to laymen to proceed subject to the bishop's consent; then came the present Act, giving this right to particularly defined and responsible parishioners. That right cannot be taken away by a proviso. The arguments in *Julius* v. *Bishop of Oxford* do not apply. Lord Cairns expressly showed how the discretion might be limited where precautions were taken to limit complainants to persons interested in the particular church and who would be made responsible for costs in lieu of the bishop. The discretion of a bishop under this Act is not absolute, but permissive if exercised as a judicial duty (*per* Lord Cairns, *Julius* v. *The Bishop of Oxford*; *Sergent* v. *Dale*, 2 Q. B. D., p. 566, *per* Lush, J.). That exercise of duty is limited (1) to the consideration of the whole circumstances of the case; (2) to an opinion formed upon the whole circumstances; (3) to a statement of his reasons for such opinion in writing. Unless the whole circumstances are considered he has not properly exercised his discretion. His opinion must be judged by the reasons given, and those reasons must amount to an extract of "the whole circumstances of the case." The words are a limitation not an extension of the discretion. The reasons must be legally admissible reasons, and those are, by the terms of section 9, reasons formed upon the whole circumstances of the case. Reasons of general expediency will not be admissible: *Reg.* v. *Adamson*, 24 W. R. 250, 1 Q. B. D. 201. A mistake in fact or misreading of the law, if given as a reason by the bishop, will show that he has not considered the real circumstances of the case, and, if so, he has not exercised his jurisdiction properly and a *mandamus* will lie. The bishop here has wrongly interpreted the principles laid down in the *Exeter case*. The court expressly state that the decision does not apply to the question of the legality of any images: *Phillpotts* v. *Boyd*. The question of idolatrous worship must be gone into upon each case. The complaint here is as to the tendency of this sculptured crucifixion to encourage illegal worship. The bishop has not dealt with that question at all, nor does the *Exeter case* apply to the question here raised. The only other reason given is a general objection to litigation on such subjects. That is an inadmissible reason. It is not a circumstance of the case. If a bishop has allowed circumstances to influence him other than those in the case, or shows such circumstances to have been the motive of his opinion by the reasons which he states, he has not properly considered the whole circumstances of the case. An excess of reasons is sufficient to vitiate his opinion, even if he has considered the whole circumstances. *Hughes* v. *Edwards* does not decide that a crucifixion as a sculptured group is legal. There was no evidence there of a tendency to encourage idolatrous worship: *In re St. Lawrence, Pittington*, 5 P. D. 131. The bishop declines to act unless the complaint is a "very grave" one, or the images have a "very serious" tendency to idolatrous worship. He has no jurisdiction to limit proceedings to such cases.

Sir R. E. Webster, A.G., in reply.—Lord Penzance, in *Hughes* v. *Edwards*, expressly applies the principles laid down in the *Exeter case*; therefore the bishop was right in considering their application to the present case. The extent of discretion is rightly laid down by Cockburn, C.J., in *Reg.* v. *Bishop of Oxford*, in his express reference to the Public Worship Act, 1874.

Cur. adv. vult.

Dec. 17.—LORD ESHER, M.R.—We have in this case to deal with the action taken by the Bishop of London upon a representation forwarded to him by admittedly qualified persons in reference to certain sculptured images upon a reredos erected in St. Paul's Cathedral. The bishop, assuming that he had jurisdiction so to do under section 9 of the Public Worship Regulation Act, 1874, has stated his opinion in writing, as required, that the proceedings ought not to be taken. Upon that state of things a *mandamus* has been granted by a majority of the judges in the Divisional Court ordering the bishop to transmit the representation to the proper ecclesiastical tribunal. It is alleged by the promoters of these proceedings that the bishop has either exceeded the duty vested in him by the statute mentioned, or has not

undertaken that duty—*i.e.*, that he has either exceeded or declined his jurisdiction. In order to determine whether he has so exceeded or declined jurisdiction, it is necessary to consider what jurisdiction has been given him under the Public Worship Regulation Act, 1874. If so, we must construe that Act. The only part necessary to consider is section 9, and the question of the proper exercise of the jurisdiction mainly turns upon the words, "After considering the whole circumstances of the case." It is said for the bishop, that these words are enabling words extending the bishop's discretion to an extreme width so as to entitle him to something more than mere words giving him an ordinary judicial discretion. On the other side it is contended that they are words of limitation. It is not denied that he has at some point to exercise a discretion, but his power or duty is said to be limited to the fact of his having considered the whole circumstances of the case—*i.e.*, each and every circumstance; and that, if he fails to consider each and every circumstance, or if he considers circumstances other than those of the case, his discretionary power does not come into play. In construing this section we must adopt the well-known rule laid down by Lord Selborne—namely, of construing the words in the ordinary and grammatical sense of the English language as applicable to the subject-matter dealt with. If they are capable of a double meaning, then the history of legislation on the subject may become material in order to interpret them; but I do not think that in this case any argument based on previous legislation is necessary to the construction of the section in question. The order of the words is unusual; the section commences with a negative proviso: "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken, . . . he shall," &c. The section would be more clear if the sentences were transposed to this effect: "Where a representation under section 8 has been made, the bishop shall transmit the same, &c., unless he shall be of opinion," &c.

Now, all that the bishop has to do is to form an opinion. He has not got to determine the legality of the subject-matter of dispute. It is not within his discretionary jurisdiction at all to determine whether certain things are, or are not, contrary to law. He has to form an opinion whether further proceedings shall or shall not be taken. That that is a matter for his discretion under the section cannot be, and is not, denied. The bishop is not a judge to determine the matter in dispute, but is to act as a high public authority intrusted with the duty of saying whether the matter is to be tried or not before the proper ecclesiastical tribunal. When, however, so called upon to act, his decision must be in the nature of a judicial decision—that is to say, he must decide fairly, to the best of his ability, and impartially between the parties. He has the same duty thrown upon him as that imposed upon anyone else in a judicial position. I do not doubt that a bishop has to act in a judicial manner, and to decide as if he were judicially deciding any matter. In that sense his discretion is a judicial discretion. What is it which gives him jurisdiction? It is really the delivery of the representation. Then his duty commences. We must consider what that duty is. It is said that his duty does not commence until he has done something beforehand, without which being done he has no jurisdiction to exercise his duty. That preliminary thing is said to be his "consideration of the whole circumstances of the case"—*i.e.*, each and every such circumstance; and if he fails to consider some one such circumstance his discretionary jurisdiction is said not to arise. Suppose the words were not there, and that the sentence only ran, "Unless the bishop shall be of opinion," &c. That gives him a judicial discretion. How much might he take into consideration under those words? Lord Selborne and Lord Cairns consider that even then he would not be confined to considering whether there was a *primâ facie* case made out in the representation or not, or whether there was *primâ facie* evidence to support a case. His discretion is to determine whether proceedings ought to be taken or not. Other things than *primâ facie* evidence might be taken into account.

But it is argued that by the insertion of the words "after considering the whole circumstances of the case," the bishop is prevented from acting, unless every circumstance is shown by him to have been taken into consideration. I am of opinion that the words must be read in their simple and ordinary sense. They are not meant to indicate a condition precedent to his discretion, nor that he is bound to consider every circumstance. They enable the bishop to go to any limit, provided that limit is confined to the circumstance of the case. If he has honestly and fairly undertaken the consideration of the circumstances of the case, and has not wilfully refused to consider some circumstances brought to his notice, or if he has considered some circumstances of the case so far as he thought such material circumstances, but has not considered certain others, I am of opinion that he has not, on that ground, failed to do his duty under the statute nor declined jurisdiction. But what are we to say as to whether he has exceeded his duty? He would exceed his duty if he considered some circumstance not a circumstance of the case, and which could not be such, and has acted upon such circumstance. The mere fact of his having considered some such circumstance is not sufficient ground to show excess of jurisdiction; he must have acted upon that circumstance which is not a circumstance of the case. To determine, then, whether a bishop has declined jurisdiction, it must be shown that he either refused to consider the case or any one circumstance of it brought to his notice, or that he has plainly acted without reference to the circumstances of the case at all. To determine whether a bishop has exceeded his jurisdiction it must be shown that he not only considered, but acted upon that circumstance which was not a circumstance of the case. But if he has undertaken the consideration of the case and its circumstances, and has not refused unfairly to consider any particular circumstance of it, the mere fact of his being shown not to have considered one circumstance of the case is not sufficient ground for a *mandamus*. If, again, he has exercised his proper jurisdiction, and has not gone beyond it, whether he has acted rightly or wrongly is not a matter into which the temporal court can inquire. If he has a discretion at all, which it is admitted he has, then when the time for the exercise of that discretion has arisen, and as long as he has exercised it within his jurisdiction, the rightness or wrongness of this actual exercise of it cannot be questioned. The bishop is to come to an opinion, and to state his reasons for that opinion. If, acting within his jurisdiction, he has come to an opinion, the question whether that opinion is a right or wrong one is not a matter for a *mandamus;* and if the reasons given are capable of being considered reasons in the opinion of the court, then, however wrong the court might, in fact, hold those reasons to be, they have no authority to inquire into the rightness or wrongness of the reasons themselves. The question, then, for us is, Has the bishop honestly and *bonâ fide* considered the circumstances of this particular case? or, Has he exceeded his jurisdiction in considering a circumstance which is not a circumstance of the case, and acted upon that? My opinion is that he has properly considered the circumstances of the case, and this opinion is supported by authority, which, though not binding, is to be treated as authoritative. Cockburn, C.J., upon the first hearing of *Reg.* v. *Bishop of Oxford*, has laid down what is a proper exercise of discretion. It is true that the decision in that

considerable importance, and, out of deference to those from whom I differ, I have thought it right to put my judgment into writing. The Public Worship Regulation Act, 1874, materially altered the law respecting the right to take legal proceedings in various ecclesiastical cases and respecting the mode of proceeding in such cases. Under the Church Discipline Act any person, male or female, whether a parishioner or not, and whether a member of the Church of England or not, could complain to the bishop of any clerk in holy orders. Under the Public Worship Regulation Act the persons complaining must be an archdeacon or a churchwarden of the parish or any three male persons of full age, parishioners of the parish referred to in the complaint, and they must be members of the Church of England. The Church Discipline Act contains no express provision applicable to cathedrals or collegiate churches, whereas the Public Worship Regulation Act does (section 8). The complainants in the case of a cathedral must be three male persons of full age, inhabitants of the diocese in which the cathedral is situate, and must be members of the Church of England (*ib.*). The Church Discipline Act merely declared that upon complaint being made to the bishop it should be lawful for him to issue a commission to inquire into the matter complained of (section 3), or to send the case to the court of appeal of the province (section 13). There was no provision requiring him in exercising this power to give any reasons for the course he might think fit to adopt, and it was held, first in *R.* v. *Bishop of Chichester*, 7 W. R. 659, 2 Ell. & Ell. 209, and later in the *Bishop of Oxford's case*, that the bishop had a complete discretion as to whether further proceedings should or should not be taken, and that his only legal duty (if any) in the matter was to hear and consider the application. (See *per* Lord Blackburn, 5 App. Cas., p. 240).

The Public Worship Regulation Act, 1874, is materially different, for by section 9, on the receipt by the bishop of a proper representation, it is his duty, within twenty-one days, to take certain steps to have the complaint investigated and determined, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation." Moreover, if he should be of this opinion, he is to state in writing the reason for his opinion, and such statement is to be deposited in the diocesan registry and a copy of it is to be transmitted to the complainant and to the person complained of. The statute, therefore, plainly casts upon the bishop the responsibility of stopping further proceedings. He is not required to sanction them; for unless he is of opinion that they should be stopped he is bound by the statute to do what is necessary to have the complaint heard and determined in one or other of the modes prescribed by the statute.

In this state of the law three questions arise—viz., (1) What is the duty of the bishop as regards forming an opinion that proceedings should not be taken? (2) Has he in this case performed that duty? (3) What jurisdiction has the High Court over him in the matter? (1) With respect to his duty. His duty is to form an opinion. Formation of an opinion is very different from a mere exercise of will. It is clearly not competent for the bishop simply to stay further proceedings by an arbitrary exercise of his will. He must be of opinion that they ought to be stayed. To form an opinion it is obviously necessary that he must consider the case to which his attention is directed. There could be no doubt on this point even if the statute went no further; but the statute expressly requires him to consider "the whole circumstances of the case." These words are to my mind very important. They show that he is to consider more than what in legal language may be described as the issues raised by the complainants. "The whole circumstances of the case" embrace more than the matters directly in controversy. The expression includes circumstances of time and of place, and the consequences which will follow in any particular case if the proceedings are stayed, and also those which will follow if they are not.

The court has no right to narrow these words. The effect of them is, on the one hand, to emphasize the duty of the bishop fairly to consider the particular case before him, and honestly to form an opinion upon it; and, on the other hand, the effect of the words is not only to empower him, but to require him to take a wide and not a narrow view of the case; to consider all its circumstances—*i.e.*, every circumstance material for forming an opinion upon the question whether proceedings should not be taken. The bishop, as will be further pointed out presently, is not at liberty to set any law of the land at defiance, and he cannot, under cover of forming an opinion under the power conferred upon him by this section, prevent the law from being enforced against persons who persist in doing that which he knows to be plainly illegal.

But what is legal or illegal with respect to images, crosses, crucifixes, and other things of the sort in churches, depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship, in the place where they are or are to be put; and if in any particular case the bishop is of opinion that a particular image, cross, crucifix, or other piece of sculpture has no tendency to encourage such worship, he is, in my opinion, perfectly justified in stopping litigation on the subject. In every such case it appears to me that the bishop may properly consider what are called the interests of the Church in the matter, by which I understand the advantages or disadvantages (to other persons than those complaining and complained of) which will result from stopping further litigation.

To exclude such considerations would, in my opinion, be unduly to limit his power and duty to consider "the whole circumstances of the case." The bishop is empowered, and is bound, to consider "the whole circumstances of the case," but it may well happen that one or two circumstances render all the others comparatively immaterial. When that does happen the bishop need no longer consider these. He is not bound to waste his time in thinking over any circumstance which is or which becomes unimportant. He has considered it as soon as he has made up his mind that it requires no further consideration. Having considered "the whole circumstances of the case," and come to the opinion that proceedings should not be taken on the representation, the bishop's next duty is "to state in writing the reason for his opinion." This must mean his reason for the opinion at which he has arrived; the reason which has influenced him and on which his opinion is based. If he does this he discharges his duty in this respect, even although other persons may think the reason unsatisfactory.

Whether his reason can be reviewed by any other tribunal is an entirely different question, which I will examine presently, but so far as the bishop is concerned he has complied with the statute.

(2) I pass now to the second question—Has the bishop in this case performed his statutory duty? It is urged that he has not, because, first, he has misapprehended the case, and, secondly, he has considered circumstances outside it, and which ought not to have influenced him. The contention that the bishop has misapprehended the case is based upon his view of the *Exeter case* and of its bearing on the present case. The differences between the two are obvious enough.

In the *Exeter case* there was no representation of a crucifix, nor of the Crucifixion, nor of the Virgin Mary; nor was there in that case any suggestion that any superstitious reverence had been, or was likely to be,

paid to any figures forming part of the reredos. The reredos in St. Paul's, which the bishop in this case had to consider, does contain a representation of the Crucifixion and of the Virgin Mary, and the representation made to the bishop states that these do tend to encourage superstitious devotions.

Notwithstanding these differences, the bishop states in his reasons that the main question of principle here at issue has been already decided in the *Exeter case;* and that the sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle there laid down, and whether the reredos in St. Paul's is such an exception. He further states that it appears to him impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not. These statements of the bishop show, to my mind, conclusively that he has considered the present case; that he has compared it with the *Exeter case;* that he has come to the conclusion that the sculptures complained of in the St. Paul's reredos are parts of an erection which is decorative in its object and character, and are not likely to encourage superstitious devotion. This, in my opinion, is the fair meaning of the bishop's statement; and, this being its meaning, he has not, in my opinion, misapprehended this case in the smallest degree. Whether the reredos in St. Paul's does or does not tend to encourage superstitious reverence or idolatry is a question of fact or of opinion. The complainants say it does, and they want to have that question tried. The bishop has considered this very point and thinks that the reredos has no such tendency. If he be right, the *Exeter case* shows that the reredos in St. Paul's is not unlawful; if he be wrong, he will have made a mistake, the effect of which I will consider presently. But, right or wrong, he has not misapprehended the case before him, but has considered it carefully as by law he was bound to do.

It is next contended that the bishop has considered circumstances outside the case, and which ought not to have influenced him. His observations on litigation on such a matter as the reredos show, it is said, that he has exceeded his power, and that he has not performed the duty imposed upon him by the statutes. The bishop's observations are, however, made with reference to the case before him. He has already stated in effect that he apprehends no danger of the reredos being perverted to superstitious or idolatrous worship; and, that being so, he deprecates litigation on the subject. Here again his view of the innocent tendency of the reredos fully justifies him, in my opinion, in considering the effect of litigation about what appears to him so harmless an erection. If he had taken a different view of the tendency of the sculpture the case would have been entirely different. The conclusion at which I have arrived on this part of the case is that the bishop has performed the duty imposed upon him by statute.

But he may have made a mistake, and this leads me to examine the last question which arises—viz. (3) what jurisdiction the High Court has over him. The Public Worship Regulation Act gives no appeal from the refusal of the bishop to allow proceedings to be taken on the representation made to him. Nor is there any appeal from such refusal under any other statute or law. It follows that his decision is final and that there is no appeal from it. If he has made a mistake it cannot be rectified; and whether the mistake is one of fact or one of law is immaterial. The only remedy is to lay before him a fresh representation pointing out the supposed mistake. He could then, and, if satisfied that he ought, he, of course, would, correct his mistake by not staying proceedings on the renewed representation. But the High Court has no jurisdiction over him on the ground that he has made a mistake; nor can it review his reasons because those reasons appear to the court unsatisfactory.

The law upon this point was so fully examined in the case of *Julius* v. *Bishop of Oxford* that it is unnecessary to enlarge upon it. But it would be a great mistake to suppose that the High Court has no jurisdiction over bishops in such cases as those now under consideration. The duty of every bishop, as of every subject, is to obey the law, whether he approves of it or not, and if he fails to perform that duty he immediately becomes amenable to the High Court. If a representation is made to a bishop under the Public Worship Regulation Act, the bishop has no right to stay proceedings upon it until he has considered the whole circumstances of the case, and come to the opinion that proceedings upon it should not be taken. If he stays proceedings without considering the case, he can be compelled by *mandamus* to perform his duty; so if he refuses to state his reason in writing a *mandamus* would lie. By requiring the bishop to state his reason in writing, to deposit it in the registry, and to send copies to the parties the Legislature has done much to insure a careful consideration of the case under a due sense of responsibility, and has rendered it possible for a court of law to ascertain whether the bishop has done his duty or not. His duty is to consider each particular case submitted to him, to give his mind to that, and not to stay proceedings respecting it unless he is of opinion that in that particular case proceedings ought to be stayed. It is not to be supposed that a bishop is unworthy of the trust reposed in him by the Legislature, nor that he will not honestly endeavour to perform it. But if any bishop should be so ill-advised as to set himself against the law, and to stay proceedings with a view to defeat the law, he would be disregarding his duty; and the court would not be imposed upon by any specious argument to the effect that the bishop had duly considered the case. In such a case a *mandamus* would clearly lie, and this is the proper answer to many of the ingenious hypothetical cases suggested in the course of the argument. *Reg.* v. *Boteler* and *Reg.* v. *Adamson* illustrate the application of the law to such cases.

It was urged that, by requiring the reasons for a stay of proceedings to be put into writing, to be deposited in the registry, and to be transmitted to the parties, the Legislature must have intended that the reasons given by the bishop should be capable of being reviewed by some court. I cannot myself come to this conclusion, for, as already pointed out, there are other objects to be attained by these requisitions quite sufficient to account for their introduction into the statute. Whether, in this particular case, the bishop is right or wrong in his view of the alleged tendency of the reredos I do not pause to inquire. He has not decided anything whatever as to its legality or illegality. He has no right to decide that question even as between the complainants and their opponents at the stage at which he stopped the proceedings, nor indeed at any stage without their consent. All that he has done is to say that, having considered the whole circumstances of the case, he is of opinion that proceedings should not be taken upon it. The responsibility of saying this is upon him. If he has *bonâ fide* considered the case and come to the conclusion that future proceedings should be stayed, he has a right to say so, and it is his duty to say so. So long as he acts in obedience to the law his opinion cannot be questioned. The attempt to show that he has not duly considered the case or has not performed the duty imposed upon him by the statute has, in my judgment, entirely failed, and this appeal must be allowed, with costs here and below.

LOPES, L.J.—To follow two such exhaustive judgments, in both of which I entirely concur, is no easy

considerable importance, and, out of deference to those from whom I differ, I have thought it right to put my judgment into writing. The Public Worship Regulation Act, 1874, materially altered the law respecting the right to take legal proceedings in various ecclesiastical cases and respecting the mode of proceeding in such cases. Under the Church Discipline Act any person, male or female, whether a parishioner or not, and whether a member of the Church of England or not, could complain to the bishop of any clerk in holy orders. Under the Public Worship Regulation Act the persons complaining must be an archdeacon or a churchwarden of the parish or any three male persons of full age, parishioners of the parish referred to in the complaint, and they must be members of the Church of England. The Church Discipline Act contains no express provision applicable to cathedrals or collegiate churches, whereas the Public Worship Regulation Act does (section 8). The complainants in the case of a cathedral must be three male persons of full age, inhabitants of the diocese in which the cathedral is situate, and must be members of the Church of England (*ib.*). The Church Discipline Act merely declared that upon complaint being made to the bishop it should be lawful for him to issue a commission to inquire into the matter complained of (section 3), or to send the case to the court of appeal of the province (section 13). There was no provision requiring him in exercising this power to give any reasons for the course he might think fit to adopt, and it was held, first in *R.* v. *Bishop of Chichester*, 7 W. R. 659, 2 Ell. & Ell. 209, and later in the *Bishop of Oxford's case*, that the bishop had a complete discretion as to whether further proceedings should or should not be taken, and that his only legal duty (if any) in the matter was to hear and consider the application. (See *per* Lord Blackburn, 5 App. Cas., p. 240).

The Public Worship Regulation Act, 1874, is materially different, for by section 9, on the receipt by the bishop of a proper representation, it is his duty, within twenty-one days, to take certain steps to have the complaint investigated and determined, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation." Moreover, if he should be of this opinion, he is to state in writing the reason for his opinion, and such statement is to be deposited in the diocesan registry and a copy of it is to be transmitted to the complainant and to the person complained of. The statute, therefore, plainly casts upon the bishop the responsibility of stopping further proceedings. He is not required to sanction them; for unless he is of opinion that they should be stopped he is bound by the statute to do what is necessary to have the complaint heard and determined in one or other of the modes prescribed by the statute.

In this state of the law three questions arise—viz., (1) What is the duty of the bishop as regards forming an opinion that proceedings should not be taken? (2) Has he in this case performed that duty? (3) What jurisdiction has the High Court over him in the matter? (1) With respect to his duty. His duty is to form an opinion. Formation of an opinion is very different from a mere exercise of will. It is clearly not competent for the bishop simply to stay further proceedings by an arbitrary exercise of his will. He must be of opinion that they ought to be stayed. To form an opinion it is obviously necessary that he must consider the case to which his attention is directed. There could be no doubt on this point even if the statute went no further; but the statute expressly requires him to consider "the whole circumstances of the case." These words are to my mind very important. They show that he is to consider more than what in legal language may be described as the issues raised by the complainants. "The whole circumstances of the case" embrace more than the matters directly in controversy. The expression includes circumstances of time and of place, and the consequences which will follow in any particular case if the proceedings are stayed, and also those which will follow if they are not.

The court has no right to narrow these words. The effect of them is, on the one hand, to emphasize the duty of the bishop fairly to consider the particular case before him, and honestly to form an opinion upon it; and, on the other hand, the effect of the words is not only to empower him, but to require him to take a wide and not a narrow view of the case; to consider all its circumstances—*i.e.*, every circumstance material for forming an opinion upon the question whether proceedings should not be taken. The bishop, as will be further pointed out presently, is not at liberty to set any law of the land at defiance, and he cannot, under cover of forming an opinion under the power conferred upon him by this section, prevent the law from being enforced against persons who persist in doing that which he knows to be plainly illegal.

But what is legal or illegal with respect to images, crosses, crucifixes, and other things of the sort in churches, depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship, in the place where they are or are to be put; and if in any particular case the bishop is of opinion that a particular image, cross, crucifix, or other piece of sculpture has no tendency to encourage such worship, he is, in my opinion, perfectly justified in stopping litigation on the subject. In every such case it appears to me that the bishop may properly consider what are called the interests of the Church in the matter, by which I understand the advantages or disadvantages (to other persons than those complaining and complained of) which will result from stopping further litigation.

To exclude such considerations would, in my opinion, be unduly to limit his power and duty to consider "the whole circumstances of the case." The bishop is empowered, and is bound, to consider "the whole circumstances of the case," but it may well happen that one or two circumstances render all the others comparatively immaterial. When that does happen the bishop need no longer consider these. He is not bound to waste his time in thinking over any circumstance which is or which becomes unimportant. He has considered it as soon as he has made up his mind that it requires no further consideration. Having considered "the whole circumstances of the case," and come to the opinion that proceedings should not be taken on the representation, the bishop's next duty is "to state in writing the reason for his opinion." This must mean his reason for the opinion at which he has arrived; the reason which has influenced him and on which his opinion is based. If he does this he discharges his duty in this respect, even although other persons may think the reason unsatisfactory.

Whether his reason can be reviewed by any other tribunal is an entirely different question, which I will examine presently, but so far as the bishop is concerned he has complied with the statute.

(2) I pass now to the second question—Has the bishop in this case performed his statutory duty? It is urged that he has not, because, first, he has misapprehended the case, and, secondly, he has considered circumstances outside it, and which ought not to have influenced him. The contention that the bishop has misapprehended the case is based upon his view of the *Exeter cases* and of its bearing on the present case. The differences between the two are obvious enough.

In the *Exeter case* there was no representation of a crucifix, nor of the Crucifixion, nor of the Virgin Mary; nor was there in that case any suggestion that any superstitious reverence had been, or was likely to be,

paid to any figures forming part of the reredos. The reredos in St. Paul's, which the bishop in this case had to consider, does contain a representation of the Crucifixion and of the Virgin Mary, and the representation made to the bishop states that these do tend to encourage superstitious devotions.

Notwithstanding these differences, the bishop states in his reasons that the main question of principle here at issue has been already decided in the *Exeter case;* and that the sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle there laid down, and whether the reredos in St. Paul's is such an exception. He further states that it appears to him impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not. These statements of the bishop show, to my mind, conclusively that he has considered the present case; that he has compared it with the *Exeter case;* that he has come to the conclusion that the sculptures complained of in the St. Paul's reredos are parts of an erection which is decorative in its object and character, and are not likely to encourage superstitious devotion. This, in my opinion, is the fair meaning of the bishop's statement; and, this being its meaning, he has not, in my opinion, misapprehended this case in the smallest degree. Whether the reredos in St. Paul's does or does not tend to encourage superstitious reverence or idolatry is a question of fact or of opinion. The complainants say it does, and they want to have that question tried. The bishop has considered this very point and thinks that the reredos has no such tendency. If he be right, the *Exeter case* shows that the reredos in St. Paul's is not unlawful; if he be wrong, he will have made a mistake, the effect of which I will consider presently. But, right or wrong, he has not misapprehended the case before him, but has considered it carefully as by law he was bound to do.

It is next contended that the bishop has considered circumstances outside the case, and which ought not to have influenced him. His observations on litigation on such a matter as the reredos show, it is said, that he has exceeded his power, and that he has not performed the duty imposed upon him by the statutes. The bishop's observations are, however, made with reference to the case before him. He has already stated in effect that he apprehends no danger of the reredos being perverted to superstitious or idolatrous worship; and, that being so, he deprecates litigation on the subject. Here again his view of the innocent tendency of the reredos fully justifies him, in my opinion, in considering the effect of litigation about what appears to him so harmless an erection. If he had taken a different view of the tendency of the sculpture the case would have been entirely different. The conclusion at which I have arrived on this part of the case is that the bishop has performed the duty imposed upon him by statute.

But he may have made a mistake, and this leads me to examine the last question which arises—viz. (3) what jurisdiction the High Court has over him. The Public Worship Regulation Act gives no appeal from the refusal of the bishop to allow proceedings to be taken on the representation made to him. Nor is there any appeal from such refusal under any other statute or law. It follows that his decision is final and that there is no appeal from it. If he has made a mistake it cannot be rectified; and whether the mistake is one of fact or one of law is immaterial. The only remedy is to lay before him a fresh representation pointing out the supposed mistake. He could then, and, if satisfied that he ought, he, of course, would, correct his mistake by not staying proceedings on the renewed representation. But the High Court has no jurisdiction over him on the ground that he has made a mistake; nor can it review his reasons because those reasons appear to the court unsatisfactory.

The law upon this point was so fully examined in the case of *Julius* v. *Bishop of Oxford* that it is unnecessary to enlarge upon it. But it would be a great mistake to suppose that the High Court has no jurisdiction over bishops in such cases as those now under consideration. The duty of every bishop, as of every subject, is to obey the law, whether he approves of it or not, and if he fails to perform that duty he immediately becomes amenable to the High Court. If a representation is made to a bishop under the Public Worship Regulation Act, the bishop has no right to stay proceedings upon it until he has considered the whole circumstances of the case, and come to the opinion that proceedings upon it should not be taken. If he stays proceedings without considering the case, he can be compelled by *mandamus* to perform his duty; so if he refuses to state his reason in writing a *mandamus* would lie. By requiring the bishop to state his reason in writing, to deposit it in the registry, and to send copies to the parties the Legislature has done much to insure a careful consideration of the case under a due sense of responsibility, and has rendered it possible for a court of law to ascertain whether the bishop has done his duty or not. His duty is to consider each particular case submitted to him, to give his mind to that, and not to stay proceedings respecting it unless he is of opinion that in that particular case proceedings ought to be stayed. It is not to be supposed that a bishop is unworthy of the trust reposed in him by the Legislature, nor that he will not honestly endeavour to perform it. But if any bishop should be so ill-advised as to set himself against the law, and to stay proceedings with a view to defeat the law, he would be disregarding his duty; and the court would not be imposed upon by any specious argument to the effect that the bishop had duly considered the case. In such a case a *mandamus* would clearly lie, and this is the proper answer to many of the ingenious hypothetical cases suggested in the course of the argument. *Reg.* v. *Boteler* and *Reg.* v. *Adamson* illustrate the application of the law to such cases.

It was urged that, by requiring the reasons for a stay of proceedings to be put into writing, to be deposited in the registry, and to be transmitted to the parties, the Legislature must have intended that the reasons given by the bishop should be capable of being reviewed by some court. I cannot myself come to this conclusion, for, as already pointed out, there are other objects to be attained by these requisitions quite sufficient to account for their introduction into the statute. Whether, in this particular case, the bishop is right or wrong in his view of the alleged tendency of the reredos I do not pause to inquire. He has not decided anything whatever as to its legality or illegality. He has no right to decide that question even as between the complainants and their opponents at the stage at which he stopped the proceedings, nor indeed at any stage without their consent. All that he has done is to say that, having considered the whole circumstances of the case, he is of opinion that proceedings should not be taken upon it. The responsibility of saying this is upon him. If he has *bonâ fide* considered the case and come to the conclusion that future proceedings should be stayed, he has a right to say so, and it is his duty to say so. So long as he acts in obedience to the law his opinion cannot be questioned. The attempt to show that he has not duly considered the case or has not performed the duty imposed upon him by the statute has, in my judgment, entirely failed, and this appeal must be allowed, with costs here and below.

LOPES, L.J.—To follow two such exhaustive judgments, in both of which I entirely concur, is no easy

matter; still, the case being so important, and as we are reversing the decision of the Queen's Bench Division, I have committed my judgment to writing, putting it in the shortest possible compass, and I will read it. The considerations upon which the decision in this case depends are, in my opinion, more limited than those which have been advanced in argument, or which were discussed in the judgments in the court below. Abstract propositions of law and fact have been debated, which it is not necessary to decide in order to determine the question now before the court. Whether the order *nisi* for a *mandamus* should be made absolute depends on the true construction of sections 8 and 9 of the Public Worship Act, 1874. It does not seem material in detail to consider the law up to that time. It is clear from the decision in *Julius* v. *The Bishop of Oxford* that up to that time the bishop under the Church Discipline Act had a discretion with which the temporal court could not interfere, and the argument is pertinent that the Legislature would not be likely to take away that discretion without using clear and unmistakeable language to that effect. But it is admitted that under the Public Worship Act, 1874, the bishop has a discretion, but, it is said, a different kind of discretion, and of a more limited character than that which he possessed before that time. That it is different I agree, but that it is more limited I do not admit. It is a discretion which must be exercised in accordance with the terms of the statute, but when so exercised, it is as large and as incapable of being reviewed as was the discretion vested in the bishop before 1874.

I will now construe the 9th section of the statute as I understand it. Section 8 deals with the representation, which must now for the first time be made by somebody interested, and in this respect is different from the Church Discipline Act, where the bishop may be put in motion by anybody. Then section 9 provides that the bishop is, within twenty-one days after receiving the representation, to transmit it, unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion. The bishop is bound to transmit unless he complies with this requirement. It is a condition precedent to his staying proceedings. I think these words are partly enabling and partly restrictive—enabling as declaring that the bishop may consider the whole circumstances of the case, by which I understand not only the direct circumstances to which his attention has been called by the representation, but also all other surrounding and collateral circumstances which are material to be considered; enabling, therefore, as enlarging the basis on which the discretion may proceed; restrictive as requiring him to state his reason in writing, and thus placing a fetter upon any arbitrary or capricious exercise of his discretion. An arbitrary or capricious exercise of his discretion would be no exercise at all. Before the Act of 1874 such an exercise was possible, and it could not have been reviewed, because there was no means by which it could be examined or discovered.

There are several objects, it may be suggested, which the Legislature contemplated when it required the bishop to state his reason. First, that which I have already stated—namely, to make it impossible for a bishop to act from mere caprice; secondly, to give publicity to the grounds on which he was acting; thirdly, to inform the complainants, and thus give them an opportunity of amending, if they thought fit, their representation. But I am clear that the Legislature never intended to fetter an honest exercise by the bishop of his discretion, or, so long as the statutory requirements were complied with, to make that reviewable by *mandamus* which was not reviewable before. If the reason or reasons given by the bishop was or were irrelevant to the matter in hand, if they amounted to no reason, were nugatory or illusory, I doubt not but that a *mandamus* would go, because the bishop would not have exercised such a discretion upon the matter as could be considered in point of law a discretion which he was justified in exercising. In point of fact he would have exercised no discretion. As to the sufficiency of the reason or reasons either in law or in fact no temporal court can inquire; that is a matter for the bishop, and the bishop alone. A court of law does not sit as a court of appeal from the bishop to say whether he has exercised his discretion, if he has one, wisely or not, though if he has no discretion it may compel him to do his duty and act. If there is any reason put forward upon which the exercise of the bishop's discretion may properly proceed, and the bishop honestly exercises it, in my opinion a *mandamus* will not go. I believe this to be the law, and the principle which has always governed the issuing to an inferior tribunal a writ of *mandamus*. To hold otherwise would be to give an appeal by *mandamus* when no appeal is given. It would be turning the right to a *mandamus* into a right of appeal against reasons and opinions of the bishop when he has exercised his discretion.

But it is said "after considering the whole circumstances of the case" are not words enabling the bishop to take all the circumstances of the case, whether direct or collateral, into his consideration, but compelling him to take into consideration every circumstance, both direct and collateral, and that if he omits one material circumstance, *mandamus* should go. I entirely disagree with this contention. The bishop may consider one material circumstance, think it enough, and, disregarding any others, found his opinion upon that. For instance, in this case, he might have said, "I have considered the allegation in the representation that these images tend to encourage ideas and devotions of an unauthorized kind. I think they are church decorations, and have no such tendency"—and this though there may be other circumstances in the case which he might, if he thought fit, have considered. But it seems unnecessary to pursue this contention, for I am of opinion that in this case the bishop had considered the whole circumstances of the case, and nothing which is not a circumstance in the case material for his consideration. The only way to gauge the circumstances which he has considered is to look at his reasons. I find nothing in them indicating any omission or commission—I mean any act of omission in not considering any material circumstance, or acts of commission in considering any immaterial circumstance. In order to justify this *mandamus* the bishop's reasons must lead the court to the conclusion that he has considered irrelevant circumstances, to the exclusion of relevant, or that his reasons are futile, and has thus, as I have said before, exercised no discretion at all.

This being my opinion, it is unnecessary to consider the matter any further, because it cannot be, and is not, suggested that he has considered irrelevant reasons to the exclusion of relevant, or that his reasons are futile. The suggestion, so far as I can understand it, is that he has considered more than he ought. I desire, however, to express the construction which I place on the language of the bishop in his reply to the representation. He says, in effect, "I have considered the whole circumstances attending your representation. I understand that you wish to litigate whether the images described in your representation have any tendency to idolatry, and whether their erection is permitted by law. I have looked at these images. I am well acquainted with the reredos at Exeter. I have carefully read the decision in *Phillpotts* v. *Boyd*. Between the images, which in that case were decided not to be idolatrous, and the

images referred to in your representation there may be differences in detail, but those differences, if any, are so unsubstantial and insignificant that they are governed by the same principle as that laid down in *Phillpotts* v. *Boyd*."

Then the bishop proceeds to speak of litigation; he lays down no hard-and-fast rule against litigation; on the contrary, he says it is sometimes necessary, but undesirable when the matter is trivial and the result doubtful. He means that he doubts if there is any breach of church discipline in this case; that if there is, it is trivial, and not of sufficient substance to justify litigation. He does not put forward litigation as an abstract and independent reason, but rather as an amplification of what he has said before.

I cannot but think that this is the meaning of the bishop's language, and that anyone carefully reading it would so understand it. It is said the bishop has misapprehended *Phillpotts* v. *Boyd*. I do not think he has; on the contrary, he has, in my judgment, correctly understood it, and rightly applied the principles, there laid down, to the present case. But if he misapprehended *Phillpotts* v. *Boyd*, provided the consideration of that case was in his discretion, it would be no ground for a *mandamus*. The decision in that case was a circumstance for him to consider. Litigation and the probable result of litigation was also a matter which he was entitled to regard. In my judgment, the bishop has given in writing reasons upon which the exercise of his discretion may proceed, and has exercised that discretion honestly. He is not called upon to consider the whole circumstances of the case as contended for by the learned counsel for the complainants, but if he is, in my opinion the bishop has considered every material circumstance, both direct and collateral, and has not considered any circumstance which was irrelevant. The learned judges in the court below, whose decision prevailed, appear to me to have been terrified by the extent of the power and responsibility which, if his contention was maintained, would be reposed in the bishop. If the construction of the 9th section of the Act of 1874 is clear, it appears to me this is a matter with which we have no concern. Many of the arguments urged by the learned counsel for the complainants would no doubt have been most material matters to consider when the Bill was passing through Parliament, but are inapplicable now. The judges do not make the law; they administer it, and that however much they may disapprove or dislike it. Some people may think it undesirable that bishops should possess so large a discretion as that, which we think, under the Act of 1874, they are entitled to exercise. It is said that bishops are human, and may abuse the discretion reposed in them. So may judges and other high functionaries to whom great powers are intrusted. The guarantee for their integrity and honest discharge of their duties is their antecedents and the force of public opinion. I venture to think that, having regard to the high character of the men in whose hands discretion is placed by the Act of 1874, the risk of abuse is remote, and one which the Legislature might safely determine to encounter. I am of opinion that the decision of the Queen's Bench Division should be reversed, and the rule for a *mandamus* be discharged.

Appeal allowed, with costs, including the costs of the Dean and Chapter of St. Paul's.

Solicitors for the Bishop of London, *Lee, Bolton, & Lee.*

Solicitors for the Dean and Chapter of St. Paul's, *Brooks, Jenkins, & Co.*

Solicitors for the respondents, *Wainwright & Baillie.*

From Chan. Div. Dec. 10, 11.

STUART v. DIPLOCK. (a.)

Covenant — Restraint of trade — Prohibition against carrying on particular business—Business of "ladies' outfitter"—Overlapping businesses.

The plaintiff carried on the business of "ladies' outfitting" on premises held under lease containing a covenant by the lessor not to consent to the business of "ladies' outfitting" being carried on at or upon the adjoining premises, also belonging to the lessor. The defendants became lessees of these adjoining premises, with notice of this covenant, and began to carry on thereat the business of "fancy drapers and hosiers," in the course of which they sold some articles the sale of which constituted part of the business of "ladies' outfitting" also. The plaintiff brought an action to restrain the defendants from carrying on the business of ladies' outfitting. It appeared from the evidence that the businesses of "fancy draper and hosier" and "ladies' outfitting" overlapped in respect of the sale of the above articles.

Held, assuming that the effect of the covenant was such as to make it obligatory upon the defendants, having notice of the covenant, not to carry on the business of "ladies' outfitting" (as to which the court gave no decision), yet that such an obligation was not broken by reason of the defendants selling, in the course of their business as "fancy drapers and hosiers," some of the articles, the sale of which constituted part of the business also of "ladies' outfitting," as the terms of the covenant did not prohibit the sale of any specific articles sold in the course of the business of "ladies' outfitting."

Feilden *v.* Slater, 17 *W. R.* 485, *L. R.* 7 *Eq.* 523, *distinguished.*

Decision of Kekewich, J., *reversed.*

Appeal from Kekewich, J.

The action was for an injunction to restrain the defendants from carrying on the business of "ladies' outfitting" at No. 9, Mount Pleasant, Tunbridge Wells, and the question raised on the appeal was whether the defendants, by reason of their selling certain articles of ladies' underclothing—viz., "vests," "drawers," "spencers," and "combinations" (which articles were all made on hosiery frames, and were composed of merino, wool, or cotton, but not of linen)—were in fact carrying on the business of "ladies' outfitting."

The plaintiff was the executrix of the lessee of No. 10, Mount Pleasant, and the lessors, who were also the owners of the adjoining houses, Nos. 9, 11, and 12, had covenanted with the lessee of No. 10, his executors, administrators, and assigns, that the lessors would "not permit or suffer to be carried on in or upon the adjoining dwelling-houses and shops known as Nos. 11 and 12, Mount Pleasant, the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen, nor give their consent to such trades or businesses being carried on at or upon the shop No. 9, Mount Pleasant, then occupied as therein mentioned" (viz., by a wine merchant).

The lessee of No. 10, Mount Pleasant, and, after his death, the plaintiff, as his executrix, carried on at No. 10 the businesses of ladies' outfitting, juvenile outfitting, and sale of baby linen. In September, 1885, the assigns of the original lessors of all the above-mentioned houses agreed to grant a lease of No. 9 to the defendants, Messrs. Diplock Brothers, and the defendants, it was admitted, took with notice of the restrictive covenant entered into by the lessors in the lease of No. 10. In March, 1888, the lease of No. 9 was granted to the defendants, and the lease contained a covenant by the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

defendants with the lessors not to carry on upon the premises the businesses of "ladies' outfitting (except vests and stockings, which the trade term 'hosiery' includes), juvenile outfitting, or sale of baby linen, being the business carried on at the adjoining shop by Mrs. Stuart" (the plaintiff). The business of "ladies' outfitter," as it appeared from the evidence, consisted in the sale of all articles of underclothing required by ladies, and of some other articles also, such as hats, caps, and handkerchiefs. The defendants carried on at No. 9 the business or trade of "fancy drapers and hosiers," in the course of which they sold the four above-mentioned classes of articles of ladies' underclothing.

Kekewich, J., held that as the sale of the above-mentioned articles formed an essential part of the business of "ladies' outfitting," the defendants, by reason of the sale of such articles, were in fact carrying on the business of "ladies' outfitting," and he accordingly granted the injunction against them asked for by the plaintiff.

The defendants appealed.

Everitt, Q.C., and *Dauney*, for the appellants.—Covenants in restraint of trade must be construed strictly: *German* v. *Chapman*, 25 W. R. 802, 7 Ch. D. 271, at p. 276; *Holt* v. *Collyer*, 29 W. R. 502, 16 Ch. D. 718; and especially so in the the case of such a composite business as that of "ladies' outfitter." The trade of "ladies' outfitter" and that of "fancy draper and hosier" overlap each other in respect of the sale of certain articles, but the sale of such articles by a hosier cannot be said to constitute a carrying on of the business of "ladies' outfitter."

They referred also to *Jones* v. *Bone*, 18 W. R. 489, L. R. 9 Eq. 674, in which *Feilden* v. *Slater*, 17 W. R. 485, L. R. 7 Eq. 523, was explained.

Warmington, Q.C., and *Chadwyck-Healey*, for the respondent.—Though the covenant by the lessors of the plaintiff is only a covenant "not to consent to" the business of ladies' outfitting being carried on at No. 9, yet the defendants, having admittedly had notice of that covenant when they took their lease of No. 9, would in effect break that covenant by carrying on there the business of "ladies' outfitting": *Nottingham Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 16 Q. B. D. 778. The evidence shows that the business "ladies' outfitter" consists in the sale of all articles and garments worn underneath the outside dress of ladies; the sale of the four classes of above-mentioned articles which the defendants sell forms a substantial part of the business of a "ladies' outfitter," and such sale therefore constitutes a breach of a covenant not to carry on the business of ladies' outfitter: *Feilden* v. *Slater*.

COTTON, L.J.—This is an action brought by a lady who is entitled under a lease to the shop numbered 10, Mount Pleasant-avenue, where she carries on the business of "ladies' outfitting," and she sues to restrain the defendants from carrying on—as she alleges they are carrying on—the business of "ladies' outfitting," on the ground that the defendants took their lease with notice of a covenant contained in the lease made by their landlord to the plaintiff, and which covenant the plaintiff alleges prevents the defendants doing what they are doing

The covenant, however, is merely that the landlord shall not give his consent to the carrying on of the businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen, in the house occupied by the defendants. The question whether such a covenant is one which, upon the principle of *Tulk* v. *Moxhay*, would render the defendants liable to be restrained is an important question, but I do not propose to give any opinion upon it, as the point was not seriously argued before us by the appellant, and I only refer to the question to mention that I do not decide it.

The defendants say that they are not carrying on the business of "ladies' outfitter." The evidence shows that the business of "ladies' outfitter" is the selling of all articles of underclothing required by ladies, and also the selling of some other articles such as hats, caps, and handkerchiefs. The defendants carry on a hosiers' and drapers' business, and also sell some of the articles sold by a "ladies' outfitter." Kekewich, J., came to the conclusion that the business of a ladies' outfitter could not be successfully carried on without the sale of these articles, and that, therefore, the defendants were carrying on the business of a ladies' outfitter, and he therefore granted an injunction against them. In my opinion, however, that is wrong, and the test applied is erroneous. If it were shown that the sale of these particular articles substantially made up the business of a ladies' outfitter, the case would be entirely different. But the mere sale of one or two essential articles sold by a ladies' outfitter —*e.g.*, corsets or stays—is not carrying on the business of "ladies' outfitter," nor can it be said that anyone who sells corsets and stays only, is a "ladies' outfitter." As Bowen, L.J., put it during the argument, if a man sold a great number of things not sold by a "ladies' outfitter," and did not sell a number of things which a "ladies' outfitter" did sell, but did sell some of such things, could it be said that he was carrying on the business of a "ladies' outfitter"? The covenant does not prohibit the defendants from selling any of the articles sold by a "ladies' outfitter," but simply from carrying on the business of ladies' outfitter, &c. If it were proved that there was a mere colourable omission of some of the articles sold by a ladies' outfitter, the case might be very different. There is no evidence of anything of that kind.

In my opinion there is nothing on the evidence sufficient to show that the defendants are, in fact, carrying on the business of a ladies' outfitter. As to the case of *Feilden* v. *Slater*, there the terms of the covenant expressly prohibited the sale of wine and spirits, and as the defendant was selling wine and spirits he was breaking the terms of the covenant. The appeal must succeed.

BOWEN, L.J.—I am of the same opinion, and as we are differing from the learned judge below I will add a few words.

I will assume—though by no means satisfied that it is so—that the defendants have come under an obligation not to carry on the business of "ladies' outfitter." That is not the same thing as an obligation not to carry on any part of the business of "ladies' outfitter." The business of ladies' outfitter is one business, the business of a hosier is another and distinct business. The two businesses touch each other in the sale of some four common articles. A man does not become a ladies' outfitter simply by reason of his selling in the course of another business some of the articles which are sold by a ladies' outfitter. I do not think the obligation which I have assumed the defendants to be under is broken by their taking what is an essential part of the business of a ladies' outfitter, if that part is also an essential part of the business which the defendants are carrying on *bonâ fide* as hosiers; nor even would the taking of a substantial part of the business of ladies' outfitter be a breach of their obligation by the defendants, if that part was also a substantial part of another business which the defendants were not prohibited from carrying on.

Of course the defendants would not be allowed, under the colourable pretence of carrying on the business of a hosier, to really carry on the business of ladies' outfitter, but that is not the case here. The appeal therefore succeeds, and the action must be dismissed.

FRY, L.J.—I also cannot agree with the decision of Kekewich, J.

The plaintiff is suing the defendants on the ground that the defendants took with notice of the covenant contained in the lease to the predecessor in title of the plaintiff. [The Lord Justice read the covenant, and continued:—] In the case of No. 11 and No. 12 the lessors covenanted not to permit certain businesses to be carried on; in the case of No. 9 they only covenanted not to consent to those businesses being carried on. The defendants are the occupants of No. 9, and they admittedly had notice of that covenant. I will only say on this point that I am by no means convinced that the defendants can be restrained from carrying on the business of "ladies' outfitter" on the ground that they had notice of such a covenant as the above. But even if they could be restrained on such ground, in my opinion the plaintiff's case nevertheless fails. The covenant relates to the three businesses mentioned in it, but it does not relate to any parts of those three businesses; there is no covenant not to sell any particular articles with reference to those three businesses. In my opinion covenants of this kind ought not to be stretched beyond the ordinary meaning of the words and expressions used in them. The business of ladies' outfitting is conversant with the sale of ladies underclothing. A ladies' outfitter sells some articles sold also by hosiers and many articles not sold by hosiers, and *vice versa*. The two businesses overlap. Can it be said that because a person carrying on the business of a hosier sells some of the articles sold by a ladies' outfitter he is therefore carrying on the business of a ladies' outfitter? Such a conclusion could not be arrived at without the pressure of necessity. In my opinion the defendants are not carrying on the business of a ladies' outfitter, and the appeal must therefore be allowed.

Appeal allowed.

Solicitors, *E. Chester; Sole, Turner, & Knight.*

High Court of Justice.

Chan. Div. Kay, J. } Aug. 5, 1889.

In re ROBERTS. (*a.*)

Solicitor and client—Mortgage to solicitor—Solicitor's remuneration—Profit costs—Right to charge.

A solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself.

Adjourned summons.

In 1880 John Miles Evans applied to his solicitor, Thomas Roberts, to procure him a loan of £2,100 upon property he was about to purchase at Great Malvern. Roberts tried to obtain the money from various persons, but, finding he could not procure the whole amount, he arranged to obtain £1,200 of it at 4½ per cent. from a third person on first mortgage, and to lend the remaining £900 himself on second mortgage at 5 per cent., and to this arrangement Evans acceded. The purchase was accordingly carried out, and both mortgages were prepared by Roberts, the solicitor, and duly executed. The mortgage to Roberts contained a clause enabling him and any other person interested in the mortgage money as a solicitor, to charge and be paid for business done by him in relation to such mortgage money or the mortgaged premises in like manner as if he were not himself interested therein, and as if he were acting as solicitor for another person.

On the 26th of March, 1889, Evans obtained an order for delivery of Roberts' bill and taxation thereof, whereupon Roberts delivered a bill made out according to the system of charging before the General Order under the Solicitors' Remuneration Act, 1881, and comprising all the work connected with both the mortgages. Upon taxation the taxing master allowed the charges for preparing the £1,200 mortgage, but disallowed, amongst other items, the whole of the costs of preparing the £900 mortgage to Roberts, though he allowed certain items for work done after the execution of the mortgage, holding that such work came within the power of charging contained in the mortgage. Roberts carried in objections to the disallowance of the items for the preparation of the mortgage to himself, alleging, as his grounds of objection, that the work charged for had been undertaken upon Evans' own instructions, that the work was for Evans' benefit in enabling him to borrow money, and that he (the solicitor) was professionally responsible to Evans for the proper negotiation of the terms of the entire loan of £2,100, and also for the proper preparation and completion of the second mortgage for £900 (part thereof) to himself. The taxing master, however, overruled the objection, on the ground that a solicitor could not make a profit of his position as mortgagee.

Roberts then took out this summons to have his objections allowed, and for a reference back to the taxing master to vary his certificate accordingly.

Marten, Q.C., and *Maidlow*, for Roberts.—There is no authority upon the question whether or not a solicitor who prepares a mortgage to himself from his client is entitled to profit costs; but, in the absence of an authority to the contrary, the solicitor is so entitled. It is unreasonable that, when a client asks his solicitor to advance him money on mortgage, the solicitor should not be entitled to charge for his time and trouble in preparing the mortgage. [KAY, J.—In *Sclater* v. *Cottam*, 5 W. R. 744, Kindersley, V.C., says that a solicitor-mortgagee acting for himself in a suit in defence of his own title cannot, as against a second mortgagee, claim more than his costs out of pocket.] That case is overruled by *London Scottish Benefit Society* v. *Chorley*, 32 W. R. 523, 781, 12 Q. B. D. 452, 13 Q. B. D. 872, which decides that where a solicitor defends an action in person and obtains judgment he is entitled to the same costs as if he had employed a solicitor. And *In re Donaldson*, 27 Ch. D. 544, 33 W. R. Dig. 61, decides that where one of a body of mortgagees is a solicitor, acting as solicitor in enforcing the security, he is entitled to profit costs.

Levett, for Evans.—A mortgagee cannot, in the absence of express contract, affix to the mortgaged property any burden clogging the equity of redemption; neither can he impose a personal burden on his mortgagor. The mortgagee stands in a *quasi*-fiduciary relation towards the mortgagor. Here the mortgagee was preparing the mortgage in his own interest, and for his own benefit, and, therefore, he is not entitled to charge for it as solicitor. The mortgagee can only charge the mortgagor for the preparation of the mortgage by his, the mortgagee's, solicitor; but here the mortgagee had no solicitor, for he did the work himself. The mortgagor, therefore, cannot be charged with any profit costs for the preparation of this mortgage.

Marten, Q.C., in reply.—Profit costs were allowed to a solicitor-mortgagee in a redemption suit, *Price* v. *M'Beth*, 12 W. R. 818.

KAY, J.—In this case the solicitor not only prepared the mortgage to the third person—the costs of which,

(*a.*) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

being mortgagee's costs, the mortgagor has admitted his liability to pay, and therefore allowed them to be included in the bill—but he has also charged profit costs for the preparation of the mortgage to himself. The reason why these costs should not be allowed is not that of any fiduciary relation between the solicitor and the mortgagor, but that they are not the mortgagor's costs at all. They are mortgagee's costs; and the only way in which they could be allowed is, if there is a mortgagee against whom they could be charged, and who would have to pay them to his own solicitor, and could then charge them to the mortgagor. But here there was no mortgagee who had to pay to any solicitor; the mortgagee has no solicitor to prepare the mortgage, for he does the work himself, and therefore he cannot charge any costs, because they never existed at all. I therefore disallow these costs.

Solicitors, *Taylor, Stileman, & Underwood*, for *T. & T. Roberts*, Worcester; *Ellis, Munday, & Bartrum.*

Chan. Div. North, J. } Nov. 16.

WOOD v. GREGORY. (a.)

Practice—Partition—Request for sale—Proof of title at hearing—Inquiry in chambers.

In a partition action the court will not, as a general rule, at the request of persons who claim to be interested in a moiety of the property, make an order for immediate sale without first directing an inquiry as to the persons interested in the property.

The court may, however, when the value of the property is small, make an order at the trial for immediate sale, on satisfactory evidence being produced as to the persons interested.

Action.

This was a partition action in which the plaintiffs were the owners of a moiety of the property and the defendants were the owners of the other moiety. The plaintiffs, by their statement of claim, asked for a sale. The estimated value of the property was £10,000. There was an affidavit that all the persons interested in the property were parties.

H. M. Humphry, for the plaintiffs.—The plaintiffs' desire an order for an immediate sale without an inquiry being first directed as to the persons interested. The affidavit is sufficient evidence that all the persons interested are parties to the action.

In re Stedman, W. N., 1888, p. 119, and *Willis* v. *Willis, ante*, p. 7, were referred to.

W. Baker; and *Oswald*, appeared for the various defendants.

NORTH, J.—I do not consider *In re Stedman* is an authority that in all partition actions the title to the property is to be proved in court at the hearing. Such a course may be very proper in simple cases, and especially if the value of the property is small. In the present case, however, the title appears to depend upon a complicated pedigree, and the value of the property is considerable. I think it will be more convenient and more for the interest of the parties in the present case that the ordinary inquiry as to the title should be made in chambers. I will give leave to apply in chambers for an order for sale.

Solicitors, *Torr & Co.*; *W. Montgomery White*; *Chester & Co.*

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div. North, J. } July 9—11, 1889.

In re PARRY.

SCOTT v. LEAK. (a.)

Will—Annuity—Security for annuity—Right of annuitant to have estate converted.

A testator, after bequeathing certain legacies and annuities, declared that the residue of his property, after payment of his debts and funeral and testamentary expenses and the legacies and annuities, should be divided among his next of kin and heiresses as though he had died intestate. The testator died possessed of real estate (consisting of freeholds and leaseholds) of large value. The leaseholds and part of the freeholds were subject to mortgages. All the testator's debts (other than the mortgage debts) and his funeral and testamentary expenses had been paid out of the personal estate, and there was a balance of £2,000 in the hands of the surviving executors. The annuities had been punctually paid. The annuitants claimed to have the testator's leaseholds sold and the mortgage debts paid out of the proceeds, and a sufficient sum invested to provide for their annuities.

Held, that the annuitants were not entitled to have the leaseholds sold; they were only entitled to have the annuities properly secured.

Webber v. Webber, 1 *Sim. & S.* 311, and King v. Malcot, 9 *Ha.* 692, *approved.*

S. H. Parry (who died on the 18th of December, 1887), by his will dated the 4th of May, 1887, after appointing John Leak and C. H. Hodgson executors, and giving to each of them £100, directed them to pay to his father and mother an annuity of £300, and to continue such annuity to the survivor of them for his or her life as the case might be.

The testator also bequeathed to his mother for her life a separate additional annuity of £100. And he directed his executors to pay an annuity of £100 to each of his four sisters, Emily, Katharine, Florence, and Edith; and in the event of the death of any one or more of his sisters, to give the survivors the benefit of their deceased sister or sisters' annuity, so that in the end the last surviving sister might enjoy the income of the four. And the testator also directed that the annuity of £300 thereinbefore bequeathed to his father and mother should go to his sisters or sister, as the case might be, on the death of the survivor of his father and mother, so that, in fact, the surviving sister, in the event of her outliving the parents, might become entitled for her life to £700 per annum. And the testator continued as follows:—"This will is merely made by me in consequence of the intestacy created by my recent marriage, and to provide for my parents and my sisters should my death occur, it being my intention, after due consideration of the subject, to make a will which shall deal with my entire estate. Meanwhile, should I die before signing such will, I declare that the residue of my property, after payment of my debts, funeral and testamentary expenses, and the legacies and annuities hereinbefore directed to be paid, shall be divided among my next of kin and heiresses as though I had died intestate with respect thereto."

At the date of his death the testator's real estate consisted (*inter alia*) of four theatres—viz., (1) the Avenue Theatre in London, which was held by the testator under a lease for a term of eighty years from the 29th of September, 1880, at the annual rent of £750. The testator had sublet this theatre for twenty-one years from the 1st of March, 1882, determinable at the end of the first fourteen years, at an annual rent of £2,276,

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

reserving to himself two stalls and a box, which produced an average net annual income of £350. The theatre was subject to a mortgage for £5,000. The net profit arising from the theatre was £2,108 17s. 6d. (2) The Greenwich Theatre, which was held under a lease for a term of seventy-one years from the 28th of December. 1863, at the annual rent of £350. This theatre had been underlet by the testator for a term of fourteen years from the 18th of August, 1884, determinable at the end of the first seven years, at an annual rent of £350. It was subject to a mortgage for £2,000. The net profit arising from it was £186 8s. 4d. (3) The Hull Theatre, which was freehold. It was subject to a mortgage for £5,500. It had been let by the testator for seven or fourteen years at the annual rent of £1,317 6s. 8d., and the net annual income of it was £888 11s. 8d. (4) The Southampton Theatre, which was freehold. It had been let on agreement for lease at the annual rent of £700, and the net annual income of it was £629 11s. 6d.

The testator's mother died in his lifetime. His father survived him, and at the date of the testator's death was about eighty-two years of age. All the testator's four sisters survived, and at the date of the testator's death were of ages varying from fifty-eight to forty-one. Since the testator's death the annuities had been punctually paid.

This was an originating summons taken out by Mrs. Scott (one of the testator's two daughters) as plaintiff, against Leak, the surviving executor, the trustees of the marriage settlement of Mrs. Anderson (the testator's other daughter), Mr. and Mrs. Anderson, the testator's father, and the testator's four sisters as defendants, asking (1) That the executor might be at liberty to raise, by a mortgage of the Avenue Theatre, such a sum as (with the sum of £2,000 in the hands of the executor) would be sufficient to discharge the mortgage debts of the testator; (2) That the annuities bequeathed by the will should be secured by a first mortgage on the Southampton and Hull Theatres, the charge of the annuities on the residue of the testator's estate (subject to the mortgage to be created as aforesaid) remaining undisturbed, with liberty to the annuitants to apply to the court for additional or other securities in case the annuities, or any of them, should fall into arrear; and that, after payment of the interest on the said mortgage and of the said annuities, the residue of the annual income of the testator's estate should be paid as it accrued, as to one moiety to the plaintiff, and as to the other moiety to the trustees of Mrs. Anderson's marriage settlement.

All the testator's debts (except his mortgage debts) and his funeral and testamentary expenses had been paid out of his personal estate, and there was a balance of £2,000 in the hands of the executors.

There was evidence of a surveyor that if sold the Avenue Theatre would realize at least £25,680, and that the Greenwich Theatre would realize at least £2,600. With regard to the Hull Theatre another surveyor deposed that, if sold, it would realize at least £2,600. While as regards the Southampton Theatre another surveyor deposed that, if sold, it would realize at least £3,000.

The testator's father and four sisters desired that the leasehold theatres should be sold, and that out of the proceeds the testator's mortgage debts should be paid, and that the surplus should be invested in investments in which cash under the control of the court could be invested, and that the whole income of the estate should then be applied, first, in payment of the annuities, and, next, in the investment of the balance in securities to be approved by the court, after making such allowance as the court might think reasonable to the testator's two daughters.

Cozens-Hardy, Q.C., and *H. M. Williams*, for the plaintiff.—The annuitants are only entitled to have the annuities properly secured. They have no absolute right to have the estate converted. The court will not appoint a receiver at the instance of an annuitant if the annuity is not in arrear, but will leave him to his remedy by distress.

They referred to *Sollory* v. *Leaver*, 18 W. R. 59, L. R. 9 Eq. 22; *Kelsey* v. *Kelsey*, 22 W. R. 433, L. R. 17 Eq. 495; *Norman* v. *Johnson*, 8 W. R. 300, 29 Beav. 77; *Burrell* v. *Delevante*, 10 W. R. 362, 30 Beav. 550.

Napier-Higgins, Q.C., and *Haldane*, for the defendants (other than the annuitants), referred to *In re Potter*, 50 L. T. (N. S.) 8, 32 W. R. Dig. 229.

Everitt, Q.C., and *Ingle Joyce*, for the annuitants.—There is no trust to pay the annuities out of any particular property. There is merely a bequest of annuities, and in such a case the annuitants are entitled to have the residuary estate converted.

They referred to *Slanning* v. *Style*, 3 P. Wms. 334; *Fryer* v. *Buttar*, 8 Sim. 442; *Taylor* v. *Taylor*, 8 Hare, 120; *Elliott* v. *Dearsley*, 29 W. R. 494, 16 Ch. D. 322.

Cozens-Hardy, Q.C., replied.

NORTH, J. (after stating the provisions of the testator's will, and the other facts above mentioned), continued:—The right of the annuitants is plain to have the estate cleared and ascertained; they have a right, I think, to see that the testator's debts are paid off and discharged. When the mortgage has been dealt with in the way proposed, all the testator's debts will have been paid and discharged, subject to this observation, that, as regards the two leasehold theatres, the testator is the original lessee, and, therefore, his estate must remain liable for the payment of the rents reserved by, and the performance of the lessee's covenants contained in, those leases respectively.

Now it is proposed that the estate shall be further cleared for the benefit of the annuitants by selling the leases. But that will not really clear the estate any more than it will be cleared so soon as the mortgage to which I have referred to is made. The liability of the testator's estate in respect of the leases must necessarily continue until the leases have run out, or a surrender has been accepted by the landlords. That liability must continue, and, although, no doubt, the executor may be relieved from liability in respect of it, the liability of the estate must necessarily continue. It is impossible, by anything which is done now, to get rid of that liability, for no one has suggested that any application has been made to the lessors to release the testator's estate. This, of course, could only be done on terms.

Now the question is, whether, under these circumstances, the annuitants, who are entitled in law to a number of contingent legacies payable at the dates at which the successive instalments of their annuities become payable, are entitled to have the estate further cleared by the sale of these leasehold properties, or whether the proposal that security should be given for their annuities is one which I ought to adopt, it being obviously for the interest of the residuary legatees, who are absolutely entitled to the residue, subject to the annuities, to continue to receive the rents which these theatres produce. I say it is obviously for their interest; they say it is, and one can quite understand that it may be so.

Have, then, the annuitants a right to have these leaseholds sold? In my opinion they have not. Several cases were cited by the plaintiff's counsel, and I am not prepared to say that Mr. Everitt's comments on those cases other than *In re Potter* are not well founded. There are circumstances which distinguish those cases to some extent from the present. Then Mr. Everitt referred to two other cases as being authorities in his favour, but I

do not think that I can derive much assistance from either of them. They are both very briefly reported. The first is *Slanning* v. *Style*. In that case the testator, "being seised in fee of some real estate," particularly a farm of £200 per annum (which he kept on his own hands), and possessed of a very plentiful personal estate, devised to his wife £30 per annum for her life charged on his real estate, and devised also to his wife an annuity of £40 per annum for the life of her mother charged upon the residue of his personal estate, payable quarterly," and subject to that, the residue of the personal estate was given to the testator's three sisters, who were married ladies, in equal shares. The question raised was as to the security which ought to be given for the annuity of £40. Nothing appears to have been said about the annuity of £30 which was charged on the real estate, whether it was considered hopeless to ask for security for that annuity or whether the parties were satisfied with the security I do not know. Security was asked for the £40 annuity, and the suggestion was that "as the personal estate was liable to be in a short time wasted (possibly by the husbands of the wives to whom the testator gave the residue)," therefore security ought to be given for the annuity. And it is to be noticed what was asked for: "Therefore it was insisted that the husbands of the wives should give some security for the payment of the same." I do not find that the court was asked to decide that the annuitant was entitled to have the property realized and invested in Consols, or something equivalent. There Lord Chancellor Talbot said: "Generally speaking, where the testator thinks fit to repose a trust in such case until some breach of that trust be shown, or at least a tendency thereto, the court will continue to intrust the same hand without calling for any further security than what the testator has required; but here the testator himself has charged the residue of his personal estate with this annuity which he intended should be duly and quarterly paid; and as this estate appears to consist of some bonds or securities, let such part thereof be brought before the master as may be sufficient to preserve this annuity of £40 per annum for the widow." That, as it seems to me, if it was a decision at all, was merely a decision that some bonds or securities forming part of the testator's personal estate were to be set aside for the purpose of securing the annuity. It certainly does not go the length of showing that an annuitant is entitled to have the personal estate converted and an amount sufficient to secure the annuity invested in Consols or other approved security. No conversion was directed, and, looking at the form of the relief which was asked, I cannot see that the Lord Chancellor decided that point one way or the other. Therefore, I cannot say that that case assists me at all in deciding the present case.

Then *Fryer* v. *Buttar* was referred to. But that, again, is an extremely meagre report, and, although I accept implicitly the decision, I am not satisfied how it was arrived at. The testator gave several legacies, and then he gave an annuity of £40 payable out of his stock of long annuities during the life of his servant, Mary Watson. Then he made a similar bequest to Mary Clarke, another servant, and he added, "in case of the death of the one or the other, the said Mary Watson or Mary Clarke, my will is that the survivor shall enjoy the annuity of the other as well as her own—that is, £80 a year—for her (the survivor's) life; and at the death of the survivor the principal out of which the whole of the annuity of £80 arose to go to my nearest of kin who may be then living. These annuities of £80 are to be secured at the decease of my wife on my stock of long annuities, and made payable to the said Mary Watson and Mary Clarke half-yearly." Then the residue was given to two persons mentioned. "The testator died possessed of £500 long annuities, and the question was whether £80 of the long annuities ought to be set apart to answer the annuities given to Mary Watson and Mary Clarke, in which case they would run the risk of the long annuities expiring in their lifetime, or whether their annuities were a charge upon the whole of the testator's long annuities." I take it, therefore, without knowing the dates, that the long annuities would very possibly expire before the deaths of the annuitants, and, if so, the appropriation of £80 long annuities would clearly not be sufficient to provide with certainty for the payment of the annuities. Then "the Vice-Chancellor held that a sum of £3 per cent. stock producing £80 a year ought to be purchased by money to be raised by sale of a sufficient part of the long annuities, and that the dividends of such stock ought to be paid to the annuitants and the survivor of them, and that the remainder of the long annuities fell into the testator's residuary estate," and the residuary legatees were entitled to it under the will. Then, again, I do not understand what the grounds were upon which the decision was arrived at. It was obvious that something more must be done than the setting apart of £80 long annuities. Moreover, the annuity was to be "payable out of the stock of long annuities," and whether there was an arrangement between the parties or a decision hostile to either party the report does not show. That case, therefore, does not give me much help in arriving at the principle which is to be followed in other cases, although it shows what the learned judge thought it right to do in the particular case with which he had to deal.

Now in the present case it is proposed, first of all, to appropriate the freehold theatres free from any other charge to the purpose of paying annuities. These freeholds produce at present a surplus income of £1,500 a year available to meet the £700 annuities. But that is not quite a fair statement of the case, because, in arriving at the £1,500, the interest, amounting to £247 10s., on the mortgage of £5,500 has been deducted. But as that mortgage will have been paid off from other sources, the clear income will be £247 10s. more—that is, over £1,700 a year. Now it is true that that income is produced by two theatres, and that a theatre is a somewhat speculative investment; but the experience of recent years, as appears by the affidavits, has shown that one theatre was built by the testator out of his own money, and the result is that from the land for which he pays a small rent he receives a very much larger rent.

Supposing that one of these theatres—say the theatre at Southampton—were unlet for a time, there would still be more than £1,100 a year available to meet the £700. If, on the other hand, the theatre at Hull were unlet for a time, the income from the other theatre alone available to pay annuities would be £629, which would be rather too little. But of course the other theatre itself would remain, even if it were not let, and upon the evidence I come to the conclusion that it is a very valuable property, although it might not fetch so much as if it were subject to a lease. I do not know whether it would or not, but sometimes if property is improving in value it might be all the better for the owner that it was not subject to a lease. But it seems to me what is proposed will give an ample security for the annuities.

Is there, then, any authority which justifies me in so treating it? I think the court in *In re Potter*, which was very like the present case, in principle took just the same view; and although I feel some doubt whether I should have applied the principle in the way in which it was then applied if I had been deciding that case, yet that does not affect the principle on which the Vice-Chancellor proceeded. There are, however, two other cases which appear to me material on this point. The first is *Webber* v. *Webber*, 1 Sim. & S. 311. In that case the testator "gave to each of his daughters Sarah

and Mary Elizabeth the sum of £10,000 on their respective marriages. And in case their mother should die before they were married, then after her decease he gave them an annuity of £1,200 to be equally divided between them so long as they both continued unmarried. And after the marriage or death of either of them after the death of their mother he gave to the other in lieu of her moiety of the annuities of £1,200 an annuity of £800 so long as she continued unmarried. Sarah, one of the daughters, married in the testator's lifetime. In November, 1796, the testator died leaving Sarah Webber, his widow, and his two daughters surviving. A suit having been instituted for the administration of the testator's personal estate, and the master having reported that all the testator's debts and legacies, except the £10,000 given to M. E. Webber, had been paid, and that £16,000 Bank Three per Cent. Annuities, part of the funds in the cause, were, according to the market price of such annuities on the day mentioned in his report, of the value of £10,000, that sum was carried over to Miss Webber's account, subject to the contingencies mentioned in the will concerning her legacy. On the 6th of May, 1819, Sarah Webber, the widow, died, upon which Miss Webber presented a petition insisting that, in the events that had happened, she was entitled under her father's will to an annuity of £800. Upon this petition an order was made directing two sums of £13,333 6s. 8d. bank annuities, part of the funds in the cause, to be appropriated to answer the annuity. Under these circumstances a petition was presented by some of the other parties to the suit submitting that, as Miss Webber could not be entitled both to the legacy and the annuity, the two sums of £13,333 6s. 8d. bank annuities would at all times be a sufficient fund to answer the legacy as well as the annuity, and therefore praying that the Accountant-General might be ordered to carry over the £16,000 bank annuities from Miss Webber's account to the credit of the cause generally; and that it might be decided that the two sums of £13,333 6s. 8d. bank annuities should be a fund for answering not only the annuity of £800 but also the legacy of £10,000.

Now, note the Vice-Chancellor's decision. "This legatee being entitled to receive a certain sum in money when the event of her marriage happens, her legacy is not capable of being secured by the present appropriation of any sum of stock. Let the residuary legatee receive the whole fund in court upon giving security to the satisfaction of the master for the payment of the legacy if the event happens. It may be secured upon land if he has land, or by a loan of money upon land." The whole fund, therefore, was ordered to be paid out upon that security being given.

That, as it seems to me, is a very strong authority in support of the view that the annuitants are not entitled to anything more than security for what is to come to them. I do not find that that case has ever been dissented from, and, indeed, it was expressly approved of by Turner, L.J., when Vice-Chancellor in *King* v. *Malcott*, 9 Hare, 692. In that case a lessor claimed security out of the estate of his deceased lessee for the payment of rent to accrue due and the performance of the lessee's covenants, the rent having always been duly paid down to the death of the lessee, and, there not having been any breach of the covenants, the Vice-Chancellor said:—"The case was likened in the argument to the case of contingent legatees. It was said that such legatees, and who, being volunteers, are not to be more favoured than creditors, have the right of retaining and impounding the assets of the testator. But every legatee has a present right, and the fund is impounded to answer the demand which exists, and is created by the will. The argument overlooks the difference between a contingent debt and a contingent legacy. A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets." I do not quite understand the distinction there taken between a debt and a legacy. I should have thought it was equally doubtful whether a contingent legacy would ever be taken out of the assets. However, the Vice-Chancellor goes on (and this is the important passage):—"Even in the case of a contingent legacy the legatee is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy; but it is a matter of arrangement, not of right; and, in strictness, the legatee is only entitled to have security for the payment of the sum should the contingency arise. The case of *Webber* v. *Webber* illustrates the distinction."

These two cases seem to me to be very clear authorities on the point, and, therefore, I have only to see that a proper security is given for the payment of the annuities. I think the annuitants are entitled to have such a security as will make it practically certain that the annuities will be fully paid. Of course the appropriation of part of the assets will not release the rest of the estate. Recourse might still be had, if necessary, to the rest of the estate. But, in my opinion, the proposed appropriation of a mortgage upon the freehold estate, notwithstanding that it is theatrical property, will be an amply sufficient security.

But the residuary legatees have, in fact, offered more, and I see no reason why the annuitants should be deprived of what is offered to them. Therefore, I propose to make an order in the terms of the summons.

I should add that one very important feature in the case is the fact that the annuities have all been paid down to the present day; there is not a penny in arrear. If the annuities had fallen into arrear the result might have been very different.

Solicitors, *A. C. Spaull; Collyer, Bristow, & Co.; Parker, Garrett, & Parker.*

Chan. Div. Stirling, J. } June 20, 22; Aug. 7, 1889.

In re WELLS' TRUSTS.
HARDISTY *v.* WELLS. (*a.*)

Appointment — Revocation — Special power—Appointment by will—Subsequent appointment by deed containing power of revocation and new appointment—Date at which will takes effect—Contrary intention—Election—Wills Act, ss. 19, 23, 24, 27.

By a settlement dated in 1842, *and made on the marriage of A. (then an infant) with B., A. and B. covenanted that, as soon as A. attained twenty-one, certain real estate of which she was tenant in tail, and certain personal estate to which she was entitled, should be conveyed and assigned to the trustees upon trust, after the death of A., for the children of the marriage as A. and B. by deed, or the survivor of them by deed, with or without power of revocation and new appointment, or by will, should appoint, and, in default of appointment, in trust for the children of the marriage in equal shares. B. also settled a policy of assurance upon his life upon the same trusts. The joint power was never exercised, and A. died in* 1857. *No disentailing*

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

assurance of her real estate had ever been executed, and, on her death, C., her eldest son, entered into possession thereof as heir in tail.

By a deed dated in 1864, *B., after reciting the death of A. without barring her estate tail, and that C. was her heir in tail, appointed all the funds comprised in the settlement other than the real estate to his four younger children, and reserved to himself a power of revocation and new appointment by deed or will. The trustees thereupon divided the funds, other than the moneys secured by the policy, equally among the four children.*

By his will, dated in 1869, *B., in express exercise of the power contained in the settlement of* 1842, *appointed certain specific sums to his children, including C., and the residue of the funds thereof to C.*

By a deed dated in 1878, *B., after reciting the deed of* 1864 *and the division of the trust funds, and that the only fund then subject to the trusts of the settlement was the policy-moneys, in exercise of the power reserved to him by the deed of* 1864, *revoked the appointment therein contained, and appointed the policy-moneys in equal fifths between his four surviving children, including C., and the children of his deceased daughter; and he again reserved to himself a power of revocation and new appointment.*

By a deed dated in 1883, *B. made the appointment to C. in the deed of* 1874 *irrevocable, and in* 1888 *he died.*

Held, that B.'s will did not speak from his death so as to revoke the appointment by the deed of 1878, *there being sufficient evidence of a "contrary intention" within section* 24 *of the Wills Act from the fact that the will was dated before that deed.*

Held, also, that the will operated as to the one-fifth ineffectually appointed by the deed of 1878 *to the children of the deceased daughter.*

Held, further, that C. was not bound to elect as regards any interest taken by him under the deed of 1878, *but that he was bound to elect as regards the real estate and any interest which might be coming to him under the will.*

Adjourned summons.

By a settlement, dated the 31st of January, 1842, and made upon the marriage of the Rev. F. B. Wells and Jane R. F. Wells (then J. R. F. Hardisty and an infant), F. B. Wells as to his own acts and deeds and those of persons claiming under him, and J. R. F. Wells as to her own acts and deeds and those of persons claiming under her, covenanted that so soon as conveniently might be after the said J. R. F. Wells should have attained twenty-one years certain parts of the real estate, to which she was tenant in tail, and certain personal estate to which she was entitled should be conveyed and assigned to the trustees of the settlement upon the trusts thereinafter declared, and by the same indenture the said F. B. Wells assigned to the trustees of the settlement a policy of insurance on his life for the sum of £3,000, and the moneys thereby secured and which might become payable thereunder upon the same trusts. Those trusts, so far as they are material for the present report, were, after the death of Mrs. Wells, for all and every or such one or more exclusively of the other or others of the children of the marriage as Mr. and Mrs. Wells should by deed appoint, and in default of such appointment then as the survivor of them "by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be given by him or her, sealed and delivered in the presence of two or more credible witnesses, or by his or her last will and testament in writing" should direct or appoint, and in default of such last-mentioned appointment in trust for all and every the children or child of the marriage who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or respectively marry under that age, equally to be divided between them.

The marriage was duly solemnized; no appointment was ever made in exercise of the joint power reserved to Mr. and Mrs. Wells, and Mrs. Wells died on the 5th of April, 1857. There were six children of the marriage—viz., Rose, who died an infant and unmarried in 1864, the defendant William Howley, the eldest son and heir-at-law of Mrs. Wells, Frances, who married in 1867 the defendant John Duncan Cameron, and died in 1871 intestate, leaving three children, who were still infants and were defendants, the defendant Francis John, and two other daughters who were defendants—viz., Mary Julia, who in 1886 married the defendant Charles Outen Fulbrook, and Charlotte Anne, who in 1871 married the defendant Martin Thomas Friend.

No disentailing deed of the shares of real estate by the settlement covenanted to be conveyed to the trustees thereof was ever executed by Mrs. Wells, and on her death the defendant W. H. Wells became entitled thereto as tenant in tail, and ever since her death he had been in possession thereof.

By a deed poll dated the 27th of July, 1864, under the hand and seal of F. B. Wells and duly attested, after reciting to the effect (*inter alia*) that Mrs. Wells had died without having barred her estate tail in the above mentioned parts or shares of real estate, and that the defendant W. H. Wells was her heir in tail, the said F. B. Wells, in exercise of the power contained in the settlement of the 31st of January, 1842, directed and appointed that all the trust funds and premises comprised in or subject to the trusts of the said settlement, other than the real estate of which the said J. R. F. Wells was tenant in tail (including therein the proceeds of sale of certain of such real estate which had been sold and the income thereof), should thenceforth remain and be in trust for such of them the said younger children—namely, Frances Wells, Mary Julia Wells, Charlotte Anne Wells, and Francis John Wells—as, being a son, should attain the age of twenty-one years, or, being daughters or a daughter, should attain such age or should respectively marry under that age, equally between them if more than one as tenants in common. And the deed provided that it should be lawful for the said F. B. Wells "by any deed or deeds, writing or writings, with or without power of revocation and new appointment to be made by him, sealed, and delivered in the presence of two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature thereof, or any codicil thereto," to revoke all or any of the trusts thereinbefore declared, and if the said F. B. Wells should choose so to do, but not otherwise by the same instrument to appoint or declare any new or other trusts for or for the benefit of some or one of the children of the marriage. In accordance with this deed poll the trustees divided the whole of the trust funds with the exception of the policy-moneys between the four children named therein, who thereupon severally granted releases to the trustees.

F. B. Wells duly made his last will, dated the 3rd of September, 1869, and thereby, after reciting that under the settlement made on his marriage with his late wife certain sums of money were settled upon certain trusts therein mentioned, and that the said settlement contained a power enabling him, either by deed or deeds executed as therein mentioned, or by his last will and testament, to appoint and dispose of the said trust funds between and amongst his children in such proportions as he should think proper, the testator directed and appointed as follows:—"Now I, in exercise and execution of the said power and of all other powers enabling me in that behalf, do by this my last will and testament direct, limit, and appoint that the trustees or trustee for the time being of the said settlement, shall pay, assign, and transfer the sum of £781 to my son, William Howley Wells, his executors, administrators, and assigns, the sum of £650 to each of my daughters,

Mary Julia Wells and Charlotte Anne Wells, and the sum of £1,100 to my son, Francis John Wells, and I further appoint the residue of the said trust funds to and in favour of my son, the said William Howley Wells, his executors, administrators, and assigns."

By a second deed poll, duly executed and dated the 15th of March, 1878, after reciting (*inter alia*) the deed poll of the 27th of July, 1864, the death of Mrs. Cameron, leaving three children, the division as above-mentioned amongst the four children named therein, and that the only fund then remaining subject to the trusts of the settlement of the 31st of January, 1842, was the sum of £3,000 secured by the policy on his life, and the bonuses thereon, F. B. Wells, in exercise of the power by the deed poll of the 27th of July, 1864, reserved to him, and of every other power, revoked, determined, and made void the appointment in the last-mentioned deed poll contained, and the trusts and provisions in the same deed poll declared concerning the trust funds and premises thereby appointed, and in further exercise of the power by the same deed given to him and of every other power, directed and appointed that the sum of £3,000 to become payable under the said policy should be held by the trustees of the settlement upon trust to pay one-fifth part to the defendant William Howley Wells, one other fifth part to the defendant Mary Julia Fulbrook, one other fifth part to the defendant Charlotte Anne Friend, one other fifth part to the defendant Francis John Wells, and that the said trustees should hold the remaining one-fifth part in trust for the three children of the said Frances Cameron in manner therein mentioned; and, secondly, that all bonuses in respect of the said policy should be paid to the defendant William Howley Wells. And by the deed poll now in statement it was provided that it should be lawful for the said F. B. Wells, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be executed as therein mentioned, or by his will and testament or any codicil thereto to revoke all or any of the trusts therein-before directed, and to appoint or declare any new or other trusts to or for the benefit of some or one of his children of and concerning the premises, the trusts thereof should be so revoked.

By a deed poll duly executed and dated the 17th of November, 1888, F. B. Wells released the appointment made by the deed of the 15th of March, 1878, in favour of William Howley Wells from the power of revocation and new appointment therein contained, and directed and appointed that the appointment by the deed poll of the 15th of March, 1878, made in favour of William Howley Wells, should be final and irrevocable, and take effect accordingly; and it was declared that nothing therein contained should prejudice or affect the power of revocation and new appointment contained in the deed poll of the 15th of March, 1878, so far as the same extended to appointments thereby made other than that made in favour of William Howley Wells.

F. B. Wells died on the 21st of March, 1888, and his will was proved on the 24th of July, 1888.

This was an originating summons taken out by the executors of the last surviving trustee of the settlement of 1842 to obtain the opinion of the court as to who were the persons entitled to the funds remaining subject to the trusts of the settlement, and in what shares and proportions.

Buckley, Q.C., and *H. King*, for the plaintiffs.

Hastings, Q.C., and *Prior*, for the defendant W. H. Wells, submitted that in any event the will operated as to the one-fifth share appointed by the deed of 1878 to Mrs. Cameron's children, who were not objects of the power, and that no case of election was raised against W. H. Wells.

Warrington, for Francis J. Wells.—The will operated as a new appointment of the funds, notwithstanding the deed of 1878, except as regards so much thereof as was irrevocably appointed to W. H. Wells.

He referred to Sugden on Powers, 8th ed., p. 290; *Airey* v. *Bower*, 35 W. R. 657, 12 App. Cas. 263; Wills Act, s. 24.

Fellows, for the trustees of Mr. and Mrs. Cameron's settlement, and for the infant children of the marriage, admitted the infant children of Mr. and Mrs. Cameron, not being objects of the power, could not take under the deed of 1878, but contended that W. H. Wells was put to his election whether he would take the real estate or under the will.

Methold, for Mr. and Mrs. Pulbrook, and Mr. and Mrs. Friend, and their trustees, contended that it was essential to the valid exercise of a power of revocation that there should be an intention to revoke a subsisting appointment: *Pomfret* v. *Perring*, 3 W. R. 81, 5 De G. M. & G. 775; *Griffiths* v. *Gale*, 12 Sim. 354. As regards the operation of the Wills Act, there was a distinction between a special and general power: *In re Ruding's Settlement*, 20 W. R. 936, L. R. 14 Eq. 266.

Warrington, in reply.—*In re Ruding's Settlement* was overruled in *Boyes* v. *Cook*, 28 W. R. 754, 14 Ch. D. 53, and *In re Clarke's Estate, Maddick* v. *Marks*, 28 W. R. 753, 14 Ch. D. 422.

He also referred to *Cooper* v. *Martin*, 16 W. R. 234, L. R. 3 Ch. 47.

Hastings, Q.C., in reply, upon the question of election, referred to *In re Vardon's Trusts*, 34 W. R. 185, 31 Ch. D. 275.

Cur. adv. vult.

Aug. 7.—Stirling, J. (stated the facts and continued:—).—The first question is whether the will of 1869 executed the power of revocation contained in the subsequent deed poll of the 15th of March, 1878. The argument in support of the contention that it did, is based on two propositions—first, that if the will had borne date subsequent to the deed poll, it would have operated as an execution of the power of revocation and new appointment; secondly, that by virtue of section 24 of the Wills Act, the will, though dated before the deed poll, speaks from the death of the testator, and has the same effect as if it had been dated subsequently to that deed.

Now, as to the first proposition, the case of *Pomfret* v. *Perring* establishes that an instrument which exercises a power of revocation and new appointment must show, not merely an intention to appoint, but an intention to revoke the subsisting appointment. In that case the donee of a special power under a settlement to be exercised by deed or will partially exercised it by deed, reserving a power of revocation. Afterwards the donee made a will, and, by virtue of every power contained in the settlement "or otherwise howsoever" appointed all the real and personal estate which under the settlement, "or otherwise," she had power to appoint, and it was held that the will operated on the unappointed part only, and was not an exercise of the power of revocation and new appointment. In that case Knight Bruce, L.J., said (at p. 780):—"I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say that they exhibit of themselves an intention to exercise a power of revocation. But if the will shows an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed. I conceive, however, that the will here does not show such an intention. Every word of the instrument may, in my opinion, be satisfied without ascribing to the testatrix any idea of dealing

with the power of revocation or the property subjected to it." Then Turner, L.J., said :—"Here an actual appointment has been made with a power of revocation, and that appointment was to be undone before the power of new appointment would arise. To show that a power of this description has been exercised it is not, I think, enough to show an intention to appoint. An intention to revoke the former appointment ought, I think, also to be shown. The principles acted on in other cases with respect to the exercise of powers seem to me to apply to this. If a person has an interest in one subject and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment it would be different, and the general words would be then held to be an exercise of that power. I think it clear that an intention must be shown to revoke and undo what has been already done." It appears, therefore, that, in the words of Turner, L.J., "the intention to revoke and undo what has been already done" may either appear by the express terms of the instrument, or be inferred from the circumstances that the will would otherwise be ineffectual. This agrees with what is laid down by Lord St. Leonards in the passage cited from his treatise on Powers (see Sugden on Powers, 8th ed., at p. 290), and by Lord Cairns in *Cooper* v. *Martin*. The foundation, however, for such inference is this: that no other explanation can be given of the language used by the donee of the power. In the present case, if the will of 1869 had borne date subsequently to the deed poll of 1878, I am unable to see how effect could be given to it except by means of an exercise of the power of revocation contained in the deed poll; and, consequently, I think that, in that event, the intention to exercise that power might have been inferred. In my opinion, therefore, the first of the two propositions is well founded.

The second proposition assumes that section 24 applies to wills made in the exercise of a special power of appointment, such as is contained in the settlement of 1842. Now that power is one of selection and distribution. The property affected by it is vested in the trustees of the settlement. The office of a will made in exercise of the power is, not to pass that property, but to indicate to the trustees which of the children of the marriage are to enjoy the property beneficially, and in what shares, and for what interests; and the will operates and takes effect by being read into and becoming part of the settlement.

The question then arises whether such a will can be said to "comprise" the property subject to the trusts of the settlement. I have been unable to find any decision which enables me to answer that question either way. Certainly the cases of *Boyes* v. *Cook* and *Airey* v. *Bower*, which were referred to in the argument, do not cover the point. Both of them relate to general powers of appointment. They establish that a will containing a general devise or bequest operates (unless a contrary intention appears by the will) as an exercise of a general power of appointment created (even by the testator himself) subsequently to the date of the will; but this conclusion does not rest on section 24 of the Wills Act alone, it is arrived at through the combined operation of sections 24 and 27. Now the language of section 27 is remarkable. It relates to general powers, and provides that "a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will: and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will." It was thought necessary, therefore, to provide, not merely that the general devise or bequest should operate as an exercise of the power, but that it should be construed to "include" (which seems to be equivalent in meaning to "comprise") the real or personal estate subject to the power.

This seems to have been done for the purpose of making section 24 applicable. In *Airey* v. *Bower* the Lord Chancellor appears to allude to this when he speaks of the Legislature having provided that a general power of appointment should be treated as the property of the testator. None of this reasoning applies to special powers. It is, however, unnecessary in this case to decide whether section 24 applies to a will made in exercise of a special power such as exists in the settlement of 1842; for I have come to the conclusion that even if it does, still the consequences sought to be deduced do not follow. The question, it is to be borne in mind, is whether the testator has shown an intention, not merely to appoint the fund, but also to revoke an appointment actually made. Apart from the section of the Wills Act, no such intention could be inferred where the will bears a date prior to that of the instrument which reserves the power of revocation. Section 24 provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." That is a very different thing from saying that the will is for all purposes to speak and take effect as if it had been executed immediately before the death of the testator. The question is one of intention and of intention to undo what has been done; and, for the purpose of ascertaining the intention, I am entitled to look, not merely at the part of the will which immediately deals with the subject-matter, but also at any other part of the instrument, including the date; and the date appears to me to show decisively that no intention to undo what was only done at a subsequent time can be attributed to the testator, and that his language is to be ascribed to a totally different cause. In my judgment the terms of the section are not such as to compel me to impute to the testator an intention which manifestly never existed in fact. I am of opinion, therefore, that the will of 1869 does not operate to revoke the deed poll of 1878. That deed, however, purports to appoint one-fifth of the fund to the children of Mrs. Cameron, being grandchildren of the testator; and as the power only authorizes an appointment to children of the testator, the deed is, to this extent, ineffectual.

The next question is as to what becomes of this one-fifth share? Now the deed poll of 1878, though it removes four-fifths of the fund from the operation of the will of 1869, does not purport to revoke that will, and although it can hardly be doubted that the testator, had he known the true effect of the deed of 1878, would have made some other disposition of the remaining one-fifth, yet section 19 of the Wills Act provides that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." It was

hardly disputed, and I think properly, that as to this one-fifth the will of 1869 remains in force, and that that share of the fund must go and devolve accordingly.

There still remains the question whether William Howley Wells, the eldest son and heir-in-tail of Mrs. Wells, is bound to elect between the real estate which devolved on him as such heir-in-tail and the benefits coming to him under the deed poll of 1878 and the will of the testator.

Now the general intention of the author of every instrument is, no doubt, presumed to be that effect shall be given to every part of it, but such intention, to use the words of Fry, L.J., in *In re Vardon's Trusts*, "may be repelled by the declaration in the instrument itself of a particular intention, inconsistent with the presumed and general intention"; and such particular intention may obviously repel the general intention either wholly or in part. In the present case there is not to be found in the settlement of 1842 any indication of a particular intention inconsistent with the general and presumed intention. Under that deed, however, F. B. Wells, in the events which happened, had power to appoint the property subject to the settlement among the children of the marriage. It was open to him, I apprehend, expressly to direct that the benefits conferred by any appointment on W. H. Wells should be in addition to those taken by him as heir-in-tail of his mother; and such express directions, if actually given, would, on the principle of *In re Vardon's Trusts*, have excluded the doctrine of election. No express direction is to be found in the deed poll of 1878, and the question is whether a like intention is not to be inferred.

Now, by the deed poll of 1864, the testator took notice that the real estate covenanted by Mrs. Wells to be settled had devolved on W. H. Wells as her heir-in-tail; and he made an appointment under which W. H. Wells took no interest; and, on the footing of this appointment, a considerable portion of the trust funds was distributed. By the deed poll of 1878 the testator took notice of the deed poll of 1864 and the distributions made in pursuance of it, and it is then recited "that the only fund now remaining subject" to the trusts of the settlement was the sum of £3,000 secured by the policy, and upon that footing he proceeds to revoke the deed of 1864, and to make a fresh appointment under which W. H. Wells took a share of the policy-moneys, together with all the bonuses. I think the meaning of that is that what had previously been taken by W. H. Wells, as well as by the other children, was to remain undisturbed, and, consequently, that the appointor has shown that particular intention which is sufficient to override the "presumed and general intention" so far as relates to any benefits derived by W. H. Wells under the deed poll of 1878. No such inference, however, can, as I think, be drawn with reference to the benefits derived by him under the will of 1869, which takes effect by the operation of law, and independently of the intention of the appointor.

I think, therefore, that W. H. Wells is not bound to elect as regards any interest taken by him under the deed poll of 1878, but that he is bound to elect as regards any interest which may be coming to him under the will of 1869.

Solicitors, *Hardisty, Rhodes, & Hardisty; Vallance & Vallance.*

Chan. Div.)
Kekewich, J.) July 5, 1889.

Combined Weighing and Advertising Co. v. Automatic Weighing Machine Co. (a.)

Patent—Action to restrain threats—Cross-action for infringement—Costs—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

A solicitor's letter saying that proceedings will be instituted is a threat within the meaning of section 32 *of the Patents, Designs, and Trade-Marks Act*, 1883.

The action pointed at by the section is an action by the patentee against the person whom he has threatened, not against any other person who may be infringing.

In an action to restrain threats the defendant is not bound to assert his rights by defence or counter-claim, but is entitled to bring a separate action for the alleged infringement of his patent; but, if he does so, arrangements ought to be made so that the proceedings in one action should be stayed to abide the result of the trial in the other.

A. commenced an action under section 32 *of the Patents, Designs, and Trade-Marks Act*, 1883, *against B. to restrain threats. B., within ten days, brought a cross-action against A. for infringing his patent. After pleadings had been delivered and notice of trial given in both actions, A. offered to stay his action for threats until B.'s action was concluded, but B. refused, and forced A. to proceed, and both actions came on together for trial. B.'s action having been dismissed, with costs,*

Held, (1) *that, on the true construction of the section, A.'s right of action was taken away by B. having, within a reasonable time, commenced and prosecuted with due diligence his cross-action for infringement; and* (2) *in consequence, A.'s action must be dismissed, but, under the circumstances, without costs.*

Both the plaintiffs and defendants were proprietors of patents for improvements in weighing machines. The defendant company instructed their solicitors to write to the plaintiffs a letter, dated the 21st of September, 1887, of which the following are the material parts:—

"We are instructed by the Automatic Weighing Machine Co. (Limited) to write to you on the subject as to an automatic weighing machine exhibited by you at the Bodega, Bucklersbury, and elsewhere, which our clients state is an infringement of their patent.

"We have, therefore, to inform you that, unless such machines are at once withdrawn from public exhibition and destroyed, and unless you undertake that no more shall be manufactured, we are further instructed to commence proceedings for an injunction to restrain you from infringing our clients' patent and for damages. We shall be glad to hear from you at your early convenience, and, in the event of your refusal to comply with our clients' demands, be good enough to send us the names of your solicitors, who will accept service of process."

The plaintiffs' secretary replied:—

"Your letter of yesterday's date received, which will be brought before the directors at our next meeting, and their decision shall be forwarded to you."

The plaintiffs thereupon at once, on the 27th of September, 1887, issued the writ in this action, claiming an injunction to restrain the defendants from representing or asserting that the plaintiffs were infringing their patent.

On the 30th of September, 1887, the defendants commenced a cross-action against the plaintiffs, asserting the validity of their patent and claiming an injunction to restrain the plaintiffs from infringing the same and consequential relief.

(a.) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

Pleadings in both actions were delivered, and, on the 22nd of March, 1888, the plaintiffs set down the defendants' cross-action for trial; and, on the 27th of April, 1888, offered to stay all further proceedings in their action until the defendants' cross-action was concluded; but the defendants refused to allow that course, and, by notice dated the 2nd of May, 1888, threatened to apply to dismiss the plaintiffs' action for want of prosecution if it were not proceeded with. The plaintiffs accordingly, though urging that every point in their action was covered by the defendants' cross-action, set down their action for trial, and gave notice that they would ask for the costs occasioned thereby.

On the 11th of January, 1889, both actions came on together for trial before Kekewich, J., when his lordship held that the plaintiffs had infringed the defendants' patent, and gave judgment for the defendants in their cross-action against the plaintiffs, and accordingly this action, which was only formally opened, was dismissed, with costs.

On the 3rd of May the Court of Appeal reversed the decision of Kekewich, J., in the defendants' cross-action, and dismissed it, with costs, and remitted this action to his lordship to be dealt with as he might think fit, the costs in the appeal to be costs in the action.

The action now came on to be heard.

Warmington, Q.C., Morton Daniel, and *Firminger,* for the plaintiffs.—The result of the defendants' threats has been to paralyze our business so far, and, unless the defendants come within the proviso of section 32 in the Patents, Designs, and Trade-Marks Act, 1883, we are entitled to restrain their threats by injunction, and to an inquiry as to damages. The intention of the Act was to prevent the injury caused by threats. The proviso does not mean that if the person making threats brings an action at any time he will be protected. Our action was the first, and the proviso does not apply to this case, because the defendants did not bring and prosecute their action with due diligence: *Challender* v. *Royle,* 36 W. R. 357, 36 Ch. D. 425. Further, the defendants have caused unnecessary litigation and expense. All the questions in their action could have been raised by way of defence or counter-claim to our action. They forced us on when we offered to stay proceedings. We ought, therefore, to have the costs of this action.

Aston, Q.C., Neville, Q.C., and *R. Griffin,* for the defendants.—Under the old law a patentee was within his right in issuing threats: *Halsey* v. *Brotherhood,* 30 W. R. 279, 19 Ch. D. 386. Section 32 of the Act of 1883 renders him liable for his threats if he does not commence an action with due diligence. When we sent the letter we had already commenced an action against one Knight for infringing our patent. Our so-called threats were the commencement of proceedings. There was no want of diligence on our part. Their writ was issued whilst we were waiting for a reply from their directors, which was a device to mislead us. A solicitor's letter is not a threat within section 32. Lastly, the plaintiffs cannot complain of our having forced them on. They ought to have stopped their action directly we issued our writ. But they waited until all the pleadings and particulars of objections had been delivered and heavy costs incurred and notice of trial given, and then they make their offer. But it was then too late.

Warmington, Q.C., replied.

Kekewich, J.—This is a case of some importance to all who are interested in patented inventions, and it is the more important because it not only touches some of the questions already decided on the 32nd section of the Patents, Designs, and Trade-Marks Act, 1883, but raises others entirely new. The section is a legislative puzzle, and I am not sure that it can be properly solved without the assistance of Parliament. I cannot conceal from myself the probability that the Legislature has failed to express what was intended, but I do not propose to guess at what was intended. It is my duty merely to construe the section. The one thing to remark on this section, which is of a general character, is that it creates a new remedy. That is to say, before 1883 it was within the right of a patentee honestly—that is to say, without doing anything improper—to threaten with legal proceedings a person whom he thought to be infringing his patent. Now the Act of 1883, by this section, provides that those threats shall give a right of action. The party aggrieved may commence an action, and succeed in that action, provided certain terms are complied with. That is a new remedy. It creates a new right of action. This is the clue to the construction of the section.

The first point to be considered is, was what was done in this case a threat within the meaning of the section? The section says, "Where any person claiming to be the patentee of an invention," and there is no doubt the defendants here were claiming to be patentees, "by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention" that shall give a right of action, and it is argued that that does not apply to a solicitor's letter to the offender telling him that unless he withdraws his manufacture from the market, or otherwise complies with the patentee's just demands, legal proceedings will be commenced against him. It was not suggested that the patentee personally must act, and he could not have very well done so in this case, because the owners of the patent were a corporation. Therefore, apart from that there can be no doubt that the patentee may do it by an agent, and if by an agent why not by a solicitor as well as by any other agent? But a solicitor's letter saying proceedings will be instituted is said not to be a threat. But for the argument I should have been under the impression that legal proceedings could not have been threatened in a more direct or unmistakeable manner than by a letter from the solicitor stating that he will issue a writ against you. I think that is a sufficient answer to this objection. As to the damages which might be recovered in such an action, in the view which I take of the case, it is not necessary for me to determine that question. As to the proviso introduced modifying language which otherwise might, I think, have been reasonably plain, it really introduces the whole difficulty, and I think it may assist the construction of the clause if I were to read the proviso into a different part of the section. The section might have said, altering the construction, "Where any person claiming to be the patentee of an invention, and not with due negligence commencing and prosecuting an action for infringement of his patent by circulars, advertisements, or otherwise," &c., and that seems to me what must be the meaning of the proviso. It is said that a man does not commence an action for infringement of his patent if, having a patent which is imitated in many different ways, he threatens one man, and commences an action against another, and still more so if he threatens a man who is alleged to have infringed his patent in one way and commences an action against a man who is infringing his patent in an entirely different way.

In this case the defendants in this action were plaintiffs in an action for establishing their patent and restraining infringement against one Knight, and that action was pending at the time the threats which were in question here were made, and they contended that they had commenced an action for the infringement of their patent. I cannot think that the Legislature in-

tended anything of that kind. Such an intention would seem to me to be utterly at variance with the language used in the Act. I think the plain meaning of the language is that the action referred to must mean an action for infringement against the same manufacture, use, sale, or purchase to which the threats relate. I do not understand either of the Lords Justices in *Challender* v. *Royle* to have so decided, though I think the language of both points that way. Cotton, L.J., says: "In my opinion the proviso is satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person, or any of the persons, to whom the threats have been made." And Bowen, L.J., after having said something to the same effect, says: "I do not express any opinion as to whether any other sort of action would or would not satisfy the proviso." Now I can quite understand it being held that if the patentee commences an action against a man who is selling or manufacturing precisely the same article which is manufactured or sold by the threatened person, that might do. But the Lords Justices do not suggest that an action against an infringer of a different character would meet the proviso. It is said that the defendants here, in commencing an action against Knight, were endeavouring to establish the validity of their patent. That might be quite true, but if the Legislature meant this to be sufficient it could easily have said so in plain terms, which it has not done. It says "if he commences an action for the infringement of his patent." It is true that in an action for infringement the question of validity is generally raised. The Legislature has said it shall be an action for infringement. I think that means infringement of the same character as that which is threatened.

Now the real difficulty in this case is that, the threats having been made, they were not followed up within nine days by an action to prevent the particular infringement. In the meantime the action for restraining the threats had been commenced. Mr. Aston does not hesitate to say that that was a trick, and ought not to be regarded as an honest action. I do not agree. Assuming, for argument, that there was a want of courtesy on the part of the solicitors in the matter, they might quite properly have advised their clients that they had better at once commence an action under this 32nd section to restrain the threats. The plaintiffs in the action for threats might have thought that they were right, and that the patent was bad, or the infringement could not be proved, and that the sooner they stopped the threats and prevented the paralysis of their trade the better. On the other hand it seems to be impossible, even apart from authority, to hold that the patentees did not commence their action with due diligence when they commenced it within the fortnight after the threats were made.

I am therefore left in a difficult position. I find a plaintiff properly commencing his action and exercising the right which is given him by Act of Parliament at the time of issuing his writ, then possibly, if one construction of the Act should prevail, defeated by something entirely future which happens after his action is commenced, so that what was right on the 27th of September becomes wrong on the 30th. The right of action given by the Legislature and properly exercised at the time is apparently on that construction taken away by the Legislature three days afterwards. It is a serious conclusion to arrive at, but if the Legislature has so said I must adopt the Legislature's express meaning. How has the Legislature so said? Having given that right of action the section says: "It shall not apply if the person making such threats with due diligence commences an action for infringement of his patent." I hold that he has commenced his action with due diligence, and it is an action for infringement, and under those circumstances it follows that this section does not apply. It is a strange result, but the language, to my mind, is perfectly plain. It has given with one hand a right of action and taken it away with the other. Because if my view is correct a man may wait any reasonable time—and it is impossible to lay down any fixed rule, three months having been held to be a reasonable time—to see what is likely to come of the action founded on his threats look up a little more carefully than he has hitherto done the question of the validity of the patent and the details of infringement and so forth, and may within such reasonable time commence his action for infringement, and say: "You were right till this morning, but now you are wrong. I have commenced an action with due diligence and there is an end of your case." Such seems to me to be the meaning of the Act of Parliament.

Now, as regards the question of prosecution, there is one fact and one fact only which is of any importance in this case. I do not pause to guess why the Legislature put in those words "with due diligence commences and prosecutes," because when once an action has been commenced the defendant is able, if he is so minded, to press the plaintiff on, and if the defendant is satisfied that he is right, or if there is any urgent reason for having the action disposed of, he can at any rate do it sufficiently to prevent the action being dropped altogether, and prevent the result which would otherwise follow on his own action being got rid of. The Legislature has recognized the duty of the patentee not only to commence but to prosecute with due diligence. It seems at a certain date the defendants had set down the action for infringement for trial, and I recognize all that Mr. Warmington says on that point. I think *primâ facie* if you find an action set down by the defendant that is evidence, and cogent evidence, that the plaintiff has not prosecuted his action with due diligence. But when I look into the dates and see what occurred, I find that the defendants in the infringement action had been obliged to give, not only once, but for a second time, further and better particulars of their objections to the patentee, and though I think that the plaintiffs in that case might with propriety have taken a somewhat different course from what they did take as regards procedure, and delayed the setting down, still I do not think it would be right to allow the defendants, who were in default as regards their own particulars, to take advantage of the few days' delay in setting down the action for trial. I cannot hold that there has been any want of due diligence in the prosecution of that action. My conclusion, therefore, on the construction, is that there were threats within the meaning of the section, that there was a proper action to restrain those threats, and that that right of action has been barred by the operation of the proviso, an action for infringement having been commenced and prosecuted with due diligence. This, therefore, is a decision against the plaintiffs here. Then I have to consider the question of costs. The Court of Appeal has left it to me. I have now here all the facts before me necessary for giving a decision. It is impossible to say that a patentee is bound to try the question of infringement with validity and so forth, by a counter-claim, but I think that, where there is an action to restrain threats, if the patentee does not choose to try the question in that way he ought at any rate to attempt to stay the action and offer terms to get rid of the action founded on the threats. I think that the course that the patentees have taken here has been to oblige the plaintiffs in the threats action to go on. Letters have been read to me which showed that that was their intention, that they insisted upon having that action set down for trial and disposed of, and the plaintiffs in the threats action are brought here because they so insisted. I think that is entirely their own fault, and if I could with propriety make them pay the costs I should

be disposed to do so. I cannot do that. I dismiss the action, but I shall certainly dismiss it without costs.

Solicitors for the plaintiffs, *Perkins & Sawyer.*

Solicitors for the defendants, *Adam Burn & Son.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) — Dec. 10.

REG. v. HOLT (VICE-REGISTRAR OF THE OFFICE OF LAND REGISTRY). (a.)

Local government — Land charges — Registration — Sanitary authority — Expenses charged on premises — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Land Charges Registration and Searches Act,* 1888 (51 & 52 *Vict. c.* 51), *ss.* 4, 10.

Expenses incurred in respect of premises by a local authority in carrying out the provisions of the Public Health Act, 1875, *for the repayment of which the owner of the premises is liable, are, by section* 257 *of that Act, made "a charge on the premises in respect of which they were incurred."*

Held, that such charges are not "land charges" within the meaning of the Land Charges Registration and Searches Act, 1888, *and do not require registration.*

In this case a rule *nisi* had been obtained on behalf of the Corporation of Nottingham for a *mandamus* directing the vice-registrar of the Office of Land Registry to register two charges on land. The two charges in question had been made under section 257 of the Public Health Act, 1875, upon houses situate in Blake-street and Montpelier-road, Nottingham, in respect of which houses expenses had been incurred by the corporation as urban sanitary authority.

The expenses were of a kind for the repayment whereof, with interest, the owner of the houses is made liable under the Act, and section 257 provides that in such a case "until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

A question arose as to whether such charges required registration under the Land Charges Registration and Searches Act, 1888, in order to preserve their priority over subsequent registered charges. In order to have this question decided the corporation obtained this rule, but as they did not desire to have the necessity for registration established, they appeared by counsel, not in support of, but in opposition to, the granting of the *mandamus.*

Sir R. Webster, A.G., and *Griffin,* showed cause.—The definition of "land charge" in section 4 of the Act of 1888 must be limited by sections 10—13, and so read it cannot include these charges. They are not created pursuant to an application by the owner of the land, as is the case with charges under the Drainage and Improvement of Land Acts. It is charges made pursuant to such applications which are alone contemplated by section 10. The Act is not applicable to charges like these, which are made *in invitum.* These charges are really "improvement rates," and in many cases it would be impossible to register them. The rules as to registration made under section 18 of the Act could not be complied with: see rule 4, form 3, in schedule.

R. S. Wright, for the corporation.—We have obtained this rule as the only means of getting this question decided, but we are entitled to be heard in opposition to it: *R.* v. *Postmaster-General,* 1 Q. B. D. 658, 24 W. R. Dig. 294. The matter is one of great importance to all sanitary authorities, for the expenses of registering these very minute charges would be very great. In Nottingham the mere fees for registration, without any professional charges, would, it is estimated, amount to £250 per annum. These charges are sometimes intermittent, their existence depending on whether or not the premises are occupied. Such charges could not be registered, and it was not the intention of the Legislature that they should be.

Lord COLERIDGE, C.J.—The argument in this case has been all on one side, and it was difficult to see the object against which it was directed. We have come to the conclusion that the rule should be discharged. The definition of "land charge" in section 4 of the Land Charges Registration and Searches Act, 1888, is wide enough, with perhaps a little straining, to include these charges under the Public Health Act, 1875. But if you look at the later sections, which explain what kind of land charges are to be registered, and exclude what they do not include, it appears to me that these charges are not within the Act. In the proviso to section 10 reference is made to "the person by or on behalf of whom the application was made pursuant to which the land charge was created." Now this implies that no land charge is to be registered except one created in pursuance of an application. These are not such charges, and though, looking at section 4, one might think that they were included, yet when one looks at section 10, which is the real registration clause of the Act, it is plain that they are not within the scope of the Act, and do not require registration. The rule must be discharged.

MATHEW, J.—I am of the same opinion.

Rule discharged.

Solicitor for the vice-registrar, *Solicitor to the Treasury.*

Solicitors for the corporation, *Sharpe, Parker, Pritchard, & Sharpe,* for *S. G. Johnson,* Nottingham.

Q. B. Div. (Fry, L.J., and Mathew, J.) — Nov. 28, 29.

STEVENS v. HOUNSLOW BURIAL BOARD. (a.)

Contract — Corporation — Contract under seal — Extra work — Right to recover — Metropolitan Burials Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 24, 31—*County court practice — Transfer of action — Payment into court — Time — Return day — County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 107, 186—*County Court Rules,* 1889, *ord.* 9, *r.* 11 (1).

A builder had entered into a contract with a burial board under the seal of the board for the execution of certain repairs to the buildings at the board's cemetery; the repairs to be done and the terms upon which they were to be done were specified in the contract. Further repairs were necessary, and were executed by the builder at the instance of the board's surveyor, and approved by him when done.

Held, by Fry, L.J. (Mathew, J., *dissenting*), *that the builder was not entitled to recover in respect of these further repairs, there being no contract under seal as to them.*

A summons was issued in a county court on the 14*th of March; the return day was the* 12*th of April; on the* 1*st of April the action was transferred to another county court, where the return day was the* 15*th of April. The*

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

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defendants paid money into court under County Court Rules, 1889, *ord.* 9, *r.* 11 (1), *on the 8th of April.*

Held, that the return day was the 15th of April, not the 12th of April, and that the payment in was made five clear days before the return day within the meaning of the rule.

This was an appeal by the plaintiff from the decision of his Honour Judge Stonor, the judge of the Marylebone County Court, under the following circumstances.

The plaintiff was a builder and the defendants a burial board subject to the provisions of the Burials Act, 1853 (16 & 17 Vict. c. 134), which, by section 7, incorporates sections 10—42 of the Metropolitan Burials Act, 1852 (15 & 16 Vict. c. 85). Certain repairs to the buildings at the defendants' cemetery being required, a written contract, under the seal of the board, was entered into on the 5th of September, 1888, between the defendants and the plaintiff for the carrying out of the repairs (which were specified in a schedule) for the sum of £38. As the work went on it became evident that some further repairs were necessary, and at the instance of the defendants' surveyor the plaintiff carried out these repairs also; these repairs are referred to in this report as "extras"; they were inspected and approved by the surveyor when they were completed. The plaintiff sued the defendants in the county court for a sum alleged to be due under the written contract and for the work done in respect of the extras. The judge held that £10 was due under the contract, and that £11 was the value of the extras, but in respect of the extras he disallowed the plaintiff's claim on the ground that, there being no contract under seal as to them, he was not entitled to recover. The plaintiff appealed.

There was a cross appeal by the defendants from a decision of the county court judge that a payment into court by the defendants in respect of the work done under the contract was not made five clear days before the return day, and that the defendants were bound to pay the plaintiff's costs occasioned by their default. The facts relating to the cross appeal were as follows. The action was commenced in the Brentford County Court by summons issued on the 14th of March, 1889, returnable on the 12th of April. On the 1st of April the action was transferred to the Marylebone County Court, the return day in that court being the 15th of April; the payment into court was made on the 8th of April. The county court judge held that the "return day" within the meaning of ord. 9, r. 11 (1), of the County Court Rules, 1889, was the 12th of April and not the 15th of April, and that the payment in was too late, not having been made five clear days before the return day.

Lowe, for the plaintiff.—The rule that a corporation can only contract under its seal is subject to two exceptions, and the present case falls under both: (1) where the contract deals with small matters of such frequent occurrence that a written contract in respect of them would be highly inconvenient; (2) where the corporation has taken the benefit of the contract they cannot be heard to say that it does not bind them.

He referred to *Haigh* v. *Guardians of North Brierley Union*, 6 W. R. 679; *Hunt* v. *Wimbledon Local Board*, 26 W. R. 830, 3 C. P. D. 208; *Nicholas* v. *Guardians of Bradfield Union*, 14 W. R. 731, L. R. 1 Q. B. 620.

Yelverton.—These extras to a builder's contract are not within the exception as to small matters: *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Ex. 137; *Lamprell* v. *Guardians of Billericay Union*, 3 Ex. 283. The burial board represents the ratepayers, and cannot go outside the Act.

He referred to sections 24 and 31 of the Act of 1852.

Lowe replied.

Cur. adv. vult.

The defendants' cross appeal was then argued, the contention on the part of the plaintiff being that, upon the true construction of section 186 of the County Courts Act, 1888, "return day" meant the day originally appointed for the hearing at the Brentford County Court—*i.e.*, the 12th and not the 15th of April—and that the payment in was too late. A question was also raised as to the sufficiency of the amount paid in to meet the plaintiff's claim under the written contract.

NOV. 29.—FRY, L.J.—The plaintiff in this case, who is a builder, sues the defendants, the Hounslow Burial Board, for moneys alleged to be due under a contract made under the seal of the board, and in respect of extra work which has been certified by their surveyor. The learned judge of the county court has found that the value of the work is £10 for that which is the subject of the contract, and £11 for the extras, and as to the extras he has held that the defendants are not liable, because there is no contract under seal in respect of them. The law which governs this case is to be found in the Act 15 & 16 Vict. c. 85, and the two important sections are section 24 and section 31, which latter section makes special provisions as to contracts entered into by burial boards. [His lordship read the section.] The subject-matter of the contracts is there described, and it is to be remarked that the words, "for executing and doing any other works and things necessary for the purposes of this Act," are very wide and general words. There are four requisites which are to be specified in all these contracts—viz., the works to be done, the prices, the times of completion, and the penalties for non-performance; and the contracts are to be entered in the books of the board. Now the scope and object of these provisions is to prevent facilities for entering into contracts which might lead to what is known as "jobbery." The proviso as to advertising contracts above the value of £100 was inserted for the same purpose. The circumstances here are these. The burial board had chapels and a lodge in their cemetery and walls which enclosed it, and they thought that these were in want of repair and redecoration. They therefore had prepared a specification of the work required to be done, and they advertised this specification. On the 5th of September, 1888, they entered into a contract with the plaintiff, who undertook to do the work for £38. That contract was under the seal of the board, and contained the requisites which, as I have mentioned, are provided for by section 31.

It appeared, as time went on, that some further work was necessary. This extra work relates to the same subject-matter as the original contract, and some of it consists of such small additions as would make the repairs more complete—for instance, painting and varnishing a wall and making a cupboard in the lodge of the cemetery. These items might, in my judgment, have been included in the specification. They are things to be done for the purposes of the Act just as much as the items in the specification. As to these extras there was no contract, and I have come to the conclusion that the county court judge was right in disallowing the claim in respect of them. If we were to reverse his decision we should be doing this—enabling a surveyor who had friendly feelings towards the builder to alter a definite contract into a much larger affair. These items should have been inserted in the contract itself, and not having been so inserted they cannot be allowed. The amount claimed in respect of them is more than a fourth part of the sum agreed upon under the contract. That sum is under £40, and the sum due (if any) for the extras is £11. If we were to allow this claim we should be letting in the mischief which this Act meant to exclude. It is said that these extras are trivial matters and come under the well-known exception. It may be that these items might in some cases be so, but here they were part of

the larger enterprize. In my opinion the appeal ought to fail.

Then the county court judge took the view that the payment into court was too late, and that therefore the plaintiff was entitled to his costs: County Court Rules, 1889, ord. 9, r. 11. The facts are these. The summons was issued out of the Brentford County Court on the 14th of March and was returnable on the 12th of April. On the 1st of April the action was transferred by order of the registrar to the Marylebone County Court, where the return day was the 15th of April. Payment into court was made on the 8th of April. The question is whether the return day was April the 12th or 15th. If it was the 12th, then the payment in was not made five clear days before the return day; but it seems clear to me that the 15th, and not the 12th, was the return day within the meaning of the rule, and that therefore the payment in was in time, and the plaintiff was not entitled to his costs.

MATHEW, J.—I regret that I am obliged to differ from my learned brother. In reference to the main question I think the plaintiff ought to succeed. In respect of small everyday occurrences required in an undertaking of this kind the board have a right to contract without seal. Do these extras belong to that class of work? The plaintiff was employed to do various small jobs; the defendants took advantage of his work, and are now taking the technical objection that the contract ought to have been under seal. The Lord Justice has treated all these items as being included in the scope of the original employment; but I cannot come to that conclusion. I cannot doubt but that if another tradesman had been employed to do these jobs he would have been entitled to recover, and can the fact of this particular tradesman having made a written contract with regard to other matters make any difference as to his rights? I think not. In my opinion, therefore, this appeal should be allowed. But I withdraw my judgment.

As to the point of county court procedure, I agree.

Appeal dismissed; case referred back to the county court judge to decide whether the payment into court was sufficient in amount, having regard to the decision that it was made in time; leave to appeal granted.

Solicitors for the plaintiff, *Charles Robinson & Co.*

Solicitors for the defendants, *Ruston, Clark, & Ruston.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Nov. 22.

REG. *v.* VESTRY OF ST. PANCRAS. (*a.*)

*Metropolis Management Acts—Vestry—*Mandamus *to—Superannuation allowance to officer—Amount of allowance—Discretion of vestry as to—*29 *&* 30 *Vict. c.* 31, *ss.* 1, 4.

A metropolitan vestry has, under the Act 29 *&* 30 *Vict. c.* 31, *a discretion to grant or refuse a superannuation allowance; but, if they decide to grant any allowance, then the amount of such allowance is not within their discretion, but must be according to the scale in the Act.*

Where a vestry considered the amount according to the scale too large, and offered a smaller sum, and, on this being declined, refused to grant any allowance at all,

Held, that the vestry had no power to do so, as they had agreed to grant some allowance, and that a mandamus *should issue to the vestry to compel them to hear and determine the matter, on the ground that they had not properly exercised the discretion vested in them.*

Rule for a *mandamus* to the Vestry of St. Pancras directing them to consider a claim for a superannuation allowance, and to take the necessary steps to secure such allowance according to the provisions of the Act 29 & 30 Vict. c. 31—an Act to provide superannuation allowances of officers of vestries and other boards within the area of the Metropolis Local Management Act.

The prosecutor, Richard Westbrook, had been a rate collector for the vestry of St. Pancras, and having been in the service of the vestry as such collector for above thirty years, and being over seventy-two years of age, and of infirm health, he wished to resign. He accordingly wrote to the vestry in December, 1888, stating that he wished to resign as from the following Lady-day, and he asked that a retiring allowance might be given to him. His salary had been at the rate of £480 a year, and according to the scale laid down in the Act the superannuation allowance would have been £230 a year, and he asked that this allowance of £230 should be granted to him. This letter was referred by the vestry to their finance committee, who considered it, and recommended that an allowance of £230 should be given. This report was referred back again by the vestry to the committee to communicate with Mr. Westbrook to ascertain if he would accept a smaller sum than the £230, and the vestry at the same time stated that if he agreed to accept £150 a year this sum would be voted unanimously. The committee communicated with Mr. Westbrook, and he declined to accept a smaller sum than the £230, to which he said he was entitled under the Act. The attention of the vestry seems in the meantime to have been called to the case of *Reg.* v. *Vestry of St. George's, Southwark*, 35 W. R. 841, 19 Q. B. D. 538, where it was held that if an allowance were granted the vestry has no discretion as to the amount, but the amount must follow the scale laid down in the statute. The vestry then resolved by a large majority to dismiss Mr. Westbrook without granting any pension at all, and he was accordingly dismissed, after a month's notice, without any superannuation allowance whatever, and a successor was appointed in his place.

A rule was obtained, at the instance of Mr. Westbrook, for a *mandamus* to the vestry directing them to hear and consider the matter, and to grant the allowance according to the scale laid down in the statute.

It was admitted that the amount of the allowance, according to the scale in the Act, would be £230 a year, as claimed by Mr. Westbrook.

Section 4 of 29 & 30 Vict. c. 31 (which applies within the area of the Metropolis Local Management Act) enacts:—"Subject to the provisions herein contained, the allowance to be granted after the commencement of this Act to persons who shall have served in an established capacity as officers as aforesaid . . . shall be as follows: (that is to say)" and then is given the scale of superannuation allowances, which in no case can exceed two-thirds of the salary.

C. A. Russell, for the vestry, showed cause.—This is a matter in which this court cannot interfere; the grant is in the discretion of the vestry, and the vestry have fully considered this application and determined the matter, and there is no room for a *mandamus*. Before the Act there was no power to make a superannuation allowance at all, and the Act was passed to enable vestries to make such allowances. It has already been held by this court, in the case of *Reg.* v. *Vestry of St. George's, Southwark*, that the vestry have a discretion to give or to refuse a pension. Here they have refused to grant a pension, and they had a power to do so.

Morton Smith (*Henn Collins, Q.C.*, with him), for the prosecutor, in support of the rule.—Here the vestry did agree to grant a pension, and the only question open was as to the amount. They resolved that if Mr. Westbrook agreed to take £150 a year instead of the larger sum that amount would be granted to him unanimously.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

That was equivalent to saying he ought to have a pension, though they differed as to the amount of such pension. They had no power to do that, because, although they might have a discretion to grant or refuse a pension in the first instance, they would have no power to determine the amount of such pension if they once determined to grant a pension. In such case the amount is fixed by the statute, and the vestry would have no power to depart from the statutory scale. The vestry have a judicial discretion to exercise, and they are bound to exercise it judicially: Maxwell on the Interpretation of Statutes, 2nd ed., p. 147; *Rooke's case*, 5 Coke's Rep. 100a; *Reg.* v. *Overseers of Withyham*, 2 C. L. Rep. 1657; *Rex* v. *Young and Pitts*, 1 Burrow, 556; *Reg.* v. *Adamson*, 24 W. R. 250, 1 Q. B. D. 201; *Rex* v. *Askew*, 4 Burrows, 2186; *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214; *Biddulph* v. *Vestry of St. George, Hanover-square*, 11 W. R. 524; *Reg.* v. *Governors of Darlington School*, 6 Q. B. 682; *Macbeth* v. *Ashley*, L. R. 2 Sc. App. 352, 22 W. R. Dig. 38.

Lord COLERIDGE, C.J.—This is a case by no means easy to decide, but upon the whole I think the *mandamus* should go.

I admit in the plainest terms and in the fullest manner the discretion of the vestry to entertain the question or not to entertain it in the beginning. The words that "a vestry may at their discretion grant to an officer a pension" seem to me to show that Parliament meant to entrust to them a discretion to entertain the question or not to entertain it in any particular case. This is the more likely as there was no power before these Acts to grant a pension, and it is more likely that Parliament would have empowered, rather than would have compelled, parties to do what for the first time they were enabled to do. It is clear to my mind that the vestry have, in the first instance, the discretion to entertain this question, and a discretion which, I am of opinion, this court could not compel them to put in force in the first instance.

But that does not by any means dispose of the case. The substance of the case I take to be this. [His lordship then stated the facts of the case.] It seems to me that, although the discretion of the vestry is, in a sense, absolute, that expression must be taken with some considerable comment. It may be, it probably is, that it is in their discretion to begin or not to begin, but in this case it appears to me that the vestry had committed itself, and had expressed its opinion that Mr. Westbrook was entitled to a pension. They were then confronted with the law, which said, If he is entitled to a pension he is entitled to *this* pension. Then they said, We do not think he is entitled to this pension, we will go back from what we said and will grant him none. Now a discretion must be, in bodies of this kind, legal discretion; it does not mean mere caprice, or mere personal or private feeling; it must be discretion founded upon grounds of justice and reason, and showing that the mind of the persons exercising the discretion has been brought to bear on the subject-matter before them.

We are not without authority upon this matter, and authority of a very high character. If the matter had been a matter of the discretion of justices, the books are full of cases in which, while the courts, on the one hand, have entirely disclaimed the right or the desire to act as courts of appeal and to review discretion, they have nevertheless been firm in saying that they will see that real discretion has been exercised, and that where discretion has been exercised upon grounds which ought not to have influenced it, they will treat it as not having been exercised at all, and send their *mandamus* to the body that has so declined really to exercise the discretion committed to it. One of the most striking cases with regard to magistrates is the case of *Reg.* v. *Adamson*, where the magistrates heard evidence, and they appeared to have exercised a discretion; but the court sent a *mandamus* upon the ground that it clearly appeared that, although discretion seemed to have been exercised, real discretion had not been exercised at all, because they proceeded upon considerations, extraneous and extra-judicial considerations, which ought not to have affected their decision, and which was the same as declining jurisdiction. That is an exceedingly strong authority in point of principle in the present case. Here it appears, to my mind, that the vestry acted as they did, not because they thought or meant that Mr. Westbrook was not entitled to a pension at all, but because they thought they were bound to give him £230 if they gave him anything, and as they thought that sum too much, therefore they would evade the Act of Parliament and give him nothing.

Now it appears to me that that is a thing which they could not, in point of law, do, and the case I have referred to is a strong authority to show that, under these circumstances, the court will hold that they have not acted judicially and have not exercised a real discretion. But it may be said that the cases to which I refer are cases with regard to magistrates, over whom the jurisdiction of this court has been long established, yet this is a different body, and that the considerations are different and do not apply. But there is a case of *Reg.* v. *The Mayor of York*, 1 W. R. 149, 1 E. & B. 588, where it was held, in the case of a town council, that they were bound to exercise a deliberate discretion, and if they refused to exercise it or exercised it colourably, then a *mandamus* would lie. That seems to me to be a case very much in point as showing that over a body very analogous to the body in the present case this court in the time of Lord Campbell asserted that if there was a colourable exercise of discretion, which was none in truth, the court would compel them to exercise their discretion.

It seems to me that these cases are very strong; they have never been interfered with, overruled, or questioned; and they show that this court, over bodies analogous to such a body as the present, where discretion has clearly been committed to those bodies, will see that there is a real discretion exercised by those bodies, and compel them so to exercise it by *mandamus*, and where discretion has apparently been fairly exercised, yet, when the grounds on which it has professedly been exercised are not legal grounds, are not grounds which the body professing to exercise the discretion ought to have taken into account, the court will treat the discretion as unexercised, and will make the body exercise it.

It seems to me that the vestry had here decided that this gentleman was entitled to a pension, but what they disliked was the judgment of this court compelling them to give £230 or nothing. They had agreed to give something, but when they found that they were obliged to give £230 they thought that sum too much and then they said they would give nothing.

That to my mind is a thing they had no right to do, and upon those grounds in my judgment this *mandamus* must go.

MATHEW, J., concurred.

Solicitors for Mr. Westbrook, *Beal, Phillips, & Beal.*

Solicitors for the vestry, *Cunliffes & Davenport.*

Q. B. Div. (Divnl. Ct.) (Field and Cave, JJ.) May 29, 1889.

HORNE v. POUNTAIN. (a.)

Practice—Charging order—Fund in court—Lunatic—Judgment debt—1 & 2 Vict. c. 110, s. 14—3 & 4 Vict. c. 82, s. 1.

A fund was standing in the books of the Paymaster-General of the Chancery Division to the credit of one J. T. P., "a person of unsound mind." A judgment creditor of the lunatic applied for an order charging this fund, and a judge at chambers ordered that "so much of the defendant's interest in the fund so standing as aforesaid should stand charged with the payment of the . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt."

Held, that the proper form of order upon such an application was to make an order charging the fund, or such part of it as the judge should think fit, and that the judge had no jurisdiction to leave it to the discretion of the Lords Justices sitting in Lunacy to say how much should be so charged.

Appeal from decision of judge at chambers.

One John Pountain having, on June 25, 1888, been found a lunatic, a committee was appointed on June 29, 1888. The plaintiff in this action was a judgment creditor against the lunatic for £51 14s. 6d. and £9 18s. costs recovered on January 30, 1889. A sum of £3,204 2s. 8d. New Consols was standing to the credit of the defendant on March 1, 1889, in the books of the Paymaster-General of the Chancery Division of the High Court of Justice, and on an application in chambers, Mathew, J., made an order that "so much of the defendant's interest in the fund so standing in the books of the Paymaster-General as aforesaid, stand charged with the above-mentioned amount due on the said judgment as the Lords Justices sitting in Lunacy may deem applicable to payment of the said judgment debt." Costs to be in the discretion of the Lords Justices.

The lunatic had no other property, and the cost of his maintenance in an asylum was about £250 to £300 a year.

Hewtall, for the plaintiff.—The judge at chambers ought to have himself exercised his discretion as to what part of the fund should be charged, there being no power in him to leave this to the Lords Justices.

Swinfen Eady, for the defendant and his committee.—The fund stands in the books of the Paymaster-General to the credit of a person of unsound mind, and therefore is a fund in Lunacy. The fund can only be administered in Lunacy, hence the Lords Justices are the proper persons to direct how much shall be charged, and they will regard rather the interest of the lunatic than that of his creditors: *In re Pink*, 31 W. R. 728, 23 Ch. D. 577. If the judge at chambers assumes jurisdiction to deal with the fund, that of the Lords Justices to deal with the property of lunatics will be excluded.

FIELD, J.—The question we have to decide arises out of the true construction of 1 & 2 Vict. c. 110 and 3 & 4 Vict. c. 82.

The plaintiff is a judgment creditor, and within the language of 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82. The fund in question is the property of a lunatic. The judge at chambers had, in my opinion, power to deal with the fund, since 3 & 4 Vict. c. 82, s. 1, entitles him to make, in respect of a fund standing in court in the "name of the debtor or of any person in trust for him," such order as "shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." The order that has been made relegates to the Lords Justices sitting in Lunacy the duty of saying how much shall be applicable to the payment of the judgment debt. I think the learned judge ought not to have omitted to say what portion of the fund should stand charged. The fund being £3,204 2s. 8d, and the debt only £61 12s. 6d., it is not right to give the creditor a charge over the whole fund, but to ascertain what sum, part of that fund, ought to be charged. His order, in effect, does not give the judgment creditor the remedy provided by statute, but sends the creditor to the Lords Justices. We have only to see whether the judgment creditor has a right under the statute to have the order made. It is urged that, as the debtor is lunatic, his property is under the management of the Lords Justices. I cannot yield to that argument. In *In re Hastings* Lord Eldon decided that he would not interfere to hand over a sum of £5,000 in the bank to creditors of a lunatic, and if we had been sitting here as a court applied to by the creditors to hand over funds under our control, we might have been called on to act on the same principles. The creditor had the right to execute a *ca. sa.* "I cannot help it," said Lord Eldon in effect, "I must maintain the debtor when in gaol, or the creditor may sequester the living or issue an *elegit*. I cannot prevent it." At first I thought our order would be of no effect anywhere, but now I am not sure of that, for if the judgment creditor applies in Chancery to have the funds sold, he may or may not have a right to have them sold, with or without reference to the jurisdiction of the Lords Justices to care for the interest of the lunatic. But that is the time when the question, as to the right to dividends or interest or whether the Court of Chancery may postpone the rights of the creditor to the maintenance of the lunatic, will arise.

Understanding that Chancery does not interfere with the legal right, I can understand the principle of the cases, from which it appears that when dealing with the funds of a lunatic in Chancery the court says, "the man shall not starve, if you want our help in dealing with them we will see that he is kept alive." Just as, when application is made to Chancery by a husband to enable him to reach property in right of his wife, the court will not give it him without a settlement on his wife, or in the case of an equitable mortgagee by deposit of deeds, where Chancery says, "if you have to come to us you shall do what we think right," and the jurisdiction exercised in *In re Pink* seems to rest on the same principle. These matters, important to consider before the fund is handed over, are not for us to deal with. Our duty is to give effect to the Act. I find in it no exception, nor anything pointing to any distinction between a sane person or a lunatic. If an order could have been made before the petition and inquisition in Lunacy, I think it may be made now, otherwise it would be in the power of the court—itself a court of equity—to abstract from all the creditors of the lunatic the whole of their common law rights, and, if the fund was small and the expense of keeping the lunatic large, to deprive them of all their legal remedies. We ought to see clear statutory language leading to such a conclusion before arriving at it. On the simple construction of the statute the order as framed cannot be supported, and should be varied by charging £70 of the fund under this order.

CAVE, J.—I am of the same opinion. A lunatic must pay his debts, and his creditors have the ordinary rights of creditors to obtain payment of their debts. When Lord Eldon decided *Ex parte Hastings*, 14 Ves. 182, he thought his duty was to the lunatic only, and that he was not bound to assist the creditor to get payment of the lunatic's debts out of funds not within the creditor's reach; but the Lord Chancellor also clearly recognised

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

the fact that the creditor ought to be allowed to have recourse to all the means which the law afforded him to obtain payment of his debt. The remedies of creditors were subsequently extended by 1 & 2 Vict. c. 110, under which the creditor could obtain a charging order on certain funds and other securities standing in the name of a debtor or of a trustee for him. This was again extended by 3 & 4 Vict. c. 82, by which the rights of creditors were extended to funds standing in the name of the Accountant-General in Chancery for their benefit. No distinction is drawn in the Act between lunatics and sane persons. Nor has this distinction been drawn in other cases—for instance, a lunatic can be made bankrupt. The Chancellor and the Lords Justices sitting in Lunacy never interfere to prevent payment of a lunatic's debts, they only decline to assist a creditor when his remedy is defective. There is no objection to an order framed in the terms proposed by Field, J., but as originally framed it was not right to leave it to the Lords Justices to determine what part of the fund should be charged. If the Lords Justices are to exercise the same jurisdiction as that of the learned judge at chambers, there is no ground for applying to them. If however they are to exercise it in a different manner, treating the fund as some property which could not be touched without their assistance, and considering the interest of the debtor, I think that would be wrong; for it is not what the Legislature intended. I think the order should be absolute, and not conditional as it was made at chambers, and should be limited as suggested by Field, J.

Appeal allowed.

Solicitors for the plaintiffs, *Warriner & Kinch.*

Solicitors for the defendant, *Aldridge, Thorn, & Morris.*

Court of Appeal.

From Chan. Div. Dec. 20.

PHILLIPS v. CAYLEY. (*a.*)

Power of appointment — Exercise of power—General power of appointment of personal estate by will referring to the power—Will containing general bequest of personal estate, but no reference to the power—Wills Act (1 *Vict.* c. 26), s. 27.

In section 27 *of the Wills Act, after the words "which he may have power to appoint in any manner he may think proper," some such words as "by the will in question" must be read in from the context and the general scope of the Act.*

A testator who, under a settlement made in 1884, *had a general power of appointing some stock by writing under his hand* (*not being a will or codicil*), *or by will or codicil expressly referring to the power, bequeathed all his personal property to trustees upon certain trusts, but without any express reference to the power or to the property subject to it.*

Held (*affirming the decision of* Kekewich, J.), *that the condition in the power restricting the class of wills whereby the power was to be exercised to wills expressly referring to the power was a perfectly lawful restriction not forbidden or invalidated by any statute; that the testator, therefore, had not in the present case power to appoint in any manner he might think proper, within the meaning of section* 27 *of the Wills Act, but only* (*in the case of wills*) *by the particular class of will aforesaid; and consequently the will in question, not being a good exercise of the power apart from that section, was not made so thereby.*

In re Marsh, Mason v. Thorne, 37 *W. R.* 10, 38 *Ch. D.* 630, *not followed.*

Appeal from Kekewich, J.

In 1884 certain stock was settled "upon trust for such person or persons, and for such purposes as H. R. Philips shall at any time or times, or from time to time, by writing under his hand (not being a will or codicil), or by will or codicil expressly referring to this power, appoint," and in default of appointment upon certain other trusts.

H. R. Phillips by his will made in 1879, and by divers codicils thereto, bequeathed all his personal property to trustees upon certain trusts, but with no express reference to the power of appointment or to the property settled. He died in 1886.

Section 27 of the Wills Act provides (*inter alia*) that a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

The question raised in this case was whether the will operated as an exercise of the power, and this came on to be argued before Kekewich, J., on an originating summons, to which the trustees of H. R. Phillips' will were made defendants, the plaintiffs being persons interested in the stock in default of appointment. Kekewich, J., held that the will was not a good exercise of the power.

From this decision the defendant George Allen appealed.

Byrne, Q.C., and *A. J. Allen*, for the appellant.—This will is a good exercise of the power. The words "in any manner" in section 27 of the Wills Act refer to the objects to be benefited, not to the mode of exercising the power. Such a power as that here is, by virtue of that section, validly exercised by any will containing a general bequest of personal estate showing no contrary intention. The contrary intention must be shown by the will, not by the power itself, as here. If the respondent's contention is right, the object of section 27 can in every case be easily defeated by imposing a condition such as this on the exercise of the power.

They referred to *In re Marsh, Mason* v. *Thorne*, 37 W. R. 10, 38 Ch. D. 630; *In re Phillips, Robinson* v. *Burke*, 37 W. R. 504, 41 Ch. D. 417; *Charles* v. *Burke*, 60 L. T. N. S. 380, 37 W. R. Dig. 137; *In re Tarrant's Settlement Trusts*, W. N., 1889, p. 146; *Airey* v. *Bower*, 35 W. R. 657, 12 App. Cas. 263, at p. 267; *In re Clarke's Estate, Maddick* v. *Marks*, 28 W. R. 753, 14 Ch. D. 422; *Boyes* v. *Cook*, 28 W. R. 754, 14 Ch. D. 53; *Hawthorn* v. *Shedden*, 3 Sm. & G. 293, 5 W. R. Ch. Dig. 120; Sugden on Powers, 8th ed., pp. 306—7. [BOWEN, L.J., referred to *In re Powell's Trusts*, 18 W. R. 228. COTTON, L.J., referred to *Pomfret* v. *Perring*, 3 W. R. 81, 5 De G. M. & G. 775.]

Warmington, Q.C., and *Warrington*, for the respondents.—A man may reserve to himself a power fettered with any condition he pleases. The power here does not answer the description in section 27, If it is a testamentary power, as it is (though exercisable by deed as well), it comes within section 27. It must, however, be exercised by a will answering the description of the will mentioned in the power, though if the will mentioned in the power is required to be executed with certain formalities, the Act cuts those away by section 10. This will is admittedly not, without the aid of the statute, a will answering to the description in the power.

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

Even if the words "in any manner" are to be confined to the objects of the power, it does not satisfy the section. But there is no ground for so confining them. The statute is one dealing with wills only. No one ventures to contend that the section applies to powers to be exercised by deed alone.

Allen, in reply.—All that is required in order that the will may, under section 27, be a valid exercise of the power, is that it should be a good will within the Act. By that section the Legislature meant that every will should pass property over which the testator has a general power of appointment, unless a contrary intention should appear by the will itself—not by the instrument creating the power.

COTTON, L.J.—This is an appeal from a judgment of Kekewich, J., on a question on which contrary opinions have been expressed by different judges, but in the present case I think the decision appealed from is right. The question is whether the testator's will in this case is a good execution of a power contained in a settlement made by himself in June, 1884.

I quite agree that you cannot have a contrary intention within section 27 of the Wills Act, except one expressed on the face of the will itself.

But the question here is whether this will was a good execution of the power, which depends on whether the settlement gave the testator power to appoint in any manner he might think proper. A difficulty arises because the words of the section do not in terms refer only to powers exercisable by will. Taken literally they apply to any property which the testator may have power to appoint in any manner he may think proper, but it is conceded that where only a power to appoint by deed has been given, an appointment by will would not suffice, even though there is no limitation of the objects in favour of whom the power could be exercised. This is an Act dealing only with wills, and the object of section 27 is, not to enable persons to appoint by will who were not empowered to do so, but to make a general disposition by will operate as an exercise of a power to appoint by will without express reference to it. That is not enough to support the appellant's case.

Then, although a power to appoint by will is sufficient to bring the case within the section, when we wish to ascertain whether the will has exercised the power, we must see, first, whether there is any contrary intention expressed in the will, and, secondly, whether the will is such a will as is required by the power; and in my opinion, if any conditions or limitations are imposed by the settlement which creates the power, and to which the Act of Parliament does not prevent effect being given, we cannot treat them as nugatory.

The restriction imposed by the power in the present case was not contrary to any Act of Parliament. If any limitation is imposed merely as to the mode of execution, the 10th section deals with that, and does away with the restriction. Here the settlor says in effect that the settlement may be put an end to, and the property disposed of otherwise than as thereby provided, by a will "expressly referring to this power." Any other will is therefore not within the power. A will which does not comply with that condition cannot, in my opinion, by virtue of section 27, be considered a good execution of that power, and this will therefore does not operate as an exercise of that power. I think the decision of Kekewich, J., was right.

BOWEN, L.J.—I am of the same opinion. The scope of section 10 is totally distinct from that of section 27. Section 10 provides that a will executed in the manner required by the Act shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, though the formalities required by the instrument conferring the power have not been observed. But section 27 has nothing to do with forms of execution or other formalities. Here we have to construe the words in the second part of the section, which provide that a general bequest of personal estate shall include personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. Now the first thing that seems clear to me is that the words "which he may have power to appoint in any manner he may think proper" are equivalent to "which he may have power to appoint by will in any manner he may think proper"; and, secondly, I think that those words extend and are equivalent to "which he may have power to appoint by the will in question in any manner he may think proper." The words "by the will in question" are to be read in from the context and from the scope of the Act, for the statute is one dealing only with wills. If that is the right construction of those words it is obvious that the will in this case does not answer to the description in the power of the sort of will which is necessary, and that is a fatal reason why the section does not apply. The statute does not attempt to cure the dissimilarity between wills and powers except so far as is provided by section 10—that is, as to formalities of execution and attestation merely. Here the dissimilarity goes far beyond mere form. It has been argued, but I cannot assent to the argument, that this view enables a man, by wording his power in a particular way, to evade the object of this section. But the section we have to construe is an enabling, and not a prohibitory section, and I cannot see any reason why the donor of a power may not so frame his settlement as to exclude from the operation of the section a particular class of wills, or why he may not impose as a condition on a will which is to amount to an execution of the power that it shall expressly name the source of the power. Suppose the settlement had said that, in order to exercise validly a power given by it, the will must refer *nominatim* to the deed of settlement and to the persons who were parties to it. He is at liberty, if he chooses, to impose a somewhat strange condition like that, and you could not escape from the obligation so imposed, under cover of this section, if you neglected to make the prescribed reference. I agree with the view of Cotton, L.J., and think that this appeal should be dismissed with costs.

FRY, L.J.—I am of the same opinion. The words we have to construe are practically the words of section 27, "Which he may have power to appoint in any manner he may think proper." Does that mean, "Any power to appoint in any manner at all?" It cannot mean that, because it cannot mean to empower a person to appoint by will in cases in which he has only been given power to appoint "by deed." Does it mean "by any will"? In my opinion it cannot mean even as much as that, because if it did it might frustrate the intentions of the person who created the power. Suppose a father on the 1st of June gave his son power to appoint by will to any person and in any manner he chose, provided the will was executed after the 1st of January then next, and the son made a will and died before the prescribed date. According to the appellant's argument that would be a valid execution of the power, and the fetter which the father had a right to impose might be disregarded if the section means "by any will." Of course, if the Legislature had said so, we should have to yield to their expressed intention; but I do not think that was the meaning of the words here, and it is not for us to invent fetters upon powers of disposition of property.

I quite agree with Bowen, L.J., that this section was not intended to deal with any relation between the power and the instrument of its execution, but was intended to deal only with the exercise of the power by

the will; and, to my mind, the provisions of the 10th section go far to show that, where that section does not apply, any fetter created by the donor of the power would still remain valid. I think, therefore, that the true meaning of these words is, "May have power, by the will in question, to appoint in any manner he may think proper." The appeal therefore fails.

Appeal dismissed.

Solicitors, *Allen & Sons; Potter, Sandford, & Kilvington.*

High Court of Justice.

Chan. Div. Kay, J. — Dec. 10—12, 18.

MACKENZIE v. CHILDERS. (a.)

Building estate—Deed poll—Covenant—Implied agreement—"Intended"—Interest in land—Limitation—Perpetuity—Jurisdiction to restrain vendors from selling without requiring restrictive covenants.

The plaintiffs had bought part of a building estate under conditions of sale which referred to stipulations contained in a "deed poll of mutual covenants which has been or is intended to be executed by the vendors, and shall be executed by each of the purchasers." The deed was executed by the vendors and the plaintiffs. It recited that "it is intended that the respective purchasers shall set and subscribe their respective names and seals to this deed," "and, whereas it was a part of the various contracts, and it is intended to be a part of all future contracts for sale of the said plots or parcels of land respectively, that the several purchasers respectively should execute this deed and should thereby be severally and respectively bound by all the stipulations hereinafter contained." The deed then witnessed that, "in consideration of the premises," the purchasers covenanted with each other, and with all persons entitled to the land, not to build except upon certain conditions. The deed contained no covenant by the vendors, who now proposed to sell some of the unsold lots upon conditions which were admittedly inconsistent with the original scheme, and without requiring that the purchasers should execute the deed poll.

Held, that the deed poll must be treated as made inter partes; that the intention of the vendors had been expressed in order to induce the plaintiffs to buy, and that they were not at liberty to alter that intention now; that, if not bound by covenant, they were bound by implied agreement; that the agreement was not void for vagueness; that it made no difference that there was no covenant by the proposed purchasers; and that the vendors must be restrained from authorising any purchaser to build contrary to the terms of the building scheme.

Motion for judgment.

The question in this case was whether the vendors of land laid out upon a building scheme had covenanted or agreed expressly or by implication with the plaintiffs, who were purchasers of part of the land under that scheme, not to authorize other purchasers to use the rest of the land in violation of the building scheme.

In 1867 the then trustees of the will of Sir Culling Eardley adopted a scheme for the laying out portions of the trust property called the Belvedere Estate for the purposes of building. The scheme was for the first time delineated and shown in its entirety on the plan annexed to certain particulars of sale prepared for the purpose of the sale by auction of the land shown on such plan and coloured green, which took place on the 3rd of June, 1867. At this sale only a few of the lots were sold.

The particulars stated that the property had been laid out with the greatest care; that no purchaser was to erect more than one single or two semi-detached villas on his or their lots, nor of a less value than £500 for single ones and £750 for a pair, with certain specified exceptions; that no public-house should be erected or opened on any part of the estate, with many other regulations intended to insure that the property should only be used for a superior class of villa residences. The twelfth condition ran thus:—"All the lots are sold subject to the general stipulations on the particulars and to certain covenants for regulating the building upon, fencing, and mode of using the land, the repair of roads, construction of cesspools, and for avoiding nuisances, contained in a deed poll of mutual covenants, which has been or is intended to be executed by the vendors and shall be executed by each of the purchasers. No objection or requisition shall be made to or in respect of such deed or anything therein contained. Copies of the said deed poll (without the plan and signatures and alterations) having been printed, it shall not be included in the abstract, but one of such copies shall be delivered to each purchaser, and in the meantime a copy thereof may be inspected on application to the auctioneers, the solicitors, or at the estate office, Belvedere. A short memorandum or notice of such deed, having been executed by the purchaser, shall be indorsed on the conveyance to each purchaser, and shall be signed by him or her at the time of the completion of his or her purchase."

The deed poll referred to was dated the 13th of February, 1868, and it was executed by the vendors and the plaintiffs and by sixty-six purchasers in all, at various times down to the year 1889.

The deed had upon it a plan which was practically identical with the plan on the particulars of sale. It recited that the vendors had laid out the property for building purposes, and divided it into building plots and formed roads. "And whereas the said vendors propose to sell the said building plots or parcels of land, and have already sold some of them, and it is intended that the respective purchasers shall set and subscribe their respective names and seals to this deed. And that the distinctive numbers of the building plots or parcels of land so purchased by such persons respectively, as numbered on the said plan, shall be set opposite the respective signatures and seals to this deed of such purchasers respectively after the said several plots or parcels so purchased by them respectively have, or shall have, been conveyed to them respectively in fee. And whereas it was a part of the various contracts, and it is intended to be a part of all future contracts, for sale of the said plots or parcels of land respectively that the several purchasers respectively should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained." The deed then witnessed that "in consideration of the premises" each purchaser for himself, his heirs, executors, administrators, and assigns, as to his particular plot, covenanted and granted with and to each of the other purchasers, his heirs and assigns, and with and to the several other persons, including the vendors, who at the time of his executing should be entitled to any part of the land, their respective heirs and assigns, *inter alia*, not to build any house or other building except appurtenant offices the cost of which should not amount to the sum mentioned in the succeeding conditions, nor to do anything in breach or violation of, or contrary to, the fair meaning of such conditions. The sixth of these conditions was that, with certain exceptions not now material, no more than one single or two semi-detached houses should be erected

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

on any one plot. This deed was executed by the vendors, and although in the form of, and called, a deed poll, it was admitted in argument that it must be treated as a deed *inter partes*. Many of the persons who had purchased, including the plaintiffs, had spent very large sums of money in building upon their land upon the faith of this building scheme, which had always been observed and acted upon down to the month of September, 1889. A change had taken place in the trustees of the will, and recently the trustees and their architect, finding that part of the land could not easily be disposed of on the terms of that scheme, but that it might be sold for the building of cottages for artizans, on the 4th of September, 1889, put up this part of the land for sale by auction in different lots, and under conditions which would be a breach of the original building scheme, by allowing the erection of more than one of such cottage dwellings upon each of the plots on the original building plan. Notice of the building scheme was given at that auction, and the contracts then made were in a form which would enable the vendors to rescind them if the objection now made should be maintained. This action was brought to restrain the trustees from authorizing the new purchasers to depart from that scheme. There were no pleadings, and, by consent, none of the purchasers at the recent auction were made parties.

Millar, Q.C., and *Kenyon Parker* (*Sir H. Davey, Q.C.*, with them), for the plaintiffs.—We have bought the land and spent our money on the faith of a representation by the vendors that all purchasers would enter into a similar contract. The vendors cannot change their mind now any more than they could have done if they had made a covenant in the words of the recital: *Spicer* v. *Martin*, 37 W. R. 689, 14 App. Cas. 12; *Renals* v. *Cowlishaw*, 26 W. R. 754, 11 Ch. D. 866. The whole estate is subject to the deed poll, so we could get an injunction against the purchasers who executed that deed, and we submit that we are equally entitled to succeed against the vendors: *Whatman* v. *Gibson*, 9 Sim. 196; *Keates* v. *Lyon*, 17 W. R. 338, L. R. 4 Ch. 218, 223.

Renshaw, Q.C., and *Onslow*, for the vendors.—It is doubtful whether any of these sales were justified by the terms of the will, and whether, if they were, the present trustees are bound by the personal covenant of their predecessors. If there is an implied contract which binds the estate, it gives the purchasers an interest in land and is void for perpetuity: *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562; *McLean* v. *McKay*, 21 W. R. 798, L. R. 5 P. C. 327. But there is no covenant by the purchasers of the lots now in question as there was in *Spicer* v. *Martin*, and there is no authority for restraining us from selling without obtaining such a covenant. There is no covenant on our part to require restrictive covenants, and none can be implied. The recitals in the deed poll and the statements in the conditions of sale as to the intention of the parties only refer to their condition of mind at the moment; they could alter their intention at any time: *Jorden* v. *Money*, 5 H. L. Cas. 185; *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467; *Tulk* v. *Moxhay*, 2 Ph. 774; *In re the Railway and Electric Appliances Co.*, 36 W. R. 730, 38 Ch. D. 597; *Aspdin* v. *Austin*, 5 Q. B. 671; *Piggott* v. *Stratton*, 8 W. R. 13, 1 De G. F. & J. 33; *German* v. *Chapman*, 25 W. R. 802, 7 Ch. D. 271; *Child* v. *Douglas*, 2 W. R. 701, 5 De G. M. & G. 739; *Western* v. *Macdermott*, 15 W. R. 265, L. R. 2 Ch. 72; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 16 Q. B. D. 778.

Millar, Q.C., in reply.—The sales were not breaches of trust, and if they were the vendors cannot raise the objection now, when they are contemplating further sales. The present trustees are bound by notice of the contract; they claim to maintain the position of their predecessors, one of whom has only retired since action brought. The doctrine of perpetuities does not apply. *London and South-Western Railway* v. *Gomm* was a case of executory limitation. Here there was an implied contract. Our rights are not affected by the circumstance that the new purchasers have made no covenant. Those purchasers would be restrained on the ground of notice. If they had not had notice they might have set up against us a title for valuable consideration without notice, but the court would not allow the vendors to give them such a title contrary to their agreement with us. Our right is the same as where an injunction is sought to restrain parting with bills of exchange or title deeds. The court will interfere to prevent them altering their condition of mind and derogating from their own grant.

Cur. adv. vult.

Dec. 18.—KAY, J., stated the facts, and continued.—Now the first question is, What is the true intent and meaning of this deed? A building scheme had been carefully elaborated. It had been embodied in an estate plan to which all purchasers were referred by this deed. The deed recites that some purchasers had already bought lots according to this scheme, in respect of which they were bound to execute the deed. That was so. They had bought, under the conditions to which I have referred which expressly mention the deed, and this deed, executed under these circumstances by the vendors, states that "it is intended," not only that the actual purchasers should execute, but that it should "be a part of all future contracts for sale of the said plots or parcels of land respectively that the several purchasers should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained." Counsel for the trustees have argued that this only means that such was the intention of the trustees for the moment, but that they might alter it at pleasure. They did not enter into any covenant, it is said, because they did not wish to bind themselves in any way. And the phrase "it is intended" was adopted, no doubt, to induce persons to buy on the faith of the building scheme—that could not be denied; but to leave the trustees free to depart from it if they chose, at any rate as to land not actually sold. That, it is urged, is the meaning according to what is sometimes called "the good faith and honour" of this deed of contract. Now I will apply to that argument a very simple test. Suppose in a building scheme like this a purchaser of one or more lots was required to covenant that he would not build more than one house on each lot. And that, there being no such deed as this, he inquired by letter of the vendors whether all past and future purchasers would be bound by like covenants, and that the vendors answered in writing:—"It is intended that all past and future purchasers shall be bound by a like covenant." Would that be a mere expression of intention which the vendors might alter at any time, or would it be a binding contract not to use or authorize the use of the remaining land otherwise? I should think that no lawyer or man of business would hesitate for a moment to say that would be a binding contract. The question is not what the vendor might mean—not whether in his own mind he intended to reserve a power of departing from the bargain—but what the purchaser would understand by the words, what effect they were intended or calculated to produce upon him. If that would be the meaning of these words in such a letter, can they have any less or other meaning in such a deed as this? These recitals were inserted in the deed as one of the main inducements to purchasers to buy. It was obviously supposed

that better prices could be obtained for the lots if each purchaser was assured that every other would be bound by like stipulations, and that the building scheme under which he was buying would be honourably carried out in respect of all the land coloured green on the plan. Another mode of testing the argument is this. If this was merely a statement of intention which the vendors were not bound to abide by they might change it at any time. If they sold half the estate at once to one or many purchasers who bought and built houses on the faith of this statement, they might then immediately break up the building scheme and sell the rest for a manufactory, for artizans' cottages, or for any purpose, however inconsistent with a scheme for a residential property. Nay, more, if it was merely an intention which they might alter they might change it as to any of the lots they had actually sold and absolve any one or more purchasers from the necessity of covenanting at all. The lapse of time before their change of intention is not in the least in their favour. For twenty years they have acted as though the expressed intention was binding upon them. If the deed be ambiguous that conduct shows what they themselves understood it to mean.

I am clearly of opinion that the recitals in this deed do not mean that the intention was one which the trustees were at liberty to change, but that the meaning is that the land coloured green, whether sold or unsold, should not be used in a manner contrary to the building scheme, or, to take the very point now in controversy, that none of the lots marked on the building plan should have more than one house built upon it. Then, if that is the meaning of this deed, what is its effect? It is a deed *inter partes*, the several parties being the vendors and the purchasers who execute. No formal words are necessary to make a covenant in such a deed. A statement of a binding intention on the part of the vendors who executed the deed, made, on the face of it, for the purpose of inducing the several purchasers to buy, is as good a covenant as could be made by the most formal words.

In my opinion the effect of this deed is, that the vendors thereby enter into a covenant not to authorize the use of the unsold land, coloured green on the plan, in a manner inconsistent with the conditions of the building scheme as therein expressed; and, in particular, with respect to the present dispute, not to authorize the building of more than one house upon each plot of the land coloured green on the estate plan annexed to the deed. But if the deed did not bind them by such a covenant, what would be the effect of the whole transaction? A more perfect example of a building scheme, on the faith of which persons have been induced to buy land and to expend money in building, there could hardly be.

In the leading case of *Duke of Bedford* v. *The Trustees of the British Museum*, 2 M. & K. 552, the covenant sought to be enforced specifically in equity against the defendants had been entered into in 1675 by their predecessor in title to build a mansion and offices, and no other buildings, on the land where the British Museum now stands, and the duke was held not entitled to equitable relief by injunction to prevent the defendants from building contrary to this covenant because of the use which had in the meantime been made of the adjoining land, which, at the date of the covenant, was occupied by another mansion or unbuilt on. Sir T. Plumer said:—"By the letter of the contract the duke is under no positive engagement to leave the northern boundary open; but the question is whether, according to good faith and the understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state." Since that decision many cases have occurred in which, especially where land has been purchased on the faith of a building scheme, an agreement has been implied between the several purchasers, or between them and the vendor, not to depart from the scheme. In *Renals* v. *Cowlishaw* there was a statement of the general doctrine by the late Hall, V.C., which was approved by James, L.J., on appeal; and more recently by the Lords of Appeal in *Spicer* v. *Martin*. That statement, in effect, is that every purchaser of a plot of land under a building scheme is entitled to the benefit of a covenant with the vendor by another purchaser "where the court is satisfied that it was the intention" that he should be bound by a like covenant and should have such benefit. "This right exists, not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it—that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase." To apply that language I should, in this case, if there were no express covenant, "collect from the transaction of sale and purchase" an implied agreement by the vendors with every purchaser that none of the unsold lots should be built upon in a manner inconsistent with the building scheme, or, at least, that they would not authorize such a departure from the scheme.

In *Spicer* v. *Martin*, Spicer, by separate conveyances, had acquired the fee simple in seven houses in Cromwell-gardens, South Kensington. Each conveyance contained a covenant by him restricting his use of each house for anything but a private dwelling. He let one of these houses to Martin. He did not enter into any express covenant with Martin restricting the use of the other houses. But the lease to Martin had upon it a plan showing all the seven houses, and Martin was informed before taking his lease that the leases of Spicer's other houses contained this restrictive covenant, and that there was a like covenant by Spicer in the conveyances to him. Martin thereupon, in his lease, entered into a like covenant as to the house he hired. Afterwards Spicer and his vendors arranged to authorize one Brett to convert five of the other six houses into an hotel, three of the houses being bought directly from Spicer for this purpose. The Lords Justices restrained Spicer from "authorizing" this to be done. On appeal to the House of Lords this decision was confirmed. The House of Lords expressly disclaimed proceeding upon the doctrine of *Piggott* v. *Stratton*—viz., that there had been a representation to Martin that Spicer was bound by a restrictive covenant as to the use of the houses from which he could not depart. Lord Macnaghten, in a speech which had been read and was approved by Lord Fitzgerald and Lord Watson, says this: "As regards the appellant," that is Spicer, "the case I think is doubly clear. It seems to me that when Spicer put his houses in Cromwell-gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representatives be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole." That is, Spicer was bound to Martin by an implied contract—implied from the whole transaction—not to authorize a departure from the rule—restricting the use of those seven houses for anything but dwelling-houses. I borrow the very words of that judgment. The defendants in this case are attempting to authorize the use of part of the estate "for a purpose inconsistent with the law by which"

they or their predecessors as trustees "professed to bind the whole." The only possible distinction between the act they propose to do and that of Spicer is that they are proposing to authorize the new purchasers to build without compelling them to enter into a covenant. Spicer was about to do the same as to three of the houses which Brett was to take, as to others he was going to release the covenants which former lessees from him had entered into. If there is any difference in this distinction I am not able to appreciate it. Therefore, if in the present case the trustees were not bound by a covenant, as I think they are, I should hold they were bound by an implied contract restricting their dealing with the land in question in violation of the building scheme. Purchasers with notice of such an agreement are as much bound as the parties to the agreement. Lord Cottenham in *Tulk* v. *Moxhay* says: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." The purchasers who bought in September last with notice of this contract are bound by it also.

Two other points were raised on behalf of the defendants which I must notice. Mr. Renshaw faintly, but his junior with much earnestness, argued that if there were any contract restricting the number of houses on the unsold plots it would be void for perpetuity. The argument was attempted in *Coles* v. *Sims*, 2 W. R. 151, 5 De G. M. & G. 1, and it was expressly decided that such a contract was not obnoxious to the rule. But the case which is most against this view is that upon which the argument was founded—*London and South-Western Railway Co.* v. *Gomm*. In that case the Court of Appeal overruled two cases which had decided that a limitation of property was not obnoxious to the rule if the person to take under that limitation could release it. But it also decided that mere contracts, whether by deed or not, are not within the rule, which only applies to limitations of property. The judges expressed an opinion that a contract by A. to sell land to B. or his heirs at a fixed price upon notice in writing given by B. or his heirs created an interest in land, and that there was no real distinction in equity between such a contract and a limitation by which, upon such payment, the estate would vest in B. and his heirs. No doubt that doctrine is entirely novel. But there is nothing in the case which gives the smallest ground for the contention that a covenant by a vendor or purchaser restricting the use of land reserved or sold is within the rule against perpetuity. Another argument was this. The vendors, it was urged, were trustees, and though they had power to sell, a sale with restrictive covenants would not be a proper exercise of that power. Counsel admitted that the sales which were made in September last were just as bad in this respect, because they were made subject to conditions similar in kind though not the same. Under such circumstances the argument is rather surprising. I am of opinion that the building scheme was within the powers of the trustees. I have no doubt that it was the best and most lucrative mode of dealing with the estate, and that they have received much more under it than could have been made by sale of the land in any other way. I have no reason to suppose that the conditions imposed were depreciatory. I should infer just the contrary, even if the land now in question remained unsold. There must be an injunction against the defendants, restraining them from authorizing any purchaser from them of any of the plots of land comprised in the building scheme and coloured green upon the plan annexed to the so-called deed poll to build upon each plot more than one house contrary to such building scheme.

The defendants must pay the costs of the action.

Solicitors, *Parish & Hickson; Frere, Forster, & Co.*

Chan. Div. }
Stirling, J. } Nov. 29; Dec. 13, 22.

Postlethwaite v. Port Philip Gold Mining Co. (a.)

Company—Winding up—Sale to new company for shares — Limit of time for exercise of option to take shares in new company—Companies Act, 1862, *s.* 161.

Where a company is being wound up, and its business and assets are to be transferred to a new company in consideration of shares in the new company, in pursuance of section 161 *of the Companies Act*, 1862, *the scheme may fix a reasonable limit of time within which a shareholder in the old company must exercise his option to take up the shares in the new company to which, under the scheme, he is entitled.*

The plaintiff was the holder of 1,978 shares in the Port Philip and Colonial Gold Mining Co. (Limited) (hereinafter called the old company).

Early in 1889, the old company being in want of additional capital, a voluntary liquidation and reconstruction were deemed advisable. Accordingly, on January 28, 1889, a resolution was passed that the old company should be wound up voluntarily. This resolution was confirmed on February 18, and a liquidator appointed.

On April 2 the liquidator issued a circular calling an extraordinary meeting of the shareholders for April 12 for the purpose of passing certain resolutions there set out with or without modification.

The meeting was held in accordance with the circular, and the resolutions passed in a modified form. The resolutions as passed were (so far as it is material to set them out in full) as follows:—

"1. That the liquidator be, and he is hereby, authorized and directed to sell and transfer to a new company to be incorporated . . . all the property of the company upon the following terms and conditions. . . . (*b.*) The consideration for the said sale and transfer shall be the payment of the sum of £20,000 by the allotment to the liquidator or to his nominees of 200,000 shares of 5s. each in the new company, credited with 2s. paid thereon, and leaving a liability of 3s. per share and no more, and the payment and satisfaction by the new company of any sums which may become payable to any shareholders of this company who have dissented under the Companies Act, 1862.

"2. That the liquidator be, and he is hereby, authorized and directed to procure to be allotted to every member of the company requiring the same, or his nominee under the contract hereinafter mentioned, two shares in the new company with 2s. credited as paid thereon for and in respect of every share held by him in this company. Provided always that to entitle the members of this company to an allotment of such new shares application must be made for the same in writing in the form and manner prescribed by the liquidator, accompanied by a payment of 6d. per share on the number of shares applied for within ten days next after notice requiring him to apply for the same shall have been given in the manner in which notices are required to be given to members under the articles of association of this company."

(a.) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

The resolutions also provided that the liquidator should dispose of so many of the 200,000 shares as should not be taken up, and that if the liquidator should obtain any premium for the shares to which members of the old company (other than dissentients) would have been entitled had they applied for the same, such premium, less the cost of realization, should be paid to such members by the liquidator.

These resolutions were confirmed at a meeting held on April 29.

On June 8 a company (hereinafter called the new company) was incorporated, in pursuance of the resolutions of April, under the name of the Port Philip Gold Co. (Limited), and a contract was entered into between the old company, the liquidator, and the new company, for the purpose of carrying the resolutions into effect.

On June 12 the liquidator issued a circular to the members of the old company of which the material parts were as follows:—

"I have now the pleasure to inform you that the new company called the Port Philip Gold Co. (Limited) has been incorporated under the Companies Acts, 1862-86, with a nominal capital of £50,000 in 200,000 shares of 5s. each, every shareholder in this (the old) company being entitled to apply for, and have allotted to him, two shares of the new company of 5s. each (credited with 2s. per share as paid thereon and leaving a liability of 3s. per share) in respect of each share held by him in the old company. I have also much pleasure in stating that in pursuance of the powers and instructions given me at the above-mentioned meetings, I have entered into an arrangement with the Gold Trust and Investment Co. (Limited), who for a payment of 3d. per share have guaranteed to find subscribers for the whole of the shares (if any) which may not be taken by the shareholders."

The circular went on to offer the shares in the new company in accordance with the resolutions, and stated:—

"If no application is received from you on or before the said 25th day of June inst., or so far as any application may not extend, you will be deemed to have refused an allotment of shares in the new company to which you are entitled under the said special resolutions and draft contract, and you will be excluded from an allotment accordingly. Any shares unapplied for will be disposed of by me, as liquidator, to such person or persons, and at such price, and on such terms and conditions (if any) as I may think fit."

This circular was accompanied by a form of application, and a further circular was subsequently issued containing instructions as to the mode of filling up the form of application.

The plaintiff did not attend any of the above-mentioned meetings of the company, but he did not dissent from the resolutions.

The notices of the meetings of April 12 and 29 and the circular of June 12 were duly sent by post to him at his registered address in accordance with the articles of association of the old company; but the plaintiff denied having received them. The evidence with regard to this appears from the judgment.

The plaintiff sent in no application for shares in the new company until August 24, 1889, when he filled up the form of application and returned it to the liquidator. The arrangement had, however, then been carried out, and the liquidator was unable to make an allotment to him.

The present action was then commenced by the plaintiff against the old company, the new company, and the liquidator. The writ claimed a declaration that the agreement between the old company and the new company was *ultra vires* the old company, and inoperative and void, and an injunction to restrain the old company and the liquidator from carrying into effect the said agreement, except upon allotting or causing to be allotted to the plaintiff shares in accordance with the scheme sanctioned by the resolutions of April. The plaintiff now moved for an interlocutory injunction. The notice of motion was originally for an injunction in accordance with the second of the above-mentioned claims, but was amended during the hearing of the case, and as amended it was for an injunction to restrain the old company and the liquidator from parting with the assets of the old company, and to restrain the new company from dealing with any such assets already transferred to them otherwise than in the ordinary course of business.

It was agreed that, so far as related to the points now decided, the motion should be treated as the hearing of the action.

Hastings, Q.C., and *Farwell*, for the applicant, contended that the liquidator had no right, under section 161 of the Companies Act, 1862, to impose on the shareholders a limit of time within which they were to apply for shares in the new company.

They cited *Griffith* v. *Paget*, 25 W. R. 523, 5 Ch. D. 894; *Alexander* v. *Simpson*, *ante*, p. 161; *Clinch* v. *Financial Corporation*, 17 W. R. 84, L. R. 4 Ch. 117.

Grosvenor Woods and *Kerly*, for the liquidator, cited *Higgs' case*, 13 W. R. 937, 2 H. & M. 657, and referred to various cases mentioned in Palmer's Company Precedents, 4th ed., p. 587, and Chadwick Healey on Companies, p. 377, in which in schemes of this kind a limit of time for application had been sanctioned. *Zuccani* v. *Nacupai Gold Mining Co.*, 61 L. T. N. S. 176, showed that the option must be exercised within a reasonable time. If you arrive at this, that under section 161 a sale may be made for shares, there must be some time limited.

They also referred to *Southall* v. *British Mutual Life Assurance Society*, 19 W. R. 865, L. R. 6 Ch. 614, and *In re European Assurance Society Arbitration*, 18 S. J. 403.

Buckley, Q.C., and *G. F. Hart*, for the new company, argued that unless a time could be limited for applying for shares in the new company section 161 would be unworkable.—A shareholder might otherwise wait and take advantage of success at the same time standing to lose nothing. Such authority as there was was in favour of that view. In *Weston* v. *New Guston Co.*, 60 L. T. 805, 37 W. R. Dig. 36, and, on appeal, Megone's Reports of Company Cases, 352, the judgment of the Court of Appeal proceeded on the view that a limit of time might be imposed. So also *Zuccani* v. *Nacupai Gold Co.*

Hastings, Q.C., in reply, cited *Nicholl* v. *Eberhardt Co. (Limited)*, 61 L. T. 489.

Dec. 22.—Stirling, J.—The object of the present motion is to test the validity of an agreement for sale by the old company to the new company, purporting to have been entered into under the provisions of section 161 of the Companies Act, 1862; and all parties are willing that I should deal with the case (so far as I can properly do so) as if this were the trial, instead of being merely an interlocutory application. [His lordship then stated the facts above set forth, and proceeded:—] The plaintiff is a stockbroker on the London Stock Exchange, and appears to have regularly attended to his business down to June 17. From June 17 to August 4 he was compelled to absent himself from business by domestic affliction. The plaintiff did not attend any of the meetings of the company to which I have referred, but he did not dissent from the resolutions passed at them. It is proved that the notices of the meetings of April 12 and 29 and the circular of

June 12 were duly sent by post to the plaintiff at his registered address at the Stock Exchange in accordance with the provisions of the articles of association of the old company. In answer to this the plaintiff states that he has no recollection of having seen any of the circulars except a notice and forms of application, which are proved by the evidence to have been posted along with the circular of June 12, and that to the best of his knowledge and belief no other circular was ever received at his office. The plaintiff, however, admits that in June, 1889, and shortly before the 17th thereof, the liquidator called on him at the door of the Stock Exchange and asked him how many shares he would be willing to take up, and that he told him he intended to take up his proportion and no more.

Under these circumstances I think it must be assumed that the notices and circulars were duly received at the plaintiff's office, and that previously to the 17th of June he was, or with reasonable diligence might have been, aware of the obligation which lay on him under the special resolutions to send an application for shares by the 25th of June. He did not, in fact, send any application by that date; but on his return to business on the 24th of August he filled up the form of application and sent it to the liquidator. At this time, however, the liquidator had carried into effect the arrangements mentioned in the circular of the 12th of June, and consequently was unable to give him any shares. After some correspondence between the solicitors of the plaintiff and the liquidator this action was commenced on the 2nd of October by writ asking a declaration that the agreement entered into between the old company and the new company is *ultrà vires* the old company and inoperative and void, and an injunction to restrain the old company and the liquidator from carrying into effect the said agreement, except upon allotting or causing to be allotted to the plaintiff shares in accordance with the scheme sanctioned by the resolutions of April. Notice of motion framed in accordance with the second of these alternatives was given, but it has since been amended, and is now to the effect which I have stated. The new company have allotted all their capital, in accordance with the agreement with the old company, and have been put in possession of the property of the old company, though a legal conveyance has not actually been made. Two objections are urged against the plaintiff's title to relief —first, it is said that the resolutions and agreement are within the powers of the old company and are valid, and secondly, that even if they are not, the plaintiff is debarred from relief by delay and acquiescence. In support of the first of these objections it was urged that the shares to be received in compensation for the sale to the new company were not for the purpose of distribution among the members of the old company within the meaning of section 161.

It was not disputed before me, and it is shown by the case of *In re City and County Investment Co.*, 28 W. R. 933, 13 Ch. D. 475, before the Court of Appeal, as well as by other cases, that a sale may be made for shares to which a liability attaches, and further, that in such a case the new shares may be given directly to the shareholders of the old company, and need not in the first instance go to the liquidator, the reason being, as is stated by the late Master of the Rolls, that "it is perfectly well known that the liquidator will not take shares which are not fully paid up." On the other hand, it was decided in *Higgs' case* that a shareholder, even although he has not expressed his dissent from the special resolution sanctioning the sale, cannot be compelled to accept the shares in the new company against his will. How, then, are shares to which a liability is attached, which the liquidator will not take, and the shareholders cannot be compelled to accept, to be distributed among them pursuant to section 161? The answer is, by giving to every shareholder who does not dissent what in substance amounts to an option to take shares in the new company; and if the scheme under consideration had been framed in this simple form, I conceive its validity would not (regard being had to the decisions to which I have referred) have been open to question. If the shareholder fails to exercise his option the result is that he loses all interest in the shares which he might have taken, but is bound by the resolutions which have been passed. This is laid down by Lord Hatherley in *Higgs' case* and also in *Clinch* v. *Financial Corporation*.

This being so, it is next to be considered within what time the option is to be exercised. It seems clear that it cannot remain open for ever. The distribution contemplated by section 161 must take place before the close of the winding up in the course of which the sale is made. It is said that the option ought to remain open until the liquidator has obtained, under section 138, the direction of the court as to any shares which a shareholder who has not dissented has abstained from accepting. The liquidator may, no doubt, if he sees fit, protect himself by an application to the court in reference to the distribution of the shares; but I see nothing which renders it obligatory on him to take such a course. All that seems incumbent on him to do is to take care that each shareholder has afforded to him reasonable opportunities of obtaining, if he is so minded, the shares intended for him; and if, having done this, the liquidator is able to wind up the affairs of the company and close the liquidation without recourse to the court, he appears to me to be entitled to do so. The question, however, affects not only the selling company, but also the purchasing company. Every company is interested in knowing who constitutes the body of its own shareholders, more particularly when a liability attaches to the shares. In the present case the company, having been formed to work a gold mine, was of a highly speculative character, and the liability attached to the shares was intended to furnish the means of obtaining the capital necessary for working the mine. Under these circumstances it was only reasonable for the purchasing company to stipulate, and for the liquidator and shareholders of the selling company to agree, that a limited time should be fixed within which alone the option should be exercisable; and I see nothing in section 161 (as interpreted by the decisions to which I have referred) to prevent this from being done. In my opinion, therefore, the scheme was not vitiated by the insertion of a limit of time within which the option was to be exercised, provided the limit was such as to leave the option available for a reasonable time.

I am confirmed in this conclusion by such authority as is to be found on the point. In the first place, schemes containing similar clauses are shown to have been repeatedly sanctioned by the court. It is true that in no case does the point appear to have been formally adjudicated upon; nevertheless, I cannot think that it entirely escaped observation, and it appears to me that some weight is due to the circumstance that such clauses were passed without objection by Sir G. Jessel and Hall, V.C. Next, I have said that if the scheme had been formed so as simply to give each shareholder an option without limiting any time for its exercise, it is difficult to see how objection could have been taken to it. Now, in the case of *Zuccani* v. *Nampier Gold Mining Co.* Fry, L.J., laid it down that, no time being limited by the scheme then under consideration for the exercise of the option, it must, as a matter of law, be exercised within a reasonable time. The reasoning which led the Lord Justice to that conclusion appears to me to be applicable to the present case, and to show that here also the option, if no time had been prescribed for the exercise of it, must have been exercised within a reasonable time. If this be so, it seems to me that the scheme cannot be vitiated merely by the circumstance

that the scheme itself fixes that reasonable time. It was said, however, that in *Nicholl* v. *Eberhardt Co.* the Court of Appeal had expressed doubt as to the validity of such stipulations. In that case, however, the limit of time was left to be determined, not (as here) by the liquidator of the old company, but by the directors of the new company, and it was provided that all shares which should not be applied for within such time should be at the disposal of the new company, the latter being a different provision from that which is found in the present case. Even there, however, as I read the judgments delivered in the Court of Appeal, no great weight appears to have been given to the objection which was raised to the limitation of time for the exercise of the option; the objection which was felt to be serious being that to the second of the provisions I have mentioned. In the present case it is not suggested, or, at all events, it is not proved, that the limit of time which was ultimately fixed by the liquidator was unreasonable, and, in my opinion, the first and second resolutions were not beyond the powers of the company.

Then, is the third resolution invalid? I think not. It appears to me, when carefully examined, to be really for the benefit of a shareholder who does not exercise the option given to him. Such a shareholder not exercising the option reserved to him would, according to the decision of the Court of Appeal in *Weston* v. *New Guston Co.*, lose all his interest in the shares of the purchasing company; but instead of this, a further chance of benefit is given to him by the provisions of the third resolution. This resolution, in effect, provided that the liquidator shall (without coming under any legal obligation so to do) be at liberty to make the most of the option on the shareholder's behalf, accounting to him for any premium he receives, less the costs and expenses of realization. No loss or liability is thrown on the old shareholder, for by clause 3 of the agreement any expenses incurred by the liquidator are to be borne by the new company, while any benefit which may result from the dealings of the liquidator comes to the shareholder. In my opinion the scheme is, in substance, one for the distribution among the shareholders (who do not dissent) of shares to which liability attaches, within the terms of section 161 of the Companies Act, 1862. In coming to this conclusion I conceive that I am not departing from anything decided or laid down in *Griffith* v. *Paget*. In that case there was an attempt to distribute the shares which constituted the consideration for the sale in a different way from that in which a money consideration would have been divided, so that some of the shareholders would have been deprived of property to which they were entitled. That was held to be invalid. In this case there is not in the resolutions, as I read them, any such attempt. There is no interest conferred on assenting shareholders of which non-assenting shareholders are attempted to be deprived, on the contrary, the utmost appears to have been done for their benefit. I think it unnecessary to express an opinion on the second point beyond this, that I think it appears to be open to serious doubt whether a shareholder who previously to the 17th of June expressed his willingness to take up his proportion of shares, who on the 24th of August sent in an application for those shares, and who did not previously to the 2nd of October challenge the validity of the resolutions, is not precluded from claiming relief founded on their invalidity, in a case where those resolutions have been acted upon to the extent which here appears. The motion must be dismissed.

Solicitors, *Snell, Son, & Greenip; Michael Abrahams, Son, & Co.; Kerly, Son, & Verden.*

Chan. Div. } Jan. 16; Nov. 6, 23, 1889.
Stirling, J. }

In re Thompson.
Bedford *v.* Teal. (*a.*)

Charity—Legacy—Impure personalty—Bonds or debentures of corporation—9 Geo. 2, c. 36.

A testator bequeathed various sums of money to charities. The greater part of his estate consisted of bonds of the following corporations:—viz., Batley, Bradford, Keighley, Dewsbury, Wakefield, and Leeds.

Held, that all these bonds, with the exception of that of the Keighley Corporation, constituted interests in land within 9 Geo. 2, c. 36, and therefore could not validly be bequeathed to charities.

Adjourned summons.

This was a summons taken out by the executors and trustees of the will of John Robert Thompson asking (*inter alia*) for the determination, under ord. 55, r. 3, of the question whether certain charitable legacies given by his will were to any and what extent or proportion void by reason of the personal estate of the testator consisting in part of corporation bonds or any other personal estate connected with land within the meaning of the Mortmain Act (9 Geo. 2, c. 36).

The testator, who died on the 1st of October, 1887, by his will, dated the 3rd of June, 1887, bequeathed numerous sums of money, amounting in the aggregate to £2,450, to charitable objects, with a direction that such legacies should be paid exclusively out of such part of his personal estate as might be legally bequeathed to charitable institutions. He then bequeathed the residue of his personal estate upon trust for his cousins as therein mentioned.

The greater part of the testator's estate consisted of money invested upon bonds issued by various corporations of the value of £4,968.

They were as follows:—

1. A mortgage of the Batley Corporation dated the 14th of October, 1880, for £500, and expressed to be made by virtue of the Batley Corporation Waterworks Acts, 1871 and 1878, and to be a mortgage of "such proportion of the works authorised by the said Acts, and of the rates, rents, profits, and other moneys arising or accruing, and in any way vested in the mayor, aldermen, and burgesses by virtue of the said Acts, from the public water rates and annual rents authorised by the said Acts to be levied and made, and also the borough rates and borough fund of the said borough."

2. A mortgage of the same corporation for a similar amount dated the 12th of January, 1882. This mortgage was expressed to be made by virtue of the Dewsbury and Batley Corporations Gas Act, 1873, and to be a mortgage of "the interest" of the mayor, aldermen, and burgesses of Batley "in the gas rates, rents, and money to be received in respect of the gasworks of the said mayor, aldermen, and burgesses. And also as a collateral security the borough rates and the borough fund of the said borough."

By the above-mentioned Acts the corporation were empowered to borrow for the purposes of those Acts, and to charge the amounts so borrowed upon the rents and rates thereby authorized to be made and levied, and also upon the borough fund and borough rate.

It appeared from the affidavit of the town clerk of the borough that the borough fund was comprised (*inter alia*) of the tolls and stallages received from the public market, and rents received from surplus lands, some of which were originally acquired for market purposes and were sold subject to rent-charges.

(*a.*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

3. A mortgage of the Bradford Corporation for £1,000, dated the 26th of April, 1870, and expressed to be made by virtue of the Public Health Act, 1848, the Bradford Corporation Act, 1850, the Local Government Act, 1858, the Local Government Act (1858) Amendment Act, 1861, and the Bradford Corporation Act, 1866, and to be a mortgage of the rates arising and accruing by virtue of the said Acts, or some or one of them, from the general district rates to be levied within the district of the said borough."

By section 57 of the Bradford Corporation Act, 1866, the corporation were authorized from time to time to borrow on mortgage any sums not exceeding in the whole £150,000 to be applied in making and providing market places and market houses, and the buildings, works, and conveniences connected therewith by the same Act authorized to be made and maintained.

By section 60, "The mortgagees under this Act may enforce payment of arrears of principal and interest due on their mortgages by the appointment of a receiver, and in order to authorize the appointment of a receiver the amount owing to the mortgagees by whom the application for a receiver is made shall not be less than £10,000 in the whole."

By section 69, "The principal sums from time to time borrowed by the corporation on mortgage under this Act for purposes other than the purposes of the waterworks, and the interest thereon, are by this Act charged upon the lands and property from time to time acquired by the corporation, whether by lease or by purchase under this Act, and the general district rate of the borough."

4. A mortgage of the same corporation for £400, dated the 1st of April, 1887, and expressed to be made under the Bradford Improvement Act, 1850, and in exercise of all other powers vested in the corporation or enabling them in that behalf, and to be a mortgage of "the borough fund of the said borough and the rates, rents, and profits and other moneys forming such borough fund or arising or accruing from the borough fund of the said borough."

The Bradford Improvement Act, 1850, was an Act for conferring upon the corporation of Bradford more extensive powers and authorities for the better paving, lighting, watching, and draining, and otherwise improving the borough, and for the better regulation thereof.

By an order of the Board of Trade entitled "The Bradford Corporation Tramways Order, 1880," and which order was confirmed by "The Tramways Confirmation (No. 2) Act, 1880," the Bradford corporation were empowered to construct and maintain certain tramways in the borough of Bradford, and for that purpose to borrow on security of the local rate and the moneys coming to them out of the rents reserved under any lease made under the authority of that order, and the tolls, charges, and sums authorized to be taken or received by them under the provisions thereof, any sum or sums of money not exceeding £50,000.

By a further order entitled "The Bradford Corporation Tramways Order, 1883," and which order was confirmed by the Tramways Orders Confirmation (No. 1) Act, 1883, the Bradford Corporation were empowered to construct and maintain additional tramways in the borough, and for that purpose to borrow on the same security as set forth in the first-mentioned order any sum or sums not exceeding £45,000.

By an affidavit of the town clerk of Bradford it appeared that the money secured by the bond was borrowed by the corporation under the above orders or one of them and expended by them in the construction and maintenance of the tramways which by the orders they were empowered to construct and maintain. It also appeared that the borough fund consisted of the proceeds of the borough rate, the profits accruing from the various undertakings of the corporation, the allowances made by the Treasury for police and prosecutions, and the rents of certain surplus lands acquired by the corporation for an enlargement of the town hall and for street improvements.

Paragraph 10 was as follows: "The corporation have no land or buildings connected with the undertaking, the same being all provided by the lessees. The said corporation are, in addition to the possession by them of their said tramway, seised or possessed of and their corporate land includes the following real and leasehold property . . . the Town Hall of Bradford . . . and certain surplus land acquired by the said corporation for the purpose of effecting an enlargement of the town hall, and improvements of the streets in the said borough, but which have not yet been used for that purpose and in the meantime are let to several persons as tenants of the said corporation at yearly or other rents."

5. A mortgage of the Keighley Corporation for £500, dated the 24th of June, 1884, and expressed to be made by virtue of the Public Health Act, 1875, the Public Health Supplemental Act, 1855 (No. 2), and the Keighley Improvement Act, 1824, or some or one of such Acts, and of every other Act or power in anywise enabling them in this behalf, and to be a mortgage of "the rates and charges arising or accruing by virtue of the said Acts or any of the said Acts and of the general district rates of the corporation, and of their rents, rates, and charges (if any) as the corporation has power to grant, assign, or otherwise charge for this purpose."

By the Keighley Improvement Act, 1882, and the Public Health Supplemental Act, 1855 (No. 2), the local board of health were empowered to manufacture and supply gas and to recover rents for such supply by warrant of distraint from a justice of the peace.

By the Keighley Waterworks Extension and Improvement Act, 1869, they were authorized to borrow £10,000 for gaswork purposes on mortgage of their gas rents and other funds carried to the gas account with or without including the general district rate, and the mortgages from time to time granted were deemed to be granted in accordance with the provisions of the Public Health Act applicable to mortgages of the general district rate.

By two separate sanctions under the seal of the Local Government Board, dated respectively the 12th of October, 1874, and the 8th of February, 1875, the local board were authorized to borrow £49,997 for the purchase of land as a site for gasworks, for the erection of such gasworks, and for certain other works incidental thereto. The application for such sanctions was made under the Sanitary Acts, the said Public Health Supplemental Act, 1855 (No. 2), and the said Keighley Waterworks and Improvement Act, 1869, and the moneys were directed to be borrowed on the credit of the charges and rates which the local board were authorized to mortgage for the purpose of securing the repayment of the said moneys.

In 1882 a charter of incorporation was granted to the district of Keighley, which thereupon became a borough, and the powers, property, and authorities of the local board of health became vested in the corporation. The amount secured by the mortgage was, with other moneys borrowed by the local board of health under the aforesaid sanctions of the Local Government Board, for the purpose of purchasing land as a site for gasworks, for the erection of such gasworks, and for certain other works incidental thereto. The interest on the mortgage was paid exclusively out of the rents, charges, and other income arising from the gasworks. In the event of such income proving insufficient for payment of interest, the mortgage was to become a charge upon the general district rates levied under the sanitary Acts.

6. A mortgage of the Dewsbury Corporation for £500,

dated the 7th of October, 1878, and expressed to be made under the Batley Corporation Waterworks Act, 1871, and the Dewsbury and Heckmondwike Waterworks Act, 1876, and to be mortgage of the share and interest of the mayor, aldermen, and burgesses in "the rates, rents, and money to be received in respect or by means of the waterworks of the Dewsbury and Heckmondwike Waterworks Board, and also, as a collateral security, the borough rates and a borough fund or general district rates and public water rate of the said borough."

Under the above-mentioned Acts the corporation had power to borrow upon the security of the borough rate, the general district rate, and the public water rate.

The town clerk, in his affidavit, deposed as follows:—"The corporation is seised or possessed of the following hereditaments and real estate (that is to say) (a) the town hall, now in course of construction upon freehold land acquired by the corporation for the purpose; also the borough offices of Dewsbury, held by the corporation for an unexpired term of years under a lease thereof granted to the said corporation. Some portions of the borough offices which are not required or constantly used by the corporation for their own use or that of their officers and servants, are sublet by the corporation to the School Board, the Waterworks Board, and the Chamber of Commerce of Dewsbury as yearly tenants thereof at certain rents, which rents are paid to the treasurer of the corporation, and are by him carried to the account of and form part of the borough fund."

7 and 8. Two mortgages of the Wakefield Corporation for £500 each, dated respectively the 10th of May, 1881, and the 9th of December, 1884, and respectively expressed to be made by virtue of the Wakefield Corporation Waterworks Act, 1880, and to be mortgages of the share and interest of the mayor, aldermen, and burgesses in the "revenues to be received in respect or by means of the waterworks authorized by the said Act, and also, as a collateral security, the general district rates and district fund of the said borough."

By section 58 of the above-mentioned Act "for securing repayment of moneys borrowed under the authority thereof, the said corporation may mortgage the water revenues and the district fund, or either of them."

By section 177 of the Public Health Act, 1875, "Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same."

By section 207, "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act," subject to certain exceptions.

By section 209, "In the district of every urban authority whose expenses under this Act are directed to be defrayed out of the district fund and general district rate there shall be continued or established a fund called the district fund; a separate account called 'the district fund account,' carried under this Act to the account of that fund, shall be kept by the treasurer of the urban authority in defraying such of the expenses chargeable thereon under this Act as they may think proper."

By section 210, "For the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet the urban authority shall from time to time, as occasion may require, make by writing under the common seal, and levy, in addition to any other rate leviable by them under this Act, a rate or rates to be called 'general district rates.'"

It appeared from paragraph 9 of an affidavit of the town clerk that the district fund consisted of "the income and profits accruing from the various undertakings of the corporation, the proceeds of the said general district rate, contributions from the county authority and from the Government in respect of the maintenance of main roads and the rent of a cottage, the site of which, with other surplus land, was acquired by the corporation under the Public Health Act, 1875, for the purposes of their sanitary department or undertaking."

9. A mortgage of the Leeds Corporation for £600, dated the 2nd of January, 1871, and expressed to be made by virtue of the Leeds Corporation Gas Act and the Acts incorporated therewith, and to be a mortgage of "the borough fund and borough rates of the said borough, and also the undertakings, works, and property of the Leeds Gas Light Co. and the Leeds New Gas Co. vested in the said mayor, aldermen, and burgesses under the said first-mentioned Act and the said gas rents and other income to be derived under the same Act."

By the above-mentioned Act the corporation were empowered to borrow on mortgage upon the borough fund and borough rates and upon the security of the undertakings, works, and property vested in the corporation under the Act.

It appeared from the evidence of the town clerk that the borough fund consisted (*inter alia*) of certain rents received from the surplus lands and property acquired by the corporation for or in connection with their various undertakings and improvements and the rent received in respect of a reformatory school.

F. H. Colt, for the summons.

As to the Batley bonds,

Charles Brown, for the residuary legatees.—In *In re Hatton*, 32 S. J. 241, North, J., decided that these bonds were pure personalty.

Bardswell (*Hastings, Q.C.*, with him), for the charities, admitted that the case was not distinguishable from *In re Hatton*.

Stirling, J., following *In re Hatton*, held that these bonds were impure personalty, and therefore could not be applied in payment of charitable legacies.

As to the Bradford bond for £1,000,

Charles Brown.—This bond also falls within *In re Hatton*.

Bardswell.—In order that the bond should create an interest in land, the land must be directly affected: *In re Hatton; In re Christmas, Martin* v. *Lacon*, 34 W. R. 8, 779, 33 Ch. D. 344, 30 Ch. D. 544; *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337; *Holdsworth* v. *Davenport*, 25 W. R. 20, 3 Ch. D. 185; *Jervis* v. *Lawrence*, 31 W. R. 267, 22 Ch. D. 202. Here the land is not directly affected.

Charles Brown, in reply, referred to 9 Geo. 2, c. 36, s. 3; *In re Harris*, 29 W. R. 119, 15 Ch. D. 561; Public Health Act, 1875.

Stirling, J.—I will dispose of the matter as regards the Bradford bond for £1,000, which seems to me to be scarcely open to doubt. Section 3 of the statute 9 Geo. 2, c. 35, provides:—[His lordship read the section, and continued:—] The question I have to determine with reference to this bond is, does it create an estate or interest in lands, tenements, or hereditaments, or is it a charge or incumbrance affecting or to affect any lands, tenements, or hereditaments? That is the question I have to consider. Now, on the face of it, the bond is issued under the provisions of, among other Acts, the Bradford Corporation Act, 1866, and it is headed "No. 29 £1,000 on the general district rates (Markets Account)." I assume, therefore, that this money is borrowed for the purpose of erecting the markets in the borough of Bradford. Now the

Act of 1866, under which it is borrowed, provides this:—[His lordship read section 69 of the Act, and continued:—] So that, in addition to the general district rate of the borough, the sum borrowed by the corporation on mortgage under the Act is, by the statute itself, made a charge upon the lands and property from time to time acquired by the corporation, whether by lease or purchase under that Act. It appears from the town clerk's affidavit that the corporation has among its property some markets which I assume to have been acquired and created under the provisions of the Act of 1866. Therefore the question—Does the bond create a charge upon lands, tenements, or hereditaments?—answers itself. The Act is express upon the point. Now the language of the Statute of Mortmain is peculiar. It not only includes charges or interests affecting any lands, but if any lands will by possibility be brought under the charge or incumbrance, it makes the gift void. In this case there are existing lands on which the principal sum is charged by virtue of the local Act. Therefore I decide this point without reference at all to any question as to the borough rate and the nature of it. I am of opinion that the £1,000 bond cannot be validly given to charity.

The cases as to the remaining bonds were then argued.

STIRLING, J., without giving any formal judgments, held that the gift of the Keighley bond was good and that of the Leeds bond was bad, and reserved judgment as to that of the Wakefield bond, and directed the case to stand over as to the Bradford bond for £400, and the Dewsbury bond for the production of further evidence.

Nov. 6.—Further evidence having been supplied, the case came on for further argument.

As to the Bradford bond.

Charles Brown, submitted that the property comprised in the bond was real estate, and, therefore, not applicable to the payment of the charitable legacies.

Hastings, Q.C., and *Bardswell*, contended that the case was governed by *In re Hatton*.

They also referred to *Attree* v. *Hawe*, and *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201.

Charles Brown, in reply, referred to *In re David, Buckley* v. *Royal National Lifeboat Institution, ante*, p. 162, 43 Ch. D. 27.

The case of the Dewsbury bond was then argued.

Cur. adv. vult.

Nov. 23.—STIRLING, J.—In this case I have to say whether certain bonds of the Corporations of Dewsbury, Bradford, and Wakefield, are pure or impure personalty.

The point which I have to consider came before North, J., in *In re Hatton*. In that case his lordship said this:—"Another question raised by the summons was whether certain debentures or mortgages of the Batley Corporation, to the amount of £7,500 in all, were pure or mixed personalty—that is to say, whether they gave the holder of the mortgages such an interest in land as to render them obnoxious to the Statute of Mortmain, and incapable of being bequeathed to charities. To take the words of one of the bonds (they were substantially in the same form), the Corporation of Leeds granted to 'the said Eliza Hatton,' for the purposes of the Act under which the charge was given, 'the interest of the said mayor, aldermen, and burgesses in the gas rates, rents, and money to be received in respect of the gasworks of the said mayor, aldermen, and burgesses, and also, as a collateral security, the borough rates and borough funds of the said borough.'" Then his lordship continues:—"Now the borough fund itself in this case consists of, among other things, rents of surplus land, and although, no doubt, they are fee farm rents out of land that has been sold subject to this arrangement, yet they are not the less rents. There are many decisions which have held that a gift of an interest in the rents of the land is the gift of an interest in land, and is void under the statute. Under those circumstances—though if I could have decided the other way I am satisfied that the mischief aimed at by the statute would never have arisen, yet I feel bound by the many previous decisions of the court that a charge upon rents, or a gift of rents, or a legacy payable out of rents, is a charge, gift, or legacy of an interest in land, and so in this case a charge upon rents is, in my opinion, a charge on an interest in land, which I certainly am precluded by numerous decisions from holding can escape being void under the statute."

In that decision and in those words I concur, more particularly because, like the learned judge, I should like to decide the other way, being satisfied that the mischief aimed at by the statute would never arise. But I am bound by the numerous decisions to which North, J., refers. It is, therefore, in each case necessary to inquire whether a charge is constituted upon the rents of land. I take, first of all, the case of the Dewsbury mortgage. [His lordship referred to the terms of the bond, and continued:—] This is the same case exactly as occurred before North, J., because in that case, as in this, there was a charge in the first instance on the gas rates, and a collateral security, as here, upon the borough rates and borough fund. What, then, does that borough fund include? That is explained by an affidavit of the town clerk. [His lordship read the paragraph of his affidavit above set out, and continued:—] It is clear from that paragraph that the corporation possesses property producing rent, which rent forms part of the borough fund, and is consequently charged by the bond in question.

I next turn to the Bradford mortgage for £400. [His lordship referred to the terms of the mortgage, and continued:—] The words there are a little wider, and make the matter, if possible, more plain, because there is an express charge upon rents. What do we find as regards the borough fund in this case. [His lordship read paragraph 10 of the town clerk's affidavit above set out, and continued:—] Here, again, we find rents of real estate forming an essential part of the borough fund, and therefore open to the objection which has been pointed out by North, J.

There remains the case of the two bonds of the corporation of Wakefield for £500 each which are not charged on the borough fund, but on another fund—viz., the district fund under the Public Health Act, 1876. [His lordship then referred to the terms of the bond, and continued:—] Now, the district fund is constituted by section 209 of the Public Health Act, 1875, thus [his lordship read sections 209, 210, 207, 177.] I have searched through the Act for the purpose of finding any direction as to what is to become of the rent of the land let under section 177, and, curiously enough, there is no express direction as to it. There is a provision in section 175 as to the dealing with surplus lands, and as to the application of the proceeds of sale; but those are in the strict sense surplus lands—lands which which are not required for the purposes of their undertaking. But section 177 is wider; so that if land is required for the purposes of the board, and it can be conveniently let, there is authority for the local authority to let it with the consent of the Local Government Board, and that even although they could not sell it. I am unable to see to what other fund these rents can belong than to the district fund, and consequently the reasoning of North, J, applies, although there is no express provision here such as is to be found in the Municipal Corporations Act, directing the rents of the property to be paid into the fund in

question. Then the question again arises here—to which fund, as a constituent of this district fund, do the rents belong? That is stated in an affidavit of the town clerk.

First of all, paragraph 4 points out that by section 58 of the Act "for securing repayment of moneys borrowed under the authority thereof, the said corporation may mortgage the water revenues, and the district fund, and general district rate, or either of them." That is the Wakefield Corporation Act, 1880. They have mortgaged the general district fund as well as the general district rate, and paragraph 9 says:—[his lordship read the paragraph.] That is acquired under the Public Health Act, but under the terms of that Act all the expenses chargeable under that Act are payable, of whatever kind, out of the district fund, and they have authority to charge that. It seems to me in this case that rent of land enters as an ingredient, and that the reasoning of North, J., in the case referred to must apply. I come, therefore, with the same expression of regret to the conclusion that all these are non-pure personalty. I ought to add that I have considered the argument of Mr. Graham Hastings that in each case these were undertakings similar to that which was the subject of decision in *Attree* v. *Hawe* and *Gardner* v. *London, Chatham, and Dover Railway Co.*; but having regard to the terms of the Public Health Act and of the Municipal Corporations Act I cannot arrive at that conclusion, and I observe that in the case of *In re David, Buckley* v. *National Lifeboat Institution* the Court of Appeal gave no encouragement to that view.

The costs of all parties will be paid out of the general residuary estate.

Solicitors, *Torr, Janeways, Gribble, & Oddie*, for *M. Cranswick*, Leeds; *Fowler, Perks, Hopkinson, & Co.*; *T. W. & T. B. Nelson*.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 11.

REG. v. JUSTICES OF BROMLEY. (a.)

Justices — Weights and scales — Post-office — Unjust weights or scales — Post-office weights supplied to tradesman who acts as postmaster—Right of inspector to seize same if unjust — Jurisdiction of justices— Prohibition— Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *ss.* 25, 59.

Weights and scales supplied by the Post Office authorities are not within the operation of section 25 *of the Weights and Measures Act*, 1878, *so that, if such weights or scales are supplied to a postmaster who, at the same time, is carrying on, in the same shop as the post-office, some other business requiring weights and scales, an inspector of weights has no right to seize such post-office weights or scales, even though they are unjust, and even though it be shown that the postmaster has in the shop no other suitable weights or scales for his ordinary business, provided it do not appear that he used such weights or scales in his business.*

If, in such a case, an information is preferred against the postmaster under section 25 *of the Act, for having in his possession unjust weights, the justices have no jurisdiction to entertain such a question, and a prohibition will go to prohibit them from entering on the inquiry.*

Rule *nisi* calling on the Justices of Bromley and the inspector of weights and measures for the district of Bromley to show cause why a writ of prohibition should not issue to prohibit the justices from hearing and determining an information against one Nicholls, charging him, under section 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), with having a false and unjust scale for use in his trade.

Nicholls was the master of the post-office at Down, Kent, and he also carried on in the same shop in which the business of the post-office was conducted the business of a bakery, and by the Act 6 & 7 Will. 4, c. 37, he was bound to sell bread by weight, and to have in his shop proper weights and scales for that purpose.

The inspector of weights visited the shop and inspected the weights and scales used by Nicholls for his business and found them correct. These weights were small weights used for weighing small things, and were Nicholls' own property, but were not suitable for the weighing of bread. There were in the shop no other weights or scales suitable for weighing bread except the post-office weights and scales. The business of the post-office was carried on at the same counter as that at which the bakery business was conducted, and the post-office weights were on the counter used for weighing bread. The inspector tested the post-office scale, and found it to be false by about a quarter of an ounce. The postmaster stated that he never used the post-office weights or scales for weighing bread, or in any part of his business other than the post-office business, and both he and his wife, in their affidavits, made the same statement, and they said that they did not know that the scale was false. The scale in question was a post-office scale supplied by the authorities and belonged to the Crown.

There was no suggestion that Nicholls knew the scale was inaccurate, or that it was used by him for his trade.

A summons was thereupon taken out by the inspector against the postmaster, under section 25 of the Weights and Measures Act, 1878, for being in possession of unjust scales.

Section 25 enacts: "Every person who uses or has in his possession for use for trade any weight, measure, scale . . . or weighing machine which is false and unjust shall be liable to a fine not exceeding £5"; and section 59 enacts that "where any weight is found in possession of any person carrying on trade within the meaning of this Act, or on the premises of any person which are used for trade, such person shall be deemed, for the purposes of this Act, until the contrary is proved, to have such weight, &c., in his possession for use for trade."

Before the hearing came on before the magistrates a rule for a prohibition was obtained.

The inspector of weights being an officer of the County Council for the county of Kent, the county council appeared to show cause against the rule.

Poland, Q.C., and *R. S. Wright*, for the Kent County Council, showed cause.—This prohibition ought not to go if the subject-matter is within the jurisdiction of the justices. [*Sir R. E. Webster, A.G.*—I admit that the prohibition ought not to go if, on the affidavits, it had been found that these scales were used in the way of business; here they were found to be post-office weights and scales.] [MATHEW, J.—The Act contemplates the confiscation of the scales which are the property of the man who uses them; here you admit they cannot be confiscated.] Whether they were used for trade purposes is a question of fact to be dealt with by the justices. The authorities are clear that prohibition will not go if the matter to be inquired into is within the jurisdiction of the justices, and here they have jurisdiction to inquire into the subject. Though the justices have no power to order the scales to be forfeited, that is no reason for a prohibition if they have jurisdiction to enter upon the inquiry. There is a question for the justices to try—whether these weights and scales were used for the purposes of trade, and if they go wrong they can be set right by prohibition, *certiorari*, or *mandamus*. There is no instance of a prohibition in a

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

case of this kind: *In re Appledore Tithe Commutation*, L. R. 8 Q. B. 189. A prohibition may issue to a court exercising criminal jurisdiction: *Reg.* v. *Herford*, 8 W. R. 579.

Sir R. E. Webster, A.G., and *Casserley*, in support of the rule.—Post-office weights and scales are not within the Act at all. The Act was never intended to apply, and does not apply, to any scales belonging to the Government. The section says that they must be in the possession of a person for the purposes of trade; that shows that the Act only applies to weights and scales which can be forfeited, and these are the words "and may seize and retain" the same. It would require express words to enable one to seize Crown property.

Lord COLERIDGE, C.J.—I entirely admit that if there is jurisdiction to enter upon this inquiry, the prohibition ought not to go. It is and must be a condition precedent to entering on this inquiry that the inquiry itself should be within the scope of the justices' jurisdiction, and if it is not the prohibition will go.

In this case an information is laid under the Weights and Measures Act, 1878, and the only material sections to consider are the 25th and the 59th sections. It is sufficient to say that this Act is directed against abuses of unjust weights and measures, and very strong and sweeping terms are employed in sections 25 and 59, which are both directed to the same point, so that we cannot take section 25 and deal with it by itself, as if section 59 were not in the Act.

Then comes the question whether it was ever intended by Parliament that weights and measures supplied by the post-office should be within the contemplation of the Act, and under the jurisdiction of the inspector of weights and measures.

I am clearly of opinion that it was not so intended, and it is enough to say here that we are not now dealing with a case of any fraudulent use of weights by the postmaster. The question is whether the justices have jurisdiction to enter upon this inquiry, that is, whether the fact of a postmaster having such weights in his possession can give the justices jurisdiction. I think clearly not: I think it never could have been intended that the fact of a person having in his possession post-office weights and scales should give the justices jurisdiction; and the case therefore is not within the meaning of the Act.

MATHEW, J.—I am of the same opinion. It seems to me clear that Parliament never meant to treat weights and measures supplied by a public body as being within the Act. The public are, it seems to me, adequately protected. The consequences of holding that these weights were within the Act would be threefold, that the weights were used unfairly, that weights and measures may be removed from the post-office and the business of the post-office stopped, and that the property of the post-office may be confiscated.

For these reasons, and for the reasons given by my lord, I am clearly of opinion that this prohibition ought to go.

Rule absolute for prohibition.

Solicitors for the county council, *Latter & Willett*, Bromley.

Solicitor for the Postmaster-General, *The Solicitor to the Post Office.*

Q. B. Div. (Fry, L.J., and Mathew, J.) — Nov. 29.

USHER AND OTHERS (*Appellants*) v. LUXMORE (*Respondent*). (a.)

Justices—Jurisdiction—Malicious injury to property—Removing post placed in public footpath—Conviction for—"Fair and reasonable supposition of right"—24 & 25 Vict. c. 97, s. 52.

The respondent, whose wife was the owner of the land at each side of a public footpath, and also of the land over which the footpath passed, erected two wooden posts in the middle of the footpath to prevent his cattle from straying down the path, one post being at the entrance to the footpath and the other some distance along the path. There was a space of two feet at each side of the posts through which foot passengers could pass. The appellants, with a number of others, inhabitants of the district, assembled and pulled up one of these posts and threw it over the fence; they were convicted, under section 52 of 24 & 25 Vict. c. 97, of having committed wilful damage to the post.

Held, that the conviction was wrong, as the appellants, in pulling up the post, had acted, as it appeared from the facts, under a fair and reasonable supposition that they had a right to do what they did; that the case, therefore, came within the proviso of the section; and that the jurisdiction of the justices was ousted.

Case stated by three justices of the peace for the county of Berks.

A complaint was preferred by the respondent against the three appellants, under the 52nd section of the Act 24 & 25 Vict. c. 97, for having, on the 10th of April, 1889, at the parish of Cookham in the county of Berks, unlawfully and maliciously committed damage, injury, and spoil upon a certain wooden post the property of Maria Luxmore, the wife of the respondent, thereby doing injury to the said property to the extent of three shillings.

The appellants were convicted and fined in the sum of sixpence each, together with a sum of eight shillings for costs and a sum of eightpence for damage to the property.

The respondent's wife is the owner of the land on either side of a certain footpath, and is the owner of the land over which the footpath passes. The land on either side of the footpath is separated from the footpath by a fence and communicates therewith by gates.

The public have a right of way or passage on foot only along the footpath. The respondent's cattle on being driven from the land on one side of the footpath to the land on the other side of the path have occasionally bolted down the footpath, and to prevent the cattle so straying along the footpath the respondent placed two wooden posts in the middle of the footpath, one post at the point A. at the entrance to the footpath, the other at a point B. some distance along the footpath, at the place where the property of the respondent's wife ended. The post at the point B. was placed in the middle of the path between two iron standards which had formerly carried a gate which was formerly closed by the respondent once a year.

The space between the two standards was four and a half feet, and, as the post was about four inches square, there was a space of about two feet on either side of the post through which foot passengers could pass. On the 10th of April the appellants, with some thirty others, in the presence of the respondent and against his will, pulled up the post at the point B. and threw it over the fence on to the adjoining land.

The justices convicted the appellants, being of opinion

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

that the respondent was in law justified in putting up the post, and that the right of passing along the footpath had not been in any way impaired by the acts of the respondent, and that the appellants, in removing the post, had not acted under a fair and reasonable supposition that they had a right to do so.

Section 52 of the Malicious Injury to Property Act, 1861 (24 & 25 Vict. c. 97), enacts that "whoever shall wilfully or maliciously commit any damage, injury, or spoil to any real or personal property shall, on conviction before a justice, be subject to imprisonment or fine . . . . provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of."

Dale Hart, for the appellants.—There are two questions in the case—whether the respondent was or was not justified in placing the post in the highway; and, secondly, whether, even if the respondent was so justified, the jurisdiction of the justices was not ousted on the ground that the appellants acted under a fair and reasonable supposition that they had a right to pull up the post. As to the first point, the public footpath was a public highway: *Rex* v. *Inhabitants of the County of Salop*, 13 East, at p. 97; *Rex* v. *Severn and Wye Railway Co.*, 2 B. & Ald., at p. 648. Such an obstruction is a nuisance: Hawkins' Pleas of the Crown, vol. 1, p. 701; *Reg.* v. *United Kingdom Telegraph Co.*, 10 W. R. 538; *Reg.* v. *Towgood*, 35 J. P. 791. As to the second point, the appellants had a fair and reasonable supposition that they had a right to do what they did, and so they come within the proviso of the section.

Rev. B. Coleridge, for the respondent, was heard as to the second point.—There was no evidence of obstruction, or that any persons had found it more difficult to pass after the post was erected. Where a right which is claimed cannot exist in law, that ousts the idea of a *bonâ fide* claim of right: *Bagshaw* v. *Buxton Local Board of Health*, 24 W. R. 231, 1 Ch. D. 220; *Mussett* v. *Burch*, 35 L. T. N. S. 486; *White* v. *Feast*, 20 W. R. 382, L. R. 7 Q. B. 353. The claim here put forward is that the public had a right to go over every part of the footpath, a claim which does not exist in law, and therefore there can be no fair or reasonable supposition of right in such a case.

FRY, L.J., after stating the facts, proceeded:—In that state of things three defendants are brought before the magistrates, and are charged with having wilfully or maliciously damaged the post.

I shall not express any opinion on the question whether this post was an obstruction of the footpath or not, but I shall assume, for the purposes of this case, that it was not an obstruction. Then comes the question whether the facts before us do not show that the defendants had a fair and reasonable supposition of right. The defendants proceeded to remove the post at the point B. but they did not interfere with the post at the point A., and it is clear that they thought they had a right to remove the post, as they appeared before the magistrates with a great cloud of witnesses to prove that there was a public footpath at the point in question. These witnesses were not called, as the right of way was admitted.

I think, under the circumstances, we are entitled to assume that the defendants had a fair and reasonable supposition that they had a right to do the act they did, and the case therefore comes within the proviso of the section, so that the conviction was wrong.

MATHEW, J.—I am of the same opinion. The jurisdiction of the magistrates is limited in cases of this kind by the very clear and precise language of the proviso. The first inquiry would be as to whether what was done was done under a fair and reasonable supposition of right. For the reasons given by the Lord Justice, I think it was, and that the jurisdiction of the magistrates was ousted. The defendants came with a body of witnesses to prove the right, but these witnesses were not called. The magistrates ought to have come to the conclusion that what was done was done under a fair and reasonable supposition of right, and the conviction therefore ought to be quashed.

Conviction quashed.

Solicitors for the appellants, *G. Thompson & Son.*

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Ford, Harris, & Ford*, Exeter.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) } Nov. 25.

BADCOCK v. HUNT. (a.)

County court—Practice—Costs—Order for, on higher scale—Certificate signed on a subsequent day to order—County Court Rules, 1889, *ord.* 50, *r.* 8—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 119.

Ord. 50, *r.* 8, *of the County Court Rules*, 1889, *provides that, "where a judge certifies under section* 119 *of the County Courts Act*, 1888, *the certificate shall be entered at the end of the minutes of the court of the day on which it is given, and shall be signed by the judge."*

In an action brought in the City of London Court, the judge made an order for costs on the higher scale, but omitted to give the certificate required by section 119 *of the County Courts Act*, 1888, *on the same day. On a subsequent day he signed a certificate, which was entered at the end of the minutes of the court of the day on which he gave the order.*

Held, that he was not prevented by the directions given in ord. 50, *r.* 8, *from adopting this course.*

Application for a writ of prohibition to the judge of the City of London Court prohibiting further proceedings being taken under an order made by him directing that the defendant's costs be taxed on the higher scale.

The plaintiffs obtained a verdict and judgment in the City of London Court on March 8, 1888, for £6 6s. and costs, the defendant having leave to appeal. The judgment was affirmed on appeal to the Divisional Court, but was subsequently reversed by the Court of Appeal (see 37 W. R. 205, where the facts upon which the action was brought are fully set out), and judgment was ordered to be entered for the defendant, with costs. The defendant thereupon, on the 8th of April, 1889, obtained an order from the judge of the City of London Court for costs on the higher scale, but no certificate was given, as required by section 119 of the County Courts Act, 1888. On the 23rd of July, 1889, the plaintiffs applied to the judge to rescind this order, and pointed out that he had not given the necessary certificate. The application was refused, and the judge thereupon signed a certificate which was entered at the end of the minutes of the court of the 8th of April. The plaintiffs then applied for a writ of prohibition to Pollock, B., at chambers, who referred the matter to the court.

E. Hume Williams, for the plaintiffs.—The Court of Appeal having dealt with the costs in their order, the judge of the City of London Court has no power to vary such order. Having dealt with the costs at the trial of the action he could not afterwards amend his order: *Taylor* v. *Great Northern Railway Co.*, L. R. 1 C. P. 430, 14 W. R. C. L. Dig. 27. The judge did not give the certificate required by section 119 of the County Courts Act, 1888, until too late: *Howard* v. *Graves*, 52 L. T.

(a.) Reported by G. K. PALEY, Esq., Barrister-at-L

N. S. 858, 33 W. R. Dig. 65. Ord. 50, r. 8, of the County Court Rules, 1889, requires that the order and certificate be made on the same day, and as he certificatet was not signed till July 23 the order is bad.

C. E. Jones, for the defendant.—The judge had discretion to make the order. Ord. 50, r. 8, does not prevent him from giving a certificate on a day subsequent to that on which he made the order.

E. Hume Williams replied.

Lord COLERIDGE, C.J.—This application must be dismissed. There is no doubt that the defendant is entitled to costs on the higher scale, and that the judge of the City of London Court intended, when he made the order of the 8th of April, 1888, that he should have them. Unless, therefore, we can find clear directions to the contrary, I am of opinion that he acted rightly in adopting the course he did. I can find nothing whatever, either in the County Courts Act, 1888, or in the rules, which prohibits such a course. If the attention of the judge had been drawn to ord. 50, r. 8, he would doubtless have made the proper entry of the certificate at the time, and as there is nothing in that rule to prevent a subsequent entry, he was justified in making one for the purpose of giving effect to his order.

MATHEW, J.—I am of the same opinion. The Court of Appeal, when making their order as to costs, never intended to interfere with the discretion given to the judge by section 119 of the County Courts Act, 1888. With regard to the form of the certificate, it is clear that rule 8 of order 50 is intended to be merely directory, and I think that the learned judge was right in correcting the mistake which he had made in not having given a certificate at the time he made the order, and that a prohibition must be refused.

Application dismissed.

Solicitor for the plaintiffs, *Arthur Harries.*

Solicitors for the defendant, *A. H. Hunt & Co.*

C. C. R. Dec. 14.

REG. *v.* JAMES HALLIDAY. (*a.*)

Criminal law—Inflicting grievous bodily harm—24 & 25 Vict. c. 100, s. 20—Threats unaccompanied by physical acts.

The prosecutrix, being on reasonable grounds frightened by the prisoner's threats, climbed out of a window to escape, and was injured.

Held, that the prisoner was rightly convicted of inflicting grievous bodily harm under section 20 of 24 & 25 Vict. c. 100.

Reg. *v.* Martin, 30 *W. R.* 106, 8 *Q. B. D.* 54, *followed.*

The prisoner had been tried at the Durham County Sessions on an indictment charging him with having wilfully and maliciously inflicted grievous bodily harm on Mary Ann Halliday and (in a second count) with having assaulted her thereby occasioning her actual bodily harm.

It was proved that Mary Ann Halliday was prisoner's wife; that he had been frequently drunk during the twelve months preceding the day on which the offence was committed; that whilst drunk his language was very violent and abusive; that he had threatened her frequently; and that in consequence of his threats she had had to leave home and go to a neighbour's house about a week before the day in question; but he had never actually used violence towards her.

On the day in question, in consequence of a request made to her by Margaret Ann Halliday (the daughter of prosecutrix and of prisoner), the prosecutrix went home and found prisoner very drunk; the son of the prisoner and prosecutrix was also there, and whilst he remained prisoner was quiet, but the son left the house after a short interval, and then prisoner fastened the door and the windows and used threatening language towards the prosecutrix, also calling her bad names and ordering her and the daughter off to bed. Prosecutrix was in an inner room and prisoner shortly afterwards called out to her asking if she was in bed. Prosecutrix said she was not, whereupon prisoner exclaimed "I'll make you so that you can't go to bed," and whilst staggering towards the inner room he knocked himself against a closet in the outer room. Prosecutrix was afraid he would blame her for that, and ran to the window, took the hasp off it, and opened it in order to get out, and had got one leg out when their daughter caught hold of her and held her. Prisoner by this time had got into the room where prosecutrix was, and was within reach of her, and was calling out to let her go; whereupon the daughter left hold, and prosecutrix fell into the street and broke her leg. Both mother and daughter were very frightened. Whilst prosecutrix was lying on the flags beneath, prisoner jeered at her from the window, saying it served her right, and he made no attempt to help her.

On these facts the chairman directed the jury that if the prosecutrix's apprehension was well grounded taking into account the circumstances in which she was placed, and if getting out of the window was an act such as under the circumstances a woman might reasonably be led to take, they should find the prisoner guilty. The jury returned a general verdict of guilty on the whole indictment.

The question for this court was whether or not the prisoner was rightly convicted.

No counsel appeared for the prisoner.

J. Lawson Walton (*Simey* with him), for the prosecution.—The question is whether by threats alone, unaccompanied by physical acts as in the case of *Reg.* v. *Martin*, 30 W. R. 106, 8 Q. B. D. 54, the prisoner can be said to have "inflicted" bodily harm under section 20 of the 24 & 25 Vict. c. 100, although the act of the party injured was voluntary. Under section 18 of the same statute it has been held that bodily harm may be "caused" by such means, and at common law if death had resulted it is clear that the prisoner would have been guilty of manslaughter. It is submitted that the prisoner ought to be equally held responsible under section 18 in the present case.

Lord COLERIDGE, C.J.—I am of opinion that this case is governed by the decision in *Reg.* v. *Martin*, where the acts done by the prisoner were not the direct physical cause of the injury inflicted, but led to a panic among the audience at the theatre whereby persons were injured. The prisoner was there taken to have intended the natural consequences of that which he did, and I think the same principle governs this case, and the prisoner was rightly convicted.

MATHEW, CAVE, DAY, and A. L. SMITH, JJ., concurred.

Conviction affirmed.

Solicitors, *Newlands*, Newcastle.

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a.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

House of Lords.

From C. A. (Ireland). July 22, 1889.

M'Cabe v. Bank of Ireland. (a.)

Practice—Staying second action for same matter—Costs unpaid.

Where a plaintiff, having failed in one action, commences a second action for substantially the same matter, the second action will be stayed until the costs of the first action have been paid.

Martin v. Earl Beauchamp, 32 *W. R.* 17, 25 *Ch. D.* 12, *approved.*

This was an appeal from a decision of the Court of Appeal in Ireland.

The facts are given in the judgment of Lord Herschell.

C. F. M. Mundy, for the appellant.

Robertson, Q.C. (of the Irish Bar), for the respondents, was not heard.

Lord Herschell.—This is an appeal from a judgment of the Court of Appeal in Ireland affirming a judgment of the Chancery Division. The appellant alleges that a certain amount of stock which was then standing in the name of John Glynn was, in the year 1856, settled, in some way or other, upon the niece of John Glynn, who afterwards became the wife of the appellant. The wife died in the year 1866, and in March, 1887, an action was brought by the appellant in the Exchequer Division in Ireland to recover from the Bank of Ireland the amount of stock which had so stood in the name of John Glynn, and, as he alleged, had been settled upon his wife, on the allegation that he, as her representative, had then become entitled to it. That action was tried before Morris, C.J., and a special jury, and a verdict and judgment were given for the defendants. The costs were afterwards taxed at a sum of £32.

An action was subsequently commenced by the appellant in the month of April, 1887, in the Chancery Division of the same court. He alleges that the former action was dismissed because it had been commenced in the wrong division of the court, it being a matter for the Chancery Division, and that he was ill-advised in having brought it in the Exchequer Division. Upon that an application was made by him to be allowed to sue *in formâ pauperis*. A cross-notice was then given by the present respondents praying that the action might either be stayed as frivolous and vexatious and an abuse of the powers of the court, or that it might be stayed until the appellant had paid the costs of the first action. Upon those notices of motion coming on the Master of the Rolls ordered that the petition for leave to sue *in formâ pauperis* should be dismissed, and that the action should be stayed until the costs of the former action had been paid by the appellant. From that decision the case was taken to the Court of Appeal in Ireland, and the decision, after argument, was by that court affirmed.

I think that the judgment is really not open to objection of any sort. It was a matter within the discretion of the learned judge of the court below, the court of first instance (and the Court of Appeal in Ireland have deemed that that discretion was properly exercised), whether he would refuse or grant the permission to sue *in formâ pauperis*. He, in the exercise of that discretion, considered that it was not a case in which he ought to grant it. The Court of Appeal have concurred in that view, and I can see no reason to doubt that they acted with perfect propriety.

The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid.

Now I find that it was laid down in a recent case in the Court of Appeal—*Martin* v. *Earl Beauchamp*, 32 W. R. 17, 25 Ch. D. 12—that "the rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid"; and there, even although the actions were not precisely between the same parties or in the same capacity, the case was held to be within the rule, inasmuch as the plaintiff there was "suing substantially by virtue of the same alleged title." It cannot be denied that in the present case the parties are the same, and that the plaintiff is "suing substantially by virtue of the same alleged title"; and, therefore, in accordance with that rule, which I apprehend is not in any respect confined to the courts in England, but applies as well to the courts in Ireland, it merely arising out of the inherent power which resides in the court to prevent a second suit being brought upon the same cause of action in the same court until the costs incurred in the first action have been paid, I think that the present case is really disposed of. It shows that it is impossible for us to interfere with that which the Court of Appeal have done, which has been entirely within their jurisdiction, and I can see no reason to doubt that it has been right.

I come with the less regret to this conclusion because, as far as I can see, if the appellant here were allowed to sue he would really not have given to him any right which would be of any advantage to him, for, from all that I have heard to-day, I have been unable to see that he would be likely to make out any sort of case against the present respondents, or to take any benefit from the litigation which he has commenced against them.

I move your lordships that the appeal be dismissed.

Lord Fitzgerald.—I concur in everything which my noble and learned friend has stated, and I should only add, from my experience of the practice in Ireland, where I was for a long time upon the bench, that as long as I can recollect, it has been part of the inherent jurisdiction, and never doubted, of every court in Ireland to stay proceedings in an action before it, where a prior action has been brought substantially asserting the same rights against the same parties in the same or another court, until the costs of that prior action have been paid. It was quite a matter of course and a part of the jurisdiction of the court, and never quarrelled with. That is exactly what the Master of the Rolls has done, and that is what the Court of Appeal has affirmed.

I join with my noble and learned friend in saying that I concur in dismissing the appeal with the less reluctance because, having read carefully the whole of the various conflicting statements put forward by the appellant, the plaintiff in the court below, I cannot make out that he ever had the least shadow of claim as against the Bank of Ireland. If this stock was bound by a trust he may follow and assert that trust against the parties to whom that stock was transferred. It appears to have been transferred properly and regularly to the personal representatives of John Glynn, the survivor of Owen Glynn and John Glynn, in whose names the stock stood. He may have that right—upon that I express no opinion; but against the Bank of Ireland he never had the shadow of a claim.

Lord Macnaghten concurred.

Judgment appealed from affirmed and appeal dismissed.

The appellant in person.

Solicitors for the respondents, *Freshfields & Williams*, for *Edward H. de Moleyns*, Dublin.

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. Dec. 10.

NIEMANN v. NIEMANN. (a.)

Partnership—Dissolution—Partner intrusted with the liquidation of the dissolved firm—Appointment of such partner as receiver—Debt due to the partnership—Scheme proposed by liquidating partner, in substitution of the debt, to take shares in a new company formed to work out the estate of the debtor—Whether court has jurisdiction to compel unwilling partner to assent to such scheme.

By a deed of dissolution of partnership between the plaintiff and the defendant, it was agreed that the defendant should have the sole management of the liquidation of the partnership firm, should pay all existing debts of the firm, and indemnify the plaintiff against the same, and should account to the plaintiff for the share of any dividends which might be received in respect of any debts or claims, after payment of all creditors of the firm out of the assets of the firm. The firm had a claim for a large sum against a foreign merchant, in respect of which claim little or nothing was capable of being realized in the ordinary way. The defendant had proposed, with a view to obtaining something on this claim, to take shares in a company about to be formed, the object of which was to take over the property of the debtor in question, subject to an arrangement being come to with the creditors of the debtor to accept, in shares of the company, amounts equal to twenty-five per cent. of the value of their claims.

The plaintiff having brought an action to have the accounts of the partnership taken and to restrain the defendant from carrying out, in opposition to the wish of the plaintiff, such proposed arrangement, an order was made by Kekewich, J., *appointing the defendant receiver, with liberty to compromise the claim in question upon terms to be approved by the judge in chambers.*

Held, (1) *that the deed of dissolution contained no power, either express or implied, authorizing the defendant to enter into any arrangement of the kind proposed;* (2) *that the appointment of the defendant as receiver did not give the court jurisdiction to clothe the defendant as receiver, contrary to the wish of the plaintiff, with authority not given by the agreement between the partners; and* (3) *that the order appointing the defendant receiver having been in fact made for the purpose of enabling the proposed arrangement to be carried into effect, should be discharged.*

In re Land Credit Co. of Ireland, Weikersheim's case, 21 *W. R.* 612, *L. R.* 8 *Ch. App.* 831, *explained.*

Appeal from Kekewich, J., sitting for North, J.

The plaintiff and the defendant were two brothers who had carried on business in partnership; the partnership was dissolved by a deed dated the 3rd of June, 1887, and made between the two partners, whereby it was agreed that the defendant should have the sole superintendence and management of the liquidation of the firm, and should pay all debts of the firm and indemnify the plaintiff against the same. Clause 3 of the deed provided that "Neither of the said partners will make any claim upon the other of them, but the said H. W. E. Niemann (*i.e.*, the defendant) shall pay all the existing debts of the firm and indemnify the said Karl Niemann (*i.e.*, the plaintiff) against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims after all the creditors of the firm shall have been paid out of the existing assets of the firm." Among the assets of the firm was a large sum claimed to be due from a firm of merchants in Java, as to which sum or claim it was, until recently, believed that nothing would be paid, the property of the Javan firm being subject to a mortgage in favour of certain bankers in Amsterdam. It appeared from the evidence that a limited company had been, or was about to be, formed in Amsterdam for the purpose of taking over the estate of the Javan firm, subject to an arrangement being come to with the creditors of that firm by which such creditors were to accept in shares in the company amounts equal to twenty-five per cent. of the value of their claims.

By his writ in this action the plaintiff claimed (1) to have the accounts taken of the partnership lately existing between him and the defendant, and the affairs wound up under the direction of the court; and (2) an injunction to restrain the defendant compromising, settling, or abandoning the claim of the partnership firm against the Javan firm in opposition to the plaintiff's instructions and without his consent.

On the 9th of December, 1889, Kekewich, J., sitting for North, J., made an order that, "upon payment of £2,000 into court by the defendant as security for the eventual share of the plaintiff under the deed of dissolution, the defendant be appointed receiver, with liberty to compromise the claim in question upon terms to be approved by the judge in chambers, the defendant to give, forthwith, copies of the documents relating to the compromise, and to prepare a memorandum stating the details thereof in order that the plaintiff might have an opportunity of considering them."

From this order the plaintiff appealed.

Cozens-Hardy, Q.C. (*Christopher James* with him), for the appellant.—The court has no jurisdiction to compel an unwilling partner to accept shares in a company in satisfaction of a debt due to the partnership; the court has no power to force such a compromise on adults.

Napier Higgins, Q.C., and *Ingle Joyce*, for the respondent.—The terms of the deed of dissolution give the defendant power to effect the proposed arrangement. The defendant is willing to take the allotment of shares in his own name and to indemnify the plaintiff. A partner carrying out the liquidation of a firm has implied authority to receive satisfaction for a debt due to the firm in "meal or in malt." Lindley on Partnership, 5th ed., p. 141, citing *In re Land Credit Co. of Ireland, Weikersheim's case*, 21 W. R. 612, L. R. 8 Ch. App. 831. This is really the case of the appointment of a receiver of the assets of this partnership, and as the court has power to authorise the receiver to accept a smaller sum in satisfaction of a debt for a larger amount, so also has it power to authorise the receiver to accept "meal or malt" in satisfaction of a debt due, for the meal or malt may be converted into money next day. In *West of England and New South Wales District Bank* v. *Murch*, 31 W. R. 467, 23 Ch. D. 138, Fry, J., held that an executor had power to sell partnership property, not for cash, but for other property, consisting in part, of shares and debentures. No compromise has been in fact as yet sanctioned by the court.

Cozens-Hardy, Q.C., in reply.—In *In re Crawshay, Dennis* v. *Crawshay*, 33 S. J., 126, North, J., held that he had no jurisdiction to sanction an agreement for the sale of the testator's share in a mining business to a limited company, the purchase-money to be paid in shares of the company, and the trusts of the will not expressly authorizing the investment of the trust property in the shares of the limited company. In the winding up of a company the court has no jurisdiction to compel the liquidator to accept a compromise: *East of England Banking Co., Pearson's case*, 20 W. R. 394, L. R. 7 Ch. App. 309.

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

COTTON, L.J.—This is an appeal from an order of Kekewich, J., directing the winding up of the partnership affairs in this case. The action was brought to have the partnership accounts taken and for the appointment of a receiver. The plaintiff and the defendant are brothers, who carried on business in partnership, which was dissolved by agreement a few years ago. Kekewich, J., made an order appointing a receiver with liberty to come before him, in order, as has been suggested, to discuss the terms of a proposed arrangement to be entered into. What is stated in the affidavit of the defendant, as a sketch of the proposed arrangement—is this, that there is a large debt due to the partnership by a firm in Java, and that there is no chance of getting any payment in respect of that debt except by entering into an arrangement for the formation of a limited company to take over the property of the Javan firm, and for the handing over of shares in such company to the different creditors of the Javan firm. That is all the affidavit states. But on the hearing of this appeal we have learned some further details as to this company. It is to be a limited company, not in England but in Holland, whatever a limited company in Holland may be.

This is strongly objected to by the plaintiff, and he says that Kekewich, J., had no right or power to compel him to assent to a compromise of the debt being entered into by the defendant on these terms. I do not enter into the question whether this is properly a compromise or not, but I hold that the learned judge had no power to authorize the defendant to enter into such an arrangement. How does the defendant justify it? The defendant could not, after the institution of this action, exercise the powers given to him by the deed of dissolution made between him and the plaintiff, except by the leave of the court; but the court, in my opinion, could not give him any extra powers beyond the authority which he had under the deed as liquidating partner. The action was really a limit on his powers under the deed, as it prevented him exercising those powers without the sanction of the court. Could the court, then, sanction the agreement which the defendant proposes to enter into? Is there anything in the deed of dissolution which enables that to be done? I do not think it can be contended (subject to the case cited by Mr. Ingle Joyce) that one partner, though he be the partner carrying out the winding up of the affairs of the partnership, can enter into such an arrangement as is proposed, unless some power to do so was expressly given him by the other partner; and in this deed I cannot see anything which gives the defendant any special power to enter into any special arrangement like this. The deed makes the defendant the person to wind up the concern; he is to pay all the debts, and I think (though that question has not been much argued) it prevents the plaintiff from interfering, except by instituting an action, with the exercise of the powers given to the defendant by the deed. The defendant is to take upon himself the whole burthen of the liquidation of the partnership firm and the payment of the creditors, and is to indemnify the plaintiff against the claims of the said creditors. It runs thus: "Neither of the said partners will make any claim upon the other of them, but the said H. W. F. Niemann (that is, the defendant) shall pay all the existing debts of the firm, and indemnify the said Karl Niemann (that is, the plaintiff) against the same, and shall also pay and account to him for the share of any dividends which may be received in respect of any debts or claims after all the creditors of the firm shall have been paid out of the existing assets of the firm."

Now that does not give the defendant any special power as regards dealing with the assets, it only limits the burthen which he undertakes; and so far, therefore, as there are any indications there, it shows that he would not have any authority to take shares in a new company, because the deed supposes *primâ facie* that what will be received by him in respect of the assets of the firm would be divisible as dividends between himself and his partner. I think that is valuable as showing that it contemplates the winding up of the firm, and that the assets of the partnership should be wound up in the ordinary way, which would be to realize and get payment of whatever could be got—payment in full, if possible, if not, payment of such sum as could be obtained.

The question then arises, has the court any power given to it by the appointment of a receiver? That question was the one most pressed on us, and most relied upon, by the respondent.

It is very true that the receiver is appointed on behalf of both the parties to the action, but in my opinion it is only for the purpose of carrying into effect on behalf of both, the powers that are given by the contract between the parties. It does not enable the court to authorize the receiver to make a new contract between the parties, or to assume to himself a power which, by the contract, has not been given him by the other party. In my opinion, therefore, it would be wrong to hold that the court can, by appointing a receiver, enable the receiver to do that which the court cannot authorize one partner to do without the consent and against the will of the other partner.

I do not enter into the question as to whether it is, or is not, correct to say that this proposed scheme will give the most profitable result to the two partners if they like to accept it. The only question we have to deal with is whether the plaintiff, as one of the partners, is or is not right in saying to the defendant, "You have no power to do this; the court was wrong in purporting to give you authority to do it." In my opinion this is not merely payment of a debt nor any compromise of a payment of a debt, but it is sanctioning the defendant entering, on behalf of himself and of the plaintiff, his partner, into a speculation to work out the estate of a debtor to the firm in such a way as to probably produce a profitable result. In my opinion the court has no power either to authorize a receiver, or the defendant, without the appointment of a receiver, to do that, when the contract between the parties does not authorize it.

Now the order made by Kekewich, J., only purports to be the appointment of a receiver, and it was pressed upon us that the appointment of a receiver in consequence of difficulties between partners is almost a matter of course, and that there can be no valid objection to that.

I do not think, however, the order can be regarded quite in that view. The appointment of a receiver under this order was simply made for the purpose of enabling the proposed scheme to be carried into effect; that was the sole reason and object of this order; the appointment of the defendant as receiver was simply machinery for the purpose of enabling that to be carried out in a way that the court might have control over it.

I think Kekewich, J., was acting in the way he thought most advisable for the interests of both parties, but in my opinion the judge had no power to authorize such a scheme to be carried into effect under the guise of compromising a claim against a debtor to the firm.

I think that the best course for us to adopt is to discharge the order altogether, without prejudice to any other application for the appointment of a receiver, and the appellant must have the costs of the appeal.

As to *Weikersheim's case*, which was cited to us as an authority for what was done in the present case, I refer to it merely because it was so quoted as sanctioned by the opinion of Lindley, L.J., in his book on Partnership. In that case one member of a firm of bankers took as security, and brought into the names of the partners, shares in a company, which involved liability; and it is

said that that is an authority in favour of the receiver here doing what he is proposing to do.

But what James and Mellish, L.JJ., decided in that case was, that in the business of bankers it was so ordinary to take shares in companies as a security for a debt that that was part of the defined contract between them, and James, L.J., points out that in fact all the partners assented to this being done.

I rather think that the statement of Lindley, L.J., has been a little misunderstood. He says, "One partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm"—I do not think there is any doubt about that. Then he goes on—"And where one member of a firm of bankers accepted as security, for money due to the bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories." The first part of the sentence does look as if it were a general statement of the law that there would be an implied authority in partners generally—not merely in the partners in that particular case—to accept shares under the circumstances. But when one examines the case to which he refers (*Weikersheim's case*), one sees that that was not the meaning of that case, and I cannot think that he intended to lay down, relying on that case, a general proposition of law that what was done in *Weikersheim's case* could be done in every case of partnership. I thought it right to refer to this, because, from the way in which it was presented to us, that statement in Lindley, L.J.'s book might mislead others who did not look at the authority cited for the statement, which I always like to do, even in the case of a book like Lindley, L.J.'s.

In my opinion, the contention of the appellant is the right one.

BOWEN, L.J.—I am of the same opinion. In this case there is no power under the deed to do what is desired to be done. It seems to me, for the reasons given by the Lord Justice, that the court has no power to clothe a receiver with authority wholly transcending the conventual powers of the parties.

It does not seem to me necessary to decide that in no case can anything except cash be taken by way of compromise; one can imagine that that would depend on the circumstances of the particular case. But in this case there is really no compromise at all; it is the mere substitution, for the payment of a debt, of a speculation to take shares in a new and unformed company in Amsterdam, the object of which is, by the employment of the debtor's assets, to recoup the creditors. That is something far more than a compromise, and therefore I think it is not what the court can impose on an unwilling partner.

I entirely agree with what Cotton, L.J., has said about *Weikersheim's case*. The whole *ratio decidendi* there turned on what was the ordinary scope and authority of a partner in a banking business. Both James and Mellish, L.JJ., base their decision on the broad foundation of what is, in their opinion, the ordinary commercial business of a banker; and James, L.J., assumes, as a reason for his decision in that particular case, that the authority there was not only implied, or rather capable of being implied, from the scope of business of the partnership, but was actually an express authority conferred by the knowledge and assent of the other partners.

That shows that that case is not an authority for the proposition for which it was cited, and that the passage in Lindley, L.J.'s book, if it did imply that (and perhaps it does not), would be *per incuriam*.

FRY, L.J.—If I were not differing from the decision of the learned judge below I should probably say nothing, but as it is, I will shortly state the reasons why I concur with my learned brethren. The arrangement contemplated in this case is of this kind. The claim which the partnership had against the Javan firm is to be given up to a new company which is intended to be formed, and the partners in the dissolved firm are to become shareholders in a concern which is to be carried on with the property of the Javan firm; in other words, instead of remaining creditors of the Javan firm they are to become partners by way of a limited company in the affairs of the business of their debtor. That is the nature and scope of the arrangement proposed. Now it appears to me that such an arrangement as that, is not within the ordinary powers of a partner who is charged with the liquidation of a dissolved partnership. It is not necessary to say if he is bound to receive all the property which he collects in the form of cash, or whether under the circumstances he might have proceeded in another form. That point does not require decision. But that he has power to enter into a company or partnership to carry on the business of the debtor to the firm which he is winding up is, in my opinion, not the case. I think, therefore, that, looked upon from a general point of view, the contention cannot be successfully urged.

Then it was said that the deed of the 3rd of June, 1887, makes a difference, and that it shows that the defendant was to be made so completely *dominus* of the winding up that he has power to do this.

I find nothing in the deed to support that contention. It appears to me only to contemplate an ordinary liquidation of the partnership affairs, with this exception, that the plaintiff is not to interfere in matters of discretion arising in that winding up. It does not clothe the defendant with any larger power, or any power of doing anything otherwise than a liquidating partner might do; and, as has been already observed by Cotton, L.J., the third clause of the deed, referring to the defendant accounting to the plaintiff for his share of any dividend received, looks as though the intention of the parties was that these outstanding claims were to be got in by way of receipt of dividends on the claims, and not by way of any such arrangement as is now proposed.

In my opinion the appointment of the defendant as receiver would not enlarge his powers, because, whilst the court, by appointing the defendant receiver, protects his operations and gives him power of having recourse to the court for assistance and advice, it does not enable him to do that as against the plaintiff which the existing convention or agreement between the parties does not justify.

I repudiate the notion that the court has a general discretion to do what it thinks best for the parties in the winding up of their affairs, which is the subject of agreement and obligation between them; and it appears to me that the argument that the court can do what it thinks best, cannot hold.

There appears to me to be no real authority cited in support of the contention which has been urged on us. I will say nothing more about *Weikersheim's case*, except that I entirely agree in the comments made upon it by Lord Justice Cotton. With regard to the case pressed upon us, and perhaps especially upon myself—viz., *West of England and New South Wales District Bank* v. *Murch*—I will only say that it has nothing to do with the present case, and whether rightly or wrongly decided seems immaterial. The conclusions I arrived at there were, in substance, that there was a compromise by the executrix with the bank of her deceased husband's copartner, and that (whether rightly or wrongly concluded seems to me immaterial) such compromise came under Lord Cranworth's Act. It has nothing to do with the power of a receiver appointed in a suit the object of which is the winding up of the affairs of a dissolved partnership.

I think, therefore, that the order must be discharged, and that the order suggested by Cotton, L.J., is the right one.

Appeal allowed, with costs here and below.

Solicitors for the appellant, *Druces & Attlee.*

Solicitors for the respondent, *Hollams, Son, Coward, & Hawksley.*

From Q. B. Div. Nov. 4; Dec. 19.

SWAINE *v.* WILSON. (*a.*)

Friendly society—Illegality of rules—Restraint of trade —Trades Union Acts (34 *&* 35 *Vict. c.* 31, *s.* 23; 39 *&* 40 *Vict. c.* 22, *s.* 16).

Where the objects of a friendly society are themselves legal, but some of the rules are illegal, being in restraint of trade, the society may nevertheless sue and be sued upon such of its rules as are not tainted with this vice.

Collins *v.* Locke, 28 *W. R.* 189, 4 *App. Cas.* 674, *discussed.*

Appeal from the decision of Denman, J.

The action was brought by a member of the Bradford Power-Loom Overlookers' Friendly Society against the officers of the society to recover a benefit of £50 to which he claimed to be entitled under rule 51 of the rules of the society. The defendants alleged that as the society, which was not registered either under the Trades Union Acts or under the Friendly Society Acts, was one the object of which was in restraint of trade, it was therefore illegal, and as such could not sue or be sued in a court of law.

Denman, J., gave judgment for the plaintiff.

The defendants appealed.

Tindal Atkinson, Q.C., and *Morton Smith*, for the appellants.—If the society is legal the plaintiff is entitled to recover. But the object of the society, as shown by the rules, being in restraint of trade, it is, in fact, illegal.

They referred to *Hilton* v. *Eckersley*, 6 E. & B. 66, 3 W. R. Dig. 176; *Hornby* v. *Close*, 15 W. R. 336, L. R. 2 Q. B. 153; *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482; *Wolfe* v. *Matthews*, 30 W. R. 838, 21 Ch. D. 194; *Strick* v. *Swansea Tin Plate Co.*, 35 W. R. 831, 36 Ch. D. 558; 34 & 35 Vict. c. 31, *ss.* 3, 4; 39 & 40 Vict. c. 22, *s.* 16.

Waddy, Q.C., and *Waugh*, for the respondent.—The object of these rules is purely beneficial and to protect the funds of the society. Although a particular rule may be in restraint of trade, that will not make the society itself illegal.

They cited *Farrer* v. *Close*, 17 W. R. 1129, L. R. 4 Q. B. 602.

Tindal Atkinson, Q.C., replied.

Cur. adv. vult.

The following rules of the society were referred to in the course of the argument:—

"2. The objects of this society are the raising of funds by entrance fees, subscriptions, fines, donations, levies, accumulated capital, and interest arising therefrom for the following purposes—namely: The rendering of assistance to members when out of employment, the superannuation of aged members, the insuring sums of money to members in case of accident, and to defray the expenses of the burial of deceased members and of members' deceased wives; and all moneys received on account of subscriptions, fines, donations, or otherwise shall be applied towards carrying out the objects of the society according to the rules thereof."

"41. Should any member be thrown out of employment, or having received notice to that effect, he shall inform the president, who may be in possession of such information as will procure him another situation. Should such member claim pecuniary benefit, the president shall lay such claim before the committee at its first meeting after such claim is made, and, if the circumstances are satisfactory to the committee as being in accordance with the rules, such member shall be entitled to receive the sum of 10s. per week for fourteen weeks, and 5s. per week for twelve weeks, provided he has not been thrown out of employment by his own misconduct or neglect. Any member having received the above amounts shall be in a regular situation as overlooker, manager, piece taker-in, or designer for six months before he be entitled to receive pay again. Any member having received any portion of the above pay, who may obtain a situation and lose it again within six months shall commence where he left off his pay, so that he shall not receive more than £10 unless he be in a situation for six months without receiving any benefit. Should any member be discharged from his employment and receive wages in lieu of notice, he shall not receive the benefit of this rule until the time for which he received wages shall have expired."

"42. Should any disagreeable circumstance arise between any member and his employer or manager which would justify such member in giving notice to leave his situation, he shall inform the president of the circumstances of the case, who shall bring the matter before the committee at once, and, if they consider it advisable so to do, shall give such member consent to leave his situation and claim the benefits under rule 41. Should any member leave his situation without such consent he shall not be entitled to benefit."

"47. Any member knowing of a situation being vacant, and acquainting anyone not belonging to this society of the same when there are members out of employment or wishing to change, shall be fined not less than 10s., and not more than £2, as the committee may decide. The committee shall also have the power to suspend such member until the fine is paid."

"48. Should any member apply for a situation where there is any member of this society working, he shall first inquire of one of the said members if there be, or is about to be, a vacancy before he applies for work; and should he apply after being informed by the said member that they are not in want of a man, he shall be fined for the first offence 5s., and if he again offends, 10s."

"49. Should any member be requested to teach a person the trade of a power-loom overlooker, and not be inclined so to do, he shall inform the president of the same, who shall bring the case before the committee at once, and, if they consider it advisable, shall give such member permission to decline to teach such person; and if he should lose his situation through such refusal, he shall be entitled to the same amount as the wages he was receiving when he was discharged until he again find employment."

"51. Any free member not twelve weeks in arrears who may, by losing a limb or having one disabled by accident or otherwise, or through blindness, be rendered permanently unable to follow his employment in any of the branches of trade mentioned in rule 41, provided such was not the result of intemperance or other improper conduct, shall receive the sum of £50 on the production to the committee of satisfactory medical and other testimony. . . ."

"64. No member shall receive any benefit during any turn out or strike, and if the weavers under the care of any member should turn out for wages or against any

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

of the rules of the place made by the employer, and should such member so far interfere as to lose his situation, he shall receive no benefit from this society till he has been in work at some other place for the space of two months."

"66. Should any member of the society who is in a situation apply for any situation which shall be advertised, and to which the parties who advertise do not attach their name or address of the firm, he shall be fined 5s. Should any member lose his situation through applying for a situation so advertised, he shall be suspended the benefits of the society for six months."

Dec. 19.—The following judgments were delivered :—

Lord ESHER, M.R.—In this case the plaintiff, a member of this society, sues its officers for a payment which he alleges to be due to him under the rules of the society. It is not denied that the claim is within the rules, but it is contended that, although the plaintiff has fulfilled all the requirements of the rules, the society is an illegal society, and that, therefore, he is not entitled to sue. The defence is a mean defence, but, nevertheless, if the law is in favour of the society the court must declare it accordingly. If the objects of the society are illegal, and there are stipulations arising from a member carry-out such illegal objects, I have no doubt that the court would not enforce any stipulations in favour of the member. If, for instance, the object of the society were the furtherance of crime, and there were stipulations in favour of a member assisting in carrying out its objects, the court would not aid him to enforce those stipulations. So, if the object of the society was to do something illegal, and in restraint of trade, I should be of opinion that such a society would be so illegal that the court would not assist any of its members to enforce any stipulations in their favour. The question here is whether the object of this society is to establish a monopoly which would be illegal and in restraint of trade. It is clear to me that it has no such object. It is a friendly society, whose object is to assist its members in case of sickness or old age. It is, however, said that there are some rules which, although the general object of the society may not be illegal, will, if carried out, be in restraint of trade, and that therefore the society is illegal. I think that even if some of the rules are in restraint of trade, as long as the general object of the society is not illegal the only effect will be that those particular rules cannot be enforced, and that the existence of those rules which cannot be enforced does not prevent the enforcement of a rule which is not tainted with that vice. The rule in question, upon which the plaintiff sues, is not a rule in restraint of trade, and therefore, in my opinion, the plaintiff is entitled to recover.

This appears to me to be the view laid down by the Privy Council in *Collins* v. *Locke*, 28 W. R. 189, 4 App. Cas. 674. Nor do I think that the rules of this society which have been alleged to be in restraint of trade were so intended. They were intended to prevent any extravagant outlay by the society on any of its members, and they do not exceed that object, even though they may, if carried out, to a certain extent restrain trade. They are, therefore, legal. I think that the plaintiff is entitled to recover, and that the appeal must be dismissed.

LINDLEY, L.J.—The ground of this appeal is that the object of this society is in restraint of trade, and that, therefore, the society being illegal, the plaintiff cannot recover. The defence so raised is not a creditable defence, but the court must consider it, and, if well founded in point of law, must give effect to it. The first point is the bearing of the Trades Union Acts (34 & 35 Vict. c. 31, s. 23, as amended by 39 & 40 Vict. c. 22, s. 16) upon societies of this description. The definition in the first Act as modified by the subsequent Act is that the term "trade union" means such combination, whether temporary or permanent (1) for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or (2) for imposing restrictive conditions, on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. The importance of that definition is that in section 3 of the first Act it is declared that the purposes of a trade union being in restraint of trade do not make the trade union unlawful nor avoid any agreement or trust. But that section is followed by section 4, the result of which is that notwithstanding trades unions are made legal by section 3, yet certain specified agreements mentioned in section 4 cannot be enforced; but even those specified agreements are not unlawful by reason of the inability to enforce them. The practical results of this enactment when applied to this particular society are as follows: (1) the society is a trade union within the definition clause; (2) it is legal by virtue of section 3; (3) the action brought by the plaintiff is an action brought by a member of the society for the payment to him out of its funds of a sum due to him as a member under and by virtue of the rules of the society. Such an action is brought with the object of directly enforcing an agreement for the application of the funds of the society to provide benefit to members, and the action is in fact "a legal proceeding instituted with the object of directly enforcing or recovering damages for an agreement" of the kind mentioned in section 4. Notwithstanding section 3 of the Act this action, therefore, cannot be maintained unless it can be maintained independently of that section. The cases which have already been decided on the Act are all consistent with this view. They are *Rigby* v. *Connol*, where the plaintiff sought relief against expulsion; *Wolfe* v. *Matthews*, where an injunction was granted not directly to enforce an agreement but to restrain a misapplication of funds; and *Strick* v. *The Swansea Tin Plate Co.*, where, after a winding-up order had been made, the assets were held distributable according to such rules as were legal, including those made legal by section 3. The above observations, however, do not exhaust the case; for although the plaintiff cannot avail himself of section 3 of the Trades Union Act, 1871, he will be entitled to relief if the society is a legal society apart from that section.

Is, then, the society a legal society? Illegality is not to be presumed; it must be established by those who rely upon it. The defendants rely on certain rules of this society, and contend (1) that they are illegal, being in restraint of trade; and (2) that, being illegal, the society itself is an illegal society, and cannot, therefore, be sued by one of its own members for money payable to him under its rules. Before dealing with this argument it is to be observed that the particular rule sought to be enforced is not even alleged to be illegal, and that the illegality relied upon is the illegality of other rules and of the objects of the society. The primary and avowed objects of the society are set out in rule 2 and are perfectly legal; but it is said that there are subordinate objects which are illegal and which render the society itself illegal. These objects are to be found in, and are sought to be attained by, rules 42, 47, 48, 49, and 66, and it becomes necessary to examine each of them in turn. These rules, or some of them, impose fines; but they in no way tend to excite or encourage ill-treatment, violence, or crime; and, before examining them in detail, it is desirable to ascertain the principles which render rules illegal simply by reason of their being in restraint of trade. The general proposition that every

society which has rules in restraint of trade is unlawful —*i.e.*, criminal—and that its members are punishable at common law was denied by the court in *Reg.* v. *Stainer*, 18 W. R. 439, L. R. 1 C. C. R. 230, and cannot be supported: see also *Hilton* v. *Eckersley*, *Hornby* v. *Close*, and *per* Patteson, J., in *Price* v. *Green*, 16 M. & W. 353. Such societies are not necessarily indictable as nuisances or as conspiracies, and their rules, although in restraint of trade, are not necessarily unlawful in any criminal sense. Whether such rules can be enforced by civil legal proceedings is quite another matter, and depends mainly on the reasonableness of the rules. But even if some rules of a society cannot be enforced, it by no means follows that other rules of the same society cannot. *Collins* v. *Locke* is a clear authority to this effect, if authority be wanted for so reasonable a proposition. No doubt if the real object of this society were unduly to fetter trade, its rules might all be tainted by the vice of the object, and none of the rules might be enforceable: see *Hornby* v. *Close* and *Farrer* v. *Close*, where the court was equally divided, and where Cockburn, C.J., and Mellor, J., relied on evidence which, in their opinion, showed that the rules were used to support strikes. But it is quite impossible in this case to hold that the avowed objects of this society, as set out in rule 2, are not the real objects of the society. There is no evidence here that the rules are in fact used for the purpose of supporting strikes or for any illegal purpose. We have nothing but the rules before us. If the objects of the society are themselves legal, the introduction of some objectionable rules will at most only have the effect of rendering those particular rules invalid. The other rules will not be affected by them: *Collins* v. *Locke*.

I might stop here, for enough has been said to show that illegality fails to be a defence to this action; but having regard to the importance of the case I pass to the consideration of each of the rules alleged to be invalid. The test of validity in a case like this is reasonableness with reference to the real and legitimate objects of the society: *Collins* v. *Locke*. One of the main objects of this society is to provide a fund for the payment of members when out of work. Rules made for the *bonâ fide* purpose of protecting the funds of the society from claims which can be avoided by reasonable care and management will not be invalid on the ground that they are in restraint of trade, provided the rules are not unduly oppressive or obviously detrimental to the public. To render rules for the above purposes invalid, it must be clearly shown that they go beyond what is necessary for those purposes: see *Tallis* v. *Tallis*, 1 W. R. 114, 1 E. & B. 391. These observations apply to rules made *bonâ fide* for the purpose of protecting the funds of the society from the claims of members who are out of work by their own fault; and to rules made *bonâ fide* for the purpose of protecting the funds from claims which will be made if one member in work seeks to displace another who is himself in work; and to rules made *bonâ fide* for the purpose of enabling members out of work and on the funds to obtain work and relieve the funds. Tried by these principles, rule 42 is clearly valid. It merely prevents a member from obtaining relief from the society if he leaves his situation when the committee think a reasonable man might properly retain it. Rule 47 is also valid, for although it imposes a fine varying from 10s. to 40s. its object is to relieve the funds of the society by assisting a member out of work to get a situation known to another member to be vacant. There is noting in the rule which affects non-members except that when there is a member out of work or wishing to change, non-members are not to be informed by a member of the fact that there is a vacancy. This is not unreasonable, nor are the consequences to members who disobey the rule unduly oppressive. Rule 48 presents more difficulty. Its object is to prevent a member in work from being displaced by another member. But the rule is so worded as to make no distinction between cases where the funds of the society are affected and cases where they are not. If two members are in work, and one is displaced by the other, a burden is thrown on the funds. But the funds of the society are not affected if one member out of work and on the funds supplants another member in work and off the funds. There is a change of claimants on the funds, but no extra burden thrown on them. The rule applies to both classes of cases. But there is always the chance that a member who applies for a situation filled by another may create a vacancy, and yet not obtain it himself; in which case there will be two claimants on the funds instead of one. Moreover, there is something mean in one member trying to supplant another when there is no vacancy, and, the rule being confined to cases where there is no vacancy, it is not unreasonable, and cannot be held invalid.

Rule 49 is unobjectionable; it merely says that a member who declines to teach a person his trade, and who is supported by the committee in his refusal, shall be supported by the society if he loses his place. The member is at liberty to exercise his own judgment in the first instance; if he elects to teach, the rule does not apply; if he refuses, without consulting the committee or contrary to their decision, and he loses his place, it will be his own fault, and he will have no claim on the funds of the society: see rule 41. The rule really protects the society from claims by persons who, in the opinion of the committee, unreasonably refuse to teach, and is in this respect similar to rule 42. Rule 66 is also reasonable, when understood. It applies only to members in employment who apply for other situations, anonymously advertised, and which may or may not be vacant. Persons answering such advertisements run serious risk of dismissal, without obtaining any other situation. The rule is both a warning to members against tricky advertisements and also a protection against claims on the funds by members who unnecessarily lose their places. The appeal, therefore, must be dismissed.

LOPES, L.J.—I agree. If the general object of this society were to fetter the course of trade, all the rules would be tainted with illegality. But this society has no such object. It is clear from the case of *Collins* v. *Locke* that some of the rules may be enforced, although other rules may be in restraint of trade. The rule under which the plaintiff has brought this action is not in restraint of trade, and he is therefore entitled to recover. In my opinion the rules in general are not in restraint of trade; they are only calculated to afford fair protection to the interests of the parties in whose favour they were made, and do not interfere with the general interests of the public.

Appeal dismissed.

Solicitors for the plaintiff, *Elliott & Ash*, for *Robinson & Robinson*, Keighley.

Solicitors for the defendants, *Jaques & Co.*, for *George Curry*, Cleckheaton.

High Court of Justice.

Chan. Div. Kay, J. } Dec. 4.

In re Frost.
Frost *v.* Frost. (*a.*)

Perpetuity—Legal contingent remainder—Possibility on a possibility—Rule against perpetuities.

A testator devised successive life estates in freehold lands to his daughter A., and to any husband whom she might thereafter marry, with contingent remainders over of the legal estate in the lands, to children who might be living at the death of the survivor of A. and such husband.

Held, that the contingent remainders over, though limitations of the legal estate, were void, as obnoxious to the rule against perpetuities.

The application of the rule against perpetuities to legal contingent remainders discussed.

Cole *v.* Sewell, 4 *Dr. & War.* 1, 2 *H. L. Cas.* 186, *explained and distinguished.*

Adjourned summons.

Thomas Frost by his will, dated the 19th of March, 1870, made the following devise:—"I give to my sons John Frost, Edwin Frost, and Albert Frost all those my closes of land and hereditaments situate in the parish of South Brent which are described," &c. . . . "to hold the same unto and to the use of my said sons and their heirs during the life of my daughter Emma Frost without impeachment of waste, upon trust so long as she shall continue unmarried to permit her to receive the rents and profits thereof to her own use, but in case she shall hereafter marry, then upon trust to receive the rents and profits thereof and pay the same to my said daughter Emma Frost for her separate use, . . . and after her decease, then to the use of any husband whom she may hereafter marry and his assigns during his life without impeachment of waste, and from and after the decease of the survivor of them, the said Emma Frost, and such husband, to the use of all and every or such one or more of the children of my said daughter Emma Frost, for such estate or interest, and subject to such charges and in such manner, without prejudice to the executory devise over hereinafter contained, as my said daughter Emma Frost shall by deed or will, notwithstanding coverture, appoint, and in default of appointment, and so far as no such appointment shall extend, to the use of all and every the children or child of my said daughter Emma Frost, who shall be living at the time of the death of the survivor of them, the said Emma Frost and such husband of the said Emma Frost, or shall have previously died leaving issue then living, their, his, or her heirs and assigns, if more than one, in equal shares as tenants in common; but in case no child of the said Emma Frost shall be living at the time of the death of the survivor of them, the said Emma Frost and such husband, or shall have previously died leaving issue then living, then to the use of such of my sons and of my other daughters as shall be then living, or shall have previously died leaving issue then living, their, his, or her heirs and assigns, if more than one, in equal shares as tenants in common"

The testator also devised and bequeathed all his residuary real and personal estate to his said three sons in trust for sale and to divide the proceeds, after payment of debts, &c., between his eight children, naming them, in equal shares as tenants in common.

The testator died in the year 1870. Emma Frost was a spinster at her father's death.

In 1872 she married Robert Tyley, but died in the same year without having had any children. Robert Tyley died in 1888.

This summons was taken out after the death of Robert Tyley to determine the question whether the limitations of the South Brent Estate after the death of Robert Tyley were void for remoteness.

Badcock, for the summons.—The gift over after the death of Robert Tyley in default of appointment by Mrs. Tyley, if an executory devise, is void for remoteness: *In re Harvey, Peek* v. *Savory*, 39 Ch. D. 289, 37 W. R. Dig. 203. In this case the husband might not have been born at the testator's death. No doubt *Cole* v. *Sewell*, 4 Dr. & War. 1, 2 H. L. Cas. 186, will be relied upon as establishing that the rule against perpetuities does not apply to legal remainders. But in that case there was a previous estate tail, the barring of which at any time would have destroyed the subsequent estate. There is no estate tail here. *Cole* v. *Sewell* has never been extended to a case in which there was no estate tail.

He also cited *Cattlin* v. *Brown*, 1 W. R. 533, 11 Hare, 372, and *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 562.*

Rowden, for persons in the same interest.

W. J. Lee, for persons entitled under the gift over.—The limitation to the testator's sons and other daughters was a good alternative contingent remainder, and was ready to vest on the death of Robert Tyley: Butler's Note to Fearne on Contingent Remainders, 10th ed., p. 565; Williams on Real Property, 13th ed., p. 271. [Kay, J., referred to *In re Finch, Abbiss* v. *Burney*, 28 W. R. 903, 29 W. R. 449, 17 Ch. D. 211.] There the limitations were all equitable, and the decision in that case has never been extended to legal remainders. [Kay, J.—Is not the limitation a possibility on a possibility? *Whitby* v. *Mitchell*, *ante*, p. 5, 42 Ch. D. 494.] That doctrine only forbids a limitation to an unborn person for life, with remainder to the issue of such unborn person, and that is what is meant in the authorities cited against me by the rule against perpetuities as applied to a contingent remainder.

Badcock, in reply.—From the remarks in Sugden's Law of Property, p. 120, it seems that Lord St. Leonards in *Cole* v. *Sewell* was relying on the previous estate tail, and Lord Cottenham's judgment in the House of Lords was entirely based on the fact that the contingent remainder was always barrable. Fearne, 10th ed., p. 502, expresses the view that contingent remainders which tend to a perpetuity are void. [Kay, J., referred to *Mainwaring* v. *Baxter*, 5 Ves. 458, and *Beard* v. *Westcott*, 5 Taunt. 393]. *Cole* v. *Sewell* is discussed in Jarman on Wills, 4th ed., vol. 1, p. 258; vol. 2, appendix, p. 845.

He also referred to *Humberston* v. *Humberston*, 1 P. W. 332.

Kay, J.—[His lordship read the limitations above set out, and continued:—] The estate to the trustees is specially limited to the life of Emma Frost. The limitations, therefore, to the use of any husband Emma Frost may afterwards marry, and after the death of the survivor of herself and such husband to the use of her children as she shall appoint, "without prejudice to the executory devise over hereinafter contained," and the limitations to the use of the children of Emma Frost living at the time of the death of the survivor of herself and such husband, together with the gift over in default to other persons, are limitations of the legal estate in the lands. The question is, whether these

(*a.*) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

* See also *Dunn* v. *Flood* (North, J.), 25 Ch. D. 629.

limitations are good. It is very clear that if it were a limitation of personal estate or by way of executory devise it would offend against the rule against perpetuities, because Emma Frost was unmarried at the date of this will. She might have married after the death of the testator a person who was not born in the testator's lifetime, and it might, therefore, have been a limitation to Emma Frost for life, remainder to a person unborn for his life, with a contingent remainder to the children of Emma Frost living at the death of that unborn person, or such of them as should be then dead leaving issue then living, with an alternative limitation to other persons still to be living at the death of that unborn person, or to have left issue then living. That clearly would offend against the rule against perpetuities, because it would tie up the estate not merely during the life of Emma Frost, who was in existence at the death of the testator, but during the life of Emma Frost's husband, who might possibly not be in existence at the death of the testator. But it is said:—"This is not an executory devise, but simply a legal limitation by way of contingent remainder, and therefore the rule as to perpetuities does not apply to the case at all." Be it so. No doubt contingent remainders were invented long before the rule against perpetuities, and they were not originally subject to any such rule. But they were subject, before this rule was invented, to another rule, which was thus expressed in the old legal language, that you could not limit a possibility upon a possibility, and the familiar illustration is that you could not limit by way of legal devise or conveyance a gift to A., an existing person, for life, with remainder to his unborn son for life, with remainder to any child of such unborn son. That last remainder was void because, according to the phrase used by the old lawyers, it was a possibility upon a possibility. Now I think there is no question that this is the law to this day, although the reason for it has been contested by modern lawyers (see Williams on Real Property, 13th ed., pp. 276, 277). I lately had to consider this point in *Whitby* v. *Mitchell*, and I decided that the rule still exists. [His lordship then read the passage in Butler's Note to Fearne on Contingent Remainders, 10th ed., p. 565, beginning, "No question of perpetuity could arise," and ending, "confer an estate by purchase on that person's issue," and continued:—]. This note recognizes that the rule exists, and has as much force in the present day as when it was originally invented. What was the reason of that rule? As expressed by the lawyers of that day, it was on the ground of a possibility upon a possibility. What was meant by a possibility upon a possibility was that there might never be such a person as an unborn person who was to take for life—that was an obvious contingency, but besides that there was another contingency—there might never be issue of that person. Therefore, there was a double contingency or a double possibility. I quite agree that the contingency in this case is not of that kind precisely; but the mischief is the same. There is the double possibility. A husband of Emma Frost unborn at the death of the testator might never exist. Even if there were such a husband, the other contingency which is to take effect upon his death might never happen. I think that this limitation would have been held by the old lawyers to fall within the doctrine of a double possibility, and would most probably have been held void. But if it is not void upon that ground, it is certainly void as a perpetuity, if the rule against perpetuities applies to the case. Does the rule against perpetuities apply to the present case? Lord St. Leonards, in *Cole* v. *Sewell*, used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder; and the same language, or something like it, is also used in what I have read from Butler's note. But in every one of these cases the language refers simply to the case of an estate for life or an estate tail limited to a person *in esse* when the limitation takes effect. If this is so, it is quite clear that no contingent remainder to take effect upon the determination of that estate could be exposed to any objection on the ground of being too remote. But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person. However, I do not at all agree that, under the law of to-day, there cannot be any application of the rule against perpetuities to remainders. The law is stated in Fearne on Contingent Remainders, 10th ed., at p. 502. [His lordship read the passage beginning, "Here, indeed, it may not be improper to remark," and ending, "void in its creation," and continued:—] I take the meaning of that statement to be this. There are limitations which would have been void under the old law, because they would have been treated as possibilities upon possibilities, and the like limitations would now be void, but perhaps from a different reason—viz., because they offend against what is known by our modern law as the rule against perpetuities.

I think, therefore, on the whole, that the balance of authority is that this limitation, although a legal limitation, is void, because it offends against the rule against perpetuities.

There will be a declaration accordingly, and that the lands in question fall into the residue.

Solicitors, *H. Queckett Louch*, for *Louch & Son*, Langport; *Prideaux & Sons*, for *J. R. Poole & Son*, Bridgewater.

Chan. Div. North, J. — Oct. 26.

In re Harrison.

Townson *v.* Harrison. (*a.*)

Administration—Covenant by testator to pay annuity—Personal estate insufficient—Adjustment of accounts between tenant for life of real estate and remaindermen.

A testator devised all his real estate (except two specified estates) to trustees upon trust for his son for life, with remainder in strict settlement. And he devised the two specified estates upon trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, the testator covenanted to pay an annuity to the son or his wife during their joint lives. The testator's personal estate proved to be insufficient to provide for the payment of the annuity.

Held, that the three real estates ought to contribute rateably towards payment of the annuity, and that each tenant for life would have a charge upon the corpus of the estate in respect of the proportion of the annuity paid by him or her, but he or she would have to keep down the interest on the amount so charged.

Adjourned summons.

Isaac Harrison, by his will, dated the 3rd of July, 1871, after appointing the plaintiff and two other persons trustees and executors of his will, and bequeathing some pecuniary legacies and annuities (which he charged on his real estate), devised all his real estate (except his estates at Gaddesby and the Gilroes) unto and to the use of his trustees in fee, upon the trusts thereinafter declared—viz., upon trust out of the rents and profits of the said real estate to pay the several annuities thereinbefore charged thereon, and then upon

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

trust to pay certain yearly sums thereinafter specified for the benefit of his son, Isaac Henry Harrison, and subject thereto his said hereditaments were to be held in trust for his said son during his life, with remainder in trust for his first and other sons successively in tail male, with divers remainders over. And the testator devised all his real estate at Gaddesby unto and to the use of his trustees in fee in trust for his daughter Beatrice Mary during her life, with remainder in trust for her first and other daughters successively in tail male, with remainders over. And the testator devised all his lands known as the Gilroes Estate unto and to the use of his said trustees in fee in trust for his daughter Catherine Maria during her life, with remainder in trust for her first and other sons successively in tail male, with divers remainders over. And the testator bequeathed the residue of his personal estate to his trustees upon trust for his son and his two daughters.

By a deed of covenant dated the 20th of November, 1882 (executed shortly before the marriage of the testator's son, Isaac Henry Harrison, with Mary Marfitt), the testator, in consideration of the then intended marriage, covenanted with the son, his executors and administrators, that, if the intended marriage should take place, he (the testator) would, during the joint lives of his son and Mary Marfitt, or until the son should become bankrupt, &c., pay unto such of them, his son or the said Mary Marfitt, as the testator should think fit, the annual sum of £700 at the times and in the manner therein mentioned. The deed also contained a covenant by the testator with his son to pay him an annuity of £700 during his life or until he should become bankrupt, &c., if he survived Mary Marfitt and there should be any issue of the intended marriage, and also a covenant to pay Mary Marfitt an annuity of £500 during her widowhood, if she survived the son and there should be issue of the intended marriage. The annuities were to be substitutional, not cumulative.

The testator died on the 6th of June, 1887, and his will was proved by the plaintiff alone, the other trustees and executors having renounced probate of the said will and disclaimed the trusts thereof.

This was an originating summons taken out by the sole acting executor and trustee as plaintiff, against Isaac Henry Harrison and Maria Harrison, his wife, Isaac Frank Odams Harrison, an infant, their eldest son, and the testator's two daughters, Beatrice Mary Harrison and Catherine Maria Harrison, as defendants, to have the following (among other) questions determined by the court—viz.:

Whether the several annuities respectively covenanted to be paid by the testator by the deed of the 20th of November, 1882, to Isaac Henry Harrison and Mary Harrison respectively ought to be valued, and upon what principle, and how?

How and in what manner the amounts at which the annuities shall be valued respectively, ought to be raised, and out of what part or parts of the testator's estate, and in what proportions, and how?

Nothing had been paid on account of the annuity of £700 since the testator's death. The last payment was made on the 20th of May, 1887.

There was evidence that after providing for the payment of the testator's debts and other liabilities there would be left in the hands of the plaintiff personal estate amounting only to £1,500 available for satisfying the claim of the annuitants.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the plaintiff.—The annuity ought to be paid out of the income of the estate, and the tenant for life would then be entitled to a charge upon the *corpus* of the estate, and liberty should be given to apply to the court after the lapse of a reasonable time to have it ascertained how the payments should be apportioned between the *corpus* of the estate and the income: *In re Muffett, Jones* v. *Mason*, 37 W. R. 9, 39 Ch. D. 534; *Yates* v. *Yates*, 28 Beav. 637, 9 W. R. Ch. D. 111; *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, 15 W. R. Ch. Dig. 122; *Cranley* v. *Dixon*, 23 Beav., p. 517, 5 W. R. Ch. Dig. 123.

Everitt, Q.C., and *Ingle Joyce*, for the son and his wife.—The value of the annuities as at the time of the testator's death should be capitalized and charged on the *corpus* of the estate with interest at four per cent. in respect of each payment that is made: *In re Muffett, Jones* v. *Mason; Allhusen* v. *Whittell; Yates* v. *Yates*.

Napier-Higgins, Q.C., and *Woodroffe*, for Beatrice Harrison.—The question is, What ought to be the charge on the *corpus* when the tenant for life pays the annuity? He ought only to lose the interest upon the capital sum charged.

B. B. Swan, for Catherine Harrison.

Cozens-Hardy, Q.C., replied.

North, J.—I think the proper course to adopt is this. The tenant for life is tenant for life of the estate, and as such is entitled to the whole income of it; he is not merely tenant for life of the residue after payment of the testator's debts. But there are certain contingent debts of the testator created by deed in his lifetime in the shape of annuities which may become payable. One or two years' payments of these annuities have already become payable, and as some of the annuitants are still alive other payments will probably have to be made. Each of these annuities is a debt of the testator, and ought to be paid out of his personal estate in the first place; his personal estate, however, is insufficient, consequently the three real estates devised by the testator must contribute towards payment of these annuities according to their respective values, since there is nothing to throw the burden on one estate more than on the other. That, of course, does not bind the annuitant; his claim is to be paid out of the testator's real estate, not out of any particular part of it. Nor is his claim upon capital or income, he has a right to be paid out of the estate. Probably the capital is the thing to which he would have to resort if he took legal proceedings to enforce his claim, because, though he might possibly ask for a receiver of the rents, he would not be likely to get one appointed against the tenant for life unless he also undertook to take steps to raise his annuity out of capital. But his legal claim is against the whole estate not distinguishing between capital and income.

In what proportions, then, are the persons who are interested in the estate as tenants for life and remaindermen respectively to pay? The principle to be applied will be the same *quâ* each tenant for life as if there were only one tenant for life of the whole estate, and it will be more simple to state it with reference to such a case. The tenant for life is entitled to the income of the estate for his life, and so long as there is nothing to intercept it I think it ought to be paid to him. But at the end of a year a payment of the annuity will become due. It will become payable to the annuitant out of the estate. If the rights of the parties were worked out strictly it might be necessary to sell a sufficient portion of the estate to raise £700, leaving the estate diminished by the amount so sold, and the tenant for life in receipt for the future merely of the income of that diminished estate. The same thing, as a matter of principle, would have to be done at the end of each year so long as the annuitant lived. I do not, however, think the tenant for life would be entitled to have the estate sold bit by

bit in that way. But I do think that if any part of his income is applied in payment of the annuity, he would be entitled to stand in the shoes of the person whom he paid as against the estate, and to have a charge upon the estate in respect of the sums so paid. Therefore, for the first year after the testator's death (assuming for convenience that the annuity is, under the deed, payable at the end of each year), the tenant for life would receive the whole income of the estate (I assume that all the testator's other debts and liabilities have been provided for out of his personal estate); at the end of that year £700 would have to be found, for paying the annuitant, and the tenant for life would pay it, and he would then be entitled to stand in the place of the annuitant. He would have a charge upon the estate in respect of the sum which he had thus paid. As tenant for life he would still be entitled to receive the whole income of the estate, but he would have to pay out of such income to himself as incumbrancer interest upon the sum which he had thus provided. In other words, he would pay the £700, which would then become a charge upon the estate, but during his life he would have to keep down the interest on it. At the end of the second year the same thing would be done again, and the charge of £700 would become a charge of £1,400. The tenant for life would have a charge for £1,400, and at the end of the next year he would have paid two years' interest on half of it, and one year's interest on the other half, and so on, so long as the annuity lasted. That seems to me to be the principle on which the thing should be worked out. The decision in *Allhusen* v. *Whittell* does not furnish me with much assistance in this present case, for it was based on the principle that the tenant for life of residue is not tenant for life of the whole estate, but of the whole estate *minus* something, and that something must be ascertained before it can be said of what he is tenant for life. He is not tenant of the whole estate, and he is not entitled to receive the whole income; and the rule in *Allhusen* v. *Whittell* was adopted as a convenient and fair rule for ascertaining the share of the estate which really represented residue, and of which the tenant for life was entitled to receive income, as distinguished from the entire estate. That rule, in my opinion, does not apply to the present case.

Solicitors, *Kingsford, Dorman, & Co.*, for *Freer, Blunt, & Co.*, Leicester; *Robinson, Preston, & Stow*, for *Berridge & Miles*, Leicester.

Chan. Div. Stirling, J. — Oct. 26, 29; Dec. 14.

In re Jodrell. Jodrell *v.* Seale. (*a.*)

Will—Construction—"Relatives hereinbefore named"—"Vested transmissible interest."

A testator gave the residue of his estate amongst such of his relatives thereinbefore named who should become entitled to a vested transmissible interest in any part of his property.

Held, that "transmissible" meant "capable of transmission" after death, and that persons having life interests took no part of the residue, and that "relatives hereinbefore named" meant legitimate relatives mentioned nominatim.

Sir R. Jodrell, who died on the 12th of November, 1882, by his will, dated the 28th of March, 1868, after appointing executors, gave certain specific bequests to his wife and to his cousin Richard Jennings and his cousin the Rev. Charles P. P. Jodrell by name.

By clauses 14 and 15 he gave his general real and personal estate to his executors upon trust, after payment of debts and funeral and testamentary expenses, for the benefit of his wife during her life, and after her death for sale and conversion, and out of the proceeds thereof to set apart and pay the legacies specified in the twenty following paragraphs of his will, with a direction to marshal in favour of charities. The testator then gave bequests in favour of (1) "such one or more of the children of my late cousin Major Edward Jodrell, other than his eldest son," as should be living at the testator's wife's death and attain twenty-one; (2) the children of "my cousin the Rev. Henry Jodrell," other than his eldest daughter, who should be living at his wife's death and attain twenty-one; (3) "my cousin Mary Bishop" for life, and then for her children surviving her and the testator's wife and attaining twenty-one; (4) "my said cousin Richard Jennings" and his wife during their lives, and then for their children surviving them and the testator's wife and attaining twenty-one; (5) "my cousin Louisa Buller" for life, and after her death for Charles Seale Hayne if he should survive her and the testator's wife; (6) "my niece Emily Higgins" if she should survive his wife and attain twenty-one; (7) "my two nieces Mary Champagné and Blanche Champagné" if they should respectively survive his wife and attain twenty-one; (8) "my cousin Major George King" for life, and then for his children who should survive him and the testator's wife and attain twenty-one; (9) "my cousin Georgiana Forde" for life, and then for her children who should survive her and his wife and attain twenty-one; (10) "my cousin Emily MacDonell" for life, and then for such of her children as should survive her and his wife and attain twenty-one. There were also bequests for a god-daughter of the testator and for various charities.

The 37th clause was as follows:—"As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided among such of my relatives hereinbefore named as, by virtue of the trusts and provisions hereinbefore contained, shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females for their separate use respectively and without power of anticipation."

The testator made five codicils to his will. By the first he revoked the legacy in favour of his nieces Mary and Blanche Champagné, and directed that such legacy should fall into residue. By the fifth he gave to Alfred Jodrell, who was the eldest living son of Major Edward Jodrell, £1,000; he then revoked the bequest in favour of his niece Emily Higgins, and directed that it should fall into residue; and by the same codicil (clause 10) he declared that neither of his said three nieces should participate in the division of his residuary estate under clause 37 of his will.

The testator's widow died on the 1st of March, 1888, and the present summons was then taken out for the purpose of determining who was entitled to his residuary estate.

On the 29th of March, 1888, an order was made on the summons directing (*inter alia*) an inquiry what persons named in the first thirty-six clauses of the will were relations of the testator.

By his certificate the chief clerk found that Charles Seale Hayne was a first cousin once removed of the testator, and that Louisa Buller and Charles P. P. Jodrell both died in the testator's life; and that Major George King, Georgiana Forde, and Emily MacDonell (all of whom were dead) were descended from illegitimate children of the testator's grandmother. The other persons named in the will as cousins were legal cousins.

Lyttelton Chubb, for the executors.

(*a.*) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

Rigby, Q.C., and *C. James*, for Charles Seale Hayne, cited, as to the meaning of the expression "hereinbefore mentioned" in the thirty-seventh clause of the will, *In re Holmes*, 1 Drew. 321; *Bromley* v. *Wright*, 7 Hare, 334; and argued that it meant persons mentioned *nominatim*. "Relatives," they contended, meant legal relatives, and for that they cited *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265; *Dorin* v. *Dorin*, 23 W. R. 570, L. R. 7 H. L. 568; *Smith* v. *Lidiard*, 3 K. & J. 252; *In re Brown, Brown* v. *Brown*, 37 W. R. 472; *Bagley* v. *Mollard*, 1 R. & M. 581; *Megson* v. *Hindle*, 28 W. R. 866, 15 Ch. D. 198; *In re Humphries, Smith* v. *Millidge*, 24 Ch. D. 691, 696; *In re Bryon, Drummond* v. *Leigh*, 30 Ch. D. 110; *In re Hall, Branstone* v. *Weightman*, 35 W. R. 797, 35 Ch. D. 551; *In re Browne, Raggett* v. *Browne*, 61 L. T. N. S. 463.

Sir H. James, Q.C., Benshaw, Q.C., and *Ingle Joyce*, for the two younger children of Edward Jodrell and the children of Henry Jodrell.

Phipson Beale, Q.C., and *Trevelyan*, for the only child of Mary Bishop, deceased.

Farwell, for Sir A. Jodrell.

Hastings, Q.C., and *Swinfen Eady; Levett; Sir H. Davey, Q.C.*, and *Rashleigh*; and *Fischer, Q.C.*, and *Hadley*, for other parties.

The following cases were also cited:—*Brett* v. *Horton*, 4 Beav. 239; *In re Campbell's Trusts*, 34 W. R. 629, 33 Ch. D. 98; *Matthews* v. *Paul*, 3 Swanst. 328; *Domvile* v. *Winnington*, 32 W. R. 699, 26 Ch. D. 382; *Livesey* v. *Livesey*, 2 H. L. Cas. 419; *Meredith* v. *Treffry*, 27 W. R. 406, 12 Ch. D. 170; *In re Whorwood, Ogle* v. *Lord Sherborne*, 35 W. R. 342, 34 Ch. D. 446; *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728, 8 W. R. H. L. Dig. 7; *Lady Lincoln* v. *Pelham*, 10 Ves. 166, 173, 175; *Owen* v. *Bryant*, 2 De G. M. & G. 697; *Evans* v. *Davies*, 7 Hare, 498; and *Shelley* v. *Bryer*, Jac. 207.

Dec. 14.—STIRLING, J., stated the facts and continued:—Various questions have been raised as to the meaning of several of the expressions which occur in the 37th clause of the will. The first is as to the meaning of the word "transmissible." I think this means "capable of transmission after death." No clearer illustration of its meaning can be found than the language of Lord Eldon in *Nannock* v. *Horton*, 7 Ves., at p. 402, where he speaks of an annuity not being transmissible, but ceasing with the annuitant. It follows that all persons who, under the trusts and provisions of the will, take merely life interests are excluded from participation in the residue. The main question, however, arises as to the meaning of the words "relatives hereinbefore named," and as to this three views have been put forward. The first rests on two elementary rules of construction, that a will is so to be construed as to give effect to each word rather than in a way which will leave some of them inoperative, and that words are to be taken in their strict and accurate meaning unless an intention can be inferred to use them in another. The strict and accurate meaning of the word "relatives" is "legitimate relatives." The strict and accurate meaning of the word "named" is, as stated by Kindersley, V.C., in *In re Holmes*, "mentioned *nominatim*, if not by all their names, by some at least, either their christian or their surnames." If the testator used the word "relatives" and "named" with those meanings, it is found that the class of persons who could have taken under clause 37, if the testator had died immediately after the execution of his will, consisted of (at most) five persons — namely, Charles P. P. Jodrell, named in clause 12; Charles Seale Hayne, named in clause 20; Emily Higgins, named in clause 21; and Mary Champagné and Blanche Champagné, named in clause 22. Three of these are females, to whom the directions as to separate use and restraint on anticipation in clause 37 are applicable. Every word in the clause has effect given to it. What is there against this construction? First, it is said, and with some force, that if this was the testator's meaning he has adopted a very circuitous mode of designating these five persons. Secondly, it is pointed out that of these five persons Charles P. P. Jodrell died in 1875, prior to the date of the fifth codicil; that the legacies to the Misses Champagné were revoked by the first codicil, and that to Miss Higgins by the fifth codicil, so that the class of persons to take is reduced to one, namely, Mr. Seale Hayne; yet that the testator in the fifth codicil speaks of the "division" of his residuary estate under the 37th clause, a term which naturally imports participation by several. The weight of this observation appears to me to be diminished by the circumstance that this clause of the fifth codicil is in reality superfluous, and appears to have been inserted *ex majori cautelâ*; for the only trusts and provision contained in the will under which the Misses Champagné and Miss Higgins took any benefit were those relating to the revoked legacies, and the revocation was sufficient to deprive them of vested transmissible interests in any part of the testator's property, and so to exclude them from participation under clause 37 of the will. The use of the word "division" in clause 10 of the fifth codicil may be attributable to the like caution on the part of the testator. Next, on behalf of the relatives strictly so called of the testator, it is contended that the word "named" is used in the secondary sense of "mentioned" or "referred to." This construction renders the word inoperative, for if this be its true meaning the clause would have precisely the same effect if the words "hereinbefore named" were omitted.

In support of this contention the case of *Bromley* v. *Wright* was cited. That was, however, a decision on somewhat different words, and the learned Vice-Chancellor does not appear to me to lay down as a general rule that the words "hereinbefore named" are to be disregarded. Lastly, on behalf of those persons who, though not, strictly speaking, relatives, nevertheless appear to have been recognized by him as such, it was contended that the words "hereinbefore named" pointed in some way or other to some recognition. It is, however, to be observed that the persons who, not being, strictly speaking, relatives of the testator, are themselves recognized as such, do not take vested transmissible interests in the testator's property, and that such interests are given to the children of those persons, so that, in order that this contention may be effectual on behalf of those in whose interest it is put forward, it is necessary to read the words "relatives hereinbefore mentioned" as having some such meaning as follows:—"Persons who, if the statements as to relationship hereinbefore contained were well founded, would be relatives of mine." This construction does give effect to the words "hereinbefore named," but, on the other hand, it seems to me to import into them a very great deal more than the testator has actually expressed. Now the clause in question is one which contains a somewhat unusual disposition of residue. The will bears marks of having been penned, not by the testator himself, but by some legal adviser, and, on the whole, I come to the conclusion that, in construing it, it is best to adhere as closely as may be to the actual language of the testator. I therefore adopt that construction which gives effect to every word in the clause, and attaches to each word its strict and accurate meaning. The result is that, in the events which have happened, Mr. Charles Seale Hayne is entitled to the whole of the residue.

Solicitors, *Satchell & Chapple; Druces & Attlee; Ward, Mills, Witham, & Lambert; Lowe & Co.; Wadeson & Malleson; Walker & Whitfield.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 12.

JONES v. MARSHALL. (a.)

Pawnbroker—Special contract—Sale—Deficit—Right to recover balance of loan—Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93).

Where a pawnbroker has advanced money to a pawner upon an article pledged under a "special contract," and has sold the article according to the provisions of the Pawnbrokers Act, 1872, *upon the expiry of the period of redemption, the liability of the pawner for the debt is not extinguished (in the absence of any express stipulation in the special contract), and the pawnbroker is entitled to recover the balance if the sale has failed to realize the full amount of the loan.*

Appeal from the Liverpool County Court.

The plaintiff was a pawnbroker, and the defendant (by an agent) had pledged a gold watch with him and had received £8 upon it. The pawnticket which was given to the defendant had printed upon the back of it a "special contract" in the form given in the Pawbrokers Act, 1872, 3rd schedule, VII. The watch, not having been redeemed within the year of redemption and days of grace, was sold by auction according to section 19 of the Act. It produced £5 5s. The pawnbroker sued the defendant to recover £2 15s., the balance of the loan, and the county court judge held that he was not entitled to recover, on the ground that the existence of the special contract excluded the pawner's liability for the debt.

The pawnbroker appealed.

Finlay, Q.C. (*Bonsey* with him), for the appellant.—There is nothing in the special contract to deprive the plaintiff of his common law right to sue to recover the amount of his loan to the defendant. Section 22 of the Act clearly contemplates a liability on the part of the pawner for a deficit on a sale; for a surplus resulting from the sale of another pledge of the same owner may be applied in reducing a previous deficit.

O'Feely.—Where there is a special contract the parties are bound by it alone. All the terms are contained in it, and no common law right outside it can be set up.

Lord COLERIDGE, C.J.—I am clearly of opinion that the learned county court judge was wrong, and that the appeal must be allowed. This contract is a contract of pledge, and at common law the pledgee is undoubtedly entitled to recover the balance of the amount he has lent if a sale of the property pledged does not suffice to satisfy the whole sum. Is there anything in the Act to prevent the exercise of that common law right? The contract must certainly be read with the Act, but there is nothing in the Act or the schedules to it to exclude the plaintiff's right to recover his debt.

MATHEW, J.—I agree. I will only add that section 22 of the Act, which deals with the application of a surplus on the sale of one pledge to supply the deficiency on the sale of another pledge of the same pawner, is, to my mind, conclusive as to the right of the pawnbroker to recover the amount of the deficit.

Appeal allowed.

Solicitors for the plaintiff, *Bremner & Son.*

Solicitors for the defendant, *Levy & Robinson.*

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 12.

REG. v. JUSTICES OF THE COUNTY OF LONDON. *Ex parte* BUCKLE. (a.)

Licensed house—Reconstruction—Provisional grant of licence—Final order—Renewal of licence—Refusal—Appeal—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 22—*Licensing Act*, 1820 (9 *Geo.* 4, *c.* 61), *s.* 27.

A provisional grant of a licence made under section 22 *of the Licensing Act*, 1874, *may be renewed from year to year in like manner as an ordinary licence, and an appeal to quarter sessions lies from a refusal of the licensing justices to renew such a licence.*

Rule *nisi* for a *certiorari* to bring up, in order that it might be quashed, an order of quarter sessions reversing the decision of licensing justices, who had refused to renew a provisional grant of a licence in respect of a public-house.

The facts were as follows:—In carrying out some street improvements at Hampstead four public-houses were pulled down, and it was proposed to build one large public-house to take their place. Application was made to the licensing justices and confirming authority, for a provisional grant of a licence for the proposed public-house under section 22 of the Licensing Act, 1874; plans were submitted to and approved by them, and the provisional grant was made. The plans were prepared for a level site, but the site was afterwards found to be on a slope. Application was made to the justices for leave to alter the plans to suit the nature of the ground, but this was refused. The house was then constructed upon the original plans with the alterations rendered necessary by the nature of the ground, and an application was made to the justices at the general licensing meeting for a final order under section 22. This was refused, on the ground that the building was not in accordance with the plans, and an application for a renewal of the provisional grant was also refused. On appeal from this refusal the quarter sessions reversed the decision of the justices and granted a renewal. This rule was then obtained, on the ground that the decision of the licensing justices refusing to make the final order was conclusive, and that no appeal lay from it, and also that a provisional grant under section 22 was incapable of renewal.

Bompas, Q.C., and *Woollett*, in support of the rule.—The decision of the justices that this house was not built in accordance with the plans is conclusive, and there is no appeal. The applicants were then thrown back on their rights as they existed before the passing of the Act of 1874, and their proper course was to apply for a new licence for the house after it was built. This provisional licence from April to April is wrong in form; it is not an annual licence, and the provisions of the Act 9 Geo. 4, c. 61, s. 27, do not apply; there is no renewal and no appeal.

Poland, Q.C., *Forrest Fulton*, and *R. D. Muir*, for the respondents, were not called upon.

Lord COLERIDGE, C.J.—Any case which involves the consideration of more Acts of Parliament than one must take time, but I do not for a moment complain of the time which this case has taken; it is a case of importance, and considerable property is involved. We think that there was an appeal to quarter sessions, and that this rule ought to be discharged.

The important section is section 22 of 37 & 38 Vict. c. 49. The substance of that provision is that whereas,

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

before it was enacted, there must have been a building *in esse* before a licence could be granted, and in consequence of the absolute discretion vested in the justices to grant or refuse a licence, much money might have been lost by persons who had invested in new buildings which were intended to be public-houses, under that section, where the architect's plans have been approved, a provisional licence may be granted before the building has been begun. This pledges the faith of the justices that where the site of the proposed public-house is such that if it were an erected house they would grant a licence, if a house be erected there according to plans which they have approved, they will grant a licence to that house subject to the condition that the occupant shall be a proper person to hold it. This gave the persons who were laying out their money a protection which they had not before; they have thus a security that, if only the conditions to which I have alluded are complied with, the magistrates shall grant a licence.

In the present case I do not wish to go through the various steps which were taken, for as the magistrates are not, technically speaking, represented here, I would rather not state the impression which their action has left on my mind.

The first question which arises is whether or not this provisional licence under section 22, like an ordinary licence, runs from year to year and is renewable. If it be so, then the sections of 9 Geo. 4, c. 61, as to appeal, apply, and there is an appeal to quarter sessions from an order of justices refusing to renew one of these provisional licences. Secondly, does the time which elapsed prevent an application for renewal? As to the first question, I think that both the words of the Act and the obvious sense of the Act show that that construction is necessary, and I have had no doubt upon the point throughout the argument. The word used in the Act is "shall"—the magistrates "shall" grant the licence subject to the two conditions (adherence to the approved plans and the fitness of the occupant) being fulfilled. Now, if it had been an ordinary licence for a year it is clear, keeping in view section 27 of the Act of George 4, that there would have been an appeal. If the licence is once granted and a vested interest thus created there would be an appeal from a refusal to renew. Then, turning to the Act of 1874, that Act gives to owners of houses not yet erected, who have obtained this provisional grant, vested interests like those of the owners of existing houses.

It was contended that if a vested interest, however large, has been created by the magistrates, it may also be destroyed by them, and that without appeal. That would be very extraordinary, and it is not a correct view. The Legislature, although not favourable to creating vested interests in this trade, is careful to protect those which already exist. We are giving the true meaning of the Legislature in deciding that there is an appeal in the case of vested interests created in this way.

Then it is said that the appeal in this case was too late; that the refusal was acquiesced in, and the provisional licence was gone, and that steps had been taken to turn the provisional licence into an actual one. But it has been decided that in such a case it is not too late to fall back upon the provisional licence. Mr. Bompas said that the whole licence in this case is wrong in form and good for nothing, being made out for a year—April to April—whereas the provisional licence covers the whole period of building, however long. There is no authority for that. If it were to be decided that there is only one termination to a provisional licence—viz., a final order—that would be to say that there would be no appeal, and persons spending these large sums on the faith of the provisional grant would be at the mercy of two justices. I think that a licence of this kind may be granted for whatever term the magistrate thinks fit, and that from a refusal to renew there is an appeal as in the case of other licences. That is enough to settle this question.

As to the right of inhabitants to appear and oppose the renewal I reserve my opinion. As to the facts of the case, it has been impossible for me not to show that, if they were as they appeared during the argument, they produced a very unfavourable impression upon my mind. But my interlocutory remarks are sufficient, and the magistrates are not represented before us.

MATHEW, J.—I agree. Assuming the facts to be as they were allowed to be by counsel, they give me a very unfavourable impression as to the conduct of the magistrates. They did, in the first instance, proceed on the assumption that the plans might be altered, and they would have been wise to adhere to that opinion. In accordance with the plans means in substantial accordance, and if this case comes before the magistrates again I hope they will bear our remarks in mind.

Rule discharged.

Solicitor for the appellant, *E. M. Hill.*

Solicitors for the respondents, *Clapham & Fitch.*

Q. B. Div. (Denman and Wills, JJ.) Jan. 11.

PARNELL v. WALTER. (a.)

Practice—Interrogatories—Action of libel against newspaper—Payment into court—Issue as to damages—Discovery of names of informants—Discovery as to extent of circulation of newspaper.

In an action of libel against a newspaper, where the defendant takes upon himself the responsibility of defending the action, the plaintiff ought not to be allowed to inquire by interrogatories as to the sources of the defendant's information, even though the only issue in the action is as to the amount of damages, and the object of the interrogatories is to increase the damages by showing gross recklessness on the part of the defendant.

Hennessy v. Wright, 36 *W. R.* 879, *considered and followed.*

Where the plaintiff asks how many copies of the paper containing the libel were issued to the public, the defendant cannot decline to give the number on the ground that it is inconvenient or even impossible to do so: he must give the number approximately.

Appeal from an order of a master, referred by Field, J. to the court.

This was an action for libel against one of the proprietors, and the printer and publisher of the *Times* newspaper. The plaintiff complained of the publication in the defendants' newspaper of four alleged letters, of which it was imputed that the plaintiff was the writer, one of them being published in facsimile, and also of the further publication of the facsimile letter in a pamphlet entitled "Parnellism and Crime."

The defendants, in their defence, pleaded that they brought forty shillings into court, and that that sum was sufficient to satisfy the plaintiff's claim; and on that defence issue was joined.

The plaintiff delivered a set of interrogatories for the examination of the defendants. The first two interrogatories asked how many copies of each of the numbers of the *Times* of three specified dates, and how many copies of the pamphlet, were issued to the public and circulated by sale or otherwise. The defendants answered that the *Times* newspaper, as was notorious, had a large and general circulation, and the numbers referred to were

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

issued and circulated in the ordinary and usual way, and not otherwise. They declined to state the number of copies either of the newspaper or the pamphlet issued to the public, on the grounds that they did not know the number, and had not the means of ascertaining it without a difficult and troublesome inquiry of persons not connected with the paper and its publication, who were not under any obligation to give them the information, and that the answer would involve a disclosure of the business transactions of the defendant Walter and of other persons, not parties to the action, who were his partners in the publication of the *Times*, and that the precise number of copies issued to the public was not material or relevant to any matters in question in the action.

The other interrogatories were in substance as follows:—3. From what person or persons did you obtain the originals of each of the four alleged letters? 4. What sum or sums of money did you pay for each of the said four alleged letters, or for all of them? 5. State precisely what inquiries you made of the person or persons from whom the said four alleged letters and each of them were obtained, (*a*) as to the person or persons to whom the said letters were respectively addressed, or (*b*) as to the person or persons from whom, or the place in which, or the means by which the person or persons from whom the *Times* obtained the same had got possession of the said four alleged letters, or any and which of them. 6. State precisely what information, if any, was given to you, and at what date or dates, by the person or persons from whom the said four alleged letters were obtained, as to the above matters. 7. State precisely, with dates, the steps, if any, taken by you to test or verify the information, if any, so given. 8 and 9. State precisely what steps, if any, and whether by the comparison of handwriting or otherwise, and how, were taken by you to ascertain or test the genuineness of the said alleged letters. 10. When did you first learn, and how, that the said four alleged letters, or any and which of them, had been obtained by the person or persons from whom the *Times* obtained the same from or through Richard Pigott? What inquiries, if any, did you then or subsequently, and when, make, and of whom, and how, as to the antecedents or character or repute of the said Richard Pigott?

The defendants declined to answer interrogatories from 3 to 10 inclusive, on the grounds that they were irrelevant and not material, and that the object of the plaintiff was to discover the evidence they proposed to adduce in support of their case, and that they were unreasonable, unnecessary, and vexatious, and were not put *bonâ fide* for the purposes of the action, but for the purpose of incriminating third parties who were not parties to the action, and that the matters inquired into related solely to the defendants' case.

On the application of the plaintiff the master made an order that the defendants should make a further and better answer to interrogatories 1 and 2, and should also answer the other interrogatories.

On the defendants appealing Field, J., referred the matter to the court.

Lumley Smith, Q.C., and *Graham*, for the defendants.—The answers to the first two interrogatories are sufficient: *Moore* v. *Craven*, L. R. 7 Ch. 94n. The remaining interrogatories ought not to be allowed. It was decided by the Court of Appeal in *Hennessy* v. *Wright*, 36 W. R. 879 (which was followed in *Gibson* v. *Evans*, 23 Q. B. D. 384), that in an action of libel against the proprietor of a newspaper, where the defendant takes upon himself the responsibility of defending the action, it is not allowable for the plaintiff to interrogate as to who was the writer of the libel or gave the information on which it was based. See also *M'Colla* v. *Jones*, 4 Times L. R. 12.

Asquith (*Sir Charles Russell, Q.C.*, with him), for the plaintiff.—The defendants ought, in answer to the first two interrogatories, to give an approximate estimate of the number of copies issued. As to the other interrogatories, the cases cited do not apply to this case, the issues being different. Here there is no plea of justification, or privilege, or fair comment. The only question is as to damages. What the Court of Appeal decided in *Hennessy* v. *Wright* was that the plaintiff in an action of libel against a newspaper ought not to be allowed to ask for the name of the writer in order that if it should turn out that the writer had a malicious feeling towards him he might impute that malice to the defendant. Here the object of the plaintiff is not to impute malice, but to show gross negligence and recklessness on the part of the defendants in trusting persons who were notoriously untrustworthy, for the purpose of increasing damages, the question of damages being the only question in issue, and one on which the plaintiff will be entitled at the trial to adduce affirmative evidence in chief. This object of increasing damages was not within the consideration of the court in *Hennessy* v. *Wright* and the other cases. It has recently been decided that in assessing damages in an action for libel the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time the verdict is given: *Praed* v. *Graham*, *ante*, p. 103, 24 Q. B. D. 53.

Lumley Smith, Q.C., in reply, cited *Robertson* v. *Wylde*, 2 Moo. & R. 101.

Denman, J.—Our decision in this case must be partly in favour of the view taken by the master, and partly contrary to it. The action is one for libel against a newspaper. The plaintiff complains of an imputation that he was the author of certain letters, which, if he was the author of them, would show him to be a bad man. The defendants do not justify the libel, neither do they plead privilege; they do not raise any defence, but they pay a sum of money into court, which they say is sufficient, so that all the jury will have to do at the trial will be to assess damages.

Now, in answer to the first interrogatory, asking how many copies of the paper were issued to the public, the defendants decline to state the number, on the ground that it would give trouble to themselves and other persons, and would involve the disclosure of the state of their business. But they are not entitled to withhold all information on the ground of inconvenience; they must give some information. We are told that it is impossible to say what the precise circulation was. But counsel for the plaintiff says that he does not want the precise number, he will be satisfied with an answer within tens of thousands. To suppose they cannot answer within such limits is absurd. Therefore they must give the best information they can; and the same thing applies to the pamphlet. That part of the order must stand.

As to the other interrogatories, I am not perfectly confident that if the question had come before me for the first time, I should not have ordered answers to be given to interrogatories as to the conduct of the defendants with reference to the libel. I think it might have been held that it was relevant to inquire where the newspaper got its information—whether from a notoriously disreputable person, or from a person of good character. Even, however, if interrogatories might be put for that purpose, I do not think the interrogatories administered in this case are allowable, for they are not interrogatories asking for admissions, but are rather in the nature of cross-examination. But we are bound by the decisions not to require any answers to be give to these interrogatories. It has been plausibly contended that *Hennessy* v. *Wright* and the cases cited do not apply to the present case. It was said that the issues were

different, the issue here being merely as to damages, and the interrogatories being put for the purpose of increasing the damages. But it is impossible to look at the decisions without seeing that the court intended to lay down the rule that in an action of libel against a newspaper, where the defendant takes upon himself the responsibility for the publication, the plaintiff shall not be allowed to ask for the name of the person from whom the paper got its information. The question of damages is a main question in every action of libel, and it must have been taken into consideration in the previous cases whether mentioned in the judgment or not. We cannot order these interrogatories to be answered, and as regards them the order of the master must be reversed.

WILLS, J.—I think the difficulties raised as to the first and second interrogatories are illusory. As to the others, the question is covered by authority. We cannot allow these interrogatories without supposing that the court in all the cases cited overlooked the bearing of the proposed interrogatories on the question of damages. The question of damages is a most important issue in every action of libel. Logically the question is, what injury the plaintiff has sustained? and therefore, logically, the conduct of the defendant is immaterial. The rule which has been laid down recently in *Praed* v. *Graham*, that all the circumstances of the case may be taken into consideration, is rather a concession to the impossibility of excluding such consideration than a logical deduction from principle. Such interrogatories as these have not been allowed during the whole of the time that the practice of interrogatories has existed. The decision of the master with respect to them must be reversed.

Order varied.

Solicitors for the plaintiff, *Lewis & Lewis.*

Solicitors for the defendants, *Soames, Edwards, & Jones.*

Prob. Div. & Adm. Div. Divorce. } July 23, 1889.

BUTLER *v.* BUTLER.
BUTLER *v.* BUTLER AND BURNHAM. (*a.*)

Divorce—Decree nisi *on wife's petition—Money paid into court to secure wife's costs—Time of payment out—Rule* 201.

Where a sum of money had been paid into court before trial, on the order of a registrar, to secure the wife's costs at the trial, and a decree nisi *was pronounced on her petition, the court, on appeal from chambers, refused to order payment out to the wife or her solicitor of such sum of money before the decree was made absolute, as being against the provisions of rule* 201.

Appeal from an order in chambers, refusing to direct payment out to the wife or her solicitor of a sum of £90 paid into court by the husband on the order of the registrar to secure the wife's costs in both suits.

These were cross petitions by husband and wife for dissolution of the marriage. At the hearing the court pronounced a decree *nisi* on the wife's petition, and condemned the husband in costs. The Queen's Proctor had intervened, charging both parties with collusion and suppression of material facts.

B. Deane, in support of the motion, referred to *Gladstone* v. *Gladstone*, L. R. 3 P. & D. 260, 23 W. R. Dig. 182.

Middleton, for the husband, against the motion, relied on rule 201, which provides that "the order for payment of costs of suit in which a respondent or co-respondent has been condemned by a decree *nisi* shall, if applied for before the decree *nisi* is made absolute, direct the payment thereof into the registry of the Court of Probate, and such costs shall not be paid out of the registry to the party entitled to receive them under the decree *nisi* until the decree absolute has been obtained; but a wife who is unsuccessful in a cause, and who, at the hearing of the cause has, in pursuance of rule 159, obtained an order of the Judge-Ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation." The object is that where husband or wife is successful no order for payment out of the costs shall be made until after decree absolute, in order that the court may be able to review the conduct of the petitioner or the petitioner's solicitor when the case is finally concluded. When the wife is unsuccessful, then the judge at the trial, if applied to, determines once for all what costs, if any, shall be allowed.

Deane, in reply.—The first part of rule 201 only applies to the full costs given when the decree *nisi* is pronounced. What the court is asked to deal with is the sum paid in to cover costs, and if the court has not power now to order payment out of such sum, then a guilty wife is in a better position than if innocent, as, under rule 159, she ordinarily gets her costs paid out immediately.

BUTT, J.—I must decide against Mr. Deane's contention. Notwithstanding Mr. Middleton's explanation, I cannot see that the provisions of rule 201 are rational provisions; but there is the rule, by which I am bound, and therefore payment out of all costs must be deferred till the decree is made absolute.

Appeal refused; costs of appeal not to be taxed against the husband.

Solicitors for the husband, *Goldring, Mitchell, & Co.*

Solicitors for the wife, *Clinton & Buckley.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } Nov. 28, 1889.

"THE CONSTANTIA." (*a.*)

Damage—Regulations for Preventing Collisions at Sea, art. 12—*Fog—Duty of sailing vessel in stays to sound fog-horn.*

A sailing vessel in stays in a fog is required under article 12 *of the Regulations for Preventing Collisions at Sea to make with her fog-horn, at intervals of not more than two minutes, when the wind is blowing on her starboard side one blast, and when the wind is blowing on her port side two blasts in succession.*

This was an action of damage instituted by the owners of the schooner *Iona* against the Norwegian barque *Constantia* to recover the damage arising out of a collision which occurred between the two vessels in a fog in the Bristol Channel on the 29th of March, 1889.

The action was now heard before Butt, J., assisted by two of the Elder Brethren of the Trinity House.

Barnes, Q.C., and *Raikes*, for the owners of *The Iona.*

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Sir W. Phillimore and *Stokes*, for the defendants, the owners of *The Constantia*.

The result of the evidence and the arguments of counsel, so far as material to this report, appear from the judgment.

BUTT, J.—The one principal question in this case is, What was the density of the fog? Was the fog at the time of this collision so thick that the barque *Constantia* could only see the schooner about a ship's length off, or was it only such weather as would have enabled the barque, with a proper look-out, to have discerned the schooner at a considerably greater distance than she did, and thus have avoided the collision? We are told that the density of the fog has been considerably over-stated by the defendants. On the other hand, we think that it was not likely that a vessel's lights would be discerned so far off as the plaintiffs' witnesses say they were—namely, half a mile or three-quarters of a mile. One thing is quite clear in this case, and it is that *The Constantia* was being most improperly and negligently navigated. She was a vessel in a fog going round from the starboard tack to the port tack, and rather than call up the men from below to assist, the look-out man is actually allowed to leave the look-out for some ten minutes and assist in manœuvring the ship. He was not only the look-out man, but the man who had charge of the fog-horn, and during the whole of these ten minutes there was no fog-signal given by any blast or blasts from the fog-horn. We have no doubt that if a signal had been given by the look-out *The Constantia* would have been seen sooner. Therefore, on that view, *The Constantia* is to blame. But we also think it quite unjustifiable for a vessel which has altered her course to lie in a fog anything like so dense as the evidence shows was the case without making any sound whatever.

Various suggestions have been made by counsel with regard to the signals which should have been given by *The Constantia*, but I think the real interpretation of article 12 of the Regulations for Preventing Collisions at Sea is, that so long as the wind is on the starboard side of a sailing ship, the ship, for the purposes of the rule, must then herself be held to be on the starboard tack, and must sound a blast on her fog-horn at an interval of not more than two minutes, and that as soon as she gets the wind on the port side she must sound two blasts in succession at intervals of not more than two minutes. However, I really do not think it necessary to comment further upon this point, because we find, quite apart from that, that she was to blame for negligent navigation, and I must so pronounce.

Solicitors for the plaintiffs, *Botterell & Roche*.

Solicitors for the defendants, *Cooper & Co.*

Court of Appeal.

From Chan. Div. Jan. 28.

In re GILES.

REAL AND PERSONAL ADVANCE CO. *v.* MICHELL. (*a.*)

Practice—Final order made in chambers—Motion to discharge—Limit of time—Judicature Act, 1873 (36 & 37 *Vict.* c. 66), *s.* 50—*Originating summons—Jurisdiction—Mortgage—Priorities—R. S. C.*, 1883, *ord.* 55, *rr.* 3 (c) (e) (g), 5 (A).

The limit of time for giving notice of motion to discharge or vary a final order made in the Chancery Division by a judge in chambers is twenty-one days from the date when the order in chambers was pronounced.

In re Johnson, Manchester, &c., Banking Co. *v.* Beales, 37 *W. R.* 765, 42 *Ch. D.* 505, *approved.*

An originating summons was issued by the mortgagees of property to which the mortgagors were beneficially entitled under the trusts of a will. The mortgagors and the trustees were made defendants to the summons, which claimed, as against the mortgagors, payment of the mortgage-moneys, or, in default, sale or foreclosure, and, as against the trustees, an account of the income of the mortgaged property received by them as trustees of the mortgagors. The trustees defendants brought in an account and gave evidence claiming to be entitled to retain a large portion of the income of the property in question, by virtue of a mortgage, made to them by their cestui que trusts, *prior in date to the mortgage of the plaintiffs. The plaintiffs alleged that they had given notice of their mortgage to the trustees, and that, at the time of the issue of the summons, they had no notice given them by the trustees of any prior charge on the property.*

Held (*affirming* North, J.), *that the originating summons should be dismissed as against the trustee defendants, on the ground that the question which had arisen as to priority of the mortgages was a question which could not be properly dealt with on proceedings by way of originating summons.*

Held, also, per Cotton *and* Lopes, L.JJ. (Lindley, L.J., dubitante), *that the court had no jurisdiction to determine a question of disputed priority of mortgages on proceedings by way of originating summons.*

Appeal from North, J.

Under the will of the testator Giles, certain property was devised to W. Giles and P. Giles on trust to receive the rents and profits, and to pay one moiety thereof to Fanny Michell, wife of W. Michell. In May, 1883, Mr. and Mrs. Michell executed a mortgage of their interest in this property, and in August, 1884, this mortgage was transferred to the Real and Personal Advance Co., who gave notice of the transfer to the trustees.

In 1886 the company issued an originating summons, the defendants being the mortgagors (Mr. and Mrs. Michell) and the trustees of the testator's will (W. Giles and P. Giles). As against the mortgagors, the plaintiff company, by their summons, claimed an account of what was due to them on their mortgage, and in default of payment thereof, sale or foreclosure; and, as against the trustees, the plaintiff company claimed an account of the rents and profits of the property comprised in the plaintiff company's mortgage received by these defendants since January, 1885, as trustees of the testator's will.

After the issue of the summons the defendants, the trustees, furnished an account of the rents and profits of the property in question received by them, but they made affidavits in which they claimed to be entitled to retain the greater portion of the same, under an instrument of charge made by Mrs. Michell on the 19th of January, 1883—prior in date to the mortgage of the plaintiff company—to secure the repayment of sums of money from time to time advanced to her by the trustees. The account furnished showed a small balance then due by the trustees to Mrs. Michell.

The plaintiff company alleged that the trustees had concealed the existence of this charge in their own favour from the plaintiff company, and that the plaintiff company had no knowledge of its existence until the trustees, after the issue of this summons, made their affidavit.

The summons was heard by North, J., in chambers on the 26th of July, 1889, when he made an order dismissing the summons as against the defendants, the trustees, with costs to be paid by the plaintiff company,

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the dismissal to be without prejudice to any other action the plaintiff might bring by writ; and as against the mortgagors he made an order for foreclosure in default of payment. In making the order dismissing the summons against the trustees, the judge expressed his desire to have the matter further argued before him in court, and accordingly gave no certificate.

On November, 16, 1889, the plaintiff company gave notice of motion before the judge in court to discharge that part of the order of July 16 which dismissed the summons as against the defendants, the trustees. The motion came on for hearing on November 22, 1889, when counsel for the defendants, the trustees, took a preliminary objection to the motion being heard, on the ground that the notice of motion was out of time, not having been given within twenty-one days from July 26, 1889, and cited *In re Johnson, Manchester Banking Co.* v. *Beales*, 37 W. R. 765, as an authority. North, J., allowed the objection, and made no order on the motion (see 34 S. J. 79).

On December 7, 1889, the plaintiff company gave notice of appeal from the orders both of July 26 and November 22. The appeal came on for hearing on January 28, 1890, when

D. L. Alexander, for the respondents, the trustee defendants, took the preliminary objection that, having regard to the provisions of section 50 of the Judicature Act, 1873,* no appeal lay from the order in chambers of July 26, no certificate having been applied for or obtained from the judge below, and no effectual motion to discharge or vary the order in chambers having been made.

T. Eustace Smith, for the appellant company.—The Rules of the Supreme Court nowhere contain any provision fixing any limit of time for moving to discharge a final order made in chambers, and until the case of *In re Johnson* before Kay, J., there was no reported case which fixed a limit of twenty-one days for moving to discharge a final order in chambers. That case was only decided on July 26, 1889, and though it was reported in the WEEKLY REPORTER of August 17, 1889 (37 W. R. 765), and is so cited in the Annual Practice, 1889-90, p. 52, it was not published in the *Law Reports* until December, 1889. Until that case, there was at least considerable doubt as to the proper time for moving to discharge final orders made in chambers. I was not aware of the case in the WEEKLY REPORTER until it was cited on the motion before North, J., in November last, and I then asked the judge to extend the time. The Court of Appeal has power to give special leave to proceed with the appeal, and there are special circumstances in this case. The notice of appeal has been given within twenty-one days of November 22.

Alexander, in reply.—Misconstruction of the rules or mistake as to the proper practice, is no ground for obtaining special leave to appeal: *International Financial Society* v. *City of Moscow Gas Co.*, 26 W. R. 272, 7 Ch. D. 241. The plaintiff company ought to have given notice of motion in the court below for an extension of the time.

* Section 50 of the Judicature Act, 1873, so far as material, is as follows:—"Every order made by a judge of the High Court in chambers, except orders made in the exercise of such discretion as aforesaid"—(*i.e.*, orders made by consent or as to costs only)—"may be set aside or discharged upon notice . . . by the judge sitting in court, . . . and no appeal shall lie from any such order to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal."

COTTON, L.J.—The preliminary objection taken on behalf of the respondents raises rather an important point. An order had been made by the judge in chambers dismissing the summons as against two of the defendants, and he asked to have the case further argued, and, accordingly, a motion was made in court to discharge the order made in chambers. Now such a motion is in no way an appeal, but merely an application for rehearing before the same judge. The notice of motion was given more than twenty-one days after the date of the order in chambers. In my opinion that was wrong. It has been established for some time, that the time for giving notice of motion to discharge an interlocutory order made in chambers, following the analogy of interlocutory orders made in court, is limited to twenty-one days, but it does not seem to have been determined (until the case of *In re Johnson*) that the same rule was to apply to motions to discharge *final* orders made in chambers. In my opinion the same rule ought to be applied.

The motion to discharge is not an appeal in any way; it is only a motion to enable the judge to hear the matter over again more fully in court, and it is merely an application made under section 50 of the Judicature Act, 1873, to discharge or vary the previous order.

In my opinion, therefore, North, J., was right in holding that he could not hear this motion in court after the twenty-one days had expired.

But the practice on this point was doubtful until the case of *In re Johnson* had been reported. An application to discharge an order made in chambers is made under section 50 of the Judicature Act, 1873, by the latter part of which, a discretion is given to this court to give special leave to appeal.

[The Lord Justice read the section, and proceeded:—] I am not quite satisfied that the condition imposed by section 50 as to making a motion before the judge has not been performed by the appellant, although, by a blunder, it was made in such a way that the judge could not hear it. But the Court of Appeal has power, under section 50, to give special leave to appeal without a certificate from the judge, and without a previous motion made in the court below to discharge the order in chambers, and, in my opinion, having regard to the fact that there is no rule of court dealing with this point, and that there has been some doubt as to the practice, we ought in this case to give special leave to appeal, even assuming that the conditions imposed by section 50 have not been complied with.

I agree with the view entertained by Kay, J., in *In re Johnson*, that a motion to discharge a final order made in chambers ought to be made within twenty-one days, such a motion being a mere application to the judge to rehear the case in court.

For the future I desire it to be understood that that rule must be followed; but in the present case I think it right to give special leave to appeal, though in future I do not say what course we shall think it right to take, in a case where no certificate had been given and no effective motion made to discharge the order in chambers.

LINDLEY, L.J.—I agree. The difficulty here arises from the fact that there is no general order as to the time within which a motion to discharge an order made in chambers must be made. With respect to final orders the limit of time was not defined till the case of *In re Johnson*, the report of which did not appear in the *Law Reports* until the month of December of last year. That being so, I think the course followed by North, J., was the proper one. I think the view entertained by Kay, J., was right, and that the notice of motion ought to be given within twenty-one days. There is no rule to that effect among the General Orders, but that limit of time has been got at by a pro-

cess of reasoning which appears to me satisfactory. Once that limit of time is got at, it follows that no *such* application as is required by section 50 of the Judicature Act, 1873, has been made in this case. But at the same time it must be remembered that this point of practice was at the time a new one. It is not a case in which there was an existing rule of court, and a blunder had been made in construing it; I do not think in the present case that anyone was to blame for not arriving by reasoning and analogy at the proper conclusion.

I think, therefore, that this is a case in which we ought to avail ourselves of the special powers given to us by section 50 and allow this appeal to proceed.

LOPES, L.J.—I agree. I think the rule laid down by Kay, J., that motions to discharge final orders made in chambers must be brought within twenty-one days, is a salutary rule. At the same time I think that there are special circumstances in this case which justify us in exercising the powers given us by section 50, and giving the appellant special leave to appeal. The special circumstances to which I refer are, that at the time when this summons came before North, J., there was no settled practice bearing on this particular point, and no rule of court dealing with it.

The hearing of the appeal was accordingly proceeded with.

T. Eustace Smith, for the appellant company.—The plaintiff company claim, as assignees of Mrs. Michell, a *cestui que trust* of the defendants, the trustees, and the question to be determined is really a question of account between the defendant trustees and the plaintiff company as *cestui que trust;* that is a question which the court has jurisdiction under ord. 55, r. 3 (*c*) (*e*), to determine on originating summons; it is at all events a question arising in the administration of the estate or trust, and therefore comes under ord. 55, r. 3 (*g*). The account put in by these defendants shows a small balance due by them to Mrs. Michell, and the plaintiff company were therefore at the very least entitled to have an order made in their favour for that amount. [*Alexander.*—The trustees offered to pay that, and you refused to take it on the ground that it might be an admittance of the priority of the trustees' mortgage.] Ord. 55, r. 5 (A), gives the court jurisdiction on originating summons to determine a question of priority between mortgagees, because that rule provides that any person entitled to an equity of redemption may take out as of course an originating summons and obtain an order for redemption, and that necessarily involves in some cases the determination of questions of priority between mortgagees.

D. L. Alexander, for the respondents, was not called on.

COTTON, L.J.—This is an appeal, by our special leave given to the appellant though he had not got any certificate from the judge, from an order made by North, J., in chambers, dismissing so much of an action commenced by originating summons as raises the question whether the two defendants, who are the present respondents, had priority in respect of their charge as against the mortgage on which the plaintiff relies. These defendants are trustees, but their claim is not as trustees in any way, but as mortgagees under a contract between them and one of their *cestui que trusts*. That claim is, therefore, entirely independent of their position as trustees, and the question to be determined as to priority is not a question in any way arising on administration of the trust. The judge held, either that he had no jurisdiction to decide the question of priority upon an originating summons, or that, if he had, it was not desirable to decide that question upon an originating summons. I agree with him. In my opinion the court has no jurisdiction to decide such a question on an originating summons, and, if it has, I am decidedly of opinion it is not a proper matter to be so decided. The question of jurisdiction depends on whether the points in issue in this case are matters which the rules of court have given power to be determined, on originating summons. I cannot find in the Rules and Orders of the Supreme Court anything to justify such a point as this being determined on originating summons.

Ord. 55, r. 3 (*g*), was relied on by the appellant, but that clause only relates to questions which arise in the administration of the trust as between *cestui que trusts* and their trustees. The procedure was intended, so far as I am aware, to enable simple matters to be settled without the expense necessarily involved in bringing an action begun by writ, not to enable the court to determine matters involving serious questions which do not come within the terms of the rule. Ord. 55, r. 5 (A), was also relied on, and it was argued that in order to work out effectually a judgment for redemption it was often necessary that priorities should be ascertained and determined, and therefore that this rule empowers this to be done. I do not agree with that. It is true that in actions for redemption such questions often arise and might have to be determined, and the court has no difficulty in dealing with such questions in an action commenced by writ in the ordinary way; but if the plaintiff chooses to come to the court by way of originating summons, although it may be more convenient to him on the ground of saving expense or otherwise, yet, unless the relief claimed comes within the terms of the order, the court has no jurisdiction to deal with it.

Even if there be jurisdiction to decide such a question as this, it would, in my opinion, be wrong to deal with it in those informal proceedings. An originating summons is a mode of procedure intended for the decision of matters of a simple, uninvolved nature, and is not calculated to determine complicated matters.

In my opinion the decision of North, J., is right.

The only point on which I have felt some doubt is as to whether it would not have been right to order the defendants to hand over to the plaintiff company, as mortgagees, the balance admitted by these defendants to be in their hands.

I think, however, the judge acted rightly, as these defendants were willing to hand it over, and the plaintiff company naturally, thinking that some difficulty might be caused by this, refused to take it.

That being so, there was nothing as to which the judge could make any order on the summons as against these defendants consistently with the view he adopted. The order is therefore right, and the appeal must be dismissed.

LINDLEY, L.J.—In this case an originating summons was taken out, by the mortgagees of Mr. Michell and his wife, claiming as against the Michells the ordinary foreclosure decree. That the plaintiff company have got under ord. 55, r. 5 (A), and no difficulty arises as to that. But the plaintiff company have added as defendants to the summons two persons named Giles, who are trustees of the property comprised in the plaintiff company's mortgage, and the plaintiff company ask, as against the Gileses, to have, in effect, an order for administration of the trust. These defendants say that they have a mortgage on the trust estate which is prior to the mortgage of the plaintiff company. The plaintiff company dispute the priority, and the point, therefore, which we have to decide is whether that is a question which it is proper to decide upon an originating summons. I am not sure that the court has no jurisdiction to do it. I am not so sure, as Cotton, L.J., is, that on a summons for administration of the trust under ord. 55, r. 3 (*g*), there might not be an inquiry as to

priorities. But I am perfectly sure that North, J., was quite right in declining to deal with such a question as this upon originating summons.

The procedure on an originating summons is plainly laid down in the rules. Rule 10 of order 55 gives the judge a discretion to make an order, or not, for the administration of the trust. By rule 7 the application is to be supported by such evidence as the judge may require, which is generally evidence by affidavit, and rule 8 provides that it shall be lawful for the judge to pronounce such judgment as the nature of the case shall require. This procedure does not seem appropriate for deciding such a question as the present. No judge would like to decide a question of priority between mortgagees on affidavit evidence. If it comes, therefore, to be a mere question of expediency and convenience, it follows that it would not be right to decide this point upon originating summons. Consequently, whether the court has jurisdiction to do so or not, I am of opinion that the judge was, on the ground of expediency, quite right in declining to deal with the matter on originating summons.

LOPES, L.J.—The jurisdiction of the court in proceedings commenced by originating summons is new, and depends on the General Orders and Rules. I can find nothing giving jurisdiction to decide the question of priority of mortgages, either under ord. 55, r. 3, or ord. 55, r. 5 (A), or elsewhere. I agree, therefore, that the appeal must be dismissed.

Solicitors for the appellant company, *Nye, Greenwood, & Moreton.*

Solicitor for the respondents, *J. Welman*, for *R. E. Geach*, Guildford.

From Prob. Div. and Adm. Div. Jan 23.

SMITH v. SMITH. (a.)

Divorce—Restitution of conjugal rights—Practice—Sufficiency of affidavit—"Written demand for cohabitation and restitution of conjugal rights"—Rules and Regulations in Divorce and Matrimonial Causes, rr. 2, 175, 176.

A wife, before commencing proceedings against her husband (who had been living apart from her for eleven years) for restitution of conjugal rights, served upon him a letter signed by herself giving him notice of her desire to cohabit and live with him, and demanding from him a full restitution of conjugal rights, and, further, notifying to him that, in the event of his not receiving her and providing a suitable home and habitation for her, she intended to apply to the High Court for restitution of her conjugal rights. The husband sent a reply the same day acknowledging the receipt of the letter and stating that he declined to receive back his wife or make a home for her. The wife's affidavit filed with her petition set out the letters.

Held (reversing the decision of Butt, J.), *that the case was distinguished from* Field *v.* Field, 37 *W. R.* 134, 14 *P. D.* 26, *by the facts that the letter was the wife's own and not a solicitor's letter, that it expressed her desire to cohabit and live with her husband, and that he answered it with an unqualified refusal; and that the wife's letter was therefore a sufficient compliance with rule* 175 *of the Divorce and Matrimonial Causes Rules and Regulations, and that a decree for restitution ought to be made.*

Appeal from Butt, J.

This was an appeal from a decision of Butt, J., refusing to grant a decree for restitution of conjugal rights upon the petition of the wife, on the ground that she had not sufficiently complied with rule 175 of the Divorce and Matrimonial Causes Rules and Regulations. That rule is as follows:—"The affidavit filed with the petition as required by rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld." Rules 2 and 176, which are less material, are printed in a note to *Field* v. *Field*, 37 W. R. 134.

The parties were married in 1866, and lived together till May, 1877, when they separated, and had not since cohabited again. In 1888 it came to the knowledge of the petitioner that her husband had committed adultery, and she forthwith took steps for the commencement of these proceedings for restitution of conjugal rights. It appeared from her affidavit, filed with the petition under the rule above set out, that in October, 1888, with the view of complying therewith, she served the following letter, written by her solicitors, but signed by herself, upon her husband:—"I, Mary Elizabeth Smith, hereby give notice to you, Charles Frederick Smith, my husband, of my desire to cohabit and live with you, and I demand from you a full restitution of the conjugal rights of which you have deprived me; and I further notify to you that, in the event of your not receiving me and providing a suitable home and habitation for me, it is my intention to apply to the High Court of Justice for the restitution of such my conjugal rights." It further appeared by the affidavit that the husband sent a reply the same day in these terms:—"I am duly in receipt of yours, and in reply I beg to state that I decline to receive back my wife, or to make any home for her."

The respondent entered an appearance after citation, but filed no answer to the petition, and did nothing further.

Butt, J., held, upon the authority of *Field* v. *Field*, 37 W. R. 134, 14 P. D. 26, that the petitioner's letter was not a sufficient compliance with rule 175, and accordingly refused to make a decree for restitution of conjugal rights.

The petitioner appealed.

Searle, for the petitioner.—The petitioner's letter in this case was a sufficient compliance with rule 175. *Field* v. *Field* is distinguishable on several grounds. Here the letter, though drawn up by the solicitors, was signed by the wife herself, whereas in *Field* v. *Field* there was simply a lawyer's letter sent to the husband with a formal demand for cohabitation and restitution. Secondly, in this case the husband sent back an answer the same day giving an unqualified refusal to his wife's demand. In *Field* v. *Field* no answer was sent, and it did not even appear from the affidavit that the letter was received. Moreover, in that case no appearance was entered, while here an appearance was entered but no answer was filed, and nothing done by the husband to justify his unqualified refusal to take his wife back. The object of the rule is to give the respondent an opportunity to resume cohabitation or give reasons for not doing so. Rule 176 confirms that view. Before these two rules were made it had been found that the process of the court had been abused by persons taking out citations causelessly, merely for the sake of giving annoyance or getting costs.

No one appeared for the respondent.

COTTON, L.J.—The learned judge appears to have refused to make a decree in this case simply because he felt himself bound by the case of *Field* v. *Field* decided

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

in this court; but I do not think he can have sufficiently considered the circumstances by which the present case seems to me to be distinguished from that. In the first place the letter in *Field* v. *Field* was written to the husband, not by the wife, but by her solicitors as such, was couched in peremptory and threatening terms, and expressed no desire on the wife's part to live with her husband. What it said was this:—"We are instructed by your wife, Mary Francoise Field, of South Villa, Wells-road, Great Malvern, to demand for her forthwith cohabitation and restitution of conjugal rights, and in default of your complying with this request we shall be compelled to institute proceedings for the same without further notice." That was an ordinary solicitor's letter, containing a demand for restitution of conjugal rights, followed by a threat of legal proceedings in default, and it certainly did not express any willingness or desire on the part of the wife to return to cohabitation with her husband. In the present case there is a substantial difference. [His lordship read the petitioner's letter, set out in the statement of this case, and proceeded:—] That does notify her own desire to cohabit and live with her husband. It is true that she does demand a full restitution of the conjugal rights of which she had been deprived, and that she states her intention to apply to the court in case her husband should fail to accede to her demand. But that is in reference to what she has already said as to her desire to resume cohabition with him, and we do not think there is anything objectionable in it. It is not like holding a pistol to her husband's head and requiring him to take her back. Although I quite adhere to what we said in *Field* v. *Field*, still in this case, the letter being written by the wife, and not by her solicitors, and expressing her own desire to cohabit with her husband, cannot be regarded as a mere threatening letter like the one in that case. In my opinion on that ground this appeal must be allowed and the decree granted.

LINDLEY, L.J.—I also think that this case is not at all governed by *Field* v. *Field* to the extent that the learned judge seems to have considered. In that case the letter sent to the respondent was nothing more than a lawyer's letter, and was never answered by the husband. In the next place the present appellant does intimate and express that which we were unable to find in the letter written in the case of *Field* v. *Field*—that is, a desire to resume cohabitation with her husband. Thirdly, it appears in the present case that the husband received the letter and answered it immediately with an unqualified refusal to receive his wife back, while in *Field* v. *Field* he sent no answer, and it did not even appear from the wife's affidavit that he ever received the letter.

LOPES, L.J.—Whether or not I should have put the same construction on rule 175 as was put upon it by this court in the case of *Field* v. *Field* I do not know, and it is not necessary to consider, but of this I am clear—that the present case is very distinguishable from that. Here the letter was written by the wife herself, and expressed her desire to live with her husband, but in *Field's case* it was written by her solicitors, and expressed no such desire. In that case no answer was sent by the husband. Here there was an answer which distinctly states that the husband will not take his wife back. I am therefore of opinion that the decision of the learned judge below was wrong.

Appeal allowed.

Solicitors for the petitioner, *Wontner & Sons.*

High Court of Justice.

Chan. Div. } Chitty, J. } Jan. 11.

In re LONDON AND WESTMINSTER BREAD CO. (LIMITED). (*a.*)

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Voluntary winding up—Transfer or sale of business—Special resolution—Dissentient member—Notice of dissent—When to be given.*

A company passed a special resolution for winding up and for the sale of its business to another company, but before such special resolution had been confirmed in the manner required by section 51 *of the Companies Act,* 1862, *a dissentient member gave notice of dissent to U., the secretary of the company, who was afterwards appointed liquidator when the special resolution was confirmed. The notice of dissent, wherein U. was styled the liquidator, was never returned to the dissentient member, and no objection was made to it until one month after the date of the meeting at which the special resolution was confirmed. Upon motion by the liquidator to restrain the dissentient member from proceeding to arbitration,*

Held, that the notice of dissent was a continuing notice and valid, and that the liquidator's motion must be dismissed.

Motion.

The above-named company having passed a special resolution for the voluntary winding up, and proposing to transfer and sell the company's assets to another company under section 161 of the Companies Act, 1862, the liquidator now moved to restrain one of the shareholders, the respondent Charles Rumsey Knight, from proceeding to arbitration under the aforesaid section.

The question was whether the respondent had expressed his dissent from any such special resolution in writing addressed to the liquidator and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed.*

On the 29th of August, 1889, and the 16th of September, 1889, respectively, special resolutions were duly passed and confirmed for the voluntary winding up of the company, the appointment of the applicant as liquidator, and the approval of an agreement for the sale of the company's assets to the Bread Union (Limited).

On the 31st of August, 1889, the applicant, who had

* The material part of the 161st section is as follows:—" . . . Subject to this proviso, that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing, addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determine in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

(*a.*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

previously been and then was the secretary of the company, received from the respondent the following notice dated the 30th of August, 1889:—

"Take notice that I, Charles Rumsey Knight, of Tythegston Court, Bridgend, in the county of Glamorgan, clerk in holy orders, being the holder of 100 paid-up shares in the London and Westminster Bread Co. (Limited), dissent from the special resolutions passed at the extraordinary general meeting of shareholders in the above-named company, and held at the Cannon-street Hotel on the 29th day of August, 1889, and I require you either to abstain from carrying such resolutions into effect, or to purchase the interest held by me in the said company at a price to be determined in manner provided by section 162 of the Companies Act, 1862.

"Charles R. Knight."

On the 16th of October, 1889, the respondent's solicitors wrote a letter to the applicant, and the material parts of it were as follows:—"Referring to the course which our client, the Rev. Charles Knight, of Tythegston Court, Bridgend, has taken, we shall be glad to know by return of post what offer you propose to make him for his shares in the London and Wesminster Bread Co.," and in reply thereto the respondent's solicitors, on the 20th of October, 1889, received from the applicant a letter dated the 19th of October, 1889, of which the material parts were as follows:—"In reply to your letter I beg to inform you that the matter is still under the consideration of the directors of the Bread Union.

"Yours faithfully,
"For and on behalf of the London and West-
"minster Bread Co. (Limited).
"Alfred Upright,
"Liquidator."

On the 23rd of October, 1889, the solicitors of the applicant wrote to the respondent (omitting formal parts) as follows:—"We have been handed your letter of the 16th inst. by Mr. Upright, the liquidator of this company. As the notice given was informal it cannot be noticed by the liquidator." The notice of dissent remained with the applicant and was not returned to the respondent, who, on or about the 15th of November, 1889, appointed an arbitrator to settle the sum to be paid to him as the price of his interest in the company, and shortly afterwards the applicant served the respondent with notice of motion.

Byrne, Q.C., and *Dunham*, for the motion.—The respondent's notice of dissent was given before there was an effective resolution to wind up, and is, therefore, invalid. Consequently he is not entitled to proceed to arbitration, as he has not complied with the requirements of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.

They also referred to sections 51 and 162 of the same Act, and to *In re Indian Zoedone Co.*, 32 W. R. 481, 26 Ch. D. 70.

Kenyon Parker, for the respondent.

Chitty, J., after stating the above-mentioned facts, continued:—The notice of dissent was received by the company's secretary, the present applicant, and it remained with the company and was not returned to the respondent. There was no correspondence about it, and no objection taken to it until one month after the special resolution to wind up had been confirmed. But it is plain from the letter of the 19th of October, 1889, written by the applicant that the notice of dissent had come to his notice and been present to his mind after he became liquidator. The notice may therefore, I think, be treated as a continuing notice, and I think that there has been a compliance with the Act of Parliament. Probably a notice given before any resolution had been passed would not be good, but it is not necessary to consider that question for the purpose of my present decision.

I think that the argument for the liquidator is entirely technical, and that there is no question of substance between the parties. The Act requires the notice to be left at the company's office not later than seven days after the date of the meeting at which such special resolution was passed. The object of that was to prevent the inconvenience to the liquidator and the company which would happen if members were not required to decide quickly and remained out to speculate on the possibilities of the company's assets becoming better or worse. The motion fails, and must be dismissed, with costs.

Solicitors, *Downing, Holman, & Co.; Watson & Co.*

Chan. Div. North, J. — Jan. 16.

Moon v. Dickinson. (a.)

Practice—Action for injunction and damages—Motion for interlocutory injunction—Denial of liability—Payment into court in respect of damages—Acceptance in satisfaction of damages—Notice of discontinuance of action—Taxation of costs—Rules of Court, 1883, *ord.* 22, *rr.* 6, 7; *ord.* 26, *r.* 1.

In an action for an injunction and damages for a nuisance, the plaintiff moved for an interlocutory injunction, but, the defendants having taken steps to stop the nuisance, no order was, by consent, made on the motion, except that the costs were to be costs of the action. The defendants by their defence denied liability, but paid money into court in respect of the claim for damages. The plaintiff accepted the money, in satisfaction of his claim for damages, and wrote that he should discontinue the action, take the money out of court, and tax his costs. The plaintiff then took out a summons for taxation of his costs of the action, and the defendants also took out a summons that the plaintiff do pay them their costs of the action, including their costs of the motion for injunction, such costs to be taxed, on the ground that the plaintiff's letter was a notice of discontinuance of the action.

Held, that as the money was paid into court only in respect of and accepted only in satisfaction of the claim for damages, and as the entire claim or cause of action was not thereby satisfied, rule 7, of order 22, did not authorize the taxation of costs thereunder, and that the plaintiff's application to tax the whole costs of the action was not right; also that the plaintiff's letter was not a notice of discontinuance so as to entitle the defendants to their costs under order 26, r. 1.

Adjourned summons.

The action was commenced on the 24th of December, 1888, for an injunction to restrain John Dickinson & Co., a company carrying on the business of paper manufacturers, from allowing smoke or effluvia to issue from their mills at Crossley, in the county of Hertford, so as to occasion a nuisance to the plaintiff, who resided in the neighbourhood of the mills, and for damages for the nuisance occasioned to the plaintiff.

On the 8th of January, 1889, the plaintiff gave notice of motion for an interlocutory injunction to restrain the defendant company from allowing smoke or effluvia to issue from their mills so as to cause an annoyance to the plaintiff.

The defendant company then introduced a new process at their mills, and on the 1st of March, 1889, the

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

motion came on for hearing, and, by consent of the parties, no order was made on it, except that the costs of the motion be costs of the action, but that was not to prejudice the plaintiff's right to apply for an interlocutory injunction if he should be so advised.

On the 25th of March, 1889, the plaintiff delivered his statement of claim, in which he claimed (1) an injunction; (2) damages; and (3) costs.

On the 8th of May, 1889, the defendant company delivered their statement of defence, in which they denied that the plaintiff had ever suffered any inconvenience from the smoke or effluvia from their mills, but stated that if he had, such inconvenience was occasioned by accidents incidental to the starting of new machinery and not from anything inherent in the nature of their manufacture; and that such accidents were incapable of recurrence, as all causes of accident had been removed; the 9th paragraph of the statement of defence was as follows:—"Under the circumstances aforesaid the defendants submit that the plaintiff cannot in any case be entitled to an injunction, and lest, contrary to the defendants' contention, any nuisance or annoyance may have been occasioned to the plaintiff or his family, servants, or tenants, or to his said property by any such accidents as aforesaid, the defendants bring into court the sum of £25, and say that the same is sufficient to satisfy the whole of the plaintiff's claim, if any, for damages in this action."

On the 21st of October, 1889, the plaintiff's solicitors wrote to the solicitors of the defendant company as follows:—"We shall discontinue this action and take out of court the amount paid in and tax our costs. We will send formal notice to morrow"; and on the 26th of October, 1889, the following notice was sent: "Take notice that the plaintiff accepts the sum of £25 paid by you into court in satisfaction of the claim in respect of which it is paid in."

On the 30th of October, 1889, the plaintiff took out a summons "that it be referred to the taxing master to tax the plaintiff's costs of the action." The chief clerk dismissed this summons, but, at the request of the plaintiff, placed it in the judge's list.

On the 7th of November, 1889, the defendant company took out a summons "for an order that the plaintiff do pay to the defendants the costs of this action, including therein the costs of the motion for *interim* injunction, such costs to be taxed."

The two summonses now came on for hearing.

Cozens-Hardy, Q.C., and *Edward Ford*, for the plaintiff.—The plaintiff has accepted the sum paid into court by the defendant company in satisfaction of the claim in respect of which it was paid in, and has given the proper notice to the defendant company, and the plaintiff is accordingly entitled to tax his costs of the action, which include the costs of his motion for an interlocutory injunction: ord. 22, rr. 6, 7. The letter of the plaintiff's solicitors of the 21st of October, 1889, is not a notice of discontinuance of the action so as to prevent the plaintiff from taking out of court the sum paid in by the defendant company and from taxing his costs of the action: ord. 26, r. 1.

Moulton, Q.C., and *Ashworth James*, for the defendant company.—The plaintiff's summons is not within order 22, as that order only relates to an action "brought to recover a debt or damages," and the plaintiff's action is for an injunction and for damages, which are grounded on two causes of action. Therefore, the plaintiff cannot apply to tax his costs under rule 7 of order 22: *M'Ilwraith* v. *Green*, 13 Q. B. D. 897, 14 *Ibid.* 766, 33 W. R. Dig. 61. The letter of the 21st of October, 1889, amounts to a notice by the plaintiff of discontinuance of the action; and, accordingly, the defendant company are entitled to issue their summons for taxation of their costs: order 26. At all events there are summonses by the plaintiff and the defendant company for taxation of costs, and the plaintiff ought to have the costs of action, by which he has obtained £25 as damages; but the defendant company are entitled to set off against such costs their costs relating to the motion for an interlocutory injunction.

North, J.—The action was brought for an injunction and for damages. Proceedings were taken with a view to obtaining an interlocutory injunction, but, certain alterations being made in the works of the defendant company, by the consent of the parties no order was made on the motion for the injunction, except that the costs of the motion were to be costs in the action, leave being given to renew the motion if necessary. The statement of claim was delivered on the 25th of March, 1889. The statement of defence of the defendant company denied any case entitling the plaintiff to an injunction, and also any case entitling him to damages, but stated in the 9th paragraph [His lordship then read the 9th paragraph, set out above, of the statement of defence, and continued:—] The statement of defence was delivered on the 8th of May, 1889. On the 21st of October the plaintiff's solicitors expressed their intention of discontinuing the action in a letter of that date. [His lordship read the letter, which is set out above, and continued:—] I do not read that as a present discontinuance of the action. It refers to something in the future. If the plaintiff's solicitors had written "We hereby discontinue," that would have been a notice of discontinuance. They were clearly not simply discontinuing, because then they could not have taken the money out of court, or have got any costs; but, having obtained £25 damages, they did not care to go on any longer with the legal proceedings. Then, on the 26th of October, they give a notice stating that the sum paid into court in satisfaction of the plaintiff's claim for damages is accepted by him. On the 30th of October the plaintiff takes out a summons asking that it be referred to the taxing master to tax his costs of the action. The defendant company say that there was a discontinuance of the action by reason of the letter of the 21st of October, 1889, and, acting on that footing, they take out their summons.

I do not think that the General Orders justify what has been done in this case. Order 22 applies to an action to recover a debt or damages; but there is nothing in the order to confine it to an action to recover a debt or damages only, without seeking any other relief. In ord. 3, r. 6, the word "only" precedes the words "to recover"; but that word is not found in order 22. In this case the money has not been paid into court to satisfy the entire cause of action, but only in respect of the claim for damages, and therefore I cannot treat the whole action as satisfied thereby; and as the entire claim or cause of action is not satisfied, rule 7, of order 22, does not authorize the taxation of costs thereunder; and the application of the plaintiff to tax the whole costs of the action is not right.

With regard to the summons of the defendant company, I do not think that I can set off their costs of the motion for an injunction. I do not see how I can deal with those costs at present. There has been no discontinuance of the action so as to entitle them to have their costs taxed under order 26. I should give a wrong effect to the letter of the 21st of October, 1889, if I held otherwise. In the result I cannot make any order now for taxation of the costs of the defendant company. I order payment out of court of the sum of £25 paid in by the defendant company; but, as far as regards the costs of the summonses, I think that each party should pay his own costs.

Solicitors, *McDiarmid & Teather; Andrew Wood & Co.*, for *Grover & Smeathman*, Hemel Hempstead.

Chan. Div. North, J. Oct. 29, 30.

CHRISTIE v. NORTHERN COUNTIES PERMANENT BENEFIT BUILDING SOCIETY. (a.)

Building society—Dispute with retiring member—Arbitration—Appointment of arbitrators after action commenced.

By one of the rules of a benefit building society it was provided that every dispute between the society and any member on which the decision of the board should not be deemed satisfactory, should be settled by a reference to arbitration, pursuant to the Building Societies Act, 1874; that five arbitrators should be elected by the members at a general meeting, and in each case of dispute the names of three arbitrators should be selected by lot out of the five, as the persons to decide the dispute.

A dispute having arisen between a member who had given notice of withdrawal and the society as to the amount which the member was entitled to receive on withdrawal, the member brought an action against the society to enforce his claim. After the writ had been issued, the society, for the first time, elected five arbitrators pursuant to the above rule, and then took out a summons to stay all further proceedings in the action, and to have the matter in dispute referred to arbitration.

Held, that, as no arbitrators had been elected at the time of the issue of the writ, the action had been properly commenced, and that the society were not entitled, after litigation had been thus commenced, to have the matter in dispute referred to arbitration.

Adjourned summons.

The above-mentioned society was registered under the Act 6 & 7 Will. 4, c. 32, on the 24th of September, 1866.

The rules of the society contained the following (among other) provisions:—

Rule 70, "Any member who may be desirous of withdrawing invested shares, shall, at any time, be entitled to receive back the net amount of his subscriptions as soon as there are funds available, with such interest as the committee may determine. If more than one shall give notice to withdraw, the committee shall order such withdrawals to be paid in rotation, according to the priority of the notices, provided always that the widows and children of deceased members shall have preference. But in all cases a proportionate share of the expenses, if required, shall be first deducted. Any person who shall give notice to withdraw his invested shares shall thereupon cease to be a member of this society (in respect of the shares withdrawn) and forfeit all interest therein."

Rule 76, "It shall be lawful to repeal or make any alteration or amendment of these rules in the manner directed by 10 Geo. 4, c. 56, s. 9, as under."

Rule 77, "In case the committee for the time being shall be unable to determine any matter of dispute or difference which shall arise between the society or the trustees or officers thereof or any person acting under them, or any member or members thereof, or any person or persons legally claiming on behalf of any member or members thereof, respecting the construction of these rules, or any clause therein, . . . reference shall be made to arbitration pursuant to the 10 Geo. 4, c. 56, s. 27. At the first meeting of this society after the enrolment of its rules five arbitrators shall be named and elected, none of them being directly or indirectly beneficially interested in the funds of the society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn by the complaining party shall be the arbitrators to decide the matter in dispute."

Rule 78, "Every member, or any person claiming under a member, whether he shall have executed a mortgage to the society or not, shall be bound by and subject to these rules, and by alterations and amendments thereof."

The plaintiff was the holder of thirty £10 shares and part of another share, upon which he had paid subscriptions amounting to £303. On the 1st of April, 1887, he gave the society a written notice to withdraw all his shares. At that time no arbitrators had ever been appointed under rule 77.

On the 24th of June, 1887, the society was registered under the Building Societies Act, 1874, at a special general meeting of the members held.

On the 19th of January, 1888, a resolution to rescind rule 70, and substitute a different rule for it, was passed.

At a second meeting, held on the 3rd of February, 1888, it was resolved to rescind all the rules and to substitute a new set of rules, among which were the following:—

Rule 15 (6), "In the event of any loss occurring to the society on any mortgage, or any expense or loss whatever, or in the event of there being any apprehended loss or expense, the same shall be charged upon and divided amongst all the ordinary invested shares then in the society, in proportion to the amount of subscriptions on each share, including arrears.

(7) "All ordinary invested shares that may be withdrawn shall have deducted from them a fair proportion of such loss or apprehended loss, and the board may estimate from time to time the amount of such loss or apprehended loss, and thereupon make such deduction or charge as aforesaid."

(9) "A member who has given notice to withdraw his shares shall continue to be a member, but shall not be entitled to vote at, or take part in, any meeting of the society, and he shall not, by reason or in consequence of such notice, or otherwise, cease to be a member of the society, but shall continue to be bound by these rules, and by all alterations and amendments thereof, until he shall have received the amount payable in respect of his shares."

Rule 32 (1), "Every dispute between the society and the board and any member or person claiming by or through any member or under the rules, on which the decision of the board shall not be deemed satisfactory, shall be settled by reference to arbitration, pursuant to the Building Societies Act, 1874. Five arbitrators shall be elected by the members at a general meeting, none of them being directly or indirectly beneficially interested in the funds of the society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn out by the complaining party shall be the arbitrators to decide the matter in dispute."

The society refused to pay the plaintiff the sum of £303, claiming under the new rules to make certain deductions therefrom, which reduced this sum to £196 19s. 6d. The plaintiff accordingly, on the 18th of April, 1889, brought this action against the society to enforce his claim. At the date of the issue of the writ no arbitrators had been elected either under the old or under the new rules. On the 1st of May, 1889, notice was given to all the members (including the plaintiff) that a special general meeting of the members of the society would be held on the 7th of May for the purpose of electing arbitrators under rule 32 of the new rules. The meeting was held and five arbitrators were elected. On the 8th of May, 1889, the society took out this summons to stay all further proceedings in the action, and that the action and all matters in dispute

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

between the plaintiff and the society might be referred to arbitration pursuant to the rules of the society.

Sir Horace Davey, Q.C., Everitt, Q.C., and *Farwell*, for the society.—The plaintiff is claiming under the new rules; he is, therefore, bound by them, and by every alteration of them. If he is not a member he is claiming through a member. If he sues the society he must sue subject to the statutory provisions of the society, and one of those provisions is that all disputes shall be referred to arbitration.

Napier-Higgins, Q.C., and *Rutherford*, for the plaintiff.—Even supposing the new rules do apply, and we submit they do not, still the society have no right, after action commenced, to fix the tribunal to decide the question at issue. They do not ask to go to arbitration under the old rule, and they could not do so, as no appointment of arbitrators was made at the time mentioned in the rule: *Walker* v. *General Mutual Building Society*, 36 Ch. D. 777; 36 W. R. Dig. 26.

Everitt, Q.C., replied.

North, J. (after stating the nature of the dispute and the provisions of the original rules of the society, continued:—).—Rule 77 seems to me to provide for the determination of such a dispute as that which has arisen between the plaintiff and the society—viz., whether he is entitled to receive back the whole of his subscriptions, or whether any, and, if any, what, deductions are to be made from them? I think also that the question is clearly one which the committee are unable to determine, because the matter has been put into the hands of the solicitors; a discussion has taken place about it, and it is because the committee could not *determine* it that recourse has been had to litigation, and the only question is, whether the dispute ought to be settled by an action in this court or by a reference to arbitration? The rule provides that five arbitrators are to be elected at the first meeting of the society after the enrolment of its rules. I have already, during the argument, intimated an opinion that that provision is merely directory and not compulsory, and that, if for any reason it happened that the arbitrators could not be appointed at the first meeting, an appointment at a second, and, perhaps, at a third, meeting would not necessarily be bad. But the rule is very important as showing that what is contemplated is that a standing body of arbitrators shall be elected as soon as possible before any of the questions to be referred to them should have arisen, and it is out of that standing body so elected before any question has arisen that three arbitrators are to be chosen by lot to decide any dispute when it actually has arisen. Under that rule no arbitrators were ever appointed, and at the time when the plaintiff gave his notice to withdraw, on the 1st of April, 1887, there was no tribunal constituted under the rules to which any dispute could possibly be referred, because the society had allowed twenty-one years or so to elapse without complying with that requirement of the rules.

On the 24th of June, 1887, four months afterwards, the society proceeded to incorporate themselves by registration under the Act of 1874, as they had a perfect right to do, and the plaintiff, acting upon that, has issued his writ against the society as defendants. It was suggested that by suing them in that way he had estopped himself from raising any objection to their having all the rights which a body incorporated under that Act might have. I do not see that he has done anything of the kind. He has recognized the fact, to which he could not shut his eyes—viz, that the society, the persons against whom he asserted a claim, had become an incorporated body. Before they were incorporated they could only be sued in the names of the trustees. But so soon as the society, which is the same body of persons which was formerly unincorporated, became, by virtue of the registration, capable of being sued itself it was perfectly competent to the plaintiff to sue it, and in my opinion he is in no worse position in so suing them than if they had remained unincorporated and he had sued the trustees. [His lordship then read rules 15 and 32 of the new rules, and continued:—] The first question raised with regard to these rules is the important one whether they bind the plaintiff, who had, under the old rules, ceased to be a member of the society, by giving his notice to withdraw before the incorporation of the society and before the new rules were passed. That point I do not think it necessary to decide on the present occasion, and I do not intend to decide it.

I am not satisfied that the new rules are binding on the plaintiff. I may put this by way of illustration. Suppose the original rules had provided that all disputes should be referred to the decison of two arbitrators, one to be nominated by the person who had the dispute with the society and the other by the society, and that the two arbitrators might appoint an umpire. Suppose that, after a member had given notice to withdraw, and a question had arisen as to what was due to him from the society, would it be open to the society to proceed to repeal the rule which I have supposed to exist, and to substitute for it a new rule that any dispute should be decided by a person to be nominated solely by themselves. It would take a great deal of argument to convince me that anything in the rules would authorize them to make such alteration as that directly affecting a person who had ceased to be a member. I put this case to show the difficulty which I feel; but, as I have just said, I express no opinion on the point. I will assume for the purpose of my present decision that the new rules apply to the plaintiff.

But, still, in my opinion, he is not bound to submit to arbitration, and for this reason. The old rules, as I have pointed out, require that there should be standing arbitrators appointed from the first. In the new rule as to arbitration there is an alteration of the language. It does not say when the arbitrators are to be appointed; all it says is, that "five arbitrators shall be elected" by the members at a general meeting. But it goes on to give directions as to what is to be done in each case of dispute—namely, that, out of a body of arbitrators who are supposed to be then existing—a standing body of arbitrators—three are to be selected by lot. This is based on the assumption that the society have already done their duty by electing five good and competent arbitrators for the general purpose of arbitration, and then the bargain is that three persons chosen by lot out of the five shall decide the dispute. It is quite a different thing to say that any dispute is to be referred to the decision of a tribunal such as that to which I am now asked to send this dispute. No arbitrators had been appointed under the original rules, and no arbitrators had been appointed under the new rules down to the time when the dispute arose. It is found that the board cannot settle it, and the parties must settle it in some legal way, and, there being no other course open to the plaintiff, he issued his writ in the action. At the time when the writ was issued the dispute could not be referred to arbitration, because there were no arbitrators to whom it could be referred, and it is impossible for me to say that it was not open to the plaintiff to issue a writ, for, if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all. In my opinion, therefore, the plaintiff was perfectly justified in commencing his action.

Then, after the writ has been served, the society proceeded to elect arbitrators by calling a general meeting of the members, at which five persons were elected. They are said to perfectly competent and trustworthy persons, and I have not the slightest reason to doubt it.

But, still, I do not consider that they constitute a tribunal such as is contemplated by the rule. The tribunal is to be a standing body of arbitrators, out of whom, when a dispute arises, three are to be chosen by lot; whereas, what has really happened is this: no arbitrators to whom the matter could be referred were elected until after the dispute had gone so far that an action had been commenced, and then the society—the defendants to the action—proceeded to nominate the judges who were to decide the action, and they ask me to say that the judges so nominated are the only persons who can deal with the matter. I do not doubt that they have been properly elected, or that they are a very good body of arbitrators, perfectly competent to deal with any dispute which may hereafter arise. But, in my opinion, the tribunal contemplated by the rule to decide a dispute between a member and the society is to consist of three persons to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons three of whom are to be the judges of the dispute. It is quite true that these gentlemen were appointed at a general meeting, but it was a general meeting of the members of the society who are the defendants. The general meeting would, in all probability, adopt the persons whose names are submitted to it, and those persons would be nominated by somebody. It is sufficient to prevent my sending the matter to such a tribunal that these gentlemen may have been nominated by the committee or the directors, or some of them, expressly because they, or some or one of them, are or is known to hold a particular view on this subject. Honest and impartial men I do not doubt they are, but still, they may have been elected because of their known views on this subject. In my opinion the tribunal to which a dispute of this sort is to be left is not one to be chosen by lot out of a body of persons elected by one of the parties to the dispute after the dispute has arisen.

I think, therefore, that, this action having been properly commenced, cannot be put an end to by referring the dispute to arbitrators thus elected. I must, therefore, dismiss the summons. The costs of the plaintiff will be his in any event.

Solicitors for the plaintiff, *Rowcliffes, Rawle, & Co.*, for *Bremner & Sons*, Liverpool.

Solicitors for the society, *Norris, Allen, & Chapman*, for *J. L. Johnson*, Liverpool.

Chan. Div. } Nov. 16, 23, 1889; Jan. 13.
Stirling, J. }

In re PYLE WORKS (LIMITED). (a.)

Company—Winding up—Mortgage of uncalled capital—Priority of mortgagee over unsecured creditors—Companies Act, 1862, *ss.* 16, 38, 75, 98, 101, 133.

A company by its memorandum of association was empowered (inter alia) *to borrow money by mortgage or otherwise, and issue bonds and mortgage debentures and other securities founded or based upon all or any of the real and personal assets or on the credit of the company. The articles of association, which bore even date with the memorandum of association, provided that the directors might borrow on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums as they might from time to time think expedient.*

The company executed certain mortgages of their property, including portions of their uncalled capital, and subsequently went into liquidation.

Held, that, the memorandum and articles of association must be read together, and that so reading them, the company had power to mortgage its uncalled capital.

Held, also, that the mortgages were valid and effectual against the unsecured creditors, notwithstanding the winding up.

In re Phœnix Bessemer Steel Co., 44 *L. J. Ch.* 683, 23 *W. R. Dig.* 45, *followed.*

Grissell's case, 14 *W. R.* 1015, *L. R.* 1 *Ch.* 528; Black & Co.'s case, 21 *W. R.* 249, *L. R.* 8 *Ch.* 254; and In re Whitehouse & Co., 27 *W. R.* 181, 9 *Ch. D.* 595, *distinguished.*

Adjourned summonses.

These were three summonses raising, under circumstances which varied somewhat in detail, the question whether the mortgagees of uncalled capital were entitled to be paid, what was due on the mortgages, out of calls made in the winding up in priority to the unsecured creditors of the company.

The company was registered in 1880 with a memorandum of association, which defined the objects of the company to be (amongst others)—(*l*) to borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds and mortgage debenture and other securities, founded or based upon all or any of the real and personal assets or on the credit of the company.

By the articles of association, which bore even date with the memorandum of association, it was provided (article 3) that the board of directors "may from time to time borrow on bonds or debentures of the company or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient."

The mortgages in question were as follows:—

1. A mortgage, dated January 3, 1882, in favour of Frederick Greenwood and John Brooke Greenwood, by which, first, all the then uncalled-up amounts of £6 per share on 3,500 preferred shares of the company; and, secondly, all the personal property, assets, and effects which then, or at any time during the continuance of the security, should belong to the company, but not including any uncalled capital of the company, except that thereinbefore expressly mentioned, were assigned to secure repayment of an advance of £2,500.

2. A mortgage dated May 3, 1886, in favour of Robert M'Ilwraith and Edward Gotto, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were assigned by way of security against any loss or damage which M'Ilwraith and Gotto might sustain by reason of their having guaranteed to the British Linen Co.'s bank the repayment of a sum of £3,500 advanced by the bank to the company, and also guaranteed to the London and North-Western Railway Co. and to the Great Western Railway Co. the payment of such sum as might be due to those railway companies by the company for carriage of goods upon their ledger account with the railway companies.

3. A mortgage, dated August 10, 1887, in favour of Ferdinand Gautier, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were (subject to the prior mortgages) assigned to secure an advance of £4,000.

4. A mortgage, dated October 28, 1887, in favour of Robert M'Ilwraith, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were assigned, subject to the prior mortgages, to secure an advance of £3,000.

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Hastings, Q.C., and *F. Whinney*, for F. Gautier's summons.—In order to ascertain whether the mortgage is valid the memorandum must be read with the contemporaneous articles of association: *In re Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683, 23 W. R. Dig. 45. Reading, therefore, sub-section (*l*) of the memorandum with article 3 of the articles of association the company were empowered to mortgage their uncalled capital. The present case, therefore, differs from *Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265, where it was held that the memorandum of association did not authorize a charge on uncalled capital. The mortgage, therefore, being valid, is not affected by the winding up: *In re Phœnix Bessemer Steel Co.; Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156.

Buckley, Q.C., and *Ashworth James*, for M'Ilwraith and Gotto's summons, adopted the same argument.—M'Ilwraith is the holder of 583 shares and Gotto of 300 shares in the company, and the question is whether they can have a charge on calls to be paid by themselves. We submit they can. The calls here are not the property of the company, but of the mortgagees. All that the company is entitled to is the equity of redemption. *Black & Co.'s case*, 21 W. R. 249, L. R. 8 Ch. 254, and *Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. 528, have no application to the present case. There is no question of set-off.

Hastings, Q.C., and *F. Whinney*, for Greenwoods' summons.—Greenwood, in addition to his charge on the uncalled capital, has a charge on the general assets of the company.

Gifford, Q.C., and *Haldane*, for the official liquidator.—In *In re Phœnix Bessemer Steel Co.* and *Howard* v. *Patent Ivory Manufacturing Co.* the judges dwelt upon the fact that it was the memorandum of association which empowered the company to charge its uncalled capital. Here, although the articles do give that power, they must be controlled by the memorandum, which, by sub-section (*l*), limits it to personal security of the company.

Phipson Beale, Q.C., and *Carson*, for Swan and McQueen, two unsecured creditors, who had been appointed to represent the rest.—The mortgages in question are void as against the unsecured creditors of the company. A company under the Companies Act, 1862, has no power to bind its calls made in a winding up, whatever may be its powers as regards calls made by its directors. It can only mortgage such calls as it has power to make. The power of a liquidator to make calls is independent of that of the directors, and would subsist without it. The calls so made by him constitute a fund for the special purposes of the Act. Throughout the decided cases there is a confusion between the liability of a shareholder to pay calls on his shares and that of a contributory to contribute to the assets of the company in the event of its being wound up—*i.e.*, the liability by contract and that by statute. *In re Phœnix Bessemer Steel Co.* and *Howard* v. *Patent Ivory Manufacturing Co.*, upon which the mortgagees rely, are inconsistent with the reasoning upon which those decisions are based, and should not be followed.

They also referred to the Companies Clauses Act, 1845, s. 38; Companies Act, 1862, ss. 16, 25, 32, 36, 38, 75, 98, 133; Companies Act, 1867, s. 11; *Stanley's case*, 12 W. R. 894, 4 De G. J. & S. 407; *Grissell's case; Ex parte Mackenzie*, 17 W. R. 343, L. R. 7 Eq. 240; *Webb* v. *Whiffin*, L. R. 5 H. L. 711; *Black & Co.'s case; Bank of South Australia* v. *Abrahams; In re Whitehouse & Co.*, 27 W. R. 181, 9 Ch. D. 595; *Muir* v. *City of Glasgow Bank*, 6 Ct. Sess. Cas., 4th ser., 401; *Burgess's case*, 28 W. R. 792, 15 Ch. D. 507; *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; Lindley on Partnership, 5th ed., p. 3. [STIRLING, J., referred to *Robinson's Executors' case*, 2 De G. M. & G. 517; on app. 5 W. R. 126, 6De G. M. & G. 572.]

Hastings, Q.C., replied.

Cur. adv. vult.

Jan. 13.—STIRLING, J., stated the facts and continued:—It was laid down in *Bank of South Australia* v. *Abrahams* that the right of a company to unpaid capital "is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect." It was held by Jessel, M.R., in the case of *In re Phœnix Bessemer Steel Co.* that the apt and proper words, or sufficient context, need not be found in the memorandum of association itself, and that it is sufficient if they are contained in contemporaneous articles of association. The principles on which he arrived at this conclusion are thus stated (44 L. J. Ch. 685):—"The memorandum and articles are contemporaneous documents, and the rule of construction is that if contemporaneous documents can be read in two ways, in one of which they appear consistent and in the other inconsistent, the construction is to be preferred which will render them consistent. Another principle is, that if one of two contemporaneous documents is ambiguous in its terms, but the other is clear, then force is to be given to the one whose terms are clear, so as to interpret the one containing ambiguous terms." Similar principles were acted upon by the same learned judge in the case of *Harrison* v. *Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358, and, so far as they related to the matter now under consideration, do not appear to be affected by the qualifications suggested by the Court of Appeal in *Guinness* v. *Land Corporation of Ireland*, 31 W. R. 341, 22 Ch. D. 349. I propose, therefore, to act upon that.

Now the memorandum of association in the present case empowers the company "to borrow on mortgage or otherwise." Mortgage of what? The contemporaneous articles of association say, "On mortgage of all or any part of the property of the company, either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled." Those words, read with those in the memorandum of association authorize a mortgage of uncalled capital certainly along with other property of the company to secure an advance. Further, the memorandum authorizes the issue of "mortgage debenture and other securities . . . founded on all or any of the real or personal assets or on the credit of the company." If it is conceded (as was contended in argument) that the strict or primary meaning of the word "assets" is property, and that it would not include uncalled capital in the absence of a context, still the articles of association show that uncalled capital was intended to be available as the subject-matter of a security, and I should therefore hold, if necessary, that there is here found a context sufficient to show that the word "assets," as used in the memorandum, is used in a sense which includes uncalled capital. I am of opinion, therefore, that the mortgage of the 3rd of January, 1882, which includes both uncalled capital and other property of the company, is authorized by the express terms of article 3. In the other mortgages the subject-matter of the security is uncalled capital only; and it is suggested that, as they include no part of the property of the company strictly so called, they do not fall within article 3. In my opinion, however, article 3 clearly shows an intent that the company should have power to mortgage uncalled capital.

It is said that the words "such mortgage" in article 3 mean, as the article ought to be read, a mortgage of all or any part of the property of the company, which

would not include the uncalled capital. The result of that would be that a mortgage of uncalled capital alone would be invalid, whereas if it included any part, however small, of the other property of the company, it would be valid. I do not think that such a narrow construction ought to prevail, and I prefer reading the words "such mortgage" as meaning a mortgage given to secure money borrowed by the company generally. In my opinion, therefore, the mortgages of the 10th of August and the 28th of October, 1887, are within the power. There remains the question whether such a mortgage may be given by way of indemnity, as in the case of the mortgage of the 3rd of May, 1886. I postpone, however, for the present, the consideration of this question, and proceed to consider whether these charges, which I have held to be valid, are effectual against unsecured creditors as regards calls made in the winding up, it being contended that a company formed under the Companies Act, 1862, has no power to bind such calls, whatever may be its powers as regards calls made by the directors. Now, the order made in *In re Phœnix Bessemer Steel Co.*, already referred to (of which I have obtained a copy), contained an expression of opinion that the mortgagees had under their mortgage a first charge on the unpaid capital of the company and on the proceeds of all future calls made and to be made on the shares in the company; and it was ordered that the liquidator should get in the unpaid capital under the direction of the judge, and should place the same and the proceeds of all future calls to be made on the shares in the company to a separate fund to be entitled "calls in respect of unpaid capital"; and the unpaid capital and the proceeds of any future calls were not to be dealt with by the liquidator without notice to the mortgagees. It therefore appears that the mortgagees were recognized and dealt with by the court as having a charge not only on calls made by the directors but on those to be made in the winding up; but no notice of any suggestion of a difference between them is to be found either in the arguments of counsel or the judgment of Jessel, M.R., as reported. A similar decision appears to have been given by Kay, J., in *Howard v. Patent Ivory Manufacturing Co.*, but here also there is a like silence as to any distinction between calls made before and those made after the commencement of the winding up. It is now contended that these decisions ought not to be followed on the ground that they are inconsistent, if not with other cases binding on me, at all events with the grounds on which the decisions in those other cases are based. Before proceeding to consider those cases I may remark that in the earliest or one of the earliest cases in which the validity of a mortgage of unpaid capital was considered—viz., *Stanley's case*, Turner, L.J., appears to have rested his decision against the validity of the charge on the ground that it would be inconsistent with the discretion vested in the directors as to the making of calls. This, however, was set aside by Jessel, M.R., in the *Phœnix Bessemer Steel Co.'s case*, who relied mainly on the analogy furnished by section 38 of the Companies Clauses Act, 1845, which expressly confers power "to mortgage the future calls on the shareholders."

In *In re Sankey Brook Coal Co.*, 18 W. R. 427, L. R. 9 Eq. 721, a charge was given on the proceeds of a call proposed to be, but not actually made. The call was afterwards made, but before the proceeds were got in a winding up commenced. It was held by James, L.J. (then Vice-Chancellor) that the charge was valid, and the liquidators were ordered to apply the proceeds of the call towards payment of the debt secured by the charge. I do not, however, treat this as an authority directly in favour of the mortgagees in this case; for the order made in *In re Sankey Brook Coal Co.* related to the proceeds, not of a call made by the liquidators, but of one made by the directors, which (as is shown by *Stone v. City and County Bank*, 3 C. P. D. 282, 26 W. R. Dig. 42), the liquidators had power to enforce. But it may be (and it is suggested in argument), that a directors' call so enforced is subject to charges from which a call made by the liquidator would be free. The cases on which reliance is placed in opposition to the summons are mainly *Grissell's case*, *Black & Co.'s case*, and *In re Whitehouse & Co.*, all of which were decided on the terms of the Companies Act, 1862, and particularly on sections 16, 38 (sub-section 4), 75, 98, 101, and 133. [His lordship then read section 16, observing that it related to moneys payable in pursuance of the conditions and regulations of the company. He also read section 38, as to the liability of present and past members of a company in the event of a winding up, and sub-section (4) of that section, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. He then read section 75, as to the liability to contribute to the assets of a company in a winding up creating a specialty debt; and sections 98, 101, and 133, sub-section (1). He observed that it was plain from sections 38 and 75 that the liability under section 38 was treated in the Act as a different liability from that which was created by section 16, and that, by the first portion of section 101, contribution under section 38 was excluded from that section. He continued:—] Now, in *Grissell's case* the company was being wound up under supervision; calls were being made in the winding up, and the question was, What were the rights of a contributory who was also a creditor of the company? It was held that the debt could not be set off against calls, but that the contributory must first pay his calls and then he would be entitled to receive a dividend *pari passu* with the other creditors. Lord Chelmsford, in delivering the judgment of the court, said:—"The question depends entirely upon the construction of the Companies Act, 1862. . . . In considering the questions involved in these applications the primary intention of the Legislature in the provisions relating to the winding up of companies must be regarded. That intention is expressed in the 133rd section of the Act, as being 'that the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company.'" Then later on he said:—"It appears to me to be quite clear that the amount of the call not paid cannot be set off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to the 133rd section, as to the satisfaction of the liabilities of the company *pari passu*." Then he proceeded to deal with section 101, upon which he relied, but to which I need not refer.

In *Black & Co.'s case* the company was being wound up by the court. The contributories had entered into an agreement with the company for the supply of locomotive engines, one term of which was that during the continuance of the agreement the contributories might set off against the calls upon all or any of their shares, the amount due to them from the company and for which they held the company's acceptances. It was held that this special contract as to set-off was not available as regards calls made in the winding up. What the Lord Chancellor, Lord Selborne, there said was:—"The point, therefore,

which his honour has decided is simply this—that a company may contract with one of its shareholders so as to take him, in case of a winding up, out of the law laid down in *Grissell's case*, and give him, in substance, a right to be paid out of his own calls in preference to other creditors; which right, but for such special contract, he would not have had. It is probably enough to say that the law generally has been settled by *Grissell's case* upon the interpretation of the Act of Parliament, and of the rules laid down in that Act of Parliament, as to the mode in which, under a winding up, the money arising from calls is to be applied in payment of the creditors *pari passu*, and without preference. That case (being decided by an authority which we ought to treat as binding on ourselves, even if we doubted that it was right) has determined that in general such a set-off is not to be allowed. That decision being founded upon the interpretation of the Act of Parliament, it is very difficult to understand how it can be seriously argued that a company and one of its shareholders can, by any agreement they choose to enter into between themselves, override and relieve themselves from the operation of the Act of Parliament. The principle of the winding-up enactments is like that of the Bankruptcy Acts. . . . That being so, it is impossible to entertain the idea that if the law is as laid down in that case (*i.e.*, *Grissell's case*) any company can, by any private contract, take a particular creditor, who is also a shareholder, out of the operation of that law unless the contract comes within the permissive portion of the 25th section of the Act of 1867. But in this case the course prescribed by that section has not been followed, and I do not propose to say more on the subject, except that I greatly doubt whether that Act does not supply additional reason against holding that the set-off in this case can be allowed." He then proceeded to deal with the case of *Brighton Arcade Co.* v. *Dowling*, 16 W. R. 361, L. R. 3 C. P. 175, decided by the Court of Common Pleas, in which it was held that the decision in *Grissell's case* did not apply to a company which was being voluntarily wound up, and then, after dealing with the ordinary law of set-off, he continued:—"But here the rights are substantially different. The moment that the winding up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and, in the first instance, to payment *pari passu*. The different sections of the Act—those which define the liability of limited companies, the 7th, 8th, 23rd, and 38th; those which deal with the administration of assets, the 98th, the 101st, and the 133rd; those which give the power to make calls, not in the ordinary way, but specially for the purposes of this Act, the 102nd and 133rd—all have in view the payment *pari passu* and equally of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors." James, L.J., simply concurred, but there are a few words in Mellish, L.J.'s judgment which I desire to read. They are these:—"Then the 98th section says that the assets, which clearly include the unpaid portions of all shares, are to be applied in discharge of the liabilities. If the case stood upon that section alone it might be a very considerable question whether the meaning was not that the money was to be called up and applied among all the creditors, so that the shareholder should only receive his share of his debt; but that is, in my judgment, made quite clear by the 101st section. Although that section does not in terms say that there is to be no set-off, yet it shows that the Legislature, in framing that section, thought it had already been enacted that there should be no set-off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be a set-off."

In *Whitehouse's case* the late Master of the Rolls applied the same principles to the case of a purely voluntary winding up, notwithstanding the case in the Common Pleas of *Brighton Arcade Co.* v. *Dowling*, which had been already dealt with and doubted in *Black's case*. The late Master of the Rolls there, after dealing with the common law right of set-off, said:—"Before going into the details of that Act—*i.e.*, the Companies Act, 1862—I may state the scheme of the Act as regards winding up, which was this, that the assets of the company were to be collected by the liquidator and distributed among the creditors; and in the case of an insolvent company it was very like bankruptcy; but if the assets were to be so distributed, of course, if the liquidator sued in his own name, he would not be indebted at all to the man to whom the company was indebted, and there would be no strict right of set-off. Whether that was affected or not by the provisions of the Act that enabled him to sue in the name of the company, I will consider further on. If he comes under those sections—notably, the 138th section—in a voluntary winding up, he comes in his own name as liquidator to enforce a call, and, strictly speaking, there is no actual set-off, because he is not indebted. If, therefore, you want a set-off at all, you must show some provision in the Act itself giving the right of set-off, because, in principle, there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due." Then, after dealing with sub-section (4) of the 38th section, which I have read, he said:—"Now, first of all, as regards the calls made in the winding up, they being calls for something unpaid on the shares, that is a contribution due by the members under the Act, and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding up, because, though that is a debt due to the company, it is not the less an amount unpaid on the shares, in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I have said before, it is as much unpaid if he had not paid the calls made before the winding up, as it is in respect of the amount unpaid on the shares, in respect of which no call has been made before the winding up." So that the Master of the Rolls thought that the principle of *Grissell's case* extended not merely to calls made in the winding up, but to calls made prior to the winding up.

It therefore appears that in *Grissell's case* and *Whitehouse's case* the question related to the ordinary right of set-off, and that *Black's case* related to a right of set-off conferred by contract. None of those cases dealt in any way with the effect of a charge given for valuable consideration. That subject is alluded to in the argument in *Black's case*, but not (so far as I have observed) in the judgment; and the terms of the agreement which were relied on by the contributories in that case were not apparently such as could be treated as creating an equitable assignment of the unpaid calls. In all these cases it was held that the right of set-off could not prevail—that is to say, that the liquidator was entitled to receive the calls in full, and undiminished and unaffected by any indebtedness on the part of the company to the person by whom the calls were payable. Here it is admitted that the calls are to be paid in full; the question is, how is the liquidator to apply them when received—whether *pari passu* among all the creditors, or in satis-

faction of the debts of the mortgagees in whose favour charges have been created on the unpaid capital? Now the decisions in the three cases to which I have referred are, therefore, not in point; but reliance is placed on the language made use of in the judgments, and certainly some of the language, if taken literally, appears to be strongly in favour of the contention on the part of the general creditors. It is, however, to be borne in mind that those judgments were given with reference to cases none of which involved the consideration of the effect of a charge upon unpaid capital. Apart from decision, the argument in favour of the mortgagees is thus put:—By section 38 there is imposed the liability to contribute to the "assets of the company" in the event of its being wound up. By section 98 the court is to cause the "assets of the company to be collected and applied in discharge of its liabilities"; and by section 133 "the property of the company" (a term which has been held to have the same meaning as "assets of the company" in section 98) "shall be applied in satisfaction of its liabilities *pari passu*." The proceeds of the calls made in the winding up therefore become, as was held in *Webb* v. *Whiffin*, part of the "assets" or "property" of the company. Now, in dealing with other portions of those "assets" or that "property," the liquidator would be bound to have regard to any equitable charges duly created thereon (including, of course, such charges as were held by the House of Lords to be valid in the cases of *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191, and *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523), and to apply the proceeds of the realization of such specific parts of the assets first in payment of the sum due on the charge; and, secondly (and only secondly), in payment of the general creditors *pari passu*. It is said on behalf of the mortgagees that the like course ought to be followed with respect to the proceeds of calls made in the winding up. On the other hand, it is said on behalf of the general creditors that the language of the Act of 1862 is such as to prohibit any applications of the proceeds of calls made in the winding up in favour of specific mortgagees, and that all such proceeds must be divided *pari passu* among the creditors of the company. This contention appears to me to be now, for the first time, explicitly raised for judicial decision; and if it had to be decided on the language of the Act alone there might be some difficulty, but in dealing with it a court of first instance is bound, I apprehend, to have regard to the current of decision on the Act of 1862.

Now in the cases relating to set-off the courts which decided them did not place exclusive reliance on sections 38 and 133; each of them attached weight to section 101, which was treated (as is put by Mellish, L.J., in *Black & Co.'s case*) as showing that "the Legislature thought that it had already been enacted that there should be no set-off."

No section of the Companies Act, 1862, so conclusively negatives the validity of a charge on calls in the winding up as section 101 negatives the right of set-off. Reference was made in argument to sections 25, 26, and 32, which impose on the company the duty of giving information to the public of certain matters, and, amongst others, as to the amount of calls made on each share, the total amount of calls received, and the total amount of calls unpaid; and it was said that a member of the public proposing to deal with the company would be misled if a charge on unpaid capital of which he had no notice or means of obtaining information were held to be valid. The same argument would show that a charge on a call made, but remaining unpaid, ought not to be held valid; yet effect was given to such a charge: *In re Sankey Brook Coal Co.* I may also add that if the observations of Jessel, M.R., in *In re Whitehouse* are to be understood as applying to a charge as well as to a right] of set-off, I have difficulty in seeing how those of them which relate to calls made by directors while the company was a going concern, but remaining unpaid at the commencement of the winding up, are to be reconciled with the decision in the case of the *Sankey Brook Coal Co.* Again, as has been already pointed out, the validity of mortgages of future calls, when apt and proper words are used or a sufficient context is found, is recognized in the judgment delivered by James, L.J., in *Bank of South Australia* v. *Abrahams*. In that case the calls sought to be affected by the mortgage had been made in the winding up, and the distinction now sought to be drawn between calls made by directors, and calls made in a winding up cannot, I think, have commended itself to the Lord Justice, or the other eminent judges who took part in the decision. It is difficult to suppose that the Judicial Committee meant to recognize the existence of a power to create a mortgage which would fail at the moment when it was most wanted—viz., when the company had become insolvent and was being wound up—any more than that the Legislature meant to confer such power only on companies governed by the Companies Clauses Act, 1845, some of which, it is to be remembered, may be wound up under the Companies Act, 1862. Looking at these circumstances, and finding two decisions in favour of the mortgagees, and having some reason to believe that the earlier cases—viz., that of *In re Phœnix Bessemer Steel Co.*—has been followed in chambers, and has been to a considerable extent relied on by persons dealing with joint-stock companies during the fifteen years which have elapsed since it was decided, it is enough for me to say that the weight of authority appears to me to be in favour of the contention of the mortgagees, and I therefore propose to follow the decision in the *Phœnix Bessemer case*. One point more under this head remains to be considered. It appears that some of the mortgagees are themselves shareholders of the company, and it was contended that, even if the mortgages were good as regards calls on the shares of third parties, they were invalid as regards calls on the mortgagees' own shares. If, however, there exists a power of mortgaging future calls, it seems to me that it must extend to calls on the shares of mortgagees as well as of other persons; and that the calls on the shares of mortgagees are as applicable in payment of the mortgagees' debt as are calls on the shares of third parties. I hold, therefore, that the claims of the mortgagees under the mortgages of the 3rd of January, 1882, the 10th of August, 1887, and the 28th of October, 1887, are well founded.

As regards the mortgage of the 3rd of May, 1886, it differs from those other three in this respect, that it is given by way of indemnity and not to secure an advance. It does not, as it appears to me, fall precisely within any of the decisions to which I have referred. I do not at present say that it is invalid, but I think it would be desirable to know something more of the circumstances under which that mortgage was given than is contained in the affidavits now before the court, and I therefore propose to postpone my decision on this part of the case until some further evidence on this point has been brought before me.

Solicitors, *Lane, Monro, & Soutter; Maples, Teesdale, & Co.; Drake, Son, & Parton; G. M. Clements.*

Q. B. Div. (Mathew and Wills, JJ.) Nov. 12.

KING v. CHARING CROSS BANK. (a.)

County court—Practice—Prohibition—Application at chambers—Notice of motion—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 127—*Rules of Supreme Court*, 1883, *ord.* 59, *r.* 8a—*Costs—Less than £20 recovered—Discretion of judge—County Court Rules*, 1889, *ord.* 4, *r.* 20—*County Courts Act*, 1888, *ss.* 119, 164.

An application for a prohibition to a county court may be made at chambers as well during sittings as in vacation, or it may be made in open court; but if the latter course is adopted notice of motion must be given.

Rule 20 *of order* 4 *of the County Court Rules of* 1889, *by which a judge is allowed, in his discretion, to give costs on the higher scale on "a claim for more than £20 where less is recovered," is not affected by the* 119*th section of the County Courts Act*, 1888, *which gives power to a judge to award costs on the higher scale in three classes of actions there specified.*

In an action brought in the Clerkenwell County Court for the sum of £29 14s. 3d., judgment was given for the plaintiff for £16 15s., with costs on the scale applicable to cases in which the amount recovered is over £20 and under £50. The county court judge made this order in his discretion, and did not certify in writing or give any specific reasons for making the order in accordance with the provisions of section 119 of 51 & 52 Vict. c. 43. The defendants thereupon applied at chambers, under section 127 of the County Courts Act, 1888, for a prohibition to the county court not to proceed on the said order, upon the ground that the county court judge had no jurisdiction to make it.

Wills, J., at chambers, referred the question to the court.

R. V. Williams, Q.C., for the plaintiff, took a preliminary objection that the application at chambers was wrong, and could not be heard.—By the R. S. C., 1883, ord. 59, r. 8a, it is enacted that every application for a prohibition to a county court other than an application made by the Attorney-General shall be brought by notice of motion served on the parties to the proceedings in the county court. In this case the plaintiff has received no notice of motion, and therefore the defendants' application must fail.

Cluer, for the defendants.—The 127th section of the County Courts Act, 1888, provides that it shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any court. This section is not overruled by ord. 59, r. 8a. The object of that rule is to carry out the object of abolishing rules *nisi*, and it only means that if applications are made in court, then they shall be made on notice of motion instead of on application for a rule *nisi*.

R. V. Williams, Q.C., in reply.

MATHEW, *J.*—I am of opinion that applications for prohibitions to county courts may still be made in chambers, and I agree that the object of ord. 59, r. 8a, is to provide that if applications are made in court they must be made on notice of motion.

WILLS, J., concurred.

Cluer, for the defendants, on the application for a prohibition.—In this case the county court judge exceeded his jurisdiction, because rule 20 of order 4 of the County Court Rules, 1889, is really *ultrâ vires*, as it contradicts the 119th section of the County Courts Act, 1888. That section limits the power of the judge to award costs on the higher scale to certain particular cases, and further provides that it shall only be done by the judge certifying in writing that the case dealt with comes within the section. The rule must have been made *per incuriam*. It is true that by section 164 the judges are empowered to frame scales of costs, but when they have done so they are bound by them, and their powers are exhausted. The object of the section which provides that the old rules are to continue in force is only to keep them until new rules are made. It does not give the rules the force of a statute: *Lumb* v. *Teal*, 22 Q. B. D. 675, 37 W. R. Dig. 60.

R. V. Williams, Q.C., for the plaintiff, was not called upon.

MATHEW, J.—It is contended in this case that the language of rule 20 of order 4 of the County Court Rules, 1889, is inconsistent with the 119th section of the County Courts Act, 1888. I cannot assent to that proposition. The two provisions deal with different things. The rule deals with cases where the claim exceeds £20 but less is recovered, whereas the section applies to cases of an entirely different class and allows the judge to award costs on the higher scale in such cases however small the claim may be. To my mind the meaning of the language is clear. Further, the rule is not a new one, and by the 164th section of the County Courts Acts, 1888, the existing rules are to continue until otherwise provided. The argument therefore leads to this, that if the rule had not been re-enacted it would still be valid, but because it is re-enacted it is bad, which is, I think, a *reductio ad absurdum*.

WILLS, J.—I am unable to see why the judges who have power to frame certain scales of costs may not also say that the judge shall have power to vary the scale in certain cases according to his discretion. As to the 119th section, I do not assent to the argument that where a new statute does not appear to harmonize exactly with the existing state of things, the presumption is that the existing state of things is thereby repealed. When we find that county court judges have for many years been intrusted with the power of using their discretion in the manner provided by this rule we ought to presume that the Legislature did not intend to take away that power by a section which does not in terms repeal the rule. I find it impossible so to read the section because it applies to matters which are not dealt with by the rule. The rule applies to cases where the claim exceeds £20, the section to cases where, for instance, the plaintiff seeks to establish a right and claims it may be, no more than a shilling. To such cases the old rule did not apply, and therefore the section was enacted with the object of enlarging, and not, as the defendants contend, restricting, the power of the county court judge.

Application refused.

Solicitors for the plaintiff, *W. T. Boydell.*

Solicitors for the defendants, *C. E. R. Preston.*

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Cave and Charles, JJ.) Nov. 13.

Ex parte SHACKLETON.
In re SHACKLETON. (*a.*)

Bankruptcy—Discharge—Condition—Consent to judgment—Principles by which the court ought to be guided in imposing such condition—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 28.

In 1886 *the bankrupt, who had previously been employed as an assistant to a linendraper, took over the business of a chemical manufactory, which he carried on until* 1888, *when he became bankrupt. On application by the bankrupt for his discharge, the official receiver reported that he had continued to trade after knowing himself to be insolvent, and had brought on his bankruptcy by rash and hazardous speculations, and the county court judge granted the discharge only on the condition that the bankrupt should consent to judgment being entered against him for the sum of* £4,038, *being the amount of the unsecured debts provable under the bankruptcy unsatisfied at the date of the order, with costs, such judgment to remain in force until all the creditors had been paid* 5*s. in the pound on their debts. The bankrupt appealed against this order, it being stated that he was a married man with four children, and that his present earnings only amounted to* £150 *a year, with no prospect of an increase.*

Held, that the order of the county court ought to be varied, and that a proper order under the circumstances would be that the discharge of the bankrupt be suspended for three years.

In imposing as a condition of granting a bankrupt his discharge that he shall consent to judgment being entered against him for the balance of the provable debts under section 28, *sub-section* (6), *of the Bankruptcy Act,* 1883, *the court ought to have regard to public morality and to the interests of the public generally, and, unless the court finds a man in receipt of an income which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise proceeding to grant an order of discharge subject to such a condition.*

Appeal against an order made by his Honour Judge Rogers in the county court at Madeley by which the discharge of the bankrupt was granted only on the condition that he should consent to judgment being entered against him for the sum of £4,038.

The case raised an important question in respect of the principles by which the court ought to be guided in imposing, as a condition of granting a bankrupt his discharge, that he shall consent to judgment being entered against him for the balance of the provable debts, under section 28, sub-section (6), of the Bankruptcy Act, 1883.

In 1886 the bankrupt, who previously had assisted his father as a linendraper at a salary of £3 a week, took over the business of a chemical manufactory, which he carried on until June, 1888, when he became bankrupt; the principal cause of his failure being alleged to be the refusal of the railway companies, owing to an explosion which had taken place during transit, to transport certain chemicals manufactured by him, by which he lost several valuable contracts.

On application by the bankrupt for his discharge the official receiver reported that he had committed two of the offences specified in section 28, sub-section (3), of the Bankruptcy Act, 1883, since he had continued to trade after knowing himself to be insolvent, and had brought on his bankruptcy by rash and hazardous speculations, and the county court judge granted the bankrupt his discharge only on the condition that he should "consent to judgment being entered against him in the county court by the official receiver for the sum of £4,038, being the amount of the unsecured debts provable under the bankruptcy unsatisfied at the date of the order, with costs. Upon such consent being given, judgment to be entered accordingly, such judgment to remain in force until the creditors who have proved, or may hereafter prove, their debts in the bankruptcy shall have been paid 5s. in the pound upon the amount of such debts, together with the unpaid costs. The amount to be paid by annual instalments of £75 until the whole is discharged."

The bankrupt now appealed from that order, it being stated that he was a married man with four children, his present earnings amounting to £150 a year only, with no prospect of any increase.

E. C. Willis, Q.C., and *Hextall,* for the bankrupt.—The Board of Trade do not intend to support the latter part of the order appealed from, which deals with the instalments, and so the case really turns on whether the county court judge was right in making such an order of discharge, striking out the latter part. I admit that the bankrupt has traded after he knew that he was insolvent, but the fact of his so trading only deserved a nominal penalty. He has not been guilty of rash and hazardous speculations. When the bankrupt took over the chemical manufactory he was told that the business was a good one, and he entered into it fairly and honestly after seeking advice. The unforeseen accident of the explosion was the real cause of the insolvency. Even admitting the offence of trading after knowledge of insolvency, such an order as this, which puts upon the bankrupt a judgment to pay 5s. in the pound and an unlimited amount of costs, ought not to be made. This is not a case in which judgment ought to be entered at all. In *Ex parte Arnaud, In re Bullen,* 36 W. R. 836, Lindley, L.J., expressed a clear opinion that a bankrupt ought not to be tied up by such a judgment as this unless something is likely to be gained by it by reason of his coming into after-acquired property. Here there is no expectation that the bankrupt will have any property.

Muir Mackenzie, for the Board of Trade.—The facts of the case warrant the order which was made, as they show a very bad case of trading with knowledge of insolvency. The balance-sheets all along showed a deficiency, and the bankrupt was well aware of his position. The order is not a highly penal one, because the judgment cannot be enforced without leave of the court.

He referred to *In re Clarkson, Ex parte Clarkson,* 2 Morrell's Bankruptcy Cases, 219.

CAVE, J.—I am of opinion that the order appealed from ought to be modified. It is always a question of difficulty to determine, where a bankrupt is not entitled to an absolute order of discharge, whether the order should be suspended and for how long, or whether it should be granted subject to a condition in respect of after-acquired property. In deciding that question the court ought to have regard to public morality and to the interests of the public generally, and unless the court finds a man in receipt of an income derived from his earnings or otherwise which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise thing to grant an order subject to a condition affecting after-acquired property. The court ought to be careful to see that it does not, by a condition of that sort, do away with the motive which a man has to work in his calling. If such a burden is put on a man that he can

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

have no hope of bettering his position he will not make the effort, and few men are more easily discouraged than that class of men who become bankrupt.

If the condition is imposed on this bankrupt that he shall consent to judgment, the result might be to discourage him from trying to improve his position, and, under the circumstances of the case, I do not think it is one in which such a condition ought to be imposed. I think, however, that the discharge ought certainly to be suspended. The bankrupt has been guilty of continuing to trade after knowing himself to be insolvent and, as I have said more than once, when a man knows he is insolvent, his plain duty is to call his creditors together and leave them to decide whether he shall go on or not. It is impossible, also, to shut one's eyes to the whole circumstances of the case, and to the rash and reckless manner in which this bankrupt entered into this business, of which he knew very little, and on which he bestowed but little care and attention.

I think the order of discharge ought to be suspended, and suspended for a period of three years from the date of the order of the court below.

Charles, J.—I am of the same opinion, and I have nothing to add.

Order accordingly.

Solicitors for the bankrupt, *Warriner & Kinch*, for *Stone*, Derby.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

House of Lords.

From C. A. (England). May 16, 17; July 1, 4, 5; Aug. 9, 1889.

Colquhoun v. Brooks. (a.)

Revenue—Income tax—Trade carried on abroad—Profits not remitted to the United Kingdom—5 & 6 Vict. c. 35, ss. 39, 100, 106, 108—16 & 17 Vict. c. 34, s. 2, schedule D.

A merchant residing and carrying on business in the United Kingdom, and, who, at the same time, is a partner in a totally separate business carried on in Australia, is not liable to income tax in respect of the profits of the trade in Australia which are not brought to this country.

Decision of the Court of Appeal (36 *W. R.* 657, 21 *Q. B. D.* 52) *affirmed, but for different reasons.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), reported in 36 W. R. 657, 21 Q. B. D. 52.

The case was stated under 43 & 44 Vict. c. 19, s. 59, by the Income Tax Commissioners for the City of London, and the assessment was for the year ending the 5th of April, 1885.

The facts sufficiently appear in the judgments of Lords Fitzgerald and Herschell.

Sir R. E. Webster, A.G., and *Sir E. Clarke, S.G.* (*A. V. Dicey* with them), for the appellant.—Mr. Brooks comes within the very words of the Act, being a person residing within the United Kingdom to whom profits and gains accrue from a trade carried on elsewhere than in the United Kingdom. The whole scheme is to tax a person according to his capacity. As soon as you have got the foreigner resident here he (subject to section 39) becomes subject to this tax: *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428; *Sulley* v. *Attorney-General*, 8 W. R. 472, 5 H. & N. 711; *Lloyd* v. *Inland Revenue*, 21 Sc. L. R. 482; *Attorney-General* v. *Coote*, 4 Price, 183.

Sir H. James, Q.C., and *Scrutton*, for the respondent.—The contention of the appellant is against international comity, and there are insurmountable difficulties in the way. The Legislature could not have intended to exceed its jurisdiction: Maxwell on Statutes, p. 169; Cases under the Legacy and Succession Duty Acts; *Attorney-General* v. *Cockerell*, 1 Price, 165; *In re Bruce*, 2 Cr. & J. 436; *Attorney-General* v. *Campbell*, 21 W. R. 34n., L. R. 5 H. L. 524.

Dicey replied.

The House took time for consideration.

Aug. 9.—Lord Halsbury, C.—I have had an opportunity of reading the judgment prepared by Lord Herschell, and, although the question is a very difficult one, I am of opinion that the conclusion at which he has arrived is the true conclusion, and therefore I am prepared to assent to the judgment which he is about to deliver.

Lord Fitzgerald.—The defendant resides solely in England, where he is a partner in an English firm, and we may assume him to be a domiciled British subject. No question arises on his income out of his English business. He is also a partner in an Australian firm carrying on business at Melbourne, in which he has a large capital invested, and he has actually received from it in this country the sum of £3,000 on account of profits for the financial year ending the 5th of April, 1885, and on that he has paid income tax.

The case stated further finds "the amount standing to the credit of Mr. Henry Brooks in the books of the Australian firm as representing the estimated profits due to him for the year ending the 5th of April, 1885, would, if realized, amount to the sum of £9,219 in addition to the said sum of £3,000. This sum of £9,219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day after deducting therefrom the estimate and valuation of the preceding year, but as a matter of fact only a portion of the amount had been actually realized. No portion of the sum of £9,219 had been received in England, or had at any time formed part of the income" of Mr. Brooks in this country.

At first sight it struck me very strongly that the defendant was chargeable here for income tax in respect of this sum of £9,219 though not actually received in this country, but as being income arising out of trade carried on in Melbourne, his share of the profits having been actually ascertained and fixed and accruing to him in this sense, that it was so completely under his control that by an act of his will he could have it actually transferred to his bankers here. There would be no hardship, and nothing dangerous or to be deprecated, in charging the defendant on his share of profits so ascertained, but the facts of the case do not warrant us doing so. On looking critically at the findings in the case it will be perceived that there is no sufficient finding to warrant us in coming to the conclusion that the profits of the Australian firm have been so ascertained for the year 1885 as to be legitimately the subject of taxation here. It is only put that the profits due to him would, if realized, amount to £9,219, a sum "arrived at by an estimate and valuation" on stock-taking, on some particular day (not stated), and "deducting therefrom the estimate and valuation of the preceding year,' also made on a day not stated, "but as a matter of fact only a portion of the amount had been actually realized." What the meaning of the word "realized" there is, I do not

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

know. The Australian firm does not appear to carry on any portion of their business in this country. The defendant does not appear to have taken, or to take, any active part in the conduct of its business, nor are its funds remitted to him save so far as they may represent his actual, ascertained profits not required for the purposes of the business of the firm and remitted to him in this country so as to be at his disposal here as income. We are therefore remitted to and called on to decide whether the contention of the surveyor of taxes was right, that the defendant was liable to be assessed on this sum of £9,219, though he had not actually received it, nor had it actually come within the United Kingdom.

The language of the 16 & 17 Vict. c. 34, s. 2, schedule D, is so comprehensive that I doubt whether a net of language could be devised stronger and more apt to include the profits arising or accruing to the defendant from a business carried on elsewhere than in the United Kingdom, and must and ought to have full effect, unless we can infer from the other provisions of the particular Act, or of the code, that it was not the intention of the Legislature to tax income from trade carried on wholly and solely elsewhere than in the United Kingdom, unless and until it has actually come to the United Kingdom as the income of some person residing in the United Kingdom.

I have not only conferred with my noble and learned friends on the construction of the Income Tax Acts in reference to this special and difficult question, but I have had the great advantage also of reading and carefully considering an elaborate review of the Income Tax Acts, which is about to be delivered by Lord Macnaghten. I concur in the conclusion at which both my noble and learned friends have arrived, and I therefore confine myself to expressing concurrence in their conclusions.

There are, no doubt, insuperable difficulties in giving full effect to the universal language of the 2nd section of the 16 & 17 Vict. c. 34, and schedule D of that Act, and I am of opinion the enactment must be controlled in the manner and to the extent, which will be described by my noble and learned friends who are about to address the House — viz., that such profits derived from trade carried on entirely elsewhere than in the United Kingdom are not accessible for income tax until received here by the person entitled to them, being a resident in the United Kingdom.

Lord HERSCHELL.—This appeal arises upon a case stated by the Income Tax Commissioners. The respondent is a merchant residing in England and carrying on business there, and in respect of the profits or gains of this business he was duly assessed, and has paid the tax. He paid the tax in addition on a sum of £3,000 received by him in respect of a remittance from Australia. This sum formed part of the profits of a business carried on at Melbourne in which the respondent was a partner and had a large capital invested. The estimated profits due to him for the year in question in respect of his share of the business amounted to £9,219 in addition to the sum of £3,000 already mentioned. The surveyor of taxes contended before the commissioners that the respondent ought to be assessed, not only upon the £3,000 received in this country, but upon his entire share of the profits which accrued during the year of assessment. The commissioners rejected this contention, but stated a case for the opinion of the court. Upon the argument of this case before two learned judges of the Queen's Bench Division they were divided in opinion, but the junior judge having withdrawn his judgment to allow of an appeal, the Court of Appeal gave judgment in favour of the respondent, adopting the view of the commissioners. The solution of the question raised by the case depends entirely upon the construction to be put upon the provisions of the Income Tax Acts. The claim of the Crown is based upon the terms of schedule D, which impose the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, whether carried on in the United Kingdom or elsewhere. The respondent does reside in the United Kingdom, profits did arise or accrue to him from a business carried on elsewhere than in the United Kingdom; therefore, say the learned counsel for the Crown, the case is within the very terms of the Act, and he must be held liable to assessment. I think it must be admitted that the words of the statute do, *primâ facie*, support this contention; for, notwithstanding the ingenious criticism to which they have been subjected by the learned counsel for the respondent in their able argument, I think that, giving to the language of the enactment its natural meaning, the facts stated do apparently bring this case within it.

It is urged, however, on behalf of the respondent, that if this construction be adopted a foreigner residing for a short time only in this country would be subjected to taxation here in respect of the whole of his business earnings in his own country or elsewhere; that so to tax him would be opposed to international comity; and that a construction which would involve such a consequence cannot be correct. I think the learned counsel for the respondent are right in saying that the result which they point out would follow in the case of a foreigner, but I do not feel satisfied that it would involve a violation of international law, and that the construction contended for by the Crown ought, on that ground, to be summarily rejected. Reliance was placed upon the decisions under the Legacy and Succession Duty Acts, which have imposed a limit upon the broad language of the enactments subjecting legacies and successions to taxation. But it must be remembered that it was necessary to put some limit upon these general terms in order to bring the matters dealt with within our territorial jurisdiction. Without such a limitation the Legacy Duty Act, for example, would have been applicable, although neither the testator nor the legatee, nor the property devised or bequeathed, was within, or had any relation to, the British dominions. A construction leading to this result was obviously inadmissible. The Income Tax Acts, however, themselves impose a territorial limit, either that the source from which the taxable income is derived must be situate in the United Kingdom, or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the Legislature to determine the measure of taxation to be applied in the case of a person so resident. At the same time I am far from denying that if it can be shewn that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country, it would afford a reason for adopting some other interpretation, if it were possible, consistently with the ordinary canons of construction.

I think it cannot be denied that, if the view put forward on the part of the Crown be correct, the incidence of the tax will be strangely anomalous. Schedule D imposes the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatsoever, whether situated in the United Kingdom or elsewhere. This in terms would apply to all such profits and gains, whether they found their way to this country or not. But by section 100 of 5 & 6 Vict. c. 35 the duties thus imposed are to be charged according to certain rules. One of these relates to the duty to be charged in respect of interest arising from securities in the British plantations in America or many other of her Majesty's dominions outside Great Britain (for which may now be read the United Kingdom) and foreign securities. The duty to be charged in respect of these is directed to be computed on a sum not less than the full amount of the sums which have been or will be received in the United Kingdom in the current year. Another of these rules, styled the 5th case, prescribes the duty to be charged in respect of pos-

cessions in the British plantations of America or in any other of her Majesty's dominions out of the United Kingdom and foreign possessions. The duty in respect of these is to be computed on a sum not less than the full amount of the actual sums annually received in the United Kingdom, computing them on an average of the three preceding years. It is clear, therefore, that, as regards income arising from investments or from possessions outside the United Kingdom, the tax is only to fall upon so much of the income as is received in this country. I reserve what I have to say about the word "possessions," but I desire to point out that if the contention of the Crown be well founded, whilst the taxation of what I will term foreign income arising from the sources mentioned, is limited to the amount which finds its way here, there is no such limit in the case of foreign income arising from a trade or profession or employment carried on abroad, the whole of which is subject to taxation, though no part of it ever reaches this country. No reason has, or can be, suggested for so startling a difference. The distinction between the income from property such as a sugar plantation in the West Indies and from a business carried on there would often be a very fine one; and why a person interested in the latter should be burdened with taxation, of which a person interested in the former is free, was beyond the ingenuity of the learned counsel for the Crown to explain. Indeed, in this very case, if the business in which the respondent is a partner were disposed of to a joint-stock company, and he retained his interest in the form of shares in that company, though the annual return to him might be precisely the same, he would, I take it, be clearly free from the taxation it is now sought to impose. I am quite aware that there are inequalities in the incidence of the income tax, and that the anomalies I have pointed out, glaring though they be, will not avail the respondent if the taxation be imposed by the clear language of the statute. But Lord Blackburn, who pointedly dwelt upon this in the case of *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315, said:—"The object of thus framing a Taxing Act is to grant to her Majesty a revenue. No doubt they would prefer, if it were possible, to raise the revenue equally from all, and, as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived, and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction upon them which will produce these effects."

It is beyond dispute too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature, and may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. It is contended by the respondent that if we thus seek the aid to be derived from other provisions of the Income Tax Acts we shall be led to the conclusion that the view presented by the appellant is erroneous.

In the first place it is said that, although elaborate machinery is provided for carrying out the taxing purposes of the Act, none of it is applicable to the assessment of the profits of a trade carried on entirely outside the United Kingdom, no part of which is received here. If this be correct, it certainly goes far to show that the Legislature cannot have intended to tax such profits. The 106th section of the Act provides, first, for the assessment of "every householder, except persons engaged in any trade, manufacture, profession, or employment." It next deals with the case of "every person" so engaged, and enacts that he is to be chargeable by the commissioners acting for the parish or place where such trade, manufacture, profession, or employment is carried on or exercised, whether it be carried on or exercised wholly or in part in Great Britain. It next provides that every person not being a householder nor engaged in any trade or profession, who shall have a place of ordinary residence shall be charged by the commissioners acting for the place where he shall ordinarily reside. Lastly, it deals with every person "not hereinbefore described." He is to be charged in the place where he resides at the time of beginning to execute the Act in each year. The counsel for the Crown argued that the respondent fell within this last category. But I think this argument cannot be sustained. He certainly is a person engaged in a trade within the earlier description, and therefore cannot be included in a class not thereinbefore described. And there is no other provision to be found in the statute which seems to apply to the case of profits derived from a trade carried on entirely outside the United Kingdom. The 108th section enacts that the duty to be assessed in respect of the profits or gains arising from foreign possessions or foreign securities, "or in the British plantations in America or in any other of her Majesty's dominions," may be assessed by the commissioners acting for London, Bristol, Liverpool, and Glasgow according to the regulations mentioned "as if such duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively." It further provides that the assessment is to be made by the commissioners acting for such of the said places at or nearest to which the property shall have been first imported into Great Britain, or at or nearest to which the person who shall have received remittances or money arising from property not imported resides. I think that in this section, if anywhere, one would have expected to find a provision dealing with the profits of a business carried on outside the United Kingdom, the more so as the assessment referred to in the section is to be made by the commissioners as if it had been upon the profits of "a trade or manufacture" carried on in London and the other places named. But it is admitted that this section is confined to property or money brought to this country; it affords no aid therefore to the present appellant, though I shall have to ask your lordships to consider presently whether, upon the true construction of the statute, it does not cover the case with which we have to deal.

For the reasons I have given I think the respondent has successfully shown that the Act has not provided the requisite machinery for assessing the duty on trade profits arising and remaining abroad, which is strong to show that it was not intended to tax them. But the difficulty of the appellant does not end here. The Act prescribes certain rules for ascertaining the duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade. One of these rules provides that the computation of duty arising in respect of any trade carried on by two or more persons jointly shall be made and stated jointly and in one sum, and it designates the partner who is to make the return on behalf of himself and the other partner or partners, which is to be sufficient to charge the partners jointly. It further provides that no separate statement shall be made "in the case of any partnership," except for the partners separately claiming an exemption or accounting for separate concerns, and that if no such claim is made then such assessment shall be made jointly according to the amount of the profits and gains of the partnership. Now it is not pretended that the whole of the profits of the Australian firm are assessable. The shares of the Australian partners clearly cannot be taxed. Yet where is there any provision for a separate statement and assessment such as the Crown contend for here? If the result of rejecting the argument presented on behalf of the Crown were to land your lordship in the conclusion that profits arising from a business carried on abroad, even though received here, were not subject to the tax it would present a formidable obstacle to yielding to the argument of the respondent, though I am not sure that the difficulties you would

have to encounter in refusing your assent to it would not even then be greater. But I do not think your lordships are driven to this conclusion. The rule, styled the fifth case, which I have already referred to, deals with the duty to be charged in respect of possessions in any of her Majesty's dominions out of Great Britain and foreign possessions. Now the word "possessions" is not used in the part of the schedule D which describes the subjects of the tax. Speaking generally, they are defined to be the profits arising from property and those arising from trades and professions. When therefore the term "possessions" is employed it seems to indicate an intention to cover by it something more than "property." And it is difficult to see why, unless the intention were to embrace something more, the latter word was not used. "Possessions" is a wide expression; it is not a word with any technical meaning; the Act supplies no interpretation of it. And I cannot see why it may not fitly be interpreted as relating to all that is possessed in her Majesty's dominions out of the United Kingdom, or in foreign countries. And if so I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere. So to construe the Act would have the advantage of removing the glaring anomaly to which I have referred, as inevitably flowing from the rival construction, and of taxing alike such portion only of the profits arising abroad, whether from property or trade, as is received in the United Kingdom.

The conclusion at which I have arrived is greatly fortified by a consideration of the 39th section of the Act, which provides that no person who shall actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and shall not actually have resided in Great Britain for six months in one year, shall be charged with the duties mentioned in schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in any of her Majesty's dominions, or any foreign possessions, or from securities in any of her Majesty's dominions or foreign securities, but that every such person shall after such residence for such space of time be chargeable to such duties. The object of this enactment is plain. The Act contains no definition of the words "a person residing," and it was therefore apprehended that they might be held to embrace a foreigner sojourning in this country for a brief time, and for a temporary purpose only. It accordingly exempts such a person from taxation; the duties are only to be chargeable after a residence of six months. But from what does it exempt him? Only from moneys received here from foreign or colonial possessions. If the construction we are asked by the appellant to put on the statute be correct, a foreigner temporarily sojourning here for less than six months, though not liable to taxation even on the moneys transmitted to this country arising from his foreign possessions, is not exempted from liability in respect of the entire profits arising from a business carried on abroad, though not a penny of it be received here. That a foreigner in such circumstances should be bound to make a statement of these trade profits and be assessed upon them would be so unreasonable that I think a construction of the statute leading to such a result should be rejected unless no other be possible. It was indeed said by the appellant that a foreigner so situated would not be within the description of a person "residing" in this country. But if so, there was no need for the exemption which assumes that the person dealt with would otherwise be chargeable, and it would be difficult to resist the argument that except so far as he was exempted he was intended to be charged with the duties imposed by the Act. The whole section points, to my mind, strongly to the conclusion that moneys received in this country arising from possessions or securities outside its limits were supposed to be the only portion of what I have termed foreign income which was taxable.

I do not think it necessary to dwell on the case of the *Cesena Sulphur Co.* v. *Nicholson*, on which much reliance was placed in support of this appeal. The head office, and therefore the principal place of business, of the companies whose income was under consideration was in England, and the argument turned principally upon where those companies resided. I need not stop to inquire whether the facts raised the same question as your lordships have to determine. It is quite certain that the important considerations which have been pressed in argument upon this House were not present to the minds of the learned judges who took part in these decisions, and they cannot, therefore, be regarded as authorities determining the question.

I do not pretend to say that any construction of the Act is free from difficulty, or to deny that some anomalies may possibly result from that which I advise your lordships to adopt, but it appears to me to be the one least open to objection and which is most in accordance with the intention of the Legislature so far as I can gather it from the provisions of the Acts taken as a whole. For these reasons I think the judgment appealed from ought to be affirmed.

Lord MACNAGHTEN.—This is a case of great importance and no little difficulty, but after the assistance afforded by the very able and elaborate arguments of counsel, I cannot say that I have any doubt as to what the decision ought to be.

The case raises the question whether a person resident in the United Kingdom and engaged in a trade carried on entirely abroad, is liable to income tax in respect of all the profits of that trade, or only in respect of so much of those profits as may be brought to this country, either in kind or money. The trading in the present case was carried on at Melbourne, in Australia. The business was a partnership business, but I apprehend the question would have been the same if no one but the respondent had been interested in the concern.

Many topics which were discussed, and properly discussed, at considerable length during the argument may, I think, be laid aside. It does not appear to me that any light is thrown upon the question by considering the Legacy Duty Acts or the Succession Duty Act, or the decisions on those statutes. Nor do I think that any assistance can be gained by referring to one or two cases in which, perhaps, the question was involved or suggested, but did not receive much attention. Nor is there, I think, any room for the argument that the expression "arising or accruing to any person" in the first sentence of schedule D. means "received by any person in the United Kingdom." Moreover, although the contention on the part of the Crown, if carried to its legitimate conclusion, would certainly lead to startling results in the case of a foreigner temporarily resident in this kingdom, I do not think that even those results are so plainly at variance with what is due to the comity of nations as to compel your lordships summarily to reject that contention without considering carefully what the Legislature has actually said. And, certainly, however unreasonable the consequences in other cases may be, there is nothing, I think, so very unreasonable in taxing a British subject who resides permanently in this country on the whole of his income, whether he chooses to bring it home or not.

It seems to me that the question must be determined on a consideration of the language of the Income Tax Acts, under which the claim is made, with such assistance as may properly be derived from a reference to Acts *in pari materia*. And I think that the question after all really lies in a narrow compass. Does the case

fall within the "first case" of schedule D. in the Income Tax Act of 1842, and under the head of "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act"; or does it fall within the "fifth case" under the head of "The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of her Majesty's dominions out of Great Britain and foreign possessions"? Or, to put the question more shortly still, what is the meaning of the term "possessions" in the "fifth case" of schedule D. and in other places in the Act where it is used in the same connection?

In order to determine this question it is not, I think, immaterial to refer to the earlier Income Tax Acts, from which the existing Acts are more or less copied.

The Income Tax Acts of 1806 and 1803, in regard to the question before your lordships, differ so little, if they differ at all, from the Acts now in force, that I may pass them by and turn at once to the original Act, the Act of 1799 (39 Geo. 3, c. 13).

By that Act certain rates and duties therein specified were to be raised "throughout the kingdom of Great Britain upon all income arising from property in Great Britain belonging to any of his Majesty's subjects, although not resident in Great Britain; and upon all incomes of every person residing in Great Britain, and of every body politic or corporate, or company, fraternity, or society of persons (whether corporate or not corporate) in Great Britain, whether any such income as aforesaid shall arise from lands, tenements, or hereditaments, wheresoever the same shall be situate in Great Britain or elsewhere, or from any kind of personal property or other property whatever, or from any profession, office, stipend, pension, employment, trade, or vocation."

Section 77 enacted, in order that the estimates of annual income chargeable by virtue of the Act might be made according to known rules, and with as much uniformity as the respective cases would admit, that in all cases the income chargeable by virtue of that Act should be estimated according to the rules and directions prescribed by that Act and the schedule thereunto annexed as far as the same respectively were applicable to such income, and in all cases where the same were not applicable, then according to the best of the knowledge and belief of the person making the return.

Commissioners, to be styled commercial commissioners, "to ascertain the income of persons engaged in trade and manufacture" were to be appointed for certain districts, and it was enacted (section 102) that income from property in the American plantations, and imported into Great Britain, might be ascertained by the commercial commissioners for London, Bristol, Liverpool, and Glasgow in the same manner as if such income had arisen from trade or manufactures carried on in such places respectively; and (section 103) that incomes received in Great Britain arising from property of persons in such plantations not imported into Great Britain might be also ascertained in like manner.

The schedule to the Act, in accordance with which the income chargeable by virtue of the Act was to be estimated, contains a collection of "cases" and "rules" not differing much from the "cases" and "rules" in the schedules to the present Income Tax Acts. It is headed "Rules for Estimating the Income to arise within the Current Year of Persons to be Assessed under the Act of the 39th Year of his present Majesty." These cases and rules are arranged under four divisions, which are as follows:—"I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments, and vocations. III. Income arising out of Great Britain. IV. Income not falling under any of the foregoing rules."

Division III. is divided into two headings. "Seventeenth Case. 1st. From foreign possessions," where "the full amount of the actual net income received in Great Britain" was to be estimated according to the year immediately preceding, or the average of the three preceding years. "Eighteenth Case." "2nd. Money arising from foreign securities," where the annual income was to be estimated according to the produce of the preceding year, or the expected produce of the current year.

It cannot, I think, be doubted that "foreign securities" are a class of foreign possessions, and that "money arising from foreign securities" was included in a separate sub-division merely because the income chargeable was to be estimated on a slightly different basis. It is obvious that the subjects comprised in the two sub-divisions, whether the second is properly a separate sub-division or not, were meant to exhaust the whole category described in Division III.—"income arising out of Great Britain." Now it can hardly be supposed that the framers of the Act could have overlooked the possibility that "income arising out of Great Britain" might include income arising from trade carried on abroad. Indeed, in the very case mentioned in sections 102 and 103, the case of income arising from property in British plantations in America, the income in produce or money would certainly, for the most part, be income arising from concerns in the nature of trade; and those sections show that that income was to be estimated in the manner in which "income from foreign possessions" was by the schedule directed to be estimated. I am therefore forced to the conclusion that in the expression "foreign possessions," as used in the Act of 1799, the word "possessions" is to be taken in the widest sense possible, as denoting everything that a person has as a source of income.

I now come to the Act of 1842, and I think it is only necessary to refer to a very few sections of that Act. For convenience sake, I will take the Act of 1842 as it stood before the passing of the Act of 1853, which substituted "the United Kingdom" for "Great Britain," and I will treat the case as if the Income Tax Acts had not been extended to Ireland.

The income of the respondent from his business in Melbourne, whether he is to be charged in accordance with the contention of the Attorney-General or not, undoubtedly comes under schedule D, and undoubtedly the portion of schedule D which is contained in schedule 2 of the Act of 1842 is expressed in the most comprehensive terms possible; and, if not restrained or limited by what follows, would operate to charge the respondent in respect of the whole of his Melbourne income. I do not, however, agree with the argument urged at the bar, that the rest of schedule D which is found in section 100 is mere machinery, or a mere collection of examples, not diminishing the generality of the earlier part of the schedule, but intended only to furnish a guide where the particular rule applies.

The whole schedule must be read together. Every case that can possibly happen under schedule D is enumerated in section 100. For every case which cannot be brought under one or other of the first five cases must fall under the "sixth case." Unquestionably the rules applicable to a particular "case" may cut down, and cut down very materially, the charging words in the earlier part of schedule D. For instance, it cannot I suppose be denied that foreign securities are a "kind of property situate elsewhere than in Great Britain." By the earlier part of schedule D the rates and duties chargeable in respect thereof would be so much for every 20s. of the annual profits or gains arising or accruing therefrom. But the rules under the "fourth case" limit the charge to the amount received in Great Britain.

It seems to me that the profits or gains from the respondent's Melbourne business might be held to fall either under the "first case" or under the "fifth case" if one looked to nothing more than the language of those two

"cases." The "first case" deals with "duties to be charged in respect of any trade . . . not contained in any other schedule." In its terms no doubt that would include the respondent's business at Melbourne as well as his business in London. The second rule of the "first case" declares that "the said duty is to extend to every person, body politic or corporate, . . . or society, and to every . . . concern carried on by them respectively in Great Britain or elsewhere, except such concerns as are mentioned in schedule A." Again in its terms this rule points to a business carried on out of Great Britain, as well as to one carried on in Great Britain. But then when one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad one gets into hopeless difficulties. If it is a partnership business, as this is, the return is to be made by the senior partner resident in Great Britain. But then the partner is to make the return "on behalf of himself and the other partner or partners," and his return is "sufficient authority to charge such partners jointly" and "no separate statement" is to be allowed in any case of partnership except for "the purpose of the partners separately claiming an exemption" or "of accounting for separate concerns."

Then, again, the computation of the duty to be charged in respect of any concern in the nature of trade is to be made exclusive of the profits or gains arising from lands occupied for the purpose of such concern. That rule hardly seems applicable to a foreign mine or a sugar plantation in the West Indies.

Then, again, by section 106, every person engaged in any trade is to be chargeable by the commissioners acting for the parish or place where the trade is carried on, whether such trade is exercised wholly or in part only in Great Britain. And there are other provisions which it is not necessary to go through, which seem to show that the "first case," though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad.

Turning now to the "fifth case," I ask, why are not the respondent's profits and gains from his Melbourne business within the "fifth case"? What is the meaning of the term "possessions" in that "case"? The word "possessions" is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not "possessions in Ireland" mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not "profits from possessions out of Great Britain," which is to be found in schedule G., No. XI., and recalls the expression "income out of Great Britain" in the Act of 1799, mean profits from every source of income abroad? I use the expression "source of income" because it is as a source of income that the Act contemplates and deals with property and everything else that a person chargeable under the Act may have, and the Act itself, in section 52, uses the expressions, "sources chargeable under the Act," and "all the sources contained in the said several schedules," as describing everything in respect of which the tax is imposed.

There are two sections in the Act to which I will refer as showing that the word "possessions" must have this meaning.

Take the 39th section. Under that section an Irishman who happened to be in Great Britain for some temporary purpose only, and not with any intent of establishing his residence there, and whose actual residence in Great Britain did not amount to a period of six months in any one year, was "not to be charged with the said duties mentioned in schedule D. as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland," or "from securities in Ireland." He was not even to be charged in respect of his receipts in Great Britain from those sources. It could not be suggested that, as a temporary resident for less than six months, he was to be charged in respect of any gains or profits from an Irish source which were not received in Great Britain. But there the section goes on to say that after six months' residence "such person is to be chargeable to the said duties," that is, to the duties "in respect of the profits or gains received from or out of any possessions in Ireland," or "from securities in Ireland." Now if profits and gains from an Irish business be not included in profits and gains from possessions in Ireland, it is certainly very singular that no mention of them is to be found in section 39. It cannot be supposed that the presence in England of an Irishman engaged in business in Ireland was so rare a thing that it escaped the attention of the framers of the Act. Nor can it, I think, be supposed that a person made liable as a temporary resident in Great Britain by reason of six months' residence there was intended to escape altogether from the payment of income tax upon receipts of his Irish business. Yet what would there be to charge him if the appellant is right? The only way to give a rational meaning to section 39 is to construe the expression "possessions in Ireland" as including every source of Irish income other than Irish securities which the person made chargeable by the section may happen to possess.

Section 106 seems to me to point clearly in the same direction. It explains in what districts the duties contained in schedule D are to be charged. After dealing minutely with the case of persons carrying on business either wholly or partly in Great Britain, it provides for the duty to be assessed in respect of the profits or gains arising from possessions or securities in Ireland, and there again there is no mention of profits or gains arising from trade or business in Ireland, and no provision for the place where such profits or gains are to be assessed, unless they are to be taken to be included in the expression "possessions in Ireland." If not so included, the omission to mention them in that section is the more extraordinary because the greater part of the section is occupied with the subject of profits and gains from trade.

It is obvious, too, I think, that if the expression "possessions in Ireland" be given a narrower meaning than that I have suggested as its proper meaning endless difficulties would arise. However much you narrow the meaning of the word "possessions," you cannot narrow it so far as to exclude all trades or concerns in the nature of trade.

Even in the rule applicable to the "fifth case" there is, I think, an indication that the case covers profits from foreign trades. It will be observed that the only deduction or abatement allowed is that allowed in the "first case." On referring to the first case it will be found that that deduction or abatement is one applicable, and only applicable, I think, to the case of a trade.

Upon the whole I have come to the conclusion that the profits and gains arising from the respondent's Melbourne business fall under the "fifth case" of schedule D, and are chargeable accordingly on the actual sums received in the United Kingdom; and consequently I am of opinion that the appeal ought to be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed, with costs.

Solicitor for the appellants, *Sir W. H. Melvill, Solicitor of Inland Revenue.*

Solicitors for the respondent, *Shepheards.*

From C. A. (England). } Dec. 13, 14, 1888; May 6, 7; Aug. 8, 1889.

(1) GUARDIANS OF THE REIGATE UNION *v.* GUARDIANS OF THE CROYDON UNION.

(2) GUARDIANS OF THE HIGHWORTH AND SWINDON UNION *v.* GUARDIANS OF THE WESTBURY-ON-SEVERN UNION.

(3) GUARDIANS OF THE MEDWAY UNION *v.* GUARDIANS OF THE BEDMINSTER UNION. (*a.*)

Poor law—Settlement—Derivative settlement—Child under sixteen—Widowed mother—Divided Parishes Act, 1876 (39 & 40 *Vict.* c. 61), *ss.* 34, 35.

(1) *The father of a pauper had a settlement in the Croydon Union in* 1878, *which he never lost. He died in* 1881. *The maiden settlement of the mother, who survived the father, was in the Reigate Union, and the mother, in* 1886, *had not acquired any settlement since her husband's death. In* 1886 *a justices' order was made adjudging the settlement of the pauper, who was then under the age of sixteen, to be in the Croydon Union.*

Held (*reversing the decision of the* Court of Appeal, 35 *W. R.* 824, 19 *Q. B. D.* 385), *that, inasmuch as the pauper on the death of her father took the settlement of the father, and as the pauper's widowed mother had not, since her husband's death, acquired a settlement for herself, the pauper retained the father's settlement in the Croydon Union, and that the order of the justices was right.*

(2) *A pauper was born on the 27th of October,* 1861, *in Wanborough, her father's birth parish, which is within the appellant union. In* 1862 *she removed with her father to the parish of Rhydgwern, in the Newport Union, where she resided with him until his death in* 1868. *Her mother married again. From her father's death until November,* 1885, *the pauper* (*who is physically incapable of work*) *resided with her mother in the parish of Rhydgwern, and from the 5th of June,* 1880, *was in receipt of relief from the Newport Union until November,* 1885, *when she went with her mother to the parish of Adeitt, in the respondent union, to which she became chargeable in September,* 1886.

When the pauper, who attained sixteen in October, 1877, *became chargeable in June,* 1880, *she had resided in Rhydgwern for about four years without having received relief, and for two years and ten months of that time she was above sixteen.*

Held, that the pauper had acquired by residence a status of irremovability, and had a settlement in her own right in the Newport Union under section 34 *of the Divided Parishes Act,* 1876.

Decision of the Court of Appeal (36 *W. R.* 422, 20 *Q. B. D.* 597) *reversed.*

The widow and three children (*under six years of age*) *of a man who at the time of his death had acquired a settlement in Gillingham under section* 34 *of the Divided Parishes Act,* 1876, *became chargeable to the Bedminster Union, the widow not having, since her husband's death, acquired a settlement for herself.*

Held, that, the father having, at the time of his death, acquired a settlement in Gillingham under section 34, *his widow and children took his settlement under the provisions of section* 35.

Decision of the Court of Appeal (36 *W. R.* 851, 21 *Q. B. D.* 276) *affirmed, but on different grounds.*

These appeals, which were heard together, depended upon the construction of sections 34 and 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), which are as follows:—

Section 34.—"Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient."

Section 35.—"No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

In the first appeal—*Reigate Union v. Croydon Union,* 35 W. R. 824, 19 Q. B. D. 385—a special case had been stated under 12 & 13 Vict. c. 45, s. 11, on appeal against an order of two justices of the county of Surrey, made under section 97 of 16 & 17 Vict. c. 97, adjudging the place of the last legal settlement of Edith Scully, a pauper, to be in the hamlet of Penge in the Croydon Union. This order was made on the 8th of May, 1886, upon the application of the Reigate Union. Edith Scully, the pauper (who was a lunatic), was born in 1875, and was under sixteen when the order was made. She was the daughter of Richard Scully and Emma his wife. Emma Scully was born in the parish of Reigate in the Reigate Union, which was her maiden settlement, and she never acquired any subsequent settlement in her own right. Her husband, Richard Scully, whilst resident with her, acquired in 1878 a settlement in the hamlet of Penge in the Croydon Union, and Emma Scully and Edith took the settlement of Richard Scully. None of them ever acquired any subsequent settlement. Richard Scully went to Gibraltar in 1881, where he was joined by his wife in 1881, and she resided there ever since. Richard Scully died at Gibraltar in 1881.

The Queen's Bench Division quashed the order of the justices, and this was affirmed by the Court of Appeal. The Reigate Union appealed.

Jelf, Q.C. (*R. Burleigh Muir* with him), for the appellants.—The question turns on section 35 of the Divided Parishes Act, 1876: *Reg.* v. *Guardians of Bridgnorth,* 31 W. R. 429, 9 Q. B. D. 765, 770 (Field, J.'s judgment showing the state of the law before the Act of 1876). *Reg.* v. *Inhabitants of All Saints, Derby,* 14 Q. B. 216, and *Overseers of Bodenham* v. *Overseers of St. Andrewis,* 1 E. & B. 465, were referred to. The numerous decisions upon section 35 cannot be reconciled. *Guardians of Liverpool* v. *Guardians of Pottesa,* 32 W. R. 494, 12 Q. B. D. 303, governs this case. *Maidstone Union* v. *Hulborn Union,* 17 Q. B. D. 817, 35 W. R. Dig. 148, and *Kingsbridge Union* v. *East Stonehouse Guardians,* 35 W. R. 580, 18 Q. B. D. 528, should be overruled. [Lord WATSON referred to *Adamson* v. *Barbour,* 1 Macq. 376.]

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Sir E. Clarke, S.G., and *Poland, Q.C.* (*Mead* with them), for the respondents.

Jelf, Q.C., replied.

In the second appeal—*Highworth and Swindon Union* v. *Westbury-on-Severn Union*—the facts will be found stated in the judgment of the Court of Appeal, reported 36 W. R. 422, and in the judgment of Lord Watson.

The pauper became chargeable to the Westbury-on-Severn Union in September, 1886, and an order was obtained for her removal to the Highworth and Swindon Union, the birthplace and last legal settlement of her father and the pauper. The Queen's Bench Division (Stephen and Charles, JJ.) quashed the order of removal. This was reversed by the Court of Appeal. The Highworth and Swindon Union appealed.

Lumley Smith, Q.C., and *R. Cunningham Glen*, for the appellants.—The residence of a child with its parents is sufficient for the acquisition of a settlement under section 34: *Reg.* v. *Elvet*, 7 W. R. 586, 2 E. & E. 266; *Reg.* v. *Cudham*, 7 W. R. 161, 1 E. & E. 409; *Reg.* v. *Glossop*, 12 Q. B. 117; *Overseers of Easton* v. *Overseers of St. Mary, Marlborough*, 15 W. R. 310, L. R. 2 Q. B. 128; *Guardians of Medway* v. *Guardians of Bedminster*, 36 W. R. 478, 851, 20 Q. B. D. 191, 21 Q. B. D. 278.

They referred to *Reg.* v. *Leeds Union*, 27 W. R. 708, 4 Q. B. D. 323; *Rex* v. *Inhabitants of Bleasby*, 3 B. & Ald. 377; *Wolstanton Union* v. *Northwich Union*, 46 L. T. N. S. 528; *Holborn* v. *Chertsey*, 33 W. R. 344, 14 Q. B. D. 289, reversed on a question of fact, 33 W. R. 698, 15 Q. B. D. 76; and Denman, J., in *St. Pancras* v. *Norwich*, 35 W. R. 547, 18 Q. B. D. 521.

H. D. Greene, Q.C., and *Fraser Macleod*, for the respondents.—Section 35 abolishes emancipation, and the argument of the respondent is that of the Court of Appeal: *R.* v. *Inhabitants of Broadhembury*, 4 Doug. 241; *R.* v. *Inhabitants of Much Comarne*, 2 B. & Ad. 861; *Reg.* v. *St. Ann, Blackfriars*, 1 W. R. 384, 2 E. & B. 440; *Reg.* v. *St. Olave's*, 22 W. R. 75, L. R. 9 Q. B. 38; *Guardians of Salford* v. *Overseers of Manchester*, 31 W. R. 380, 10 Q. B. D. 172.

R. Cunningham Glen, in reply, cited *Nixon* v. *Rowand*, 15 Court Sess. Cas., 4th series, 191; *Cassells* v. *Somerville and Scott*, 12 Court Sess. Cas., 4th series, 1155.

In the third appeal—*Medway Union* v. *Bedminster Union*, 36 W. R. 851, 21 Q. B. D. 278—an order of justices had been made for the removal of Caroline Baker with her three children (all under six) from the Bedminster Union to the Medway Union as the place of their last legal settlement. Caroline Baker had resided in the parish of Gillingham, in the Medway Union, continuously, together with her husband, for upwards of three years immediately before his death, in 1886, and she continued to reside there as a widow for three months after. Subsequently the widow and children became chargeable to the Bedminster Union.

The Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) had affirmed the decision of the Queen's Bench Division (Pollock, B., and Hawkins, J.), which affirmed the order of removal.

The Medway Union appealed.

Sir E. Clarke, S.G., and *R. B. Kinglake*, for the appellants.—The question arises under section 34. A wife cannot acquire a settlement for herself. Wife in section 35 does not include widow: *Reg.* v. *Overseers of Manchester*, 30 W. R. 247, 8 Q. B. D. 50; *Giles* v. *Eversley Blackwater*, 1 Stra. 580.

Poole, Q.C. (*J. Cresswell Wall* with him), for the respondents.

They cited *Reg.* v. *Glossop*, 12 Q. B. 117; *Reg.* v. *St. George's-in-the-East*, 18 W. R. 787, L. R. 5 Q. B. 364; *Reg.* v. *Weymouth*, 16 Q. B. D. 31, 34 W. R. Dig. 135; *Reg.* v. *East Stonehouse*, 2 W. R. 410, 3 E. & B 596.

Sir E. Clarke, in reply.

The House took time for consideration in the three appeals.

Aug. 8.—Lord Halsbury, C.—In the case of the *Reigate Union* v. *The Croydon Union* an order has been made by the justices of Surrey adjudging the settlement of a lunatic pauper in the respondent union. The lunatic was, at the time of the order, under sixteen years of age, and was the daughter of a father who was settled in the respondent union. The mother's maiden settlement was in the appellant union, and was a settlement by birth, and since her husband's death five years before the order appealed against, she had acquired no settlement in her own right.

Under these circumstances no question could have arisen under the law as it stood before the passing of 39 & 40 Vict. c. 61. But it is said that section 35 of that Act has altered the law in respect of the wife's retaining the settlement with which, by marriage, she has become invested.

At first sight it seems strange that when the express language of the section, relied upon to effect this change, excepts from its operation the case of a wife's settlement derived from her husband, it should be supposed that these words have been construed to make the very change which the ordinary meaning of those words would seem to be expressly intended to prevent. But the reasoning appears to be this—that the word "wife" imports a living husband, because the appropriate word for a woman whose husband is dead is "widow," and the same section speaks of a "widowed mother."

Whether the words "derived from the husband" is the most strictly accurate language to describe the *status* which the wife acquires upon marriage I will not stay to inquire, since, whatever be the true construction of the section, it is obvious that the Legislature has used the phrase in relation to that subject; but, assuming it to be accurate, one cannot but inquire in what other way could the exception be worded so as to preserve to the widow the rights which she had acquired as a wife.

Neither in this nor in any other branch of the law does the *status* acquired by the wife in marriage terminate with the death of the husband, though it is by being a wife she acquires it, and certainly not as a widow.

If the Legislature was pointing to the rights acquired by marriage it must use the word "wife," since it was only as a wife that those rights could be acquired. The reason for the use of the words "widowed mother" in the same section was obvious enough. If the child's father was alive it would take its father's settlement; but if the father were dead, then its mother's, who in that case would be a "widowed mother."

I am therefore very clearly of opinion that the order of the Court of Appeal was wrong, and that the appellants are entitled to succeed. I move your lordships accordingly.

For the same reasons I think that in the third case—viz., the *Medway Union* v. *Bedminster Union*—the order appealed from ought to be affirmed.

In that case the husband of the pauper—the father of the children—was settled in the parish of Gillingham, it is immaterial to inquire how. Upon his death the wife retained his settlement, and with her children subsequently became chargeable to the Bedminster Union, never having herself any other settlement than that in the parish of Gillingham. I think they were therefore properly removed to that parish, and I move your lordships that the appeal from the judgment

affirming the propriety of that removal be dismissed with costs.

The second case, that of the *Highworth and Swindon Union* v. *Westbury-on-Severn Union*, I think is concluded by the authority of Lord Campbell, C.J., and Erle and Wightman, JJ., which I should be very sorry to see disturbed. I agree with Stephen and Charles, JJ., that the case of *Reg.* v. *Elvet* determines, and rightly determines, the question in debate.

The pauper had, for more than the necessary period of residence, acquired a *status* of irremovability, and so was "settled" in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of age, and it is true that if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally irremovable, and, if so, the periods of emancipated and unemancipated residence may be put together.

It is clear, therefore, that in this case there was for more than three years a *status* of irremovability in each of the three years, and therefore the pauper acquired a settlement, and the judgment of the Queen's Bench Division is right.

I accordingly move your lordships to reverse the judgment of the Court of Appeal reversing the judgment of the Queen's Bench Division; that the judgment of the Queen's Bench Division be restored; and that the respondents do pay to the appellants the costs both here and below.

Lord WATSON.—These appeals, which were heard together, all depend upon the construction of the leading clauses of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), relating to the settlement of paupers. I think it will be convenient, first of all, to indicate my own views with regard to the meaning and effect of the 34th and 35th sections of the statute, and then to deal with their application to the particular facts of each case.

The interpretation of section 34 is not attended with difficulty, and has not given rise to any serious difference of opinion in the Courts below. The Act 9 & 10 Vict. c. 66, s. 1, provided that (subject to certain conditions as to quality of residence, &c.) no person should be removable from a parish in which he had resided for the five years immediately preceding the application for a warrant of removal. The period of three years was substituted for that of five by 24 & 25 Vict. c. 55, s. 1, which also enacted that residence for the requisite period in any part of a union should have the same effect as residence in a single parish within it. The length of residence necessary to confer the privilege of irremovability was, by 28 & 29 Vict. c. 79, s. 8, reduced to one year. Such was the statutory rule with respect to irremovability at the time when the Act of 1876 was passed. Section 34 does not trench upon the previous law regarding irremovability, but creates a new species of settlement by residence. It enacts that a person who resides in a "parish" for three consecutive years shall, if his residence during each of these years has been such as would, in accordance with the statutes already referred to, render him irremovable, be "deemed to be settled therein" until he acquires a new settlement in another parish by a like residence or otherwise.

Section 35 contains three separate clauses, the first of which abolishes derivative settlement, subject to certain exceptions in the cases of married women and legitimate children; the second gives to illegitimate children the right to retain their mother's settlement until they acquire another; and the third imposes a limitation upon the provisions of the two preceding clauses in favour of children by enacting that, in certain events, the child, whether legitimate or illegitimate, is not to have the benefit of its parent's settlement when that settlement is itself derivative.

The provisions made by way of exception in the first of these clauses, with respect to the derivative settlements of married women and legitimate issue, have occasioned much difference of opinion. Since the passing of the Act there have been numerous decisions upon the import of the exceptions by divisional courts and in the Court of Appeal; but these authorities are marked by such a degree of fluctuation and inconsistency that I do not think any advantage can be gained by referring to them. I may observe, however, that the structure of the clause, which begins with the sweeping declaration that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise," has induced many of the learned judges to favour a construction of the excepted cases, which appears to me to be unduly severe. The language used by the Legislature to describe the exceptions is not *per se* definitive, and is only intelligible by reference to the pre-existing law applicable to settlements by marriage or parentage. The fact that the Legislature has resorted to the convenient form of first abolishing the whole, and then excluding what it was intended to retain, does not necessitate a narrow reading of the exceptions. These ought, in my opinion, to be construed according to their ordinary and natural meaning, just as if they had stood alone or had been positive enactments.

The words of exception are:—"Except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it acquires another."

The settlement which "a wife" derives "from her husband" is expressly saved, and that in terms which aptly describe a woman's settlement by marriage according to the previous law, one quality of which was that it adhered to her after her husband's death until she acquired a new settlement. But it has been held in some of the decided cases that the use of the word "wife" implies that a "widow" is no longer to take a settlement from her husband, but loses it immediately on his decease, a view which is said to be confirmed by contrasting "wife" with "widowed mother" as used in relation to the settlement of children under the age of sixteen. The result of that construction is, that on the father's death the widowed mother at once reverts to her maiden settlement, to which the children in nonage also become chargeable. I can find nothing in the language of the clause to warrant the inference that it was intended to deprive a widow of the benefit of her husband's settlement, and to throw the burden of supporting her and their family upon the parish of her birth until she acquires a new settlement. The marriage settlement of a widow was that which she took, not as a widow from a dead husband, but as a wife from her living husband—in other words, the settlement which she retained after his death was one derived by a wife from a husband, and is, therefore, within the precise words of the exception.

So far as it concerns the settlement of lawful children, the clause introduces a very important alteration of the law. It puts an end to all nice questions as to emancipation or non-emancipation by enacting that, on attaining the age of sixteen, every child shall, without regard to its physical or mental capacity, cease to follow its parent's settlement and become capable of acquiring a settlement in its own right. The clause leaves the old law applicable to parentage settlements unchanged in all other respects. The words, "or of its widowed mother, as the case may be," do not, in my opinion, amount to a declaration that the child must, on its

father's death, at once shift to the maiden settlement of its mother. They obviously refer to the existing law, and are perfectly intelligible as referring to the well-known rule that, after the death of the father, unemancipated children take the benefit of any primary settlement which their widowed mother may acquire for herself.

The 2nd clause of section 35 enacts that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement." It had already been enacted by 4 & 5 Will. 4, c. 76, s. 71, that such a child shall have and follow the settlement of its mother until it attains the age of sixteen or acquires a settlement in its own right; and it had been decided in *Bodenham* v. *St. Andrew, Worcester*, that, by virtue of that enactment, a bastard only retained its mother's settlement until sixteen, and after that age was removable to the parish of its birth. It was also decided in *Reg.* v. *St. Mary, Newington*, that, under the Act of William, a bastard under sixteen took, not only such settlements as its mother might acquire in her own right, but also (in that respect differing from a lawful child) the settlement of any husband whom she might marry. Making due allowance for the differences arising from the circumstance that in law a bastard has no father, the practical effect of the second clause of section 35 is to place illegitimate, as nearly as may be, on the same footing with legitimate children.

The third clause applies to children of both classes. It enacts that:—"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have acquired a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." The object of the enactment is to impose a limit upon parentage settlements by double derivation, by providing that children emancipated shall not retain their derivative parentage settlement where the settlement of their parent is also derivative, but shall, in the event of their becoming paupers without having acquired a new settlement, be chargeable to the parish of their birth. The provisions of the clause have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of section 35 to the effect that a legitimate, or that of the 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves.

The views which I have thus expressed with reference to the construction of section 35 are not exhaustive, but they are sufficient to dispose of all the questions of law arising in these appeals. Shortly stated, my opinion comes to this, that the effect of section 35 is (1) to reserve to married women, whether during marriage or in viduity, the same right to their husband's settlement which they had under the law existing at the time when the Act was passed; (2) to fix absolutely the age of sixteen as the period of emancipation in all questions regarding the settlement of legitimate children, as had already been done in the case of illegitimates; (3) to give to bastards the privilege enjoyed by lawful children of retaining their parentage settlement after emancipation until the acquisition of a new settlement; (4) in all cases where the parents' settlement was itself derivative, to throw children of either class, as soon as they attain the age of sixteen, upon their own birth settlement until they acquire another; (5) subject to these provisions and limitations, to reserve to children the same rights in relation to parentage settlement which they possessed under the then existing law; and (6) to abolish all other kinds and forms of derivative settlement.

I shall now proceed to deal separately with these appeals, and with the facts presented for judgment in each of them.

In the first of them the pauper, the liability for whose maintenance is the subject of controversy, is a lunatic girl whose father died in 1881, having in the year 1878 acquired a settlement in the respondent union, which he never lost, by renting a tenement and being charged with and paying rates and taxes. Her mother, who is still alive, had her maiden settlement by birth in the appellant union, and she has not acquired any settlement since her husband's death. On the 8th of May, 1866, an order was made by two justices of the county of Surrey adjudging the settlement of the pauper, who was at that time under the age of sixteen, to be in the appellant union. Their adjudication has been confirmed by a divisional court and by the Court of Appeal, upon the ground that the pauper on her father's death took the maiden settlement of her widowed mother. For the reasons already explained, I am of opinion that the pauper after her father's death retained her parentage settlement in the respondent union, and that the judgment appealed from ought, therefore, to be reversed.

In the second appeal the facts are as follows:—The pauper was born on the 27th of October, 1861, in Wanborough, her father's birth parish, which is within the appellant union. In 1862 she removed with her father to the parish of Rhydgwern in Newport Union, where she resided with him until his death in August, 1868. Her mother married in 1871 one John Gibbs or Gibson, who died in 1884; and in November, 1885, she was again married to her present husband. From the time of her father's death until her mother's third marriage the pauper, who is physically incapable of work, continued to reside with her mother in the parish of Rhydgwern, and from the 5th of June, 1880, she was in receipt of relief from Newport Union until the 9th of November, 1885, when she went with her mother to the parish of Adsett, in the respondent union, to which she became chargeable in September, 1886. On the 18th of March, 1887, the guardians of the respondent union obtained an order for her removal to the appellant union, on the ground that the parish of Wanborough was the birthplace and last legal settlement both of the pauper and of her father, seeing that the residence of the latter in Rhydgwern was prior to the Act of 1876. It was, therefore, unnecessary to determine whether the pauper took her own or her father's birth settlement if she had not acquired a new settlement of her own after emancipation.

The pauper attained the age of sixteen on the 27th of October, 1877. When she became chargeable to the union in June, 1880, she had resided in Rhydgwern for nearly four years without ever having received relief, and for two years and ten months of that period she was above sixteen years of age. In these circumstances a divisional court, consisting of Stephen and Charles, JJ., quashed the order of removal, holding, on the authority of *Reg.* v. *Elvet*, that the pauper had in each of the three years preceding the 5th day of June, 1880, acquired by residence a *status* of irremovability, and that she had consequently at that date acquired a settlement in her own right in Newport Union under the provisions of section 34. Their judgment has been reversed, and the order of removal affirmed by the Court of Appeal, who were of opinion (1) that the pauper retained her birth settlement in the parish of Wanborough until she acquired another; and (2) that she had not acquired a settlement in Rhydgwern because unemancipated residence cannot be taken into account in ascertaining the period of previous

residence necessary to entitle an emancipated child to a settlement in terms of section 34.

I have been unable to find in section 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen. The only provision having a bearing upon the point is to be found in section 35, which enacts that until emancipation the child "shall retain" the settlement of its father or widowed mother. That provision does not necessarily imply that on attaining sixteen the child is not to have the benefit of previous residence; but, even if it pointed to that result, I do not think that any mere implication derivable from it can be permitted to override the express enactments of section 34. The only test of residence sufficient to give "any person" a settlement under that section is that it shall be such as would, "in accordance with the several statutes in that behalf, render him irremovable"; and the case of *Reg.* v. *Elvet* is a clear authority to the effect that the pauper's residence under sixteen, coupled with her residence after she attained that age, did render her irremovable in accordance with the statutes. The pauper, having admittedly acquired no settlement after June, 1880, must, at the date of the order of removal, have retained the statutory settlement which she had gained by residence in Rhydgwern, and I am, therefore of opinion that in this case the judgment of the Court of Appeal ought to be reversed, and that of the Queen's Bench Division restored.

The facts of the third appeal appear to me to raise an issue which may be very easily disposed of. Frederick William Baker died on the 25th of March, 1886, in the parish of Gillingham, in the appellant union, having resided there continuously with his wife and family for more than three years before his death, after which event his widow continued to reside with her children in the same parish for three months. She and three children, all under six years of age, subsequently became chargeable to the respondents, who obtained an order for their removal to the appellant union on the ground that the widow had, in the circumstances, acquired a settlement in her own right in the parish of Gillingham by virtue of section 34, and that order has been affirmed on the same ground in both courts below. I concur in their conclusion but I cannot assent to the reasons assigned for it. I am of opinion with Lopes, L.J., that the father, having at the time of his death acquired a settlement in Gillingham under section 34, his widow and children took his settlement under the provisions of section 35. During the subsistence of her derivative settlement I do not think that the widow had the capacity to acquire by residence another settlement of the same quality and in the same parish.

Lord Fitzgerald.—I have had an opportunity of reading and considering the excellent judgment which has just been delivered by Lord Watson, and I concur in the interpretation which he has put upon sections 34 and 35. I also concur in the conclusions at which he has arrived upon the three appeals before us.

Lord Macnaghten.—The question in these cases depends upon the true construction of sections 34 and 35 of the Divided Parishes and Poor Law Amendment Act, 1876. The latter section has led to great divergence of opinion, and has provoked much unfavourable criticism.

Patchwork legislation is never quite satisfactory. But I rather doubt whether the enactment under consideration deserves all the hard things that have been said of it. I cannot help thinking that no small part of the difficulty which seems to surround section 35 is due to the gloss which was put upon it in the *Bridgnorth case*.

The section begins by stating that "no person shall be deemed to have derived a settlement from any other person" with two exceptions. For some reason or other the learned judges in the *Bridgnorth case* appear to have thought that the section began too abruptly, and that it would be the better for something in the way of introduction. Accordingly, they held that it was to be construed as if it were prefaced by the words, "In any question of the removal of a pauper." They then determined that "the moment of time which governs the question of settlement is the time when the proper persons have to make up their minds as to the removal—in other words, the moment of adjudication," and that the expression "no person" means "the person whose case is under discussion, and who is to be removed": see *Reg.* v. *Guardians of Bridgnorth*, *Guardians of Croydon* v. *Guardians of Reigate*.

I must say that I can find nothing in the Act which suggests or justifies this construction. It has, I think, given rise to great difficulty and confusion in dealing with the two exceptions to the general rule abolishing derivative settlements.

The first exception is "in the case of a wife from her husband." Those words seem plain enough. The wife is deemed to take her settlement from her husband. What happens if the husband dies in the lifetime of the wife? There is nothing in the Act, nothing in the general law before the Act was passed, nothing, I think, in the reason of the thing, to deprive her of her settlement. But, in obedience to the rule laid down in the *Bridgnorth case*, it has been held that if a question of settlement arises in the case of a widow, the court is bound to regard her position at the moment of adjudication, and then it is said at that moment she is no longer a wife, and therefore not within the first exception.

The second exception is "in the case of a child under the age of sixteen, which child," the enactment declares, "shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Again, apart from the rule laid down in the *Bridgnorth case*, those words are reasonably plain; and, notwithstanding that rule, and the judgment of Lord Esher, M.R., in the *Croydon case*, I think they were rightly construed by Lopes, L.J., delivering the judgment of the court, in the *Highworth and Swindon case*, 36 W. R. 423, 20 Q. B. D. 597. Every child up to the age of sixteen takes the settlement of its father, but if the father dies while the child is under sixteen, and the mother, being a widow, acquires a settlement in her own right before the child attains that age, or, I suppose, if the deceased father had no settlement, the child takes the settlement of its widowed mother up to the age of sixteen. In either case, whether it takes the settlement of the father or of the mother, it retains the settlement so taken until it acquires another.

So far I can see no difficulty in the section.

Up to this point the section deals with the case of legitimate children only. It then proceeds to deal with the case of illegitimate children. The only obscurity in that part of the section lies in its brevity. "An illegitimate child," it says, "shall retain the settlement of its mother until such child acquires another settlement." And it says nothing more.

But then it must be remembered that it had been already enacted that an illegitimate child should "have and follow" the settlement of its mother until it attained the age of sixteen or acquired a settlement in its own right (4 & 5 Will. 4, c. 76, s. 71); and it had been decided by the Queen's Bench in *Bedenham* v. *St. Andrews*, that when an illegitimate child attained sixteen without having acquired a settlement in its own right its birth settlement revived. The object of this part of section 35 seems to be to get rid of that decision and to place illegitimate children, as far as possible, in the same position as legitimate children.

I now come to the third part of the section, which

certainly is not free from difficulty. It declares that "if any child in this section mentioned" (that is, as I understand it, if any child, whether legitimate or illegitimate, who has derived a settlement from a parent) "shall not have acquired a settlement for itself or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

This part of the section is, I think, plainly directed to a case where it is necessary to show, and to show by inquiry, what the settlement of the child is, and I think it only applies where such an inquiry is undertaken. If the child becomes chargeable and is removable with its parent or parents, there is no need for any inquiry into the settlement of the child. There is an inquiry into the settlement of the parent, but when that is ascertained there is an end of the matter. I think that this part of the section only applies where there is an independent inquiry into the settlement of the child. In that case the section says, if you find that the settlement of the parent of the child was a derivative settlement, you are not to pursue the inquiry any further. The child is to be deemed to be settled in the place of its birth. I agree with what was said on this point by Mathew, J., in *Guardians of Hollingbourn* v. *Guardians of West Ham*, 29 W. R. 629, 6 Q. B. D. 580.

It only remains to apply the provisions of the Act, as I think it ought to be construed, to the three cases under consideration.

As regards the case of the *Guardians of Reigate* v. *Guardians of Croydon*, it seems to me clear that the pauper there took the settlement of her father, who acquired a settlement in the Croydon Union, and that, inasmuch as the pauper's widowed mother never acquired a settlement for herself, the pauper retained her father's settlement in Croydon, and therefore I think the decision of the Court of Appeal in that case must be reversed.

In the case of *The Highworth and Swindon Union* v. *The Guardians of Westbury-on-Severn*, I agree with what was said in the judgment of the Court of Appeal as to section 35; but I am unable to agree in their opinion that the residence of a child after sixteen cannot coalesce with its residence under sixteen so as to complete the period required for gaining a settlement. The older authorities, of which it is only necessary to mention *Reg.* v. *Elvet*, are, I think, decisive upon the point. It appears to me, therefore, that the appeal should be allowed.

In the case of the *Guardians of Medway Union* v. *Guardians of Bedminster Union*, I think the appeal must be dismissed. But I prefer the reasons given by Lopes, L.J. I think that in that case the wife took a derivative settlement from her husband, and that it is not necessary, though if it had been necessary it would have been competent, to tack the three months during which she resided in the parish of Gillingham after she became a widow to the period of two years and nine months during which she resided there immediately before the death of her husband.

Reigate Union v. *Croydon Union: Order of the Court of Appeal and order of the Queen's Bench Division reversed, with costs here and below; cause remitted to the Queen's Bench Division.*

Highworth and Swindon Union v. *Westbury-on-Severn Union: Order of the Court of Appeal reversed, with costs here and below; order of the Queen's Bench Division restored; cause remitted to the Queen's Bench Division.*

Medway Union v. *Bedminster Union: Order of the Court of Appeal affirmed, and appeal dismissed with costs.*

In the first appeal:

Solicitors for the appellants, *Morrisons*, for *G. C. Morrison*, Reigate.

Solicitors for the respondents, *West, King, Adams, & Co.*

In the second appeal:

Solicitors for the appellants: *Few & Co.*

Solicitors for the respondents: *Wilkins, Blyth, & Dutton.*

In the third appeal:

Solicitors for the appellants, *Nickinson, Prall, & Nickinson*, for *Prall & Son*, Rochester.

Solicitors for the respondents, *Guscotte, Wadham, & Daw*, for *O'Donoghue & Anson*, Bristol.

Court of Appeal.

From Chan. Div. Jan. 22.

WARD *v.* LAWSON.
LAWSON *v.* WARD. (*a.*)

Solicitor—Country solicitor and London agent—Agreement on the "usual agency terms"—Stipulation that the London agent is not to be paid till the country solicitor is paid—Right of London agent to a share of money recovered as interest on costs.

An agreement between a country solicitor and a London solicitor that the latter should act as the London agent of the former, "upon the usual agency terms," entitles the London agent to his disbursements out of pocket, and to half the "profit charges," whether the country solicitor is paid them by his client or not, but does not entitle the London agent to any share whatever in any other profit made by the country solicitor out of the business.

W., a country solicitor, entered into an agreement with L., a London solicitor, that the latter should act as W.'s London agent on the usual agency terms, and subsequently a further agreement was made that all the business in connection with a particular company, who were clients of W., and the bills of costs in respect of such business, were to be kept separate from the other agency business and bills of costs, and that L. was not to call upon W., to pay him until W., had himself been paid by the company. The company having failed to pay for many years, W., sued them and recovered payment of his costs, with interest. L. claimed to be entitled to a share in this interest under his agreements with W.

Held (reversing the decision of Chitty, J.*), that, upon the true construction of the agreements, the usual agency terms applied except so far as expressly varied, and that therefore, in the absence of any express stipulation as to interest, L.'s claim to share in it could not be sustained.*

Appeal from Chitty, J.

The plaintiff Ward was a solicitor at Sheerness, and in the year 1856 was appointed solicitor to a company formed for the purpose of constructing a railway between Sittingbourne and Sheerness, and known as the Sittingbourne and Sheerness Railway Co.

In the year 1859 he entered into an agreement with Messrs. Eyre & Lawson, a firm of London solicitors, that they should act as his London agents on the usual agency terms. By a further agreement, made in 1860,

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

the bills of costs for business transacted by Eyre & Lawson as the plaintiff's agents in respect of the said railway company were to be kept separate from the bills in respect of other business so transacted, and the London agents were not to call upon Ward to pay them until he had himself been paid by the company.

In 1867 the firm of Eyre & Lawson dissolved partnership, and from that time the defendant, Mr. A. Scott Lawson, acted as the plaintiff's agent in respect of all business connected with the company till the plaintiff ceased to be the company's solicitor.

The present action of *Ward* v. *Lawson*—reported on demurrer, 21 W. R. 88, L. R. 8 Ch. 65—and the similar one of *Ward* v. *Eyre* (*and Lawson*) 28 W. R. 712, 15 Ch. D. 130, were commenced in 1872 for accounts and other relief. By the decree (dated June 26, 1874) in *Ward* v. *Lawson* there was ordered (1) an account of all money paid or advanced by the defendant to or for the use of the plaintiff in relation to matters of business transacted by the defendant for or on behalf of the Sittingbourne and Sheerness Railway Co; (2) an account of all money received by the defendant for the use of the plaintiff in relation to the matters aforesaid; (3) an account of all dealings and transactions between the parties in relation to the matters aforesaid. The company had failed to pay their costs for many years, but eventually Ward had taken proceedings against them and obtained judgment for the amount due, with interest at four per cent., which he had since been paid. The plaintiff Ward had subsequently died, but the action (*Ward* v, *Lawson*) had since been revived, Ward's representatives being substituted as parties, and the revived action was set down as *Lawson* v. *Ward*, Lawson being made plaintiff on account of the refusal of Ward's representatives to proceed. Lawson claimed that in taking the accounts credit should be given by Ward's representatives in respect of the sum paid to Ward for interest. The present question, which arose upon the taking of the accounts in chambers, was whether the claim of the London agent to a share in this interest could be maintained or not.

Chitty, J., held that the London agents were entitled to share in the interest, and he accordingly ordered the personal representatives of the late plaintiff Ward to give credit for it in the taking of the accounts.

The personal representatives of Ward appealed.

Byrne, Q.C., and *Chadwyck-Healey*, for the appellants.—The question is whether or not, as between the country solicitor and his London agents, the latter are entitled to participate in the interest on costs. In the absence of special agreement there is never any question of interest between solicitors and their London agents. [LINDLEY, L.J.—No; but if interest is received, ought it not to be shared? LOPES, L.J.—I suppose this case turns on a special agreement?] It was so dealt with by the judge. He thought the agents would not be entitled to share in the interest except under a special agreement. The agreement here says nothing expressly or by implication about interest. [LINDLEY, L.J.—The interest is received in respect of the whole of the costs—Lawson's share as well as Ward's.] The other side claim that the interest is, in fact, part of the profits; but where is the agreement for that? [LINDLEY, L.J.—Is any agreement necessary? Is not the interest accessory to the principal? Is not half of it Lawson's?] They were not partners. Why should he have a share of the interest without an express agreement for it?

They referred to *Ward* v. *Lawson* and *Ward* v. *Eyre*.

Romer, Q.C., and *Eyre*, for the respondent.—We transacted some of the business for the company direct, and received money which we brought into account. The company passed a resolution appointing Lawson their solicitor. He could have sued them. He was their solicitor as well as Ward. This interest is money which Ward received in respect of the costs. Why should there be any difference between interest and principal in this case? [COTTON, L.J.—The point seems to be whether the agent is entitled to share the profit made out of the business, or merely to share the profit charges.] No express agreement is necessary here. The interest was a sum payable by the clients in respect of the bills of costs. [The COURT here took the opinion of Mr. Ryland, one of the taxing masters, as to what was the practice between country solicitors and their London agents with regard to sharing costs when the terms were the "usual agency terms"? COTTON, L.J.—Mr. Ryland says the London agent is entitled only to his expenses out of pocket, and to a share (half or a third, as may have been agreed) of the "profit charges," and that he has no claim to share in any other profit the country solicitor may make out of the business.] It would be putting a very strained construction on the decree to say that this recovering of the interest from the company is not, within the meaning of the decree, a transaction between the parties.

They referred to *Rhodes* v. *Sugden*, 35 W. R. 75, 34 Ch. D. 155, and *De Havilland* v. *Bowerbank*, 1 Campb. 50.

COTTON, L.J.—This is an appeal from a decision of Chitty, J., made on a matter which has arisen in taking the accounts between these parties, and though it does not in terms state that the plaintiff is to pay to the defendant (the plaintiff being now dead), yet I think it does imply not only that he is to account, in the sense of saying what interest he has received, but that the defendant is entitled, under the arrangement between the parties, to half of that interest. To my mind it turns on what were the real terms of the agreement between the plaintiff and the defendant—that is to say, between Ward, the plaintiff, who is dead, and the defendant Lawson. The original plaintiff, Ward, was a country solicitor, and the defendant, who was in partnership with another gentleman, was a London solicitor. No doubt Ward was originally the solicitor of the railway company, and then he applied to the defendant, or his then firm, in order that his then firm might transact some business for this railway company. I think it is hardly to be doubted that in its origin the position was that of country solicitor and London agent. But then there was an agreement made between them, and it is said that afterwards, at a later period, Ward ceased to be the solicitor of the company, and that then the defendant became himself the solicitor of the company, and that, therefore, it was not a case as between the plaintiff as country solicitor and the defendant as London agent. In my opinion it is not shown that there was any putting an end to the agreement which I have referred to, and, in my opinion, if that was the real position of the parties at one period, yet the agreement is binding, and still regulates, so far as it applies, and can regulate it, the question in dispute between these parties. It is this: The plaintiff made an arrangement with the firm of Eyre & Lawson that the firm should act for the plaintiff as his agents in London, and it was agreed between the plaintiff and the firm that all business introduced by the plaintiff to the firm and transacted by them should be so transacted as agents for the plaintiff on the usual agency terms. So that, so long as the plaintiff was really in the position of solicitor, and the defendants were really in the position of London agents, the usual agency terms were to regulate their dealings and transactions, and that, as regards all business which was introduced by the plaintiff, the defendants were to act as agents for the plaintiff on the usual agency terms—that is to say, that, so long as the business is introduced, and as regards all business introduced by the plaintiff to the defendants, they should act on the usual agency terms. To my mind that means that any

moneys received in respect of the business so introduced, even though, at the time, the defendants were not really in the position of London agents for the country solicitor, should be dealt with on the usual agency terms; and there is this, that, in the usual case, the London agent has no claim at all against the client, but he can sue the country solicitor for what is due to him on the arrangement usually regulating the distribution of moneys, received or charged for, in respect of bills of costs.

Now there was a considerable question as to what was the position and claim of the London agent as against the country solicitor. Of course the London agent is entitled to all charges which are made for sums paid by him out of pocket, but there may be and are many other charges in solicitors' bills, where there is no actual expenditure by the London agent. He makes charges for professional services and attending on the client or rendering advice, and many other matters. Those, I think, are called "profit charges"; and the conflict as to what the right of the London agent is was this: Was he entitled to half the profit made on the bill of costs in respect of the transactions in which he was engaged? or was he entitled to half the amount of the profit charges—that is to say, of those charges to which I have referred? We did not feel quite justified in deciding that point without getting the opinion of one who would know very well, from his position as taxing master, and his former position as solicitor, what was the arrangement; and we learn from Mr. Ryland what I have said, that the London agent is entitled only—not regarding the charges which he has paid out of pocket—to half the amount of those which are called profit charges—that is, those charges which do not involve any expenditure of money by him. It is upon the use of the term "profit charges" that this difficulty has really arisen. Now the contention raised here on behalf of the defendant is that he is entitled to half the profit. We are told by Mr. Ryland, "Not at all—the London agent has nothing to do with the profit made by the solicitor; nor is he in any way, unless there is some special arrangement, implicated in any loss which the country solicitor, the solicitor in the case, may suffer in respect of the client not being able to pay him." Now, is there any arrangement here which alters that—which gives the defendant here a claim to half the profit? It is said that there is, because this was not on the usual agency terms, and, in my opinion, it was not. There was no distinction or difference as regards the distribution of the money which he received—that is to say, as regards the charges which the London agent is able to make; but there was this, that he was not to sue the plaintiff until the plaintiff had obtained payment of his bills of costs from the company. The words are that they shall not call upon the plaintiff to pay any of their agency bills until the plaintiff has obtained payment of the bills of costs from the company. That does not, to my mind, say what amount is to be claimed by the defendant, or what sums he is entitled to charge as against the plaintiff, his principal—what in his agency charges he can claim—but only limits the time. It says that he shall not make any claim in respect of what he is entitled to as agency charges unless and until the plaintiff obtains payment of the bill of costs from the company. In my opinion there is nothing in that which gives the London agent, the defendant here, any right to anything more than he would get according to the usual agency terms. It prevents him undoubtedly from suing for those, or from making any claim against the solicitor, until the solicitor is paid, but the saying that he shall not do so for a certain time does not alter in any way the amount which he can claim when that time arrives.

Then it is said that natural justice gives him a claim as against the solicitor for any interest he may obtain in addition to the amount of the profit charges—charges in respect of which the London agent has made no expenditure. That might have been very reasonable if there had been any such clause here; but there is not; and, in my opinion, it would be wrong, simply because the London agent has agreed not to sue the solicitor until certain events occur, to import into that this condition, that if, in consequence of the delay, you get any interest paid to you, then there is an implied contract or agreement that I shall have half that interest. In my opinion, the view of Chitty, J., was wrong, and I cannot agree with it. I think the appeal must be allowed.

LINDLEY, L.J.—The difficulty of this question arises from misunderstanding the exact meaning of the real agreement entered into between the parties, because the decree upon which the respondent relies is based upon that agreement, and it is so carefully worded and expressed as to give effect to it. Now there is nothing in the decree which settles this point one way or the other. I am quite aware that there is the 3rd clause about "dealings and transactions," but there is nothing which says what is to be done with the interest when it is recovered—whether it is to be shared between the parties, or to whom it is to belong. To decide that we must look at the agreement itself. Now the agreement was entered into at two different times. It is set out in paragraph 4 of the bill in *Ward* v. *Lawson*. The first agreement was in January, 1859, when it was arranged that the business, which I will shortly allude to by calling it "the business," should be transacted by Eyre & Lawson as agents of the plaintiff on the usual agency terms. I pass that over for the moment. Then, after that, in 1860, there was a further agreement embodying this important stipulation, that the defendants, the town agents, Eyre & Lawson, should not call upon the plaintiff to pay any of their agency bills until the plaintiff had obtained payment of the bills of costs from the company, and that those bills should be kept separate. Now the first question and the main question is, what is meant by the expression "on the usual agency terms"? I confess I thought at one time, until Mr. Ryland made it plain that I was wrong, that the town agent shared the profits up to a certain point made by the country solicitor. But that is not so at all. Mr. Ryland tells us that what is meant by "the usual agency terms" is this: that the town agent has nothing on earth to do with the profits; and he gave us a very remarkable case in which a country solicitor got from a grateful client £500 in a case in which Mr. Ryland was the town agent, and the town agent did not get a farthing of that. The town agent does not share the profits, and has nothing to do with the profits, but what he does is this: he gets his disbursements, and then he has half of certain charges which are called "profit charges," to distinguish them from disbursements. When once one sees it, and gets clearly into one's head that the usual agency terms have nothing to do with sharing profits at all, then this case becomes one very easy of solution.

Now there is nothing in the agreement, and there is nothing which, when the expression is understood, can be interpreted so as to involve as a consequence the right of the town agent to share any profits, whether they come in the shape of interest, or whether they come in the shape of gift, or otherwise, to the country solicitor. The sum which the town agent is to be entitled to is to be ascertained upon a different footing altogether, and there is nothing in the decree which in any way varies that; but in consequence of the difficulties which have arisen from the contentions of Mr. Lawson, and from his conduct—I do not say that he was wrong or right in the matter—he may have been partly right and partly wrong—but in consequence of

the fact that he had apparently worked, or assumed to work, for the company as principal, and not merely as an agent, it became necessary, in pronouncing the decree, to introduce some words which would define the position of the two parties, and there is an account therefore. First of all there is a declaration as to his position—that he is an agent, and what he is to do; then there is the third clause about "all dealings and transactions," which was naturally relied on by the respondent. Then there are certain clauses carefully worded with reference to getting in what is due from the company, and they are both to get in as best they can what may be payable from the company to them or either of them; but there is not a word that I can see in this decree which entitles the town agent to more than the agreement gives him; and it appears to me that that is where Chitty, J., has gone wrong, because he seems to have attributed to this decree a force and effect which I do not think it bears. He says: "It is clear in this case, from the terms of the agreement which I have read, that if Mr. Lawson had received the amount of the bills from the railway company, he must have allowed, as between himself and Mr. Ward in account, the sum he actually received"—he certainly must—"and if that sum had included the original principal of the demand and interest for forbearance, then he would be chargeable with interest, and the interest would then go as part of the profit to be divided between these two persons." There, I think, is a mistake; he would have had to hand over the amount of that interest to the person to whom it belonged, and that is the country solicitor. I cannot, now that I understand the meaning of the agreement, spell out of this anything to the effect which would entitle Mr. Lawson to interest on these bills. He has stipulated that he will not demand payment for a time, which is unfortunately very long—until the railway company pays. That delay has been very considerable, and nothing would have been more reasonable than for him to have stipulated that he should have interest if the railway company paid interest. He has not done anything of the kind; and now that the terms of it are understood, I do think that it is incumbent upon him to show some agreement entitling him to interest. At first I thought it was the other way. I thought it would require an agreement to disentitle him, but that is entirely changed, I think, when one understands the full and accurate meaning of the phrase "usual agency terms."

That Mr. Ryland has explained to us; and in face of his explanation this appeal must be allowed.

LOPES, L.J.—In the judgment which has been referred to, Lord Selborne says that the account in question is an agency account between a London agent and a country solicitor. The relation, therefore, between the plaintiff and the defendant in this case is the relationship of a country solicitor and a London agent. What, then, is an agency account? Or, in other words, what is a London solicitor entitled to receive in respect of agency charges from the country solicitor? He is entitled to receive all out-of-pocket expenses, and he is entitled to receive a share of the profits, be it a half or a third, what I call a share of the profit charges, whichever may be the arrangement between them. Now this, to my mind, is, when it is considered for a moment, a very reasonable arrangement in respect of these charges. The country solicitor does nothing whatever, but, on the other hand, he has introduced the business to the London solicitor, and, moreover, the country solicitor remains immediately responsible to the client. Therefore it seems to me fair that he should be remunerated, although the work is done by the London agent. Now, when it is clearly understood what the agency bill is, or what the agency charges are, it appears to me not very difficult to interpret this agreement. To my mind, it means this: the country solicitor is speaking, and says, "You, the London agent, are to have your share of the agency charges, but subject to this, that you are not to be entitled to have those charges paid to you by me, the country solicitor, until I, the country solicitor, have received them in the bill of costs which I shall send in and shall recover from the company, or, in other words, until the company has paid them to me." That being so, I am of opinion that Mr. Lawson, the London agent, is not entitled to recover the interest which he seeks to recover in this case. The country solicitor is entitled to recover the amount of his bill of costs, subject to the proper proportion in respect of agency charges being paid to the London agent. I think, therefore, that the judgment of Chitty, J., was wrong, and that this appeal must be allowed.

Appeal allowed.

Solicitors, *Sole, Turner, & Knight; A. Scott Lawson.*

From Chan. Div. Dec. 18, 19, 21.

LEESON v. GENERAL MEDICAL COUNCIL. (a.)

Medical practitioner—General Medical Council—Charge of infamous conduct in a professional respect—Domestic forum—Jurisdiction of the Supreme Court—Medical Act, 1858 (21 & 22 *Vict.* c. 90), s. 29—*Constitution of tribunal—Members of an association which acted as accuser sitting as judges—Competency of tribunal.*

The defendants, the General Medical Council, had held an inquiry into a charge preferred against the plaintiff, a registered medical practitioner, of "infamous conduct in a professional respect," the particulars of which charge were, that the plaintiff, being a registered medical practitioner, did act as "cover of," or by his presence, advice, and assistance, did enable H., an unqualified person, "to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified, under the style of the Medical Battery Co." The inquiry resulted in the defendants finding that the plaintiff had been guilty of the acts charged against him, and the defendants ordered the name of the plaintiff to be erased from the register of medical practitioners.

Held (affirming North, J.*), that the charge in question, on the true construction of its terms, amounted to a charge that the plaintiff had assisted an unqualified person to practise as if he were a medical practitioner duly qualified to practise as such; that the charge was therefore one which the defendants had power to deal with, and did in fact deal with, under section* 29 *of the Medical Act,* 1858; *and that, as the defendants, acting* bonâ fide *and after due inquiry, had adjudged the plaintiff guilty of infamous conduct in a professional respect, the courts of law had no jurisdiction to review their decision.*

The above-mentioned charge against the plaintiff had been preferred in the name of and by the Medical Defence Union, which was an association incorporated under the Companies Act, 1862, *as a company limited by guarantee, having for its objects the protection of the interests of medical practitioners, the promotion of honourable practice, the prosecution of unauthorized practitioners, and the defence of members of the association where proceedings involving questions of professional principle were brought against them. By the articles of association, the management of the business and the control of the Medical Defence Union was vested in a council, which was thereby authorized to exercise all powers and do all acts which might be exer-*

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

cised or done by the Medical Defence Union in general meeting. Two persons who were members of the Medical Defence Union and subscribers to its funds, were also members of the General Medical Council, and, as members of the General Medical Council, were present at the inquiry into, and adjudicated upon, the charge against the plaintiff. These persons were not, however, members of the council of the Medical Defence Union, and had no pecuniary interest in the success of the accusation brought against the plaintiff.

Held, per Cotton and Bowen, L.JJ. (Fry, L.J., *dissenting*), *that these two persons were not in fact, either actually or constructively, accusers or quasi-prosecutors in the charge preferred against the plaintiff, and therefore that the tribunal which adjudicated on the charge preferred against the plaintiff was a tribunal competent to do so.*

Reg. *v.* Allan (*or* Hodgson), 12 *W. R.* 423, 4 *B. & S.* 915, *distinguished.*

Per Fry, L.J., *that the fact that these two persons were subscribers to and members of an association having for one of its objects the carrying on of prosecutions of this nature, and which association was the accuser in the present case, constituted these two person virtually prosecutors themselves, and therefore, that, on the ground of public policy, the tribunal which adjudicated on the charge preferred against the plaintiff was not competent to do so, and that its decision was invalid.*

Appeal from North, J.

This was an appeal by the plaintiff, a registered medical practitioner, from a refusal of North, J., to restrain the defendants, the General Medical Council, from removing his name from their register of medical practitioners, and from publishing certain resolutions passed by them to the effect that the plaintiff had been guilty of infamous conduct in a professional respect.

The General Medical Council is a Body composed of medical men, some of whom are nominated by certain Bodies, others of whom are chosen by the general body of medical men in the United Kingdom, and some of whom are nominated by the Queen. This Body was first constituted by the Medical Act, 1858 (21 & 22 Vict. c. 90), which was passed for the purpose of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners. The Act requires, for the first time, that a register of qualified medical practitioners should be kept, and provides that only those whose names are entered on the register can sue for and obtain payment of money payable to them for medical fees.

Section 29 of the Act provides that, "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime of offence, or shall, after due inquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

Section 40 provides that, "Any person who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, . . . surgeon, general practitioner, . . . or any name, title, addition, or description implying that he is registered under this Act, or that he is recognized by law as a physician, or surgeon, . . . or a practitioner in medicine, . . . ; shall upon a summary conviction for any such offence, pay a sum not exceeding £20."

In November, 1889, the solicitor of the General Medical Council sent a written notice to the plaintiff Leeson informing him that on a specified day the General Medical Council would hold an inquiry into a charge of alleged "infamous conduct in a professional respect" which had been preferred against him, "the particulars of which alleged conduct are as follows: that you, being a registered practitioner, do act as cover of, or by your presence, advice, and assistance do enable, one C. B. Harness (an unqualified person) to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified under the style of the Medical Battery Co. (Limited), and publicly advertising himself as the Medical Battery Co.'s consulting medical electrician."

The charge in question was preferred in the name of the Medical Defence Union, which was an incorporated company limited by guarantee under the Companies Act, 1862, and the objects of which (*inter alia*) were "(1) to support and protect the character and interests of medical practitioners practising in the United Kingdom; (2) to promote honourable practice and to suppress or prosecute unauthorized practitioners; (3) to advise and defend, or assist in defending, members of the union in cases where proceedings involving questions of professional principle or otherwise are brought against them."

By article 36 of the articles of association of the Medical Defence Union, the management of the business and the control of the Medical Defence Union was vested in a "council," which were thereby authorized to exercise all such powers and to do all such acts as might be exercised or done by the Union, and which were not by the articles or by statute expressly directed to be exercised or done by the Union in general meeting. The only limit on the power of the "council" contained in the articles, was a provision in article 2 that the objects of the Union, so far as they related to the suppression or prosecution of unauthorized practitioners, should not be acted upon without the sanction of a unanimous resolution of the "council" confirmed by a majority of the members of the Union present and voting at a general meeting.

The inquiry into the charge so preferred against the plaintiff Leeson was held by the General Medical Council. The proceedings at the inquiry were opened by the solicitor of the General Medical Council, who read the charge against the plaintiff Leeson, and the solicitor for the Medical Defence Union then submitted written statements in support of the charge. The plaintiff Leeson was present at the inquiry, accompanied by his solicitor and other persons who submitted statements in support of his contention that in his conduct he had done nothing which was infamous in a professional respect. The General Medical Council in the result found the plaintiff Leeson had been guilty of "infamous conduct in a professional respect, for that he, being a registered practitioner, did act as cover," &c., following the words of the charge; and they accordingly passed a resolution to that effect, and directed their registrar to erase the name of the plaintiff Leeson from the register of medical practitioners.

Among the members of the General Medical Council who took part in the inquiry and in the resolution arrived at, were two persons, Mr. Teale and Dr. Glover, who were also members of the incorporated company forming the Medical Defence Union, as being subscribers of ten shillings a year, and as guarantors, but neither Mr. Teale nor Dr. Glover were members of the Council of the Medical Defence Union.

The General Medical Council had no power to, and did not in fact, throw the expenses of the inquiry before them, on the plaintiff Leeson.

The present action was brought by Leeson for an injunction to restrain the General Medical Council from removing his name from their register of medical practitioners, and from publishing the above resolution.

North, J., held that the charge against the plaintiff was really that he had acted as "cover" of Harness, not merely to enable the latter to carry on the business of a medical electrician, but to practise as if he were a duly qualified medical practitioner; that this was a

matter within the statutory jurisdiction of the General Medical Council; and that, they having acted regularly and *bonâ fide* in their proceedings, the court had no power to interfere. He also held that the two members of the General Medical Council who were also members of the Medical Defence Union were not thereby incapacitated from taking part in the inquiry, and that the decision of the General Medical Council was not invalidated on this ground, and he accordingly declined to grant an injunction.

The plaintiff appealed.

Bigby, Q.C., Cozens-Hardy, Q.C., and *George Henderson*, for the appellant.—The written complaint against the appellant was that he enabled Harness, an unqualified person, to carry on the business of "a medical electrician," and to "practise as if he were duly qualified under the style of the Medical Battery Co."—*i.e.*, duly qualified as a medical electrician. It is no offence under section 40 for an unqualified person to act as a medical electrician; for a medical electrician is not a medical practitioner, and therefore there was no complaint against the appellant which could possibly have been made the subject of a charge under section 29 of the Medical Act, 1858. [They referred on this point to *Ex parte La Mert*, 12 W. R. 201, 4 B. & S. 582, and *Allbutt* v. *General Medical Council*, 37 W. R. 771, 23 Q. B. D. 400.] Secondly, the tribunal which made the order now in question was a non-competent tribunal, as two of its members were also members of the Medical Defence Union, the incorporated association which brought this charge against the appellant; that is contrary to the well-known rule that a man cannot be both prosecutor and judge: *Dimes* v. *Proprietors of the Grand Junction Canal*, 3 H. L. Cas. 759; *Mercers' Company of Chester* v. *Bowker*, 1 Strs. 639; *Reg.* v. *Allan or Hodgson*, 12 W. R. 423, 4 B. & S. 915; *Reg.* v. *Milledge*, 27 W. R. 659, 4 Q. B. D. 332; *Reg.* v. *Gibbon*, 29 W. R. 442, 6 Q. B. D. 168; *Reg.* v. *Farrant*, 36 W. R. 184, 20 Q. B. D. 58. If this be established, the fact that these two persons had no pecuniary interest in the result, or, in fact, showed no bias, is immaterial.

Sebastian, for the Medical Battery Co.

Everett, Q.C., and *Muir Mackenzie*, for the respondents, were called on as to the second point only.—The proceeding before the General Medical Council is not a judicial, or a *quasi*-judicial, proceeding at all. The General Medical Council might themselves *mero motu* have set the inquiry in motion. If the whole body of the General Medical Council can promote the proceedings *mero motu*, how can the fact, that two members of the General Medical Council sat on the inquiry promoted by another body in which these two persons had an interest, render the inquiry bad? These two persons had no pecuniary interest in the result, and therefore it must be shown that they had some interest which would create a real bias against the appellant, in order to invalidate the order of the General Medical Council: *Reg.* v. *Handsley*, 30 W. R. 368, 8 Q. B. D. 383; *Reg.* v. *Meyer*, 24 W. R. 392, 1 Q. B. D. 173; *Reg.* v. *Rand*, L. R. 1 Q. B. 230, 14 W. R. C. L. Dig. 47; *Reg.* v. *Rochester, Dean and Chapter*, 17 Q. B. 1. These two persons were not members of the Council of the Medical Defence Union, and as individual members of the Medical Defence Union they had nothing to do, either actually or constructively, with the promotion of this inquiry, and they were not, therefore, virtually prosecutors, even assuming that the promotion of this inquiry was in the nature of a prosecution, which we submit it was not. The inquiry is one by a domestic *forum*: *Reg.* v. *General Medical Council*, 9 W. R. 413.

Bigby, Q.C., in reply.—The promotion of this inquiry and the proceedings thereon was in substance a prosecution. The Medical Defence Union was the accuser in this case, and if any member of the accusing body sit in judgment on the case the judgment is invalid. [BOWEN, L.J., referred to *Reg.* v. *Pettitmangin*, 9 L. T. N. S. 683, 12 W. R. C. L. Dig. 72.]

Dec. 21.—COTTON, L.J.—This is an appeal by the plaintiff from a refusal of North, J., to restrain the defendants from acting on a resolution which they had arrived at—viz., that the name of the plaintiff be struck off the register of medical practitioners, and to prevent them from publishing that resolution. [The Lord Justice, after referring to 21 & 22 Vict. c. 90, read section 29 of that Act, and proceeded:—] It was with reference to the powers given by section 29, that the defendants, the General Medical Council, proceeded in this case, as regards Dr. Leeson, as he was on the register—and properly on the register—at the time when the order in question was made by the General Medical Council.

There is another section of the Act, section 40, which I ought to refer to, as it was a good deal referred to in the argument. That section enabled criminal prosecutions to be taken against persons who falsely pretended to be registered practitioners; but the proceeding taken in this case was not with reference to that section.

The first point argued was that the matter in respect of which the General Medical Council adjudicated or decided in this case, was not a matter within the powers given to them under section 29; and for the purpose of this argument the charge made against Dr. Leeson, and which was brought to his notice by writing, according to the practice of the General Medical Council, was referred to. [The Lord Justice read the charge above set out, and proceeded:—] It was said that there was nothing contained in this complaint which would justify the General Medical Council in exercising the powers given them by section 29, because, as was said, the complaint contains no allegation that Mr. Harness is practising as if he were a duly qualified medical man, but only "as if he were duly qualified under the style of the Medical Battery Co.," and that all Dr. Leeson was supposed to have assisted in, was to represent Harness as a medical electrician. I cannot read it in that way. We know what a duly qualified man is in the Act. A person is duly qualified if he is on the register, and in that respect duly qualified to obtain the benefit of the Act as regards the privileges which are conceded to those medical men who are on the register; the register stating the different qualifications in respect of which medical men—and the medical man in question—can be put on the register. I have myself no doubt that this charge does state that which would justify the General Medical Council, if on the facts they were satisfied of it, in coming to the conclusion that an offence in the words of the Act, of "infamous conduct in any professional respect," had been committed. That, in my opinion, is the true construction of the words of the charges which are made against Dr. Leeson.

It was found that Dr. Leeson had been guilty of the acts which were charged against him, and then there was a direction to erase his name from the register.

Now there has been, on this appeal, a good deal of question as to what took place, and we have had the evidence which was before the General Medical Council, and the evidence given in this action, brought before us. In my opinion it is wrong for us to consider whether the General Medical Council arrived at a right conclusion on the evidence before them. That is not for us to consider. The General Medical Council cannot have what is strictly called evidence. They cannot take evidence on oath. They cannot take evidence in the sense of what we, as lawyers, consider evidence. They have statements made before them in support of any complaint which is made, and they have also statements

made on the other side by the medical man against whom the complaint is made, and if it be once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by section 29, then I think we ought not to look at the evidence for the purpose of, in any way, considering whether they have arrived at a right conclusion. Of course, if it were alleged that they acted corruptly, and if those who appealed to us gave evidence that they had acted corruptly, and proved it by showing that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion at which they did arrive, then, I think, we ought to consider it, to see whether the absence of any statement, which would justify the conclusion, was such evidence as, if not displaced, would lead us to the conclusion that the council had not acted honestly on the charge brought before them, but for some other indirect purpose or with some other indirect object. But although there were some statements in the affidavit of the plaintiff in this case, that there was prejudice against him, that matter was not pressed upon us by counsel, nor was it in any way supported by anything which was brought before us. Dr. Leeson seems to have had a most perfect consideration of his case. The complaint was brought forward in the ordinary mode required by the rules and regulations of the General Medical Council. Dr. Leeson was present, he was represented by his solicitor, and he brought his own witnesses—*i.e.*, those who were with him were to make statements in support of his contention that in his conduct he had done nothing which was infamous in a professional respect—and everything was most fully heard and considered, and then the council arrived at the conclusion at which they did arrive. That being so, in my opinion we cannot consider as to whether they were right or wrong. That is left for them. If they acted honestly, required statements to be made, and gave every opportunity for the man complained of, to bring his statements before them, and fairly conducted the matter in question, in my opinion we ought not to enter into the question, because if we once do that we are assuming to judge whether or not, in our opinion, they came to a right conclusion on the statements which were before them. In my opinion, therefore, the first ground which was taken in support of this appeal fails, because I think there was a charge which justified the General Medical Council in coming to a conclusion under section 29, and there was no reason for suggesting that the proceedings were improperly conducted by them.

But there was another point raised, which gave us rather more doubt. It was said that this order made by the General Medical Council must be considered as made by a non-competent tribunal, because, taking the General Medical Council as acting judicially, they were in such a position—they were so constituted on this particular occasion—that any order made by them ought, having regard to the decisions in the cases cited, to be considered as a nullity.

It appears that the complaint—I will not call it indictment or anything of that sort—made against Dr. Leeson, and which was the complaint so considered, was one which was brought in the name of the Medical Defence Union, and it appears also, when attention has been called to the matter, that two of the members of the General Medical Council who were present when the case of Dr. Leeson was considered, were also members of the Medical Defence Union; and it is said that that being so, they are to be considered in the light of prosecutors, and that, being prosecutors, they were acting in this matter in such a way that they could not also sit as judges of the matter, and that, therefore, any decision arrived at by the General Medical Council when these two members, who were incompetent to act as judges in the matter, were present, must be considered as a nullity.

Now, of course, the rule of law is very clear that no man can be actor, plaintiff, or prosecutor in any action, and at the same time sit in judgment to decide in that particular case—either in his own case or where he is bringing forward, as against the person complained of, the accusation or complaint on which the order is made—where, in fact, he puts himself in the position of prosecutor or complainant. It is clear to my mind, that the General Medical Council, in respect of the complaint against Dr. Leeson, were acting judicially. Though not judges in the ordinary sense, yet they had to decide judicially as to whether or not the complaint against Dr. Leeson was well founded, and, in my opinion, they could, if they considered it was well founded, make an order which would be of great importance to him, and would deprive him from being on the register, with very important consequences. The question, therefore, we have to consider is whether either of these two gentlemen—Mr. Teale and Dr. Glover—are to be considered as complainants in this case.

Now, for this purpose I must examine what is the Medical Defence Union. [The Lord Justice then stated the nature and objects of the Medical Defence Union, as above set out, and continued:—] On looking at its articles of association I find that there was a council, and that this council practically had all the powers of the company which formed the Medical Defence Union, except in one respect—viz., that the council could not institute prosecutions against anyone who was acting in violation of the law without the vote of a general meeting. The provision I refer to is this. [The Lord Justice read the proviso contained in article 2 above stated, and continued:—] As we are not now considering a prosecution of an unauthorized practitioner under the Act, I only mention the above provision, as the limit on the power of the Council of the Medical Defence Union; except in that respect, there is no limit on the power of that council, who can do everything which is not expressly, or by Act of Parliament required to be done by the whole body. [The Lord Justice read article 36, which is above stated; and continued:—] Neither Mr. Teale nor Dr. Glover were members of the council of the Medical Defence Union, but they were members of the company which formed the Medical Defence Union, by subscribing 10s. a year and by giving a guarantee, the amount of which we do not know, which was to provide for any expense which would be necessary in order to carry out the objects of the company.

Now this complaint made against Dr. Leeson was a complaint brought forward by the council of the union, to which council neither of these two members of the General Medical Council belonged. These two gentlemen, not being on the council of the union, could not, having regard to the articles, exercise any control or give any direction as to what should be done by the council of the union in bringing forward this complaint.

Then are they, as members of the company which formed the union, in any way interested? The expenses of this complaint could not be thrown by the General Medical Council on Dr. Leeson, the person complained of. The General Medical Council had no power to give any costs, and therefore, whatever might be the result of this complaint, it could not in any way affect the liability of Mr. Teale and Dr. Glover to contribute to the expenses of this proceeding.

In my opinion, therefore, as regards the question whether Mr. Teale and Dr. Glover are to be considered as complainants, we ought to look to the substance of the thing, and we ought not to hold that, because the complaint is brought by the council of the union in the name of the union, a member of the union—who has nothing to do, and can have nothing to do, with bringing forward the complaint—must be treated as a prosecutor;

or as one of the persons who are bringing this complaint. The term "prosecutor" was sometimes used and sometimes objected to, but I use it for the sake of simplicity.

As regards the objects of the Medical Defence Union (I give no opinion as to whether it is desirable to form such unions), it must be remembered that the objects were just as much to defend those who might be improperly attacked, as to bring before the General Medical Council any question which might throw reflection on the conduct of any member of the profession; so that, in my opinion, these two gentlemen, as members of the union, cannot be considered as complainants in this case —*i.e.*, as persons bringing forward this charge. I have already pointed out that they could have no pecuniary interest in the result, for whichever way it turned out, their liability as to contributing to the expenses would be just the same, and, indeed, there was hardly any contention that their position as members of the union did involve a bias which would prevent them from adjudicating on this case.

Numerous cases have been cited, but in the view which I take it, is only necessary to advert to one, which probably is the strongest in favour of the appellant, *Reg.* v. *Allan*. In that case certain riparian owners and the owners of salmon fisheries, and some persons who were outsiders, formed themselves into an association—not in any way incorporated—all of whom apparently would have equal power, and a committee was formed, which was a committee to direct prosecutions. Three magistrates were on the bench when a question as to a breach of the Fishery Laws was brought before them, and they were members of the association which had been formed. One of them was a member of the committee, and had directed the prosecution. There was no doubt, therefore, he was a prosecutor in the matter brought before the magistrates for decision, and therefore there could be no doubt that, having regard to the principle of law often laid down, the conviction was bad. But the other two magistrates had nothing to do with the committee, and were only members of the association. That fact, however, was the principal point relied upon by the appellant in the present case. Cockburn, C.J., in that case, however, does use language which would seem to show that even if only those magistrates who were members of the association, and not on the committee, had been on the bench, the conviction would have been bad. He said, "Certain members of that association were present as justices, and took part in this conviction. They were essentially prosecutors, being members of an association the aggregate of which were undoubtedly prosecutors." For my part, I do not think that the language of judges ought to be taken without reference to the facts of the case, and although the Chief Justice does use those wide words, yet Lord Blackburn—then Blackburn, J.—and Mellor, J., who also constituted the court on that occasion, do not use language which can be even tortured into expressing that if any member of the association had been on the bench at the time, that would have vitiated the proceeding. Blackburn, J., said, "One of the justices who joined in the conviction, being a member of the committee of the association which instituted the proceedings, was one of the prosecutors. There may be difficulty in finding magistrates in this neighbourhood, who are not interested, to hear such an information, but members of the association which institutes the prosecution must not act as judges upon it." There, I think, he puts it that the conviction was bad because one member of the committee who were actually prosecutors, was sitting on the bench at the time; and the language of Mellor, J., fairly interpreted, leads to the same conclusion. But even if Cockburn, C.J., did intend by the language he used, to say that the conviction would have been bad if any one of the members of the association who had nothing to do with the prosecution, and who could have nothing to do with it, and who was not on the committee, had been present as a justice, and had taken part in the conviction, I should not follow him in a case like the present, in which neither Mr. Teale nor Dr. Glover had, or could have, any voice at all in this prosecution, and in which neither of them, on the evidence, knew anything at all about it until the matter was brought before them as members of the General Medical Council.

In my opinion, this objection, which is a most serious one, cannot prevail, and we ought to hold that North, J., was right in refusing the injunction.

BOWEN, L.J.—As to the first point raised by the appellant, I shall say very little in addition to what the Lord Justice has already stated. These proceedings were in the nature of judicial proceedings, although the *forum* is a domestic one, and although the evidence taken before such *forum* differs in many respects from evidence which is adduced in a court of law, and in particular in the all-important respect that it is not given upon oath.

What alone the courts can investigate when proceedings of the General Medical Council of this character are brought before them, is whether the domestic *forum* has acted honestly within its jurisdiction. The jurisdiction is defined by the statute. There must be an allegation before the General Medical Council of infamous conduct in some professional respect, and the adjudication must be arrived at after due inquiry. The statute says nothing more, but in saying so much, it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen that these conditions have been fulfilled by the inquiry and by the tribunal which instituted it. The functions of the court of law are at an end. It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to the right conclusion. If, indeed, it could be shown that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to show that the inquiry had not been a due inquiry; but if there is no blot of that kind upon the proceedings, the jurisdiction of the domestic tribunal, which has been clothed by the Legislature with the duty of discipline in respect of a great profession, must be left untouched by courts of law. It appears to me for these reasons that the view which Cotton, L.J., has expressed, is the sound one, and I entirely concur with it.

Next comes a very serious question, whether or not the tribunal which adjudicated in respect of the appellant's conduct was, in respect of two of its members, rendered incompetent by the fact, as alleged, that they had taken part as accusers before the General Medical Council of that very person upon whose conduct they were adjudicating. As the Lord Justice has said, nothing can be clearer than the principle of law, that a person who has a judicial duty to perform disqualifies himself from performing it if he has a pecuniary interest in the decision which he is about to give or a bias which renders him other than an impartial judge. If he is an accuser he must not be a judge. If he has a pecuniary interest in

the success of the accusation he must not be a judge. Where such a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biassed by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge. But it must be in all cases a question of substance and of fact, whether one of the judges has in truth also been an accuser. The question which has to be answered by the tribunal which has to decide —the legal tribunal before which the controversy is waged—must be, has the judge whose impartiality is impugned, taken any part whatever in the prosecution, either by himself or by his agents?

I think it is to be regretted that these two gentlemen, as soon as they found out that the person accused, was a person against whom the complaint was being alleged by the council of a society to which they subscribed and to which they in law belonged as members, did not at once retire from the inquiry. I think it is to be regretted, because judges, like Cæsar's wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the General Medical Council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical Council will think it reasonable advice that those who sit on these cases, should cease to occupy the position of subscribers to a society which brings these cases before the General Medical Council.

Having said that I will come back to the point which we have to decide, whether these two gentlemen took any part whatever in the prosecution, either by themselves or by their agents. It appears to me, in spite of the cloud which the ingenuity of the appellant's counsel raised upon it, that the true answer must in this case on the facts—and it is a question of fact—be in the negative. I think that, although they were members of the incorporated body whose council did bring this complaint before the General Medical Council, they did not themselves take any part, and could not have taken any part, whatever in the prosecution. They did not in fact take any part whatever in the prosecution, and the prosecution was not conducted by the council of the union as their agents. The council of the union was supreme in the matter, and I think that these two gentlemen stand clear, upon the facts being investigated, of all suspicion whatsoever.

For these reasons, treating the latter part of the case as one which depends upon an inference of fact, and regretting, as I do, that there should be colour for the suggestion that has been made, and that a controversy should accordingly have arisen which required to be carefully considered, nevertheless I think that, as a matter of substance and of fact, these gentlemen were not accusers on this particular occasion.

The appeal, therefore, in my judgment must be dismissed, with costs.

FRY, L.J.—Two questions have been urged before us. The first was a question whether the charge which was laid before the General Medical Council was one which was within the jurisdiction of that council. Now with all that has been said by my learned brothers on that part of the case I entirely concur. I shall add nothing to what they have so fully and clearly expressed.

Then comes the second question, whether, having regard to the fact that two members of the General Medical Council which adjudicated on the charge, were subscribers to what is known as the Medical Defence Union, the General Medical Council as so constituted, was competent or incompetent to determine the charge. Now there, again, there are two subordinate questions in which I entirely agree with my learned brethren. In the first place I cannot for one moment yield to the argument which was addressed to us by the leading counsel for the General Medical Council that they were not acting judicially in the performance of their duties on that occasion. The nature of the proceedings and the effect of the proceedings seems to me to be very strong to show that it must be a judicial proceeding, because the result was to deprive Dr. Leeson of rights which before that, were vested in him as a duly qualified medical man on the register of the council. Further than that, the language of the statute, if it be necessary to refer to that, is in my judgment equally clear—it requires a due inquiry. It requires a judgment. It requires that that judgment shall find him guilty. Now "inquiry" and "judgment" and "guilt" are all words which express and which are relevant to a proper form of judicial proceedings, and therefore, although this body proceeds by different rules of evidence to those on which the courts of law proceed, I cannot for a moment doubt, that the council were proceeding judicially, nor can I help adding, that the manner in which the council has proceeded on this inquiry, as on all other inquiries, shows that the council are fully conscious that they are performing judicial duties, and endeavour evidently to perform them in a very admirable manner.

Now the second point is this. It was urged before us that the Medical Defence Union were not in fact complainants. It was said that the Medical General Council could proceed without any prosecutor or person acting before it. They might proceed *mero motu*. That is quite true, but it is equally true that in this case they did not proceed *mero motu*, but they proceeded in this manner. They allowed the solicitor and the honorary secretary of the Medical Defence Union to appear before them in the character of complainants, a course which seems to me to have been a very convenient one to pursue, and it is not unworthy of remark that on the very same meeting of the General Medical Council at which these proceedings were taken against Dr. Leeson, rules in respect of the procedure at such inquiries were passed, which divided themselves into two classes of cases. Where the inquiry is brought before the General Medical Council by a complainant, and the complainant appears personally or by counsel or by a solicitor, then a certain order of procedure was enacted, and that order of procedure followed very nearly the procedure before a court; it gave the complainant an opportunity to state his case, then produce his proofs; then the accused was to be invited to state his case and to produce his proofs; and then there was an opportunity given for a reply in certain cases. The second class of cases was where no complainant appeared. There the General Medical Council proceeded simply by reading the complaint and calling on the accused practitioner to state his case and produce his evidence. It is evident therefore, the Medical Defence Union, either as a whole or by their executive, were proceeding as complainants and as *quasi*-prosecutors in this inquiry. No doubt the Medical Defence Union acts through its council, through its executive body, and this proceeding was taken by the executive body, and they were represented as I have already stated, by their solicitor and the honorary secretary. They acted in fact as prosecutors, producing the evidence and stating the case and urging what was to be said for the prosecution or *quasi*-prosecution. Now to that union two of the members of the General Medical Council which sat upon this case, and therefore took part in this decision, were subscribers, and it may be taken that this prosecution—I call it a prosecution for the sake of brevity—this proceeding, was within the objects of the union. Now it appears to me that subscribing to a union of this description implies two things. It implies a general sympathy with the objects of the union, and it implies, secondly, a confidence in the discretion of the executive body who have to carry on the business of that union. No doubt the

amount of confidence and the amount of sympathy may vary in different cases and from time to time with the same subscribers; but that is the natural conclusion I think one arrives at when one finds a person subscribes to an association for carrying on prosecutions. Now that, in my opinion, makes the subscriber to an association of this kind, what has been called a virtual prosecutor—of course he is not an actual prosecutor, he is not before the tribunal *in propria persona*, he has not even given instructions to the solicitor who appears, but he has shown his sympathy and his confidence in that body who are acting in this respect, and I cannot think that a body of subscribers to a union of this description, could form a satisfactory body of judges to determine the proceedings taken by the union itself. Taking that view of the case I cannot shut my eyes to the fact, which judges know as well as everybody else, that there are in this country numerous associations formed for the purpose of carrying on prosecutions in respect of alleged violations of the law of various kinds. They may be sometimes in respect of violations or alleged violations of rights of fishery in a river, as in the *Tees case* (*Reg.* v. *Allan*), or they may be violations or alleged violations of the laws which restrain cruelty towards animals, or they may be violations or alleged violations of the ecclesiastical laws. Now it appears to me that subscribers to those associations indicate their sympathy with the general proceedings of the body in carrying on those prosecutions, and I think they come within the description which has been laid down of virtual prosecutors.

To my mind this point is determined by authority. I do not say authority binding on us, but authority which I think deserves the utmost respect and consideration. I mean the case to which Cotton, L.J., has referred, of *Reg.* v. *Allan*. In that case there was a voluntary association of persons, which consisted of two classes—first, ordinary members, who were the owners of riverside property, or occupiers of the rights of fishing in the Tees and its tributaries; secondly, honorary members, who might be desirous of promoting the objects of the association by contributing to its funds, and who were, as I understand, not riparian proprietors or owners of rights of fishing in the Tees. That body acted, as most of these bodies do, through a committee, and that committee was not only to make bye-laws and rules and regulations, but they were the persons to engage and dismiss watchers; and, in the event of proceedings under the Act being considered necessary, they—that is, the committee—were to instruct the secretary to enforce its provisions, and the secretary and treasurer were, subject to the approval of the committee, to determine what proceedings should be taken against any person acting in contravention of the law. The ordinary members, therefore, and the honorary members had nothing whatever to do with instituting the prosecutions, or appointing watchers. The person who laid the information in that case was a watcher of the association—therefore engaged and liable to dismissal, not by the general body, but by the committee. The magistrates who sat on the bench to hear that complaint were three—Mr. Allan, who was an ordinary member and the owner of property having a frontage to the river; Mr. Smith, who was not only an ordinary member, but an active member of the committee, and had been concerned in a resolution which authorized the committee to take proceedings for the recovery of such penalties as, in their opinion, had been incurred at the defendants' locks; and lastly, Mr. Pease, who was not an ordinary member, but only a subscribing member of the association. Those were the three justices.

Now in what way did the court deal with the application to quash the conviction on the ground of the magistrates being the virtual prosecutors? Cockburn, C.J., said:—"It is impossible to hold, consistently with the principles which have been established by decided cases, and are founded in the very essence of justice, that these magistrates were competent judges upon the occasion in question." Now, observe, he does not hold that one magistrate is disqualified, but he holds that all three were disqualified according to the essential principles of justice. "An information was laid against the defendant for the violation of the provisions of an Act of Parliament passed for the protection of salmon fisheries." Then he says:—"Certain members of that association were present as justices"—again dealing with them all individually—"and took part in this conviction. They were essentially prosecutors, being members of an association the aggregate of which were undoubtedly the prosecutors." Then Lord Blackburn—Blackburn, J., as he then was—in my view, notwithstanding what has been said by Cotton, L.J., took the same view. He deals, no doubt, in the first place, with the case of Mr. Smith, who was a member of the committee; but he goes on to add this:—"There may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the association which institutes the prosecution must not act as judges upon it." In other words, he says neither an ordinary nor an honorary member of this association can act as judge upon the matter. Every subscriber to that association appears to me, in the view of these two learned judges, disqualified from sitting as judge or acting as judge on that complaint.

I think, therefore, that is a decision which, in point of substance and principle, applies to the present case. Of course it is not binding upon us, but, in my view, that decision is right, and I think it ought to be upheld and applied to the present case. I think it is a matter of public policy, so far as is possible, that judicial proceedings should not only be free from actual bias and prejudice of the judges, but that they should be free from the suspicion of bias or prejudice, and I do not think that subscribers to associations for the purpose of carrying on prosecutions, can be said to be free from suspicion of bias or prejudice in the cases of prosecutions instituted by the associations to which they subscribe. It is needless for me to disclaim any intention, in arriving at that conclusion, of holding that the two gentlemen in question were liable to any bias. That appears to me a point which is not really open to us, because I put my decision on the ground of public policy, and I disclaim any right to inquire whether in fact they were or they were not biassed. I need hardly say that I do not believe they were. Then it was urged that this case is not conclusive and is not in point, because it was said that there the association was not an incorporated one, and in the present case it was incorporated. That, in my judgment, has nothing to do with the case. Corporation or non-incorporation is quite immaterial in considering the operation upon the mind of being a member of a union for the purpose of carrying on prosecutions. I think, therefore, that we should be misled by a trivial and immaterial difference if we gave any effect to that. If the matter, therefore, rested with me, I should have held that the decision of the General Medical Council in this case was invalid, and that the General Medical Council, as constituted on the occasion in question, was not competent to decide on the case before it, and in so doing I think that I should best maintain the dignity, and, therefore, the usefulness, of the General Medical Council. My learned brethren are of the opposite opinion, and, therefore, this appeal will be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant, *R. Furber*.

Solicitors for the respondents, *Farrer & Co.*

Solicitor for the Medical Battery Company, *A. Fleet*.

From Chan. Div. Dec. 13.

GRAY *v.* SMITH AND BENNITT. (*a.*)

Partnership — Dissolution—Agreement to retire from partnership—Specific performance—Concluded agreement—Interest in land within Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Right to use name of retiring partner.*

*Gray, Smith, and Bennitt being partners, Smith agreed to retire from the partnership, and almost immediately afterwards Bennitt signed a document, the material part of which was as follows:—"Rough Draft.—*31 *May,* 1888.—*This is to record that, in consideration of William Gray or his executors paying H. C. Bennitt or his assigns the sum of* £100 *on the* 1st *of January,* 1890, *and the sum of* £100 *on every* 1st *of January for the nine succeeding years, H. C. Bennitt agrees to withdraw from the firm of Gray, Smith, & Bennitt." The partnership business was carried on upon leasehold premises.*

Held (*affirming the decision of* Kekewich, J.), *that the document amounted to a concluded agreement, and that, though, as involving an agreement to assign the leasehold premises, which constituted an interest in land, it fell within the 4th section of the Statute of Frauds, it was a sufficient memorandum in writing within that section.*

Held, also (*affirming the decision of* Kekewich, J.), *that Gray was not entitled to use Bennitt's name as part of the title of the new firm.*

Levy *v.* Walker, 27 *W. R.* 370, 10 *Ch. D.* 436, *distinguished.*

Appeal from Kekewich, J.

It appeared that Messrs. Gray, Smith, & Bennitt entered into a partnership in 1885 as soap manufacturers. In May, 1888, Smith agreed to retire from the firm, and at the end of the same month Bennitt signed the following document:—"Rough Draft.—Rockingham Soap Works, Wath-on-Dearne, 31 May, 1888.—Memorandum from Gray, Smith, & Bennitt.—This is to record that, in consideration of William Gray, or his executors, paying H. C. Bennitt, or his assigns, the sum of £100 on the 1st of January, 1890, and the sum of £100 on every 1st of January for the nine succeeding years, H. C. Bennitt agrees to withdraw from the firm of Gray, Smith, & Bennitt." Bennitt shortly afterwards repudiated the contract, and refused to execute an assignment of his share in the partnership property. The business had been carried on upon leasehold premises.

Gray brought this action for specific performance, and a declaration that the partnership was dissolved. The defendant Smith delivered no defence, but Bennitt set up (*inter alia*) the defence that the agreement involved the sale of his share of the leasehold premises on which the business was carried on, and that therefore the transaction was within section 4 of the Statute of Frauds, and that the above memorandum was an insufficient memorandum in writing within that section.

Smith, as one of the partners, appeared by counsel at the trial, but did not oppose the plaintiff's contention, merely asking for his costs.

Kekewich, J., held that the 4th section of the Statute of Frauds applied, but that the memorandum was sufficient to satisfy it, and he expressed an opinion that Gray would not be entitled to use Bennitt's name as part of the title of the new firm.

The order as drawn up included a declaration that the plaintiff was not entitled to use Bennitt's name as part of the title of the new firm.

The defendant Bennitt appealed from the former part of that decision, and the plaintiff Gray from the latter part.

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

H. Terrell, for Bennitt.—This was an agreement within section 4 of the Statute of Frauds, because it was an agreement to assign the partnership business, a most material part of which was the leasehold premises. My first point, however, is that no concluded agreement was come to between the parties. It was a material part of the contract that there should be an indemnity, and that is not in the memorandum. The document really only amounted to heads of an agreement. But assuming there was a concluded agreement, it is one that comes within section 4 of the Statute of Frauds, and the memorandum is insufficient as not containing all the material terms of the agreement on its face, as it should do to satisfy that section. The indemnity is not an implied term. The ordinary relation of vendor and purchaser does not imply any undertaking by the purchaser to indemnify the vendors.

Curtis Price, for the defendant Smith, merely asked for his costs.

Crackanthorpe, Q.C., and *Upjohn*, for the plaintiff.—[COTTON, L.J.—We do not require to hear you in answer, Mr. Crackanthorpe, but we should like to hear you in your own appeal.] We are entitled to call ourselves the successors of the late firm, but, as the injunction stands at present, we cannot use the defendant's name at all. Further than that, we have a right to use the old name, and a right to sell the existing stock of soap which is impressed with the old name, and is included in the assets assigned to us: *Levy* v. *Walker*, 27 W. R. 370, 10 Ch. D. 436; *Banks* v. *Gibson*, 13 W. R. 1012, 34 Beav. 566. The soap is part of the assets assigned to us. That the right to use the name is part of the assets of a partnership was held in *Levy* v. *Walker*, *per* James, L.J. "Gray, Smith, & Bennitt" is a mere style or firm. Gray is in the same position as if the goodwill were expressly assigned. The firm name is a mere fancy name, and is a part of the goodwill of the firm, being the only name. There is a property in it, and an agreement to hand over all the property of the firm includes the name. The agreement to withdraw implies an agreement to hand over all the property of the firm, which includes the goodwill, and that includes the name. Even if we are not entitled to use the name, Bennitt has no right to stop us from doing so.

H. Terrell, for the defendant Bennitt, was not called upon in the plaintiff's appeal.

COTTON, L.J.—I think we need not hear any further argument. To take the appeal of the defendant Bennitt first, his first contention is that there was no concluded agreement at all between himself and the plaintiff Gray at the time the memorandum was signed. That contention, however, is not supported by the evidence, though, no doubt, it was the intention of the parties that the terms of the memorandum should be embodied in a formal document, which was to be subject to the approval of their solicitors. But that means nothing more than that the solicitors were to consider the best way of carrying out the terms of an agreement already entered into.

Then it was said that if there was a concluded agreement at that time, it was an agreement within the Statute of Frauds. I think it was. Then it was contended that there was not in the document of the 31st of May a full statement of all the terms which ought to be stated in writing. But it was not necessary that all the terms should be expressed in the memorandum when those terms were intended to be worked out by a formal deed to be drawn up afterwards. It is said that an indemnity was stipulated for, but was not included in the memorandum, though it was an essential part of the agreement. But when the agreement was carried into effect by a formal deed there would have to be an

assignment of all the interest in the leasehold property on which the partnership business was carried on, and that would contain an indemnity to the assignor. There is an implied obligation upon the assignee, when the property is given up to him, to indemnify the person who gives it up, in the absence of any express contract for indemnity. Bowen, L.J., reminds me that there was one other point—it was one which failed to make much impression on my mind. It was that there was no stipulation in the memorandum as to the time when the defendant was to withdraw from the firm. Well, that being so, in the absence of any specified time, the time for him to withdraw would be "forthwith"—that is to say, within a reasonable time. In my opinion the appeal of the defendant fails.

Then, as to the cross appeal of the plaintiff, the judge held that the agreement gave the plaintiff no right to use the name of the defendant as part of the the title of the firm. Was the judge wrong in deciding that the plaintiff could not continue to use the old firm's name? I think he was right, and that the plaintiff is not entitled to use it, except in the case of the stock-in-trade existing at the date of the dissolution of partnership, and which was stamped with the name of the old firm, which included that of the defendant. But it was contended that the plaintiff was entitled to use Bennitt's name, because the right to use the name is part of the goodwill of the partnership, and the goodwill is part of the property to be assigned, and that the right to use the name would therefore be included in the assignment of the property. We must look at the memorandum to see if there was to be an assignment, not only of the leasehold shop, but of all the property of the partnership. I think it implies that the plaintiff is to have an assignment, but when it says that Bennitt is to withdraw from the firm, that does not imply, but rather contradicts the view, that the plaintiff was to have the right to use Bennitt's name. In the case of *Levy* v. *Walker* the agreement was not at all like that in the present case. In that case Levy could not have been subjected to any liability by the continued use of the name of the old firm. It was not his name. Moreover, there was in that case an assignment in express terms of the goodwill and business, whereas in the present case the only agreement is that Bennitt shall withdraw from the partnership. The plaintiff's appeal, therefore, fails also, and he is not entitled to use the defendant's name except so far as is necessary in order to wind up the affairs of the old firm.

BOWEN, L.J.—I agree.

FRY, L.J.—I am of the same opinion. I believe we all think, after the discussion that has taken place, that it is necessary to modify the injunction by adding some such words as these: "Except so far as is necessary, in order to realize the assets of the old firm."

Appeals dismissed.

Solicitors: *Indermaur & Brown*, for *F. W. Fisher*, Doncaster; *Torr, Janeways, & Co.*, for *Dibb & Clegg*, Barnsley; *Pilgrim & Phillips*, or *Smith, Smith, & Co.*, Sheffield.

From Q. B. Div. Feb. 1.

REG. v. VESTRY OF ST. PANCRAS. (*a*.)

Metropolis Management Acts—Officer of vestry—Superannuation allowance—Discretion—29 & 30 Vict. c. 31, ss. 1, 4.

A metropolitan vestry has a discretion, under 29 & 30 Vict. c. 31, s. 1, not only to grant or refuse a superannuation allowance to a retiring officer, but also as to the amount of the allowance, provided that it does not exceed the scale prescribed in section 4.

Reg. v. Vestry of St. George's, Southwark, 35 *W. R.* 841, 19 *Q. B. D.* 533, *dissented from.*

Appeal from the Queen's Bench Division making absolute a rule for a *mandamus* (*ante*, p. 238).

The facts are fully set out in the report below. For the purposes of this report they may be shortly stated as follows:—Richard Westbrook had been for some years in the service of the Vestry of St. Pancras as rate collector, and upon his resigning office he applied for a superannuation allowance under 29 & 30 Vict. c. 31. His salary was at that time £480 a year. The vestry at an ordinary meeting resolved to grant him an allowance if he would accept £150 a year. Westbrook declined this, insisting that he was entitled under the Act to £230 a year. The vestry thereupon, at a meeting convened for the purpose under section 7 of the Act, refused his application for an allowance. In *Reg.* v. *Vestry of St. George's, Southwark*, 35 W. R. 841, 19 Q. B. D. 533, it was held that if a vestry in their discretion grants an allowance the amount must be in accordance with the scale laid down in the Act.

The Divisional Court (Lord Coleridge, C.J., and Mathew, J.) held that under the circumstances the vestry had not exercised their discretion on fair and proper grounds, and made the rule for a *mandamus* absolute, directing them to hear and consider the application of Richard Westbrook for a superannuation allowance, and to take the necessary steps to secure him such allowance according to the provisions of 29 & 30 Vict. c. 31.

The vestry appealed.

The case is reported solely upon the question whether the decision in *Reg.* v. *Vestry of St. George's, Southwark*, was right, and so the facts, arguments, and judgments relating to the exercise by the defendants of the discretion are omitted. It is sufficient to state that the Court of Appeal agreed with the Divisional Court that the defendants had not properly exercised their discretion, and affirmed the order for a *mandamus*.

By 29 & 30 Vict. c. 31, s. 1, "The vestry of any parish . . . within the metropolis . . . may, at their discretion, grant to any officer . . . who shall become incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of mind or body, or of old age, upon his resigning . . . an annual allowance not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances hereinafter contained."

By section 4, "Subject to the provisions herein contained, the allowance . . . shall be as follows:"—(then followed a scale beginning at ten-sixtieths for ten years' service and increasing one-sixtieth for each additional years' service up to forty-sixtieths).

Poland, Q.C., and *C. A. Russell*, for the defendants.—The decision in *Reg.* v. *Vestry of St George's, Southwark*, was wrong, and ought not to be followed. Section 1 of 29 & 30 Vict. c. 31 gives the vestry an absolute discretion, both as to granting an allowance, and also as to the amount of it, subject to the scale in section 4 not being exceeded. The words in section 1, "regard being had to the scale," only mean that, as regards the amount of the pension, the vestry must look at the scale to see that they do not exceed it.

Henn Collins, Q.C., and *Morton Smith*, for the prosecutor.—The words in section 1 giving the vestry a discretion refer only to the question whether they will grant a pension or not. The amount is regulated by the scale in section 4. Section 1 refers the vestry to the scale, and section 4 says that the allowance "shall be as follows."

Reported by W. F. HARRY, Esq., Barrister-at-Law.

Lord ESHER, M.R.—In this case the Lord Chief Justice and Mathew, J., both held that they could not go into the question whether the case of *Reg.* v. *Vestry of St. George's, Southwark*, was rightly or wrongly decided. They considered themselves bound by it; though they said that they did not agree with it. This court, however, could say whether they would follow that case or not, and, having carefully considered the language of the statute, I am prepared to say that I too disagree with that case.

Now, section 1 of the Act provides that the vestry may, at their discretion, grant to any officer, who shall come incapable of discharging the duties of his office by reason of permanent infirmity or old age, an annual allowance. Those are the conditions precedent to the grant of an allowance. If the section had stopped there, then, no doubt, the discretion of the vestry would only extend to the grant or refusal of an allowance, and the amount of the allowance, if granted, would be fixed by the scale in section 4. But the section goes on:—"Not exceeding in any case two-thirds of his then salary." That seems to me, by necessary implication, to involve this, that the vestry have a discretion to give less. An instance of the use of similar words occurs in section 6, where it is said that a gratuity not exceeding three months' pay may be given. Can anyone doubt that under those words the vestry could give a sum less than three months' pay? Section 1, however, further goes on:—"Regard being had to the scale of allowances hereinafter contained." Those words refer to section 4, which prescribes the scale, a scale of allowance ascending with the number of years' service. That enables the vestry to regard the number of years' service in exercising their discretion as to the amount of the allowance so long as they do not exceed the limit prescribed by the scale, but it does not, in my opinion, prevent them from granting a smaller allowance if they think fit in their discretion to do so. This interpretation of section 1 seems to me to render the interpretation of section 4 reasonably plain, for then the words "the allowance shall be as follows" refer to the maximum rate of allowance as prescribed by the scale, and do not take away from the discretion previously given by section 1. The vestry, therefore, upon the application for an allowance, if they decide to grant one, may either grant the full allowance authorized by the scale or any less sum. In my opinion, the decision in *Reg.* v. *St. George's, Southwark*, cannot be supported.

FRY, L.J.—I am of the same opinion. Mr. Henn Collins suggested that the only discretion the vestry had under section 1 was to consider whether the retiring officer should have a pension or not, but that there was no discretion as to the amount of the pension, the amount being fixed by the statute. The result of such a construction would be that whenever a vestry think it desirable to grant a pension they must shut their eyes to the amount they are going to vote, as the statute acts automatically and fixes the amount. The Legislature might conceivably have so enacted; but if they had intended to do, so one would have expected to find the two functions clearly separated. It seems to me that the Act gives the vestry power to determine, not only whether there shall be a pension, but also what its amount is to be within certain limits. Section 1 places in the discretion of the vestry the power to grant an annual allowance "not exceeding in any case two-thirds of his then salary." Those words fix the maximum. It seems clear to me that the question of *quantum* is dealt with by this section as well as the question of the grant, and that both are linked together as matters of discretion. The section then goes on to say, "regard being had to the scale of allowances hereinafter contained." One may be allowed to ask, What would be the use of looking at the scale if the scale worked automatically? Obviously it would be of use to refer to the scale if the vestry had a discretion to act within the scale. The true meaning of those words, in my opinion, is that the vestry is to look at the scale to see that it does not exceed it. Reliance has been placed on the words in section 4, "the allowance shall be as follows." Those words seem to me to be merely declaratory of the maximum limit allowed by the scale, and not to fetter the discretion within the scale. This seems a more reasonable construction of the Act than that adopted in *Reg.* v. *Vestry of St. George's, Southwark.*

Appeal dismissed.

Solicitors for the prosecutor, *Beal, Phillips, & Beal.*

Solicitors for the vestry, *Cunliffes & Davenport.*

From Q. B. Div. Jan 31.

In re EAST LONDON RAILWAY CO. OLIVER'S CLAIM. (*a.*)

Railway company—Lands injuriously affected—Amount of compensation—Question of liability—Order for trial by judge of the High Court—Jurisdiction—Railways Regulation Act, 1868 (31 & 32 *Vict.* c. 119), *ss.* 41, 43—*R. S. C.*, 1883, *ord.* 36, *r.* 7*a.*

Upon a claim for compensation against a railway company for lands alleged to be injuriously affected, the railway company disputed the title of the complainant to the lands in question, and, on an application of the railway company under section 41 *of the Railways Regulation Act*, 1868, *to a judge at chambers, an order was made directing that the questions of liability and the amount of compensation (if any) should be tried before a judge of the High Court sitting without a jury.*

Held, that the order exceeded the jurisdiction given to a judge at chambers under the said section, and that "the question between the parties" mentioned in the section only embraced the question of compensation.

Semble, *that the question of compensation, if ordered to be transferred to the High Court under the section, could only be tried by a judge with a jury.*

Appeal from an order of the Divisional Court (Lord Coleridge, C.J., and Mathew, J.) reversing an order of Grantham, J., at chambers.

Under the Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), s. 41, an application had been made at chambers on behalf of the East London Railway Co. to have all questions at issue between the parties removed for trial to the High Court. Notice had previously been given to the sheriff to issue his warrant for a jury to try the question of compensation in accordance with the provisions of the Railways Regulation Act, 1868, adopting the procedure under the Lands Clauses Consolidation Act, 1845, and the sheriff had fixed a day for the hearing. Grantham, J., made an order directing that the questions of liability and the amount of compensation (if any) claimed by one Oliver in respect of lands alleged to be injuriously affected by the railway works should be tried before a judge of the High Court sitting without a jury. The Divisional Court set aside this order on the ground that section 41 of the Act of 1868 gave no jurisdiction to make it. Against this decision the East London Railway Co. appealed.

Littler, Q.C., and *Lawson Walton*, for the appellants.—By section 41 of the Railway Regulations Act of 1868 "the question between the parties" can be transferred to the High Court by order. That must mean the whole

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a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

question at issue, whether of liability or compensation. Both questions could then be disposed of at one sitting: *New River* v. *Midland Railway Co.*, 25 W. R. 502; *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 37 W. R. 285, 22 Q. B. D. 435; *East and West India Docks* v. *Gattke*, 20 L. J. Ch. 217.

Jelf, Q.C., and *Gover*, for the respondent.—Whether damage has arisen by the acts of the railway company must be a question of fact for a jury, while the question of title is for the judge, so there must be a separate trial of the issues in any case. The question of compensation is alone dealt with in section 41 of the Act of 1868. It is only in regard to that question that the judge has jurisdiction to order its transfer. The order in any case is beyond the judge's jurisdiction, since he can only order the question between the parties to be tried before a judge and jury. If the question here is only one of discretion, that discretion has been wrongly exercised. In the *Birmingham Land case* a verdict was first taken on the question of compensation and treated exactly as a verdict taken in the sheriff's court.

Littler, Q.C., in reply, cited the practice of the Chancery Court of prohibiting by injunction the trial of the question of compensation before the question of liability had been determined: *London and North-Western Railway Co.* v. *Smith*, 1 M. & G. 216.

Jelf, Q.C., referred to *South Staffordshire Railway Co.* v. *Hall*, 3 M. & G. 353, and *London and Blackwall Railway Co.* v. *Cross* (*per* Lindley, L.J.), 34 W. R. 201, 31 Ch. D. 367, as overruling the older chancery practice.

Lord ESHER, M.R.—At the time when the Railways Regulation Act, 1868, was passed the law had been perfectly settled in regard to actions under the Lands Clauses Consolidation Acts for injury to lands—namely, that no question in law or equity could be raised to try the title of the complainant in regard to land so alleged to be injured until the amount of compensation for the alleged injuries had been decided by a jury in the sheriff's court. It is equally clear that at the trial the title of the claimant to the lands injured might be assumed to be bad, and yet that question of the possible damage might be tried before the sheriff's jury. It is said that the Court of Chancery was once accustomed to issue an injunction against the sheriff's jury proceeding with any inquiry until the court had decided the question of title and a decision of Lord Cottenham has been cited to this effect (*London and North-Western Railway Co.* v. *Smith*.) It is clear that Lord Truro was, in a subsequent case (*South Staffordshire Railway Co.* v. *Hall*), not of the same opinion, since, though he declined to be quoted as overruling Lord Cottenham, he left it open for succeeding equity lawyers to say, and for the House of Lords to hold, that he had practically overruled the earlier decision of Lord Cottenham granting such an injunction. The law may therefore be taken to be settled beyond a doubt, against an injunction being granted under such circumstances, since Mr. Walton has been unable to cite to us any case beyond this one, which has practically been overruled. It is argued, however, that section 41 of the Railways Regulation Act, 1868, altered the course of procedure so far as to allow the court or judge, when applied to, to order or not, at his discretion, the question of title to be decided first, or together with the question of compensation. I may observe upon this that if the Legislature had intended to give such a discretion, the existing practice being then perfectly well settled, it would have stated such an alteration in plain terms. Is that the effect of section 41? It must be admitted that if that section does effect that alteration it is drawn in terms the very opposite of clear, and such a meaning can only be deduced from a special interpretation of particular words by a manipulation rather than construction of their ordinary meaning. All the argument depends on this section. Has the Legislature thereby given power to the court or judge to alter the former settled practice? This section enacts that: "Whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is, under the provisions of 'The Lands Clauses Consolidation Act of 1845' (*g*), to be settled by the verdict of a jury empanelled and summoned as in that Act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company to the sheriff as by that Act directed, apply to a judge of any one of the superior courts of common law at Westminster, who shall, if he think fit, make an order for trial of the question in one of the superior courts upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in case of difference by the judge, or as he shall direct, and such issue shall and may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action, at such place as the judge shall direct; and the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the court as in ordinary action therein, but so nevertheless that the jury shall, where the issue relates to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to lands therewith, deliver their verdict separately in manner provided by the forty-ninth section of 'The Lands Clauses Consolidation Act, 1845.'" The section only applies to "lands purchased for the purposes of a public railway" and to any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway." "Whenever any such question—*i.e.*, of compensation—is to be settled under the provisions of the Lands Clauses Consolidation Act, 1845, by the verdict of a jury empanelled as therein mentioned, the company or party may . . . apply to a judge of the superior court, who shall, if he shall think fit, make an order for trial of the question in one of the superior courts upon such terms and in such manner as to him shall seem fit." "The question" must refer to the question of compensation as mentioned at the beginning of the section. Whether the judge could, since the Judicature Act, order such a question to be tried before a judge alone, it is not necessary for us here to determine. He certainly could not at common law at the time when this section was enacted. Here we have only to say what question he could order to be tried in the superior court. The section goes on, "The question between the parties shall be stated in an issue to be settled in case of difference by the judge or as he shall direct." These are the only words relied upon by the appellants in support of their contention upholding the judge's order at chambers. But it must be noted that the words are still "the question," not "the questions" between the parties. The only question hitherto mentioned is that of compensation, the one which would be tried before the sheriff's jury unless ordered otherwise by the judge. It is argued that the judge could not be meant to settle issues of compensation only, and that the words necessarily include the question of title. But I do not think that is a necessary implication, since there might be distinct questions of compensation upon which it might be advisable to have distinct verdicts from the jury, and if so the Act may intend to provide that such be put in separate issues to be settled by the judge if necessary. To say that the mere words "the

question between the parties" may be intended to enlarge the only question previously alluded to—viz., of compensation—is to give an unreasonable construction to the words, since the obvious answer is that, had the Legislature intended to alter or extend a well-known form of procedure, it could easily have done so in plain words, and it is admitted by the very argument of the appellant that these words do not do so in plain language, but only by inference. It is said that the further enactment that the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the court as in ordinary actions therein," shows that the usual consequences of a judgment are to follow—namely, execution—and thereby imply that all questions between the parties may have been determined by the proceedings. But it is a mistake to suppose that execution is under the control and jurisdiction. Execution is a right which the successful party is entitled to use unless otherwise stayed. It depends upon the party to put it into practise, and is not the necessary proceeding under the control of the court. All that the court does is to see that that right of the successful party is exercised according to law. The control alluded to in the section is presumably the control which the court exercises over questions submitted to arbitration, as to the reception of proper evidence, &c., and the intention is to assimilate the trial of these questions of compensation to the general control exercised over tribunals of reference and arbitration. I can see nothing in section 41 which shows sufficiently, or indeed at all, that the rights of parties under the Lands Clauses Act are in any ways affected. It is argued that section 43 is in favour of the appellants, which enacts that "the verdict and judgment of the court upon any issue authorized by this Act shall, as regards costs and every other matter incident to or consequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict and judgment of a sheriff upon an inquiry conducted upon a warrant under the Lands Clauses Consolidation Act, 1845." But either this section leaves untouched the question of compensation dealt with in section 41 or, if it applies, it is against the appellants, because it places the verdict and judgment of the High Court upon the issue exactly in the same position as the question of compensation before the sheriff, implying that it is a similar issue. Possibly it may refer to the lodging of that verdict and judgment at the town clerk's offices, as, it is asserted, is the necessary proceeding with the verdict and judgment of the sheriff's court under the Act of 1845. What I think it practically means is that the issue or question allowed by this Act to be transferred to the High Court gives to the High Court a peculiar jurisdiction and does not bring the issue or question under the general jurisdiction of that court. Its verdict and judgment could not be enforced under its general jurisdiction. Some machinery is required, and the sections together apply to the verdict and judgment of the High Court upon the issues or question of compensation brought before it under the provisions of this Act exactly the same machinery as was supplied by the Lands Clauses Consolidation Act for the same issues or question of compensation before the sheriff's court. I am of opinion that Grantham, J., had no jurisdiction to make this order, nor do I see any reason why we should exercise any discretion we may have to order that the question of compensation should be transferred to the High Court. I will not here express any opinion as to whether such a question could, since the Judicature Act and the new rules consequent thereon, be tried before a judge of the High Court alone sitting without a jury.

FRY, L.J.—This is an application to restore an order made for the trial of this claim of compensation as well as a question of title before a judge of the High Court without a jury. One ground is that all questions between the parties can be thereby decided on in one sitting; the other ground is based upon special circumstances. The first point is the important one. It depends upon the construction of the Railways Regulation Act, 1868, s. 41. The proceedings under the Lands Clauses Consolidation Act were well known when this later Act was passed. Two distinct questions were differently tried, one, that of compensation, by the sheriff and a jury summoned under his warrant, the other, that of title, by a judge and a jury of the High Court. The chancery courts seem at one time to have tried to interfere with the trial of the question of compensation by an injunction restraining such a proceeding until the question of title had been decided; but they have for a long time withdrawn from any such interference, and the right of its exercise seems to have been strongly doubted, so that the general practice of having the question of compensation tried first must be taken to be the established practice. Section 41 commences by regulating the trial of the question of compensation before a sheriff's jury, it goes on to enact that "the question between the parties" may upon application be ordered to be tried before a judge of the High Court with a jury. What is the question alluded to? Clearly the question which was, if not otherwise ordered, to be tried in the sheriff's court. But that is the question of compensation only. I can hardly understand that there can be any real doubt that that is the true and plain construction of the words. This is further shown by the words of section 43, that "the verdict and judgment of the High Court upon the question so ordered to be submitted to it shall have the same operation and the same effect as the verdict and judgment in the Sheriff's Court." As to the argument that it would be more convenient to try both questions at one sitting, if such a course would really shorten the proceedings, it would doubtless be advisable if permitted under the Act, but, if so, such procedure must exist in all cases. Here, according to the argument of the appellants, if the question of compensation can be transferred into the High Court and be tried with the question of title, it comes under the general jurisdiction of the High Court, and a long process of appeal would thereby become open to the parties, whereas if the question is left to be tried in the Sheriff's Court no such appeal is left open. It cannot be intended that two such different procedures should be allowed under the wording of the Act, which expressly enacts that the verdict and judgment of the High Court upon the question transferred by order to that court, should have the same operation and effect as the verdict and judgment in the sheriff's court under the Lands Clauses Consolidation Act, 1845. Upon the question of discretion as to transferring the one question of compensation to the High Court I do not see that it would be advisable so to order the present case, in view of the delay which would be incurred, and seeing that the sheriff has already issued his warrant for a jury to view the buildings alleged to be injured, and has fixed a day for the trial of the question of compensation. It is not necessary, therefore, to decide whether the order is wrong in respect of its ordering a trial before the judge alone, but I am inclined to think that such a trial must be before a judge and jury. This is special legislation for specific procedure, and I doubt if such could be altered by subsequent general legislation as to procedure under the Judicature Act.

Appeal dismissed.

Solicitors for the appellants, *Wilson, Bristows, & Carpmael.*

Solicitors for the respondent, *H. Gower & Son.*

From Q. B. Div. Jan. 24, 27.

REG. v. BARNARDO.

GOSSAGE'S CASE. (a.)

Habeas corpus—*Application for writ—Inability to obey caused by previous illegal act of person to whom writ addressed—Intention to evade process of court.*

The defendant, having permission from the parent of a child to keep the child in his institution, without the leave of the parent, handed the child over to a person to be adopted by him and taken out of the country. No address was given to the defendant by this person, and the defendant alleged that it was impossible for him to find this person. On a subsequent application for a writ of habeas corpus,

Held, by Lord Esher, M.R., *and* Fry, L.J. (*affirming the* Divisional Court) *that the writ must issue* (per Lord Esher, M.R.) *on the ground that it had been decided in* The Queen *v.* Barnardo (Tye's case), 37 *W. R.* 789, 23 *Q. B. D.* 305, *that, where a child had been entrusted to a person other than its lawful guardian, and he wrongfully parted with the custody of the child, a writ of* habeas corpus *would issue to compel him to produce the child, unless he was able to convince the court that it was absolutely impossible for him to do so; and* (per Fry, L.J.) *on the ground that, although a writ of* habeas corpus *would not issue where it was plain that obedience to it was impossible, yet that the writ would issue where this was not plain, and where the defendant wilfully and with intent to defeat the process of the court had, by an act done before the application for the writ, put it out of his power to obey the writ when issued.*

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Bowen, L.J.).

In September, 1888, Dr. Barnardo received into his homes a boy of twelve years of age named Harry Gossage, who had been found in a destitute condition at Folkestone. The boy's father was dead, and his mother resided at Leamington. Communications were entered into with the mother, and on September 29 a letter was written by her expressing her wish that the boy should be kept at the homes as she could not afford to keep him herself. Dr. Barnardo thereupon sent to her for her signature the form of agreement in use by him in such cases, which contained a consent by the parent to the child being sent to any of her Majesty's colonies. This form was never filled up or signed, and was subsequently returned to Dr. Barnardo. On November 12 an application was received at the homes purporting to be made on behalf of the mother that the boy should be transferred to a Roman Catholic home. On November 16 Dr. Barnardo handed the boy over to a Mr. Norton in order that he might adopt the child and take him to Canada. Mr. Norton made it a condition of receiving the boy that he should give no address in order to escape the importunity of the boy's relatives. The child's mother was not told until January 4 that he had been sent away. On an application at chambers for a writ of *habeas corpus* on March 13, Mathew, J., declined to issue the writ on the ground that the child was no longer in Dr. Barnardo's possession, custody, or control; but on November 23 (the case of *Reg.* v. *Barnardo* (*Tye's case*), 37 W. R. 789, 23 Q. B. D. 305, having in the meantime been decided by the Court of Appeal), the Divisional Court directed the writ to issue.

Dr. Barnardo appealed.

The appellant in person.

The present case is not governed by *Reg.* v. *Barnardo* (*Tye's case*). The question in that case was as to a valid return to a writ, not as to its issue. It was never intended that the writ of *habeas corpus* should be punitive and not remedial, and it cannot be issued where it is apparent to the court that obedience to it is impossible.

He cited *In re Matthews*, 12 Ir. C. L. R. 233; *In re Goldsworthy*, 2 Q. B. D. 75, 25 W. R. Dig. 169; *Reg.* v. *Clarke*, 5 W. R. 222, 7 E. & B. 186; *In re Ethel Brown* (or *Rowe*), 33 W. R. 79, 13 Q. B. D. 614; *In re Agar-Ellis*, 32 W. R. 1, 24 Ch. D. 317.

Forbes Lankester (*Joseph Walton* with him) for the respondent.—It was decided in *Reg.* v. *Barnardo* (*Tye's case*) that inability to obey the writ, if caused by an illegal act of the person to whom the writ was directed, was no answer to the writ, and it was said that it was immaterial whether the illegal act was committed before or after the application for the writ. Inability to obey is, therefore, no reason why the writ should not issue. When a child is once handed over to a person other than its lawful guardian, that person becomes responsible for its safe guardianship, even although he has parted with its physical custody, if he has done so without legal excuse.

Lord ESHER, M.R.—In this case a writ of *habeas corpus* has been granted against Dr. Barnardo, directing him to produce to the court the body of Harry Gossage. Against the issue of that writ Dr. Barnardo has appealed, and we have to see whether on all the facts now before us, we, if we had been in the position of the court below, should have directed the writ to issue. The person to whom the writ is directed is the head of a peculiar institution, of which, from its magnitude, it is impossible that he should himself regulate every detail. He is obliged, therefore to leave much of the work that he would otherwise do himself to be done by agents and subordinates, for whose conduct he is, of course, responsible just as if he had done it himself. What is the history of the case? The child in question is found at Folkestone in a destitute condition, and is sent by a benevolent clergyman to Dr. Barnardo's home. There was no obligation on him to receive it, but he agreed to do so. Then, having ascertained that the child has a mother alive—though his father was dead—Dr. Barnardo writes to the mother and sends her, for her signature, the form of agreement which he ordinarily uses in such cases. That agreement, if signed, would, as long as it held good, have authorized Dr. Barnardo to keep the child in his homes, and to send it to any of the colonies. The agreement was, however, never signed; but a letter was written by the child's mother, saying that she should be glad for Dr. Barnardo to keep the child, as she could not afford to keep it herself. What, then, was Dr. Barnardo's position? He had the consent of the mother to keep the child; he had not her consent—so he knew, for I must take it that what was known to his subordinates was known to him also—to send it abroad. As I have said before, in *Tye's case*, even if the mother had signed the agreement, she might have revoked it at any time, and even where such an agreement is signed by the parent Dr. Barnardo takes a child subject to the risk of subsequent retractation.

The next thing that happens is that certain persons, thinking that it is for the spiritual welfare of the child that it should be brought up as a Roman Catholic, get the mother to give them authority to ask for the child. The mother was herself utterly careless and neglectful of her duty to her child, but I cannot see that these persons used any improper influence with her or that they did anything wrong in asking for the child. Accordingly, on November 12, an application for the child was received at the home by Dr. Barnardo's subordinates. Dr. Barnardo contends that there was no direct authorization from the mother, but the application purports to be made by her authority; and I think that until the contrary was proved, Dr. Barnardo was bound to consider that the letter was written with her sanction. That letter was received by Dr. Barnardo's

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

subordinates; and, if it were necessary, I should hold that their knowledge of it amounted in law to his knowledge of it, but even if he had not known of it, what he did was illegal. On November 16, without any consent of the mother, he hands over the child to a person who tells him that he is going to take it next day to Canada. He may have acted with the best motives, but he acted illegally, and had no authority to do what he did. The child is deliberately handed over in such a way that all means of tracing it shall be lost. I am quite willing to believe that this was done in order to save the person who intended to adopt the child from future annoyance from its relatives, but I repeat that Dr. Barnardo had no right to do as he did. He sent the child out of the jurisdiction in such a way as to deprive the court of the power of inquiring what had become of it. In *Tye's case* we considered what the consequences of such action were, and we decided that it was no answer to a writ of *habeas corpus* that the person to whom the writ was directed had, by his illegal act, put it out of his power to obey the writ. Almost every argument that we have heard to day was before us then, and we decided, on the authority of the Irish case *In re Matthews*, that if a person other than its lawful guardian was once shown to have the custody of a child, and if he wrongfully and without legal authority parted with the custody of the child in such a way that he can truly say that he cannot get the child back when he is asked for it, that is no answer to an application to produce the child. It was unnecessary then, and it is unnecessary now, to decide whether if he would show an absolute impossibility to produce the child, as, for instance, by proving its death, the writ of *habeas corpus* ought to issue merely to punish him. I have no hesitation in saying that in such a case it ought not to go, and that the writ was not intended to be used merely punitively. But neither in *Tye's case* nor in this was there any such absolute impossibility. It may be very difficult and almost impossible for Dr. Barnardo to reach the child, but he is bound to use every effort to recover it—to write, to advertise, if necessary to go to America himself to seek for it. It has been urged upon us that *Tye's case* only had reference to the return to a writ already issued, and that this is an application for a writ to issue. But I think that we assumed in *Tye's case* that all that had been done was done before the application for the writ, and that Dr. Barnardo had put the child out of his control before the writ was asked for.

I cannot see the distinction between the two cases, and I cannot accept the argument that where, if the writ was issued, we should hold that the facts constituted no answer to it, the same facts, if the writ has not been issued, constitute a good reason against its issue. That argument appears to me too far-fetched, and would be too great a restriction on the power of the court. I do not think that we can accept any excuse except the proof of absolute impossibility to obey. We are, no doubt, applying the writ to a state of circumstances for which it was not originally intended; but I think that, following the Irish case and *Tye's case*, we must direct the writ to issue. I need hardly say that we are far from deciding now what shall be done with the child when it is produced. It by no means follows that we shall hand it over either to the mother or to the Roman Catholic institution. We shall have then to consider what is most for its benefit. Dr. Barnardo must, I think, produce it, and must use every effort to do so, in order that the court, and not he, may decide what is best for the child's welfare. I am therefore of opinion that this appeal must be dismissed.

FRY, L.J.—I need not say much as to the circumstances of this case, as I agree with the Master of the Rolls about them. Up till November 16 I think Dr. Barnardo had the lawful custody of this child with the mother's consent. He had, however, no authority to do more than keep it. But on November 16, without any authority, he makes over the child to Norton in order that he should take it to Canada. Dr. Barnardo has argued that at the time of the application for the issue of the writ, and at the time of the making the order for the issue of the writ, against which he now appeals, all his power over the child was gone, and it was no longer under his custody or control, and therefore he says that a writ of *habeas corpus* cannot issue against him even if he acted unlawfully in parting with the custody of the child. A very similar point was raised in *Tye's case*. The question there was whether inability to obey the writ if brought about by the unlawful act of the person to whom the writ was directed was a valid return to the writ. Lindley, L.J., there said, "As a matter of law, I think that it is no valid excuse for not producing a child or other person in obedience to a writ of *habeas corpus* to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed. Here the defendant's inability arises from his having illegally sent the child abroad against the will of his lawful guardian, and that he did this before any legal proceedings against him were commenced is immaterial." The question there determined was in regard to a valid return to the writ, and it is now said that what cannot amount to a valid return to the writ cannot be a reason why the writ should not issue. The Master of the Rolls says that the court there intended to decide that point, and that there judgment applies equally to the issue of the writ as to the return to the writ. If that is so I must differ from that judgment.

I cannot think that it was ever intended that the writ should issue when, to the knowledge of the court, it was impossible that it should be obeyed. The very name of the writ, the suggestion that the person to whom the writ is directed has the custody of the body, the exigence of the writ that he should produce the body, and the statutes relating to the writ, all combine to show that the principal object of the writ was that the body should be brought before the court, and therefore, if that is really and manifestly impossible, I do not think the writ ought to issue. It proceeds upon the hypothesis of possible obedience, and therefore, if obedience is impossible, the writ ought not to go. Otherwise the consequence would be that the court, by virtue of the writ, would require a person to do that which the court knows to be impossible. That is what the court has never been in the habit of doing. Then, for not doing that which it was impossible for him to do, a person would be in contempt. Contempt of this kind is the failure to do something which the court orders to be done, and which the person ordered can do. If it is impossible for him to do that which he is ordered to do, there is no contempt. If, therefore, we directed the writ to issue in such a case, we should be using it to punish—though, perhaps, justly enough—a person for having done a wrongful act before the writ was issued. I do not think it would be right so to strain the machinery of the writ. It would be to determine that a person might be committed to prison on affidavit, and by a single judge, for an unlimited period. All this makes me pause before saying that where the facts would not amount to a good return the writ must issue nevertheless.

It is said that the case of *In re Matthews* is an authority for that proposition. That case came before the court on three occasions. The first question was whether the writ could issue; the second, whether the facts proved constituted a good return to the writ; and the third, whether the contempt which had been committed had been purged. It is plain that only the first

of these can be an authority in this case. The decision on that point relied on the fact that the court believed that the person to whom the writ was addressed had the "virtual" custody of the child. If by virtual custody what would in law amount to legal custody is meant the case is no authority for the proposition now contended for. If virtual custody means anything other than legal custody, I confess that I do not understand what it does mean.

Therefore, I think that if we were called upon to issue the writ knowing that it would be impossible for it to be obeyed, I could not be a party to such a decision. But there is, in my opinion, one exception to this view. Where an illegal act resulting in inability to obey the writ is done before the issue of the writ, and there is reason to believe that it was done in order to evade the exigence of the writ and to defeat the process of the court, then there is an exception to the rule I have laid down, and in such a case the writ must issue. The facts of the present case raise in my mind the strongest suspicion as to the circumstances under which the child was made over to this person from Canada, and I cannot help thinking that the child was sent out of the jurisdiction of the court in order to evade the operation of the writ, and I am inclined to believe that if the writ issues the child will be produced. I think it lay on Dr. Barnardo to repel the inference which the circumstances of the case raise that this child was sent away in order to evade the process of the court. He has not done so, and, therefore, I agree in thinking that the writ must issue. I cannot but believe that if it goes it is highly probable that the child will be produced.

Appeal dismissed.

Solicitors for the appellants, *H. C. Nisbet & Daw.*

Solicitors for the respondents, *Leathley & Phipson.*

High Court of Justice.

Chan. Div. } Feb. 1.
North, J. }

In re Gatling Gun (Limited and Reduced). (*a.*)

Company—Reduction of capital—Cancellation of part of preference and ordinary shares—Intra vires—*Companies Acts*, 1867 *and* 1877.

There is nothing in the Companies Acts, 1867 *and* 1877, *which prevents a company reducing some of its shares without reducing the others.*

In re Barrow Hæmatite Steel Co., 37 *W. R.* 249, 39 *Ch. D.* 582, *and* In re Quebrada Railway, Land, and Copper Co., 33 *S. J.* 202, 40 *Ch. D.* 363, *followed.*

In re Union Plate Glass Co., 37 *W. R.* 792, 42 *Ch. D.* 513, *not followed.*

Petition.

This was a petition for the sanction of the court to resolutions for the reduction of the capital of the company. The company was incorporated in April, 1888, its capital being £800,000, divided into 45,000 ordinary shares of £10 each and 35,000 preference shares of £10 each. The vendor of the patents to the company had received in part payment for the same a number of fully-paid ordinary and preference shares, but in consequence of the property sold having been found to be of less value than originally estimated, the vendor, by an agreement dated the 10th of August, 1889, and made with the company, agreed to surrender 16,325 ordinary shares and 12,697 preference shares to the company for cancellation, for the purpose of reducing the amount of his consideration. The usual resolutions had been passed by the company for the reduction of its capital by the cancellation of these shares, and the company now asked for the confirmation thereof.

Farwell, for the petition.—This case is distinguishable from *The Union Plate Glass Co.*, 37 W. R. 792, 42 Ch. D. 513, as here we ask to cancel fully-paid shares, whilst in that case it was proposed merely to reduce the value of a class of shares. [North, J.—Is there any distinction between reducing shares by taking part off them or by writing off the whole shares?]

He also cited *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 582, and *In re Quebrada Railway, Land, and Copper Co.*, 33 S. J. 202, 40 Ch. D. 363.

North, J.—I think I must make the order asked for. Kay, J., says in *In re Union Plate Glass Co.* that he can find no authority or intimation in the Companies Act, 1867, giving a company power to reduce some of its shares without reducing others, but I cannot find anything in the Act which prevents a company from so reducing its shares, and I adhere to what I said in *In re Barrow Hæmatite Steel Co.*, that there is nothing in the Act which requires that the reduction should be spread, either equally or rateably, over all the shares in the company, and that if it is a proper case for assenting, nothing in the Act prevents me from so doing. I think the application reasonable, and I therefore make the order.

Solicitor for the company, *E. F. B. Harston.*

Chan. Div. } Aug. 6, 7, 9, 1889.
Stirling, J. }

In re Lord Stamford's Settled Estates. (*a.*)

Settled Land Act, 1882—*Different estates and same tenant for life—Application of capital moneys of one estate for improvements on another—Costs of surveyor and solicitor of tenant for life.*

Four estates were devised upon trust for the same tenant for life, and, after her death, as to the first three of the estates, to different persons in strict settlement, and as to the fourth, upon trust for a long term of years, and subject thereto as to one moiety to the uses of the first of the other estates, and as to the other moiety to the uses of the second of the other estates.

Held, that, notwithstanding the term of years, the second estate and the moiety of the fourth estate constituted one settled estate within the meaning of the Settled Land Act, and that, consequently, capital moneys arising from the moiety of the fourth estate might be applied in improvements on the second estate; and that the costs as between solicitor and client of the surveyor and solicitor of the tenant for life, in preparing and carrying out the schemes for such improvements, were costs incidental to the application, and payable out of the same capital moneys.

Adjourned summons.

The Earl of Stamford and Warrington, who died on the 2nd of February, 1883, by his will, dated the 26th of June, 1875, devised his Staffordshire, Leicestershire, Lancashire, and Cheshire estates, subject to the mortgages affecting the same respectively, to trustees during the life of his wife upon trust for her benefit, subject to provisions as to management and to the payment of certain annuities. Subject thereto the testator devised the Cheshire, Staffordshire, and Leicestershire estates to

(*a.*) Reported by Francis T. Duka, Esq., Barrister-at-Law.

(*a.*) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

different persons in strict settlement, and the Lancashire estate to his trustees for the term of 1,000 years, and subject to such term as to one moiety to the same uses as the Staffordshire estate, and, as to the other moiety, to the same uses as the Leicestershire estate. The trusts of the term of 1,000 years were to apply the rents and profits in aid of the testator's personal estate in paying his funeral and testamentary expenses and debts and the legacies and annuities given by his will, and then towards discharging, first, the mortgages on the Staffordshire estate; secondly, the mortgages on the Leicestershire estate; thirdly, the mortgages on the Cheshire estate; and, lastly, the mortgages on the Lancashire estate itself; and when the expenses, debts, legacies, annuities, and mortgages were all paid and discharged, the term was to cease and determine. And the testator declared that the subsistence of the term should not prevent the trustees from selling the Lancashire estate for any purpose for which such sale was authorized by the will, and that such sale, unless expressly made subject to the term, should have priority over it. The trustees were also empowered to apportion the Lancashire estate, or any part thereof, among the persons entitled thereto, and for that purpose to revoke and appoint uses of any hereditaments, and to provide, by means of mortgages, for equality of partition. The will further contained powers of management during minorities, and also during the life of the testator's wife, and as to the Lancashire estate during the term of 1,000 years. The management clauses commenced as follows: "And I hereby declare my will to be, as regards each settled estate (for facility of reference hereinafter, the Cheshire estate being considered and treated as one settled estate, the Staffordshire estate and one moiety of the Lancashire estate being considered and treated as one other settled estate, and the Leicestershire estate and the other moiety of the Lancashire estate being considered and treated as the third settled estate)," &c. The will also contained powers of sale and exchange.

The aggregate rents and profits of all the estates were more than sufficient to pay the interest on all the mortgages, but the rents and profits of the Leicestershire estate (which was very heavily mortgaged), exclusive of the mansion-house, were not sufficient by themselves to keep down the interest on the mortgages upon that estate and to pay the expenses of management; permanent improvements were also greatly needed upon that estate. The Lancashire estate, on the other hand, produced a considerable surplus income, and there were in the hands of the trustees capital moneys arising from that estate sufficient for permanent improvements both on that and on the Leicestershire estate.

The present summons was taken out by the Countess of Stamford as tenant for life for a declaration authorizing the trustees to apply the capital moneys arising from the Lancashire estate in improvements on the Leicestershire estate. The summons also asked that the costs of the application, including the costs of the tenant for life and her solicitor and surveyor in preparing and carrying out the necessary schemes, might be taxed as between solicitor and client and paid by the trustees out of the property subject to the trusts of the will.

Hastings, Q.C., and *B. Fossett Lock*, for the applicant, argued that, as regarded the four settled estates, the will constituted one settlement within section 2 of the Settled Land Act, but that even if that were not so, at all events the Leicestershire estate and one moiety of the Lancashire estate constituted one settled estate.

They cited *In re Duke of Marlborough's Settlement*, 33 W. R. 871, 30 Ch. D. 127.

Buckley, Q.C., and *Marshead*, for the trustees, submitted that each estate was the subject of a distinct settlement.—With regard to the costs, they said that the employment of a surveyor was a necessary step towards the exercise of the power, and the case of *In re Eyton's Settled Estate*, W. N., 1888, p. 254, which appeared to be opposed to that view, was an exceptional case. [STIRLING, J., said that the surveyor's costs were certainly costs incidental to the exercise of the power. They must, however, be reasonable and ordinary costs, and it would not do to get, for the purpose of selling one farm, the costs of a survey of the whole estate.] The next question was as to the costs of the solicitor of the tenant for life. [*Hastings, Q.C.*, said that that was decided by *In re Llewellin*, 36 W. R. 347, 37 Ch. D. 317. STIRLING, J., said that the words of the Act were not merely "costs, charges, and expenses of," but also "or incidental to," and he thought it was intended to give to a tenant for life properly put to costs and charges in the course of the execution of the power something more than ordinary costs.]

Borthwick, for the infant tenant in tail of the Staffordshire estate, contended that the effect of the interposition of the 1,000 years' term was that the Lancashire estate was divided for the benefit of all the other three estates, the first trust being to discharge the mortgages on the Staffordshire estate, and that while that term was in operation the moiety of the Lancashire estate did not coalesce with the Leicestershire estate so as to form one settled estate.

Henry Fellows, for the tenant for life in remainder of the Leicestershire estate.

Peck, for the tenant for life of the Staffordshire estate.

Hastings, Q.C., in reply.

Aug. 9.—STIRLING, J., stated the facts and continued:—The question which has arisen is this:—It appears that the Leicestershire estate is heavily burdened with mortgages, and there are no capital moneys arising from that estate which are available for the purpose of improvements on that estate, which improvements are urgently wanted. On the other hand, the Lancashire estate is a very valuable estate. It is less heavily burdened, and there are capital moneys arising from it which it is sought to apply in improvements on the Leicestershire estate. It was first contended that as all the four estates were settled by the same instrument, and as there was the same tenant for life of them all, there was really only one settlement created by the will, and one settled estate. As to that, I felt during the argument, and still feel, very great difficulty. It is not necessary, however, that I should decide that question, because the point was, I will not say abandoned, but at any rate not insisted upon; and ultimately the case was put in a different way. It was said that the Leicestershire estate and one moiety of the Lancashire estate constituted but one settled estate. That is totally different from the case at first put with reference to the four estates. As regards the three estates, the Cheshire estate, the Staffordshire estate, and the Leicestershire estate, though they are all settled by the same instrument, and though there is the same tenant for life, in the first place, of them all, yet all the subsequent limitations are in substance different, whereas, as regards the Leicestershire estate and one undivided moiety of the Lancashire estate, the limitations are the same throughout, with this one exception, that upon the Lancashire estate there is created a term of 1,000 years immediately after the death of the present tenant for life.

Now, what are the purposes for which the term of 1,000 years is created? It is for the satisfaction of funeral and testamentary expenses, debts, legacies, and annuities, and then for payment of the mortgage debts of all the four estates in a particular order. It seems to me, therefore, that, in substance, we have here a settle-

ment of one estate consisting of the Leicestershire estate and an undivided moiety of the Lancashire estate, but that the undivided moiety is subject to a charge from which the Leicestershire estate is exempt. The question which I have to consider, therefore, is whether, when a settled estate comprises land which is subject to a charge from which the rest of the settled estate is exempt, capital moneys arising from the lands which are subject to the charge can be applied for the improvement of the portion of the settled estate which is not subject to the charge; which is a very different question from the one put forward in the first instance. Mr. Borthwick called my attention to this, that if I come to the conclusion that the capital moneys arising from the moiety of the Lancashire estate are available for improvements on the Leicestershire estate, I must also be prepared to say that they are applicable for any of the purposes to which capital moneys may be applied under the Act, and his argument was that, as regards other applications, there were indications in the Act that that was not intended. In particular, he referred to the sections which deal with the application of the capital moneys in the purchase of lands to be settled to the same uses and to those which deal with the application of capital moneys for the payment off of incumbrances.

Now I must see whether there is anything in the provisions of the Act relating to those applications which prevents me from saying that money arising from the Lancashire estate, which is subject to the charge, can be applied for improvement or otherwise for the benefit of the Leicestershire estate, which is not.

First of all, as regards the investment in land, that is regulated by section 24; and the 2nd sub-section says, referring to land which has been acquired by purchase or in exchange, or on partition, that "freehold land" which has been acquired by purchase shall be conveyed "to the uses, on the trusts, and subject to the powers and provisions which, under the settlement or by means of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging." I must read that in connection with sub-section 5—"Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge." The 5th sub-section undoubtedly provides that land purchased by moneys arising from the sale of land subject to a charge is to be conveyed subject to that charge; but it was considered necessary to insert an express provision directed to this particular matter, and the conveyance in that way would not necessarily have followed merely from the provisions of the 2nd sub-section. It is obvious, from a comparison of the 2nd sub-section with the 5th, that the Act contemplates that the settled land may, as to part, be subject to a charge, and as to the rest be free from it, and there is an express provision with reference to the conveyance of land when moneys arise from the part which is subject to the charge. I think that the charge which is referred to in sub-section 5 is not merely one which takes priority over the settlement; but extends to charges which are created by the settlement itself. The word is used in various parts of the Act with reference to both, and conspicuously in section 20, which deals with conveyances; and as to the operation of conveyances made by the tenant for life under the Act, it is expressly enacted by sub-section 2 that such a deed is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (1) all estates, interests, and charges having priority to the settlement." So that the word "charge" is used there with reference to both classes, and I see no reason why, in sub-section 5 of section 24, that should be limited to charges existing in priority to the settlement. I think, therefore, that, as regards the purchase of lands, that rests on the peculiar provisions of section 24 with reference to those portions of the settled land which are subject to charges.

Then I have next to consider whether there is anything in the way in which the payment off of incumbrances is dealt with which would lead me to suppose that it was not intended by the Act that the power to apply the money in payment off of incumbrances should extend to paying off incumbrances on the part of the land which is not subject to the charge. That is governed by section 21, sub-section 2, which provides that capital money arising under the Act may be applied in "discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land or other the whole estate, the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land." Mr. Borthwick directed my attention to section 5, which provides that where, on a sale, exchange, or partition, there is an incumbrance "affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly." That is to say, there are special powers given, on a sale, exchange, or partition, to the tenant for life to shift incumbrances from one part of the settled estate to the other; and the suggestion is that there is no power, in the absence of an express provision, to apply capital moneys arising from one part of the settled estate in discharge of incumbrances on another part. I think that that would be taking too narrow a view of the Act. It has been decided by Pearson, J., in *In re Ohaytor's Settled Estates Act*, 32 W. R. 517, 25 Ch. D. 651, that capital moneys arising under the Act may be applied in the discharge, purchase, or redemption of incumbrances which affect only a part of the settled land.

The question which I have now to consider is whether, when the capital money arises from the part of the settled land which is subject to the charge, I can apply it in discharge of the incumbrances affecting the other part. There is no restriction expressly imposed by the Act, and it seems to me that, in the absence of express restriction, I ought not to hold that there is no such power, and that the real answer to any difficulty which arises out of the supposition of the existence of such a power is that it is not to be exercised arbitrarily by the tenant for life, but, under section 53, is to be exercised, as all the other powers are, with a due regard to the interests of all parties entitled under the settlement. By that section the tenant for life is, in relation to the exercise of such a power, to be "deemed to be in the position, and to have the duties and liabilities, of a trustee for those parties." Therefore it is his duty, in exercising the discretion which is vested in him under the Act as to the application of capital moneys, to consider whether he is unduly prejudicing any of the parties by the proposed exercise of that discretion, and if he is, then it would not be proper so to exercise the discretion; but where it is a matter of doubt, in the absence of any reason for supposing that the discretion is unfairly exercised, then that discretion ought to prevail. I may illustrate that by reference to the mode in which the income arising during the term of 1,000

years is to be applied in the present case. It is, leaving out the debts, funeral and testamentary expenses, legacies, and annuities, to be applied in payment off of mortgage debts on the four estates in the following order: Staffordshire, Leicestershire, Cheshire, and Lancashire. I think it would hardly be disputed that the capital money arising from the Lancashire estate could be applied in discharge, at the discretion of the tenant for life, of incumbrances on the Lancashire estate, notwithstanding the direction of the will as to the proceeds of the income arising during the term of 1,000 years. I think that the point has, in substance, been decided already by Chitty, J., in the case of *Clarke v. Thornton*, 35 W. R. 603, 35 Ch. D. 307, with reference to improvements. There the will had thrown the improvements on the income, and yet it was held that, notwithstanding the express provision made by the will, the tenant for life had a right under the Act to have capital moneys arising under the Act applied for improvements. It seems to me that the reasoning which prevailed in that case with reference to improvements would also prevail so as to enable incumbrances on the Lancashire estate to be paid off out of capital moneys arising under the Act, in priority to the Staffordshire estate for example, although the income which arises under the trusts of the term of 1,000 years can only, under the terms of the will, be applied in paying off incumbrances on the Lancashire estate in the last place, and after all the incumbrances on the three other estates are satisfied.

Then, again, the contention on behalf of the persons interested in the Staffordshire estate is, that if the capital money is taken and applied in improvements on the Leicestershire estate or is taken and applied in payment of incumbrances on the Leicestershire estate, the persons who are entitled to the Staffordshire estate will be deprived of a certain amount of income during the term of 1,000 years which would be available for payment of the debts on the Staffordshire estate. Now there might be circumstances under which that argument would deserve the very greatest weight. Suppose, for example, that the Staffordshire estate was so heavily incumbered that, according to reasonable calculation, the whole of the income available during the 1,000 years would be required to discharge those incumbrances; then it seems to me that it would not be a fair exercise of the discretion vested in the tenant for life to take the moneys arising from the Lancashire estate and pay off the debts of the Lancashire estate in the first instance; but if the Staffordshire estate is only moderately incumbered, and there are ample means under the term of 1,000 years for paying off the mortgages on the Staffordshire estate, then the only result is, that instead of the Staffordshire mortgages being paid off quickly under the term of 1,000 years, a little longer time will be required for their complete discharge, and it would, as it seems to me, be a fair question for the tenant for life to consider which course would be most for the benefit of all parties interested in the settled estate, and if he comes to the conclusion, in the exercise of a fair discretion, that it is better that the money should be applied in payment off of incumbrances, or for the purpose of improvements, then I think that there is power so to do, and that the discre- ought not to be interfered with.

I might give other illustrations of the same thing. If, for example, the Leicestershire estate was heavily incumbered, as I understand it is, and if it were sought to apply such a large amount of the capital moneys that the Staffordshire estate would practically be deprived of any benefit, then I should not think that a fair exercise of discretion; but if it is simply a question of the time at which the Staffordshire estate will be discharged, and the effect of applying the money in the way proposed will merely be to postpone for a little longer the complete discharge of the Staffordshire estate, then I should consider that that would be a fair matter for the exercise of the discretion of the tenant for life. I give these instances simply as general illustrations of the way in which I view the Act.

It seems to me, on the whole, that there is nothing in the Act, either as regards the application of the capital money for the purchase of land or for the purpose of paying off incumbrances, which prevents me from saying that there is power to do what is sought to be done; and that it is a matter for the discretion of the tenant for life, to be exercised in accordance with the provisions of section 53, in each case as to whether the particular application ought to be made. I think, therefore, in this case, it not being alleged that anybody will be irretrievably prejudiced by the proposed application, that I may say that, as regards the capital moneys arising from one moiety of the Lancashire estate, they may be applied for the improvement of the Leicestershire estate, and there must be a declaration to that effect. There will also be a direction that the costs of and incidental to this application, including the costs of the tenant for life, and her solicitor and surveyor, in the preparation and carrying out of the necessary schemes, may be taxed as between solicitor and client, and paid out of capital moneys arising from the Leicestershire and one moiety of the Lancashire estates.

Solicitors, *Smith, Fawdon, & Low*, agents for *T. Wright*, Leicester; *Bower, Cotton, & Bower; Ilifes, Henley, & Sweet*, for *Laycock, Dyson, & Laycock*, Huddersfield; *Evans, Foster, & Wadham.*

Q. B. Div. (Fry, L.J., and Mathew, J.) Jan. 30.

Reg. v. Judge of the Bloomsbury County Court. (a.)

County court—Local jurisdiction—Administration proceedings—Metropolitan county court districts—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 75, 84.

Section 84 *of the County Courts Act*, 1888, *must be construed as forming an exception to section* 75, *sub-section* 3. *Therefore, where the plaintiff or the defendant in administration proceedings carries on business within the district of a metropolitan county court, the judge of that court has jurisdiction, notwithstanding that neither the deceased nor his executor had their place of abode within that district.*

Order *nisi* in the nature of a *mandamus* calling upon the judge of the Bloomsbury County Court to show cause why he should not hear and determine certain administration proceedings.

In October, 1889, one Taylor, a creditor of Richard Cattle, deceased, commenced by plaint in the Bloomsbury County Court proceedings for the administration of his estate, making Mrs. Cattle, the widow and executrix of the deceased, defendant to the proceedings. The deceased in his lifetime, and Mrs. Cattle subsequently, resided at Holloway, outside the district of the Bloomsbury County Court, but within the metropolitan district. The deceased carried on business within the district of the Bloomsbury County Court, and so did his widow after his death. Taylor also carried on business within the same district.

By section 74 of the County Courts Act, 1888: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant, or one of

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

the defendants, shall dwell or carry on his business at the time of commencing the action or matter."

By section 75: "The provisions of the next preceding section shall not apply to any of the following proceedings; but . . . (3) Proceedings for the administration of the assets of a deceased person shall be taken in the court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode."

By section 84: "Where a plaintiff shall dwell or carry on business in the district of the Bloomsbury County Court of Middlesex, or in the district of the Brompton County Court of Middlesex"—and so on, enumerating all the metropolitan county court districts—"and the defendant shall dwell or carry on business in the district of any of the said courts, the action or matter may be commenced, and all proceedings thereon taken and had, either in the court of the district in which the plaintiff shall dwell or carry on business, or in the court of the district in which the defendant shall dwell or carry on business."

The county court judge thought that, inasmuch as neither the deceased nor his executrix had their place of abode within the district he was precluded by sub-section 3 of section 75 from entertaining the proceedings, and therefore declined to hear the matter.

F. J. Lowe, for the defendant in the administration proceedings, showed cause.—The county court judge rightly declined jurisdiction. Section 74 is a general rule applying to "every action or matter." Section 84 uses the same words, "the action or matter"; and the effect of section 84 is to modify the general rule in its application to the metropolitan district. Section 75, on the other hand, deals with various special "proceedings," which are neither actions nor matters within the meaning of section 74; and sub-section 3 deals with administration proceedings. Section 75 thus stands quite apart from section 74, and its operation is not modified by section 84.

Rose-Innes, for the plaintiff in the administration proceedings, was not called upon to argue.

Fry, L.J.—The question is as to the jurisdiction of the judge of the Bloomsbury County Court to entertain these administration proceedings, which are brought by Taylor, who carries on business within the district of that court, against Mrs. Cattle, who also carries on business within the same district. It is necessary to consider the sections of the County Courts Act, 1888. By the interpretation clause (section 186), "action" shall include suit, and shall mean every proceeding in the court which may be commenced by plaint; and "matter" shall mean every proceeding in the court which may be commenced otherwise than by plaint. Therefore the two words "action" and "matter" include all possible proceedings which may be commenced in the court. Section 74 says that, except where by the Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant dwells or carries on business. Section 75 makes an exception to section 74. It says that the provisions of that section "shall not apply to any of the following proceedings." The word "proceedings" here is a single word used to express both actions and matters. Sub-section 3 says that administration proceedings shall be taken in the court in the district of which the deceased had his place of abode or the executor has his place of abode. In the present case the place of abode of the deceased and that of the executrix are outside the district of the Bloomsbury County Court.

Then section 84 says that where the plaintiff dwells or carries on business in the district of any metropolitan county court, and the defendant dwells or carries on business in the district of any metropolitan county court, the action or matter may be commenced, and all proceedings thereon taken, either in the court of the district in which the plaintiff dwells or carries on business or in the court of the district in which the defendant dwells or carries on business. If this section applies, the judge has jurisdiction. In my opinion it does apply. It is said that section 84 constitutes an exception to section 74, and not to section 75. But section 84 is a local provision, the two other sections being generally applicable to the whole country. I see no reason why section 84 should not apply to administration proceedings as well as to other proceedings. I think that section 84 is not only an exception to section 74, but also to section 75. I am therefore of opinion that the county court judge had jurisdiction.

Mathew, J.—I am of the same opinion. I think that section 74 stands clear of section 84, and that section 75 equally stands clear of section 84.

Order absolute.

Solicitors for the plaintiff, *Mann & Taylor.*

Solicitor for the defendant, *T. A. Lee.*

Court of Appeal.

From Chan. Div. Feb. 11.

In re Brighton and Dyke Railway Co. (*a.*)

Railway company—Scheme of arrangement—Assent of preference shareholders—Ordinary shares split into preferred and deferred half-shares—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 12, 17—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 14—*Brighton and Dyke Railway Act*, 1877 (40 & 41 *Vict. c. clxxxix.*), *ss.* 10—13, 17.

A railway company, by its special Act, was empowered to divide any share in its capital into a preferred half-share and a deferred half-share; the dividend which would have been payable on an entire share to be applied, first, in payment of a dividend not exceeding five per cent. per annum on the preferred half-share, and the remainder (if any) on the deferred half-share; each preferred half-share to be entitled to such dividend in priority to the deferred half-shares bearing the same number; the several half-shares to be half-shares in the capital of the company, and every two half-shares (whether preferred or deferred, or one of each) held by the same person, to confer such right of voting at meetings of the company, and to have all such other rights, liabilities, and incidents as attached or were incident to an entire share.

The share capital of the company, on its incorporation, consisted exclusively of ordinary shares. The company, in exercise of the power in that behalf contained in its special Act, divided a part of its shares into preferred half-shares and deferred half-shares. The directors of the company subsequently prepared and filed a scheme of arrangement with the creditors of the company.

Held (reversing North, J.), *that the holders of preferred half-shares were not preference shareholders nor a class of preference shareholders within the meaning of section* 12 *of the Railway Companies Act*, 1867, *and therefore that it was not necessary to procure their assent as such to the scheme of arrangement, in the manner required by that section.*

Appeal from North, J.

(*a.*) Reported by M. J. Blake, Esq., Barrister-at-Law.

By the Brighton and Dyke Railway Act, 1877 (40 & 41 Vict. c. clxxxix.), the Brighton and Dyke Railway was incorporated as a company, with a capital of £72,000 in 7,200 shares of £10 each. The shares were all ordinary shares. Section 10 of this special Act gave the company power, with the authority of three-fourths of the votes of the shareholders at a general meeting of the company specially convened for that purpose, "to divide any share in their capital into half-shares, of which one shall be called 'preferred half-share,' and the other shall be called 'deferred half-share.'" Section 11 enacted that "the dividend which would . . . be payable on any divided share, if the same had continued an entire share, shall be applied in payment of dividends on the two half-shares in manner following—*i.e.*, first, in payment of dividend after such rate not exceeding five per cent. per annum as shall be determined once for all at a general meeting of the company . . . on the amount for the time being paid up on the preferred half-share, and the remainder (if any) in payment of dividend on the deferred half-share. . . ." Section 12 enacted that "each preferred half-share shall be entitled, out of the profits of each year, to the dividend which may have been attached to it by the company as aforesaid, in priority to the deferred half-share bearing the same number." Section 13 provided for the registration of each half-share and the issue of certificates of each half-share bearing the same number as the certificate of the original entire share. Section 17 enacted that "the several half-shares under this Act shall be half-shares in the capital of the company, and every two half-shares (whether preferred or deferred, or one of each) held by the same person shall confer such right of voting at meetings of the company, and (subject to the provisions hereinbefore contained) shall confer and have all such other rights, qualifications, privileges, liabilities, and incidents as attach and are incident to an entire share."

The company, under the power conferred by section 10 of their special Act, had "split" 4,960 of the shares into 2,480 preferred half-shares and 2,480 deferred half-shares, leaving 2,240 shares "unsplit"; the preferred half-shares to have a five per cent. dividend. Subsequently, the company being unable to meet its engagements with its creditors, the directors prepared, and on the 11th of December, 1889, filed, a scheme of arrangement under section 6 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and that scheme was, on the 23rd of December, 1889, submitted to an extraordinary general meeting of ordinary shareholders specially called for that purpose, and was assented to by a large majority of the shareholders.

On the 2nd of January, 1890, the directors presented a petition, under section 16 of the Railway Companies Act, 1867, for the confirmation of the scheme by the court. The petition was opposed by a minority of shareholders who objected to the scheme.

North, J., ordered that the petition should stand over generally for the purpose of enabling the directors to procure the assent of preference shareholders in accordance with the Act of 1867.

The question in issue was whether or no the holders of preferred half-shares were preference shareholders or a class of preference shareholders within the meaning of section 12 of the Act of 1867, which section enacts as follows:—"The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows—if there be only one class of guaranteed or preference shareholders, then by three-fourths in value of that class; and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each of such class."

The only other section of the Act of 1867 material to be referred to is section 17, which provides as follows:—"After hearing the directors and any creditors, shareholders, or other persons whom the court thinks entitled to be heard on the application, the court, if satisfied that the scheme has been, within three months after the filing of it, . . . assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme."

The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), by section 13 enables any company which is by its special Act authorized to raise any additional sum by the issue of new preference shares to create and issue new shares, either ordinary or preference; and section 14 provides that "the preference shares so issued shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each year, in priority to the ordinary shares . . . of the company."

The directors appealed from the decision of North, J.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the appellants.—The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 13, gives power to railway companies which have paid a dividend on their ordinary stock of not less than three per cent. per annum to split their ordinary stock into preferred and deferred ordinary stock. Though that Act does not apply to this company, yet the provisions as to splitting are similar to those contained in the special Act of this company. The holders of preferred half-shares are not holders of preference shares, nor a class of preference shareholders within the meaning of section 12 of the Act of 1867, therefore it is not necessary that their assent should be obtained as such, in the manner required by that section. The directors have obtained the assent of ordinary shareholders as required by section 13 of the Act of 1867. The holders of the preferred half-shares are really only ordinary shareholders. Preference shareholders are those who are entitled to take out of the profits a preferential dividend in priority to the ordinary shareholders: section 14 of the Companies Clauses Act, 1863. If these preferred half-shares are to be considered to be preference shares, then stock of the same kind is to be considered as preference stock, and might be invested in, as such, by trustees under the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), s. 3 (*g*); whereas it is obvious such an investment was never intended to be authorized. The shares in this company have not in fact been all split.

S. Stephens, for the holders of some of the preferred half-shares, *contrà*.—The company have treated the holders of preferred half-shares as preference shareholders in the ordinary sense. In their circulars they speak of these shares as "fixed five per cent. preference shares." The effect of "splitting" is that the preferred half-share is always to have preference. It is a particular class of preference share. The power of splitting shares in this company depends entirely on section 10 of their special Act. The object of this section was to enable the company to create a class of preference shares without being obliged to get a fresh Act of Parliament for that purpose.

Cozens-Hardy, Q.C., replied.

COTTON, L.J. — I don't intend at present to express any opinion as to what might be the result in a case where all the shares in a company like this had been split; but I am of opinion that there is not, at present, in this company a class of preference shareholders within the meaning of section 12 of the Act of 1867. The practice of "splitting" shares does not seem to have been in existence in 1867, but what we have now to decide is, whether or no the shares in this company which have been split, under the power contained in the special

Act, do form a class of preference shares within the Act of 1867. I am afraid I do not entertain so clear an opinion on the point as my learned brethren do; for the special Act of this company does not use the same nomenclature as the Act of 1868, and say in express terms that it treats part of the split shares as preferred ordinary stock, and the other part as deferred ordinary stock. But in my opinion it cannot, in substance, be said that there is any class of preference shareholders within the meaning of the Act of 1867, because in the special Act there is nothing mentioned but ordinary shares, and there is no statement that there is to be any preference shares or preference stock at all.

On looking at the special Act of this company one sees that two of these half-shares do not together constitute one entire share; the Act only gives the holder of two of these half-shares the same right of voting at meetings of the company as if he were the holder of one entire share, and that is an entirely different thing from enacting that two of the half-shares constituted one entire share. That seems to me to create a difficulty in the way of the view taken by North, J., for how can it be said that there is any class of preference shares where no preference shares exist, but only two half-shares, which when held by one person gave him the same right of voting as if they were one entire share?

When these split shares were introduced, the framers of the special Act did not provide as to whether the two halves were to be considered preference shares within the Act of 1867 or not. I do not think we can hold them to be so, because preference shares are described by the Companies Clauses Act, 1863, s. 14, as being "entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares of the company." But that is not what has been done in this case; the dividend attributable to the ordinary shares is to be given to the split shares, but then that dividend is dealt with in this way: the preferred half of the split share is to have a fixed dividend, and the remainder (if any) is to go to the deferred half of the split share. Though, therefore, there may be a difference of interest as between the holders of the preferred half-share and the holders of the deferred half-share (which may, in the opinion of a judge, make it reasonable, before confirming the scheme, that there should be some assent of the holders of the preferred half-shares), yet I cannot see that section 12 of the Act of 1867 has hit upon the holders of these preferred half-shares, as either preference shareholders or a class of preference shareholders.

I differ, therefore, from North, J., in the view that he took—viz., that the assent of the holders of the preferred half-shares is required by section 12 of the Act of 1867, but I express no opinion as to what had better be done if he sees that there is any difference of interest between the holders of the preferred and the deferred half-shares.

LINDLEY, L.J.—North, J., ordered the petition to stand over, on the theory that this company contained a class of persons who are preference shareholders within the Act of 1867, and that the assent of that class, as required by section 12 of the Act of 1867, had not been obtained. The form of the order made by him clearly shows that that was his view. Was that view right? In my opinion this company contained no class of shareholders who are preference shareholders within the meaning of the Act of 1867, and, therefore, it was not necessary to obtain the assent of that class as required by section 12 of the Act of 1867.

The practice of "splitting" shares has originated since 1867; it seems to have been unknown then. That is how the confusion has arisen in the present case. The holders of the preferred half-shares have, no doubt, as between themselves and the holders of the deferred half-shares, a priority, but they are not what is commonly called preference shareholders, and they are not within the class of persons denoted by that expression in the Act of 1867. I think, therefore, that North, J., erred in the construction he put on section 12 of the Act of 1867. When the petition comes before him again, he will, of course, have to deal with the matter under section 17 of the Act of 1867, and these holders of preferred half-shares will be entitled to be heard in opposition to the scheme. It will be the duty of the judge to see that they are not unfairly dealt with, and that their rights are sufficiently protected, and he may decline to sanction the scheme without their assent. That is all within his power under section 17, and they are sufficiently protected by the duty cast on him by that section.

LOPES, L.J.—In this company there are no preference shares at all; all the shares are ordinary shares which have been split into preferred and deferred half-shares. Preference shares, as I understand the definition of them, are shares which give the right to the holder of them to receive interest thereon in priority to ordinary shareholders. I do not think the holders of these split shares are in that position, and, therefore, they do not come within section 12 of the Act of 1867. The practice of splitting shares does not seem to have been known in 1867, and the Act of 1867 was passed without any reference to the state of things which has happened in regard to this company.

Appeal allowed.

Solicitors for the appellant company, *Powell & Rogers.*

Solicitor for the respondents, *F. J. Blake.*

From Chan. Div. Dec. 7, 9, 10.

TOMLIN *v.* LUCE. (*a.*)

Mortgage—Sale by mortgagee—Misdescription—Compensation to purchaser—Liability of mortgagee to mortgagor—Measure of damages—Minutes of judgment.

On a sale of a building estate by first mortgagees, the particulars, which were prepared by an auctioneer employed by the first mortgagees, contained an erroneous statement that the roads on the property were kerbed and sewered, and the purchaser claimed and obtained compensation in respect of this misstatement.

Held, that, as between the first mortgagees and the second mortgagees, the former were liable to the latter, but only if, and so far as, any loss had been occasioned by the misstatement; that the compensation allowed to the purchaser was not, however, the measure of that loss; and, therefore, that the judgment of Kekewich, J., *on that point* (37 *W. R.* 490, 41 *Ch. D.* 573) *could not stand.*

Appeal from the decision of Kekewich, J., reported 37 W. R. 490, 41 Ch. D. 573.

The plaintiffs in this action were second mortgagees of a building estate which had been sold by the defendants, the first mortgagees, under the power of sale contained in their mortgage. The property was sold in lots, and the particulars of lots 2, 3, and 4, which were prepared by the defendants' auctioneer, contained a statement that "all roads on the property are constructed in the best manner, are kerbed and sewered, and there is perfect drainage." The property was purchased for £20,800, but the purchaser having ascertained, after the sale, that the above statement was not correct, refused

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

to complete without compensation. The vendors, after some negotiations with the purchaser, agreed to allow the latter to deduct £895 from the £20,800, as compensation.

The plaintiffs by this action claimed, as against the defendants, an account of the purchase-moneys, on the footing of wilful default, and claimed to be entitled to charge the defendants, in taking the accounts, with the sum of £895, as part of the purchase-money which the defendants ought to have received.

Kekewich, J., at the trial of the action, found that, as between the vendors and the purchaser, the sum of £895 was a reasonable and proper sum to allow the purchaser as compensation in respect of the misstatements; but he also held that, in taking the accounts between the plaintiffs and the defendants, the defendants ought to be charged with this £895.

The defendants appealed.

Warmington, Q.C., and *G. Harris Lea*, for the appellants.—The misstatement the defendants made was a misstatement inducing an increase, not a diminution in the price, and yet the judge below has held that the defendants must account to the plaintiffs for the whole £895. [They were stopped.]

Neville, Q.C., and *Charles Browne*, for the plaintiffs, the respondents.—The case was argued below on the point as to whether or not a mortgagee selling under a power of sale was responsible for the negligent act of his agent, and for loss arising therefrom. It is quite possible that the misstatement may result in a loss on the purchase-moneys, and as to the amount, that is a question of *quantum*. It seems to have been admitted in the court below that the plaintiffs were entitled to the whole £895, or to nothing. We are, however, willing to take an inquiry now, as to what was the actual loss arising by the misstatement.

G. Harris Lea, for the appellants, did not object to such an inquiry.

COTTON, L.J.—This is an appeal by the defendants against a judgment of Kekewich, J., and the defendants are appealing as to the exercise of a power of sale contained in their mortgage. They got for the property a bid, and a contract was made for a sum of £20,800. Unfortunately the conditions of sale contained a statement by the auctioneers of importance. It was this, that, it being building land, and to a certain extent prepared for building, "the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect drainage." The purchaser found out that that was not correct, and he contended that he was entitled to rescind unless some allowance was made for the misstatement, and after some negotiation between the parties, a sum of £895 was allowed to be deducted from the purchase-money. The defendants, therefore, did not get the whole of that sum, but only £19,905, and the plaintiffs, who are second mortgagees—whom therefore we may treat as owners of the equity of redemption—said that that ought not to be allowed, that that £895 ought to be struck out and disallowed; and they put it in this way by their pleadings, and I suppose by their argument, that the defendants, the first mortgagees, were answerable for that £895 on this ground, that they were answerable for what they received or for what, but for their wilful default, they might have received. The judge has found that that sum, was a sum reasonably and properly allowed by the first mortgagees in order to avoid any contest with the purchaser. I do not see how, on that footing, and on the contention of the plaintiffs, that sum of £895 could be disallowed to the first mortgagees, as in fact it has been disallowed by Kekewich, J., by the judgment which he gave. On what exact ground he disallowed it, I cannot understand. Probably he was led to that judgment by the contention on the one side, and on the other, because the defence seems really to have been very much, if not entirely, directed to this, that the mortgagees, selling under their power, employed a competent auctioneer, and were not answerable for any blunder which the auctioneer committed. There they were wrong, and that point, I think, was not argued before us; but I think probably that Kekewich, J., was misled in his judgment by the two grounds taken on both sides—on both the plaintiff's and defendant's sides—but certainly we cannot agree with that judgment as being a correct statement of the law. What we think is this, that the mortgagees when they sold, there being that blunder made by the auctioneer, were answerable for any loss which was occasioned by that blunder. It may be that there was none. It may be that there was considerable loss occasioned by it, because, of course, as Kekewich, J., says, and I think rightly, in an estate like this, the question whether the roads were properly made throughout, and whether the things stated to have been done had been done, was an important matter, and he finds, as against the mortgagees, the value of the misstatement to be £895. I think the value of the misstatement was this—what would have been given by a purchaser for the property if it had been properly described—that is to say, if the fact that the roads had not been kerbed and sewered, had been stated? In other words, the difference between £19,905 and that which would have been given if the property had been properly described. The loss occasioned is a matter of fact, and in my opinion, therefore, the judgment is not right in treating the defendants, the mortgagees, as answerable for this £895 as a sum which, but for their wilful default, they might have received. That being so, we must disaffirm the judgment. The plaintiff, when he found that we intimated our opinion against the view taken by Kekewich, J., asked for an inquiry as to what the damages were, and this was not objected to on the other side. What ought to be done, we think, is to direct an inquiry, and Fry, L.J., has prepared and will read the terms of the order which we are prepared to make. We must ascertain what really was the loss occasioned by this misstatement. In our opinion the mortgagee exercising the power of sale is answerable for that loss. Fry, L.J., has also prepared minutes dealing with the costs. The view taken in those minutes is, I think, a correct one. The first mortgagees have their costs up to and including the trial, then this inquiry will be directed; and his lordship has framed the minutes in such a way that it will not be necessary for the matter to come back to us, but in accordance with the result of the inquiry will the costs of the inquiry be borne.

BOWEN, L.J.—I am of the same opinion as Cotton, L.J. I agree with the order as framed by Fry, L.J. I do not agree with the judgment of the court below, or with the reasoning of it. I do not think that reasoning is the proper line of reasoning to apply to the facts of this case, and as the case below has been reported as an authority with respect to the measure of compensation, I think that that case and the reasoning of it must be taken to be overruled, and to be no longer an authority so far as it stands upon the records of the court. But, on the other hand, we must recollect that this action has got into a tangle, owing, I think, to the way in which it was presented to Kekewich, J., at the trial, and by which he was led to adopt the line of reasoning which turns out really not to be applicable to the case. I agree that the true measure of damages, or the true measure of allowance I ought to say, is that which has been stated by the Lord Justice and embodied in the order. The only point upon which I have some hesitation is this. I am not certain, if I had been sitting by my own unaided, I will not say light, but twilight,

that I should have come to the same conclusion as to the costs of the trial below. It is a matter with which my brothers are so infinitely better fitted to deal with than I am, that I willingly yield my view on this point to theirs.

FRY, L.J.—[The Lord Justice read the minutes which are given below, and proceeded:—] I am of the same opinion. It does not appear to me that the reasoning of Kekewich, J., can be maintained. I am not able myself to follow it. I think the learned counsel who appeared for the respondents are quite right in the course which they took in not insisting upon maintaining the judgment as it stands. Then arises the question of inquiry, and as to this we were relieved of much difficulty by the appellants' counsel not objecting to that inquiry. The case was evidently in a very tangled condition, partly by reason of the way in which it had been conducted in the court below, and partly by reason of the admissions which seem to have been made on both sides; but under the circumstances of the case I think the minutes of the judgment which I have already read are the right ones for this court to pronounce.

With regard to the question of costs in the court below, I agree with Cotton, L.J., and for this reason. It appears to me that the plaintiffs came with an entirely false view of their case, their pleadings stating a claim to £895 as a specific disallowance, and they claimed to have an account taken as against the first mortgagees upon the footing of wilful default. They not only put that forward in their pleadings, but they seem to me to have put that as the case before the learned judge, and I think they were entirely wrong in this case until the moment when Mr. Neville asked for the inquiry in lieu of the disallowance of £895. I think, therefore, that they were absolutely wrong at the hearing before the learned judge, and ought to pay the costs up to and including that hearing. The subsequent costs caused by the inquiry, we deal with by making them follow the event. Under the circumstances no costs of the appeal.

MINUTES OF JUDGMENT.—The plaintiffs, by their counsel, admitting that the disallowance of the £895 cannot be maintained, and asking in lieu thereof for the inquiry hereinafter directed, and, the defendants not objecting to such inquiry, vary the judgment of Kekewich, J., and, as varied, let the judgment stand as follows:—This court doth order that the following inquiry and accounts be made and taken—that is to say (1) An inquiry whether the lots 2, 3, and 4 would have sold for any, and, if any, for what, sum in excess of the sum of £19,905 (being the sum of £20,800 less £895) in case the same had been sold without the misstatement contained in the particulars in the pleadings mentioned; (2) An account of what, on the 5th of May, 1887, was due to the defendants under and by virtue of the indentures of mortgage dated October 26, 1883; (3) An account of the defendants' costs of this action up to and including the hearing before Kekewich, J.; (4) An account of the proceeds of sale of the hereditaments comprised in the said indentures of mortgage received by the defendants or by any other person or persons by the order or for the use of the defendants. Declare that in case that it shall appear on the inquiry numbered (1) that the said lots would have sold for any sum in excess of the sum of £19,905, then the costs of the said inquiry are to be borne by the defendants. But if it shall appear that the said lots would not have sold for any sum exceeding the said sum of £19,905, then the said costs are to be borne by the plaintiff. Let the smaller of the two following sums be deducted from the larger of them, and the balance thereof be certified—that is to say, (A) the amount of proceeds of sale as certified on account numbered (4), together with the sum, if any, which may be certified in answer to inquiry numbered (1); (B) the sum due on the said indentures of mortgage as certified in answer to account numbered (2). Let interest be computed on the said balance at five per cent. per annum from the 5th of May, 1887, and certified accordingly. Let the plaintiff be charged with the amount of account numbered (3), and to or from the said balance or interest, Let the costs of the said inquiry numbered (1) be added or deducted as the case may require. Let the ultimate balance, according to all the said directions and declarations, be certified. Liberty to apply in chambers for the payment of such balance and in respect of any costs not dealt with by this order. No costs of this appeal.

Solicitors for the appellants, *Lane, Munro, & Soutter.*

Solicitor for the respondents, *Thairlwall.*

From Q. B. Div. Feb. 19.

HODGSON v. BELL. (a.)

County court—Power to remit action—Claim reduced to a sum not exceeding £100—Reduction by payment after action—"Payment, an admitted set-off, or otherwise"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

Where, in an action of contract, the claim indorsed on the writ is reduced to a sum not exceeding £100 by payment of part after action brought, there is no jurisdiction under section 65 *of the County Courts Act,* 1888, *to remit the action for trial in a county court.*

Appeal from an order of the Divisional Court remitting an action for trial in the county court.

The claim indorsed upon the writ was for £173 money lent. Upon an application under order 14 the plaintiff obtained leave to sign judgment for £101, and the defendant paid that sum. The defendant had leave to defend as to the balance. The master, upon the application of the plaintiff under section 65 of the County Courts Act, 1888, ordered the action to be tried in the county court. The defendant appealed, and Charles, J., referred the matter to the court.

In the Divisional Court Denman, J., held that there was power to remit the action to the county court, Wills, J., held that there was not. The order of the master therefore stood. The defendant appealed.

51 & 52 Vict. c. 43, s. 65.—"Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed £100, or where such claim, though it originally exceeded £100, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding £100, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court . . . and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly," &c.

Colam, for the defendant.—There was no jurisdiction here to remit the action. The words of section 65, "payment, an admitted set-off, or otherwise," are the same as those used in section 7 of the County Courts Act, 1867, and it was held that those words did not include a payment after action brought: *Osborne* v. *Homburg*, 24 W. R. 161, 1 Ex. D. 48; *Foster* v. *Usherwood*, 26 W. R. 91, 3 Ex. D. 1. In section 26 of the County Courts Act, 1856, the words used were "payment into court, payment, an admitted set-off, or other-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

wise," and it was held in *Gray* v. *Hopper*, 36 W. R. 716, 746, 21 Q. B. D. 15, 246, that those words included payment after action brought. The Legislature, in the present Act, knowing of those decisions, deliberately adopted the words used in the Act of 1867, and therefore section 65 does not include a case where the claim is reduced to a sum not exceeding £100 by payment after action brought.

T. W. Chitty, for the plaintiff.—This is a new statute, and the court will not follow the decisions upon the former statutes. The language of the present section is different. Under the Act of 1867 the application could only be made by the defendant, and had to be made within eight days. In the present section the application can be made by either party, and may be made at any time, clearly showing that the Legislature contemplated a reduction of the claim after action brought. If the contention of the defendant is adopted the effect will be to narrow the Act.

Lord COLERIDGE, C.J.—This appeal must be allowed. There were before the County Courts Act, 1888, two sections of two separate Acts stating the circumstances under which actions could be remitted or transferred to the county court. In each section certain elements of reduction were stated by which a claim, that was originally beyond the county court jurisdiction, might be reduced to a sum within the jurisdiction. One section used a set of words which plainly referred to matters reducing the claim before action brought, and accordingly the courts construed the section in that way. The other section used an additional phrase, "payment into court," which could only occur after action brought. It was held that the words "or otherwise" following that phrase included a payment after action brought. There being then those decisions upon those two sections, the County Courts Act, 1888, was passed, a consolidating and amending Act, in which the words "payment into court" is omitted. The Legislature, under those circumstances, must have carefully left those words out, and the only inference that can be drawn is that it intended to leave them out with all the consequences arising therefrom by reason of the decisions of this court. There was therefore no jurisdiction to order this action to be tried in the county court.

Lord ESHER, M.R.—In section 26 of the County Courts Act, 1856, the words used were "payment into court, payment, an admitted set-off, or otherwise." Though the word "payment" meant payment before action brought, the words "or otherwise," by reason of the preceding words "payment into court," were held to include payment after action brought. Then came the County Courts Act, 1867, and section 7 expressly omitted the words "payment into court." In *Foster* v. *Usherwood* it was held that the word "payment" there also meant payment before action, and being coupled with "set-off," which must arise before action, it was held that the words "or otherwise" must also refer to something happening before action. The present statute is *in pari materiâ* with those two statutes as so construed. The words used in section 65 are the precise words used in section 7 of the Act of 1867. The present Act is a consolidating Act, and, though it is also an amending Act, it is perfectly clear that the words used must bear the same construction as the same words in the former Act. It was said that the words of section 65 giving an unlimited time to make the application showed that the intention was to alter the meaning placed upon the words in the former Act. Unless that was a necessary implication the court could not depart from the construction placed by the former decisions upon the words. I can see no such necessary implication here.

FRY, L.J.—I am of the same opinion. The case is really unarguable. There were two sections in two former Acts, one of which was held to extend to payment after action brought, and the other not. The Legislature, knowing of those decisions, deliberately excluded the words which had been held to extend the section to payment after action brought. The Legislature must have done so with the intention of adopting those decisions.

Appeal allowed.

Solicitors for the plaintiff, *Stocken & Jupp*, for *Lomer & Son* Southampton.

Solicitors for the defendant, *Cotton & Son*.

High Court of Justice.

Chan. Div. North, J. — Dec. 14.

FAITHFULL v. WOODLEY. (a.)

Practice—Motion for judgment in default of pleading—Foreclosure action—Personal judgment—Allegation of amount due—Admission—Form of judgment—Rules of Supreme Court, 1883, *ord.* 19, *r.* 13; *ord.* 27, *r.* 11.

On a motion for judgment in default of defence in a foreclosure action, the plaintiff (who was an equitable mortgagee of leaseholds) asked for a personal judgment against the defendant, the mortgagor (who did not appear), for the amount which the plaintiff alleged by his statement of claim to be due to him, on the ground that the defendant, by not pleading, had admitted that amount to be due to him. The plaintiff had not, by his statement of claim, asked for a personal judgment against the defendant.

Held, that the defendant's admission by not pleading, could only be treated as made for the purpose of the relief asked by the statement of claim, and that, as the defendant did not appear, the plaintiff could only have such relief as he had asked by his statement of claim. An account was therefore directed of what was due to the plaintiff.

Motion for judgment.

This was a foreclosure action. The plaintiff was the equitable mortgagee of certain leasehold property; the defendant was the mortgagor. The mortgagor had covenanted to pay the mortgage debt, with interest, and upon the request of the mortgagee to execute a mortgage of the leasehold hereditaments by way of underlease or of assignment of the residue of the original term, as security for the debt and interest, and that meanwhile the property should be charged with the payment to the mortgagee of the mortgage debt and interest. No mortgage had been executed. The plaintiff, by his statement of claim, claimed an account of what was due to him by virtue of his mortgage; payment of the amount found due; and, in default of payment, to have his security enforced by foreclosure or sale, and an assignment of the property for the residue of the term and possession thereof.

The defendant did not put in any defence.

The plaintiff now moved for judgment in default of pleading. The defendant did not appear at the hearing.

J. G. Wood, for the plaintiff.—[NORTH, J.—Why is the application not made by summons?] Because rule 5a of order 55 does not contain any provision that an order for conveyance of the legal estate in property sub-

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

ject to an equitable mortgage can be made on summons. [North, J.—It is not necessary for me to decide now whether the court has jurisdiction to order a conveyance on summons, but I shall give no special decision as to costs.] I now ask for a personal judgment against the mortgagor for the debt and interest in the alternative form settled by the Court of Appeal in *Farrer* v. *Lacy, Hartland, & Co.*, 34 W.R. 22, 31 Ch. D. 42, as applicable to a case in which the amount due on the mortgagor's personal covenant is admitted or proved at the trial. The defendant, by not pleading, must be taken to have admitted the allegation in the statement of claim of the amount due: ord. 19, r. 13. [North, J.—There can be no admission because the defendant does not appear.] The allegation in the statement of claim as to the amount due is not denied, therefore it is admitted. [North, J.—You do not by your statement of claim ask for personal judgment.] It was not asked for in *Farrer* v. *Lacy, Hartland, & Co.* I ask for what I am entitled to on my statement of claim.

North, J.—As the defendant does not appear I cannot give the plaintiff any relief which he has not asked by his statement of claim. The plaintiff might have asked, by his statement of claim, for judgment for the sum which he alleges to be due, but he has not done so. The defendant's admission by not pleading can only be treated as made for the purpose of the relief which is asked by the statement of claim. The judgment, therefore, will be in the form given in *Farrer* v. *Lacy, Hartland, & Co.*, for a case in which the amount due is not admitted.

Solicitors, *Faithfull & Owen.*

Chan. Div. } North, J. } Dec. 7.

In re Wells.
Wells *v.* Wells. (*a.*)

Infant—Maintenance—Right to accumulations during minority—Apportionment of maintenance as between income of vested and contingent life estates—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-section* 2.

Under the trusts of a will, an infant granddaughter of the testator was entitled to a life interest in the moiety of the annual income, of a pecuniary legacy and of a freehold house, contingently on her attaining twenty-one or marrying; and power was given to the trustees in their discretion to apply the whole or part of the income arising therefrom for the maintenance of the granddaughter during her minority; the granddaughter was also entitled under the will to a vested life interest in one-sixth share of the income of the testator's residuary estate. After the testator's death, and while the granddaughter was still an infant and unmarried, an order was made in chambers appointing a guardian of the granddaughter, and directing that the trustees of the will should, out of the funds subject to the trusts by the will declared in favour of the granddaughter, pay on account of her maintenance, £100 per annum to her guardian. After the date of this order, and thenceforth during the minority of the granddaughter, the trustees paid the £100 to the guardian out of the whole income arising from the granddaughter's share of the trust property, without distinguishing between the income arising from her share of the pecuniary legacy and the freehold house on the one hand, and the share of residue on the other; and they accumulated the surplus income.

On the granddaughter attaining the age of twenty-one years, the question was raised whether she was absolutely entitled to the whole of the accumulations of income arising from her share of residue, and also in what manner the payments made for her maintenance were to be apportioned as between the income arising from her share of the pecuniary legacy and the freehold house on the one hand, and the one-sixth of residue on the other. There was an affidavit by the trustees that they had not exercised any discretion in the matter. The income arising from the granddaughter's share of the pecuniary legacy and of the freehold house was less than £100 per annum.

Held, that the granddaughter was absolutely entitled to the accumulations of income which had arisen from the share of residue.

Held, also, that the moneys paid for maintenance were primarily payable out of the granddaughter's share of the pecuniary legacy and freehold house, that being most for her benefit, and that, as the trustees had not exercised any discretion in the matter, the court could exercise it for them.

Adjourned summons.

Michael Wells, by his will dated the 26th of April, 1883, bequeathed to his trustees the sum of £2,600 upon trust to invest the same as therein mentioned, also his freehold house and premises called Orchard House, upon trust that his said trustees should stand possessed of the said trust fund, and the said freehold hereditaments and the annual income arising from the same respectively, upon trust, as to one moiety thereof, if and when his granddaughter Rose Wells should attain the age of twenty-one years, or marry under that age, to pay the income arising from such moiety to the said Rose Wells during her life for her separate use, and after her decease should stand possessed of the said moiety of the said trust fund and freehold hereditaments and the income thereof in trust for the children of the said Rose Wells, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry. Provided always that if the said Rose Wells should be under age and unmarried at the testator's death, the trustees might in their discretion apply the whole, or such part as they should think fit, of the income arising from the said moiety, for the maintenance, education, and support of the said Rose Wells, and such part of the said income as might not be required for such purpose should be accumulated and invested so as to follow the *corpus* of the fund and premises from which it arose; and as to the other moiety of the said trust fund and freehold hereditaments and the annual income thereof, upon such and the same trusts, and under and subject to the same provisoes and conditions, in favour of the testator's granddaughter Christina Wells and her children as were thereinbefore declared and contained as to the first-mentioned moiety in favour of the said Rose Wells and her children. Provided always that if either of them, the said Rose Wells and Christina Wells, should die without having had any child or children who should attain a vested interest under the trusts aforesaid, then the share of the one so dying should be held upon the same trusts for the other of them, the said Rose Wells and Christina Wells and her children, as were thereinbefore declared respecting her original share; and if both of them, the said Rose Wells and Christina Wells, should die without having had any child or children who should attain a vested interest under the trusts aforesaid, then the said trust funds and freehold hereditaments were to fall into and form part of the residue; and the testator devised to his trustees certain freehold hereditaments upon trust for his daughter Elizabeth Wells for life, and after her death for her children at twenty-one or marriage, and in default of such children the said hereditaments were

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

to fall into and form part of the residue; and the testator devised and bequeathed the residue of his real and personal estate to his trustees upon trust for conversion and investment as therein mentioned, and the testator directed his trustees to stand possessed of his residuary estate and the investments thereof as to one-sixth part thereof, upon the same trusts in favour of the said Rose Wells and her children as were thereinbefore declared in favour of his daughter Elizabeth Wells and her children, and as to another one-sixth part thereof upon the same trusts in favour of the said Christina Wells and her children as were thereinbefore declared in favour of the said Elizabeth Wells and her children.

The testator died on the 23rd of March, 1884. At the date of his death, Rose Wells and Christina Wells were both under the age of twenty-one years, and unmarried.

By an order made in the matter of the two infants on the 23rd of July, 1886, a guardian of the infants was appointed, and it was ordered that the sum of £200 per annum should be allowed for the maintenance of the infant Rose Wells out of the funds subject to the trusts declared in her favour by the said will, and the trustees of the will were ordered to pay on account of such maintenance £100 a year to the guardian, by half-yearly payments. The residue of the £200 was ordered to be paid out of other property to which the infant was entitled. From the date of this order until Rose Wells attained the age of twenty-one years the trustees paid the £100 a year to the guardian out of the whole income arising from a moiety of the said legacy and freehold house and the one-sixth share of residue, without distinguishing between income arising from Rose Well's share of the legacy of £2,600 and the freehold house on the one hand, and her share of residue on the other, and accumulated the surplus income. Rose Wells attained the age of twenty-one years on the 21st of May, 1889. She then claimed that, inasmuch as she had under the will a vested life interest in a one-sixth share of the residue, she was entitled to receive all the accumulations of income arising from such share, and she also claimed that her maintenance ought to have been paid out of the income arising from her share of the legacy of £2,600 and the freehold house, in which she only had a contingent life interest, in relief of the income arising from her share in the residue, in which, under the will, she had a vested life interest. The trustees of the will thereupon took out this originating summons against Rose Wells, Christina Wells, and Rebecca Beville and her only child, Fredk. Wells Beville (the persons entitled to the shares of Rose Wells and Christina Wells in the residue, in the event of their both dying without having had any children), as defendants, to have it determined (*inter alia*) whether Rose Wells was entitled to payment of the whole of the accumulations of income arising during her minority from her share of the residue; and if she was so entitled, in what manner the payments made for her maintenance ought to be apportioned between the income of the respective trust funds settled on her by the will.

The summons was adjourned into court.

There was evidence that the income arising from Rose Wells' share of the legacy and freehold house was less than the annual sum of £100 ordered to be allowed for maintenance.

There was an affidavit by the trustees that they had not exercised any discretion in the matter.

Rolt, for the summons.

Colt, for the defendants, Rose Wells and Christina Wells.—Rose Wells is entitled to all the accumulations which arose from her share in her grandfather's residuary estate. She took a vested life interest in her share, and not a contingent life interest, as in the case of the legacy and freehold house. So far as this point is concerned *In re Buckley's Trusts*, 31 W. R. 376, 22 Ch. D. 583, is exactly in point. Your lordship is not bound by section 43 of the Conveyancing Act, 1881. As the trustees have not exercised their discretion, but have paid maintenance out of the funds generally, without distinction, the court will now exercise their discretion for them: *Lucas* v. *King*, 11 W. R. 818.

Marcy, for the other defendants.—As to the accumulations of the income of the residue, I rely upon the express words of the Conveyancing Act, 1881. By section 43, sub-section 2, the trustees are directed to hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise. "Property" there means capital. *In re Buckley's Trusts* was a very different case from the present, for there the infant might have become entitled to *corpus*. With regard to the other point, as the trustees have not exercised their discretion, it is too late for them to do it now. [NORTH, J.—If they have not exercised their discretion, must not I exercise it for them?] I submit not, since the time has gone by during which income can be applied for maintenance. The order of the 23rd of July, 1886, precludes this question.

NORTH, J.—I think the point is quite clear. I am of opinion that the accumulations of the income of Rose Wells's share in the testator's residuary estate belong to her absolutely. I think the principle upon which the case of *In re Buckley's Trusts* was decided applies to the present one. I am by no means satisfied that the word "property" in sub-section 2 of section 43 of the Conveyancing Act, 1881, means capital exclusively; it, no doubt, includes capital. In the present case I shall be prepared to hold, if necessary, that Rose Wells is, as regards the income of her share of residue, the person who has "ultimately become entitled to the property" from which the accumulations have arisen within the meaning of sub-section 2. I am satisfied that the Conveyancing Act, which was passed for the purpose of shortening and simplifying conveyances, was not intended to alter the devolution of property. Then, as regards the question of apportionment, it seems to me that the case of *Lucas* v. *King* is exactly in point. I was under the impression at first that the trustees had exercised their discretion as to which fund should be applied to the payment of the maintenance, and if they had done so I should not interfere with it. It is clear, however, that they have not done so. They have received the income of both funds, and have applied so much of this income as was necessary for maintenance without distinguishing between the two funds, and have accumulated the surplus income. As, therefore, the trustees have not exercised their discretion in the matter, the court has now power to make the apportionment. It is clearly for the benefit of Rose Wells that the income applied for her maintenance should be treated as having come out of the legacy of £2,600 and the freehold house, in exoneration of the testator's residuary estate. There will, therefore, be a declaration that, as between the legacy of £2,600 and the freehold house on the one hand, and the residue on the other, Rose Wells' maintenance ought to have been paid out of the former fund in exoneration of the latter.

Solicitors for all parties, *R. B. Wheatley, Son, & Daniel.*

Chan. Div. } Stirling, J. } Nov. 23.

FRANCIS v. HARRISON. (a.)

Foreclosure action—Parties—Trustee representing cestui que trust—*Rules of the Supreme Court*, 1883, *ord.* 16, *r.* 8.

In a foreclosure action a mortgagee defendant who is a trustee of the money secured on his mortgage, and who has become bankrupt, does not properly represent his cestui que trust.

Motion for judgment.

This was a foreclosure action. The plaintiffs were first mortgagees; the defendants were the mortgagor, a second mortgagee, and the trustee in bankruptcy of the second mortgagee. The second mortgagee was a trustee of the money secured by his mortgage for several persons. In February, 1889, he was adjudicated a bankrupt, and he had not entered an appearance to the writ; the other defendants had appeared, but had not delivered any defence.

The action now came on on motion for judgment in default of pleading.

The question was raised whether the second mortgagee sufficiently represented his *cestuis que trust*.

Napier-Higgins, Q.C., and *B. Fossett Lock*, for the motion, referred to *Jennings* v. *Jordan*, 30 W. R. 369, 6 App. Cas. 698, and rule 8 of order 16. [NORTH, J., referred to *Mills* v. *Jennings*, 28 W. R. 549, 13 Ch. D. 639.]

None of the defendants appeared.

NORTH, J.—In my opinion the defendant Sankey (the second mortgagee) does not sufficiently represent his *cestuis que trust*. *Mills* v. *Jennings* was a redemption action. A foreclosure action differs entirely from a redemption action. In the former the defendant has to provide money to redeem the mortgage; in the latter the defendant has to receive money paid for redemption. It cannot be supposed that an insolvent trustee will be able to find money to redeem a mortgage. The observations made by Cotton, L.J., in *Mills* v. *Jennings* appear to me to be precisely in point. The Lord Justice said:—"Under ord. 16, r. 7, of the Rules of Court, 1875, trustees may, both as plaintiffs and defendants, sufficiently represent the trust estate without any of the parties beneficially interested being before the court, with power, nevertheless, for the court or judge to direct any of such last-mentioned persons to be made parties. But this rule is, in substance, a repetition of rule 9, section 42, of the Chancery Act, 1852, and it was argued that in suits relating to mortgages it had been held, as in *Goldsmid* v. *Stonehewer*, 1 W. R. 91, 9 Hare, *App.* 38, that trustees did not sufficiently represent their adult *cestui que trust* unless it was probable that the trustees, from being executors or otherwise, had funds in hand sufficient to enable them to redeem. But that case was a suit for foreclosure, in which the trustee was a defendant whom the plaintiff sought to foreclose; and there is a reason in such a case for not giving the plaintiff the relief he seeks, unless he brings before the court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the plaintiff trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the defendant Jennings, so as to prevent any further proceedings for redemption in respect of the property vested in the plaintiff as trustee." I should have had great difficulty in holding that even a solvent trustee who is a mortgagee sufficiently represents his *cestuis que trust* as defendant to a foreclosure action. But here the trustee is a bankrupt, and under these circumstances I think the *cestuis que trust* are not only proper, but necessary, parties to the action, and I cannot give judgment for foreclosure in their absence. I will give liberty to amend, but I can make no other order.

Solicitor for the plaintiffs, *H. A. Dowse*.

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div. } Kekewich, J. } Jan. 20.

AMERICAN BRAIDED WIRE CO. v. THOMSON & CO. (a.)

Patent—Infringement—Damages—Reduction in price arising from competition.

The defendants infringed the plaintiffs' patent, and in consequence of the competition thereby caused, the plaintiffs reduced the price of the goods. The official referee found that the damages consisted of (1) *the profits made by the defendants by the sale of the goods;* (2) *the loss arising to the plaintiffs by the reduction in price.*

Held, that the loss arising to the plaintiffs by the reduction in price was too remote, and could not be regarded in the assessment of damages, which must be limited to the profits made by the defendants by the sale of the goods by them.

United Horse Shoe and Nail Co. v. Stewart, 13 *App. Cas.* 401, 36 *W. R. Dig.* 63, *discussed and applied.*

Motion.

This action was brought for an injunction against an infringement of the plaintiffs' patent for improvements in braided wire bustles, and for damages. At the trial Kekewich, J., decided against the validity of the patent; but his decision was reversed by the Court of Appeal, and their judgment affirmed by the House of Lords. An inquiry as to damages was accordingly taken before the official referee, who awarded to the plaintiffs £8,625 for damages under the following heads: (1) Loss by diminution in price in consequence of the defendants' competition; (2) The actual amount of the defendants' sales.

This was an application to the court by the plaintiffs to adopt the report of the official referee, there being a cross-application by the defendants to vary the report.

Sir R. E. Webster, A.G., Moulton, Q.C., and *Roger Wallace*, for the plaintiffs.

Aston, Q.C., Cohen, Q.C., and *W. N. Lawson*, for the defendants.

KEKEWICH, J.—The official referee in his finding in this case reports that the plaintiffs' prices for goods sold during the period of infringement were diminished in proportion to the defendants' sales during the same period. He also reports that the plaintiffs might have sold at their own original prices but for the sales effected by the defendants. I adopt these findings of the referee as correct. But on this state of the facts a serious question arises—namely, whether the reduction in price caused by the competition of the defendants may be properly regarded as an element in assessing the damages, in other words, whether, in fixing the price of the articles sold both by the plaintiffs and defendants for the purpose of assessing damages, the price originally fixed by the plaintiffs should be taken as a basis, or the price subsequently ascertained and determined by the competition. There is nothing to prove that the fashion of wearing these articles dropped off during the period of

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

infringement, so that the plaintiffs could not have maintained their original prices. The question of damages caused by the difference of price arising from competition was discussed in *United Horse Shoe and Nail Co.* v. *Stewart* (13 App. Cas. 401, 36 W. R. Dig. 63). "The sole question," said Lord Macnaghten in that case (p. 416), "is, what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profit by reason of the reduction of price must be rejected. I do not think that was the natural or direct result of the respondents' acts."

In my opinion Lord Macnaghten there intended to lay down the rule that in an action for infringement, although the patentee may be entitled to the benefit of all sales made by the person infringing the patent as if they had been made by himself, so that he may take all the profits derived from such infringement, yet, if he thinks fit to reduce the price at which he himself was selling the goods in question, he is not entitled to recover the difference between the original and the lower price, because it is not the natural and direct consequence of the acts of the person so infringing, and the damage is therefore too remote. No damages must therefore, in my opinion, be given in respect of the reduction in price of the goods which the plaintiffs have themselves sold; but the only damages allowed must be in respect of the defendants' sales, calculated on the basis of the actual prices charged. That will reduce the damages from £8,625 to £1,654. The plaintiffs will have the costs of the inquiry before the referee, and the defendants will have the costs of the present application and cross-application.

Solicitors, *Burn & Berridge; Witham, Lambert, & Roskell.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Feb. 3.

FAIRCLOUGH v. ROBERTS. (*a*.)

Justices—Intoxicating liquors—Sale by retail—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Beerhouse Act*, 1834 (4 & 5 *Will.* 4, *c.* 85), *s.* 19—*Excise Act*, 1825 (6 *Geo.* 4, *c.* 81), *s.* 2.

The plaintiff, not being a brewer, held a licence under 6 *Geo.* 4, *c.* 81, *s.* 2, "*to sell strong beer in casks of not less than four gallons and a half imperial gallon measure, or of not less than two dozen reputed quart bottles at one time, to be consumed elsewhere than on his premises.*" *He was summoned under the Licensing Act*, 1872, *s.* 3, *for having sold beer by retail without being licensed to do so, in that he had sold beer in two dozen imperial pint or half-pint bottles, instead of in the manner stated in the licence, and he was convicted and fined for the said offence.*

Held, upon a case stated, that the conviction must be quashed, on the ground that, by section 74 *of the Licensing Act*, 1872, *when read with section* 19 *of the Beerhouse Act*, 1834, *a sale of beer by retail is defined to be selling in less quantity than four gallons and a half, that the quantity sold was the criterion of the offence, and that here there had been no offence shown under the Licensing Acts, as the quantity sold was in excess of the measurement statutably imposed.*

Case stated by the justices of Bangor in petty sessions under 42 & 43 Vict. c. 49, s. 33.

The case stated that the appellant, Fairclough, was "a person, not being a brewer, holding a licence to sell strong beer in casks of not less than four gallons and a half, imperial gallon measure, or of not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises," under the provisions of 6 Geo. 4, c. 81, s. 2. The appellant had been summoned under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, for having sold beer by retail when not licensed so to sell it—namely, by selling it in two dozen imperial pint or half-pint bottles. The case further found that the quantity of beer so sold amounted to more than what would have been contained in two dozen reputed quart bottles. The appellant had twice applied for another licence to sell by retail, but his applications had been refused. The justices convicted the appellant for the offence, and imposed a fine of £5, and the appellant thereby forfeited his licence.

The question submitted to the court was whether the appellant was entitled to sell beer in other than reputed quart bottles of not less than two dozen without an additional licence? and, if not, whether he was rightly convicted of selling beer by retail without being licensed to do so under section 3 of the Licensing Act, 1872?

Henn Collins, Q.C., and *Mansfield*, for the appellant.—Imperial quart bottles are no longer customary in the trade. The only offence is a sale of less quantity at one time than that authorized by the licence. The offence charged is under the Licensing Act, 1872, s. 3—namely, for "selling by retail intoxicating liquor without being duly licensed." "Sale by retail" is defined in section 74 of that Act as "the sale of that liquor in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors"; and by 4 & 5 Will. 4, c. 85, s. 19, "a sale of beer, cyder, or perry in any less quantity than four gallons and a half shall be deemed a selling by retail." Both Acts mention the quantity sold at one time as the criterion of a sale being wholesale or retail, and here the quantity is not less than that authorized by the licence held under 6 Geo. 4, c. 81, s. 2. It was an excise offence, if any, and could be dealt with under the Inland Revenue Acts; but the excise authorities had acquiesced in wholesale sales of beer in pint or half-pint bottles provided the quantity sold at one time was equal to the amount mentioned in the licence.

Bryn Roberts, for the respondent, the inspector of police.—The Licensing Act, 1872, s. 74, refers back for its definition to other Acts relating to the same matter. This brings in 26 & 27 Vict. c. 33, s. 1, which expressly requires any person holding an excise licence under 6 Geo. 4, c. 81, to take out an additional licence if desirous of selling beer "in any less quantity and in any other manner" than in casks or less than two dozen quart bottles as mentioned. The words disallowing a sale in any other manner must include sales in pint or half-pint bottles. No other manner of sale than that mentioned—viz., in casks or quart bottles of not less than two dozen—can be brought under the definition of the Licensing Act, 1872. 4 & 5 Will. 4, c. 85, s. 19, is not an exclusive definition. The appellant had twice applied for a retail licence and been refused. Pint bottles can be more easily concealed for illicit sale than quart bottles.

POLLOCK, B.—This conviction cannot, it seems to me, be sustained. Much of the argument has been applied to the point as to what might be offences deducible from the series of Licensing Acts referred to. Our duty here is simply to inquire whether this conviction for an offence charged under section 3 of the Licensing Act, 1872, was a proper one? The appellant was charged with the specific offence of selling beer by retail without being duly licensed. That offence is expressly prohibited by the section under which he was summoned. The question here is not what licence the appellant ought to have

(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

had, but whether or not he sold beer by retail? Sale by retail is defined by section 74 to be "selling in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors." We turn to the Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85, s. 19), and find that sale by retail is expressly defined as "selling in any less quantity than four gallons and a half." This is a specific measurement for persons requiring beer in a small quantity. The quantity is the criterion between retail and wholesale sales. Here the quantity is admittedly over four and a half gallons. Undoubtedly such a sale must be made at one time, and, so far as may be, in one delivery. It is argued, however, that the sale is taken out of this section by being made in pint or half-pint bottles, and must come under 6 Geo. 4, c. 81, s. 2, where quart bottles are expressly mentioned. But that Act and the other cited (26 & 27 Vict. c. 33) are Excise or Revenue Acts. The section under which the appellant is charged is out of a Licensing Act, and must be construed in reference to Licensing Acts. The excise officers are not prosecuting here. They have not taken any action in regard to sales in pint bottles. The reasonable construction of sections 3 and 74 of the Licensing Act, 1872, cannot be used to make an offence of that which, if it is an offence at all, is not one against the licensing laws.

This conviction must be quashed.

HAWKINS, J.—I quite agree. The case stated distinctly refers to a summons for an offence against the Licensing Act, 1872, s. 3. The interpretation clause (section 74) does not say that the sale by retail must be in such vessels and such quantities as have been declared in other Acts, but only in such quantities as have been so declared, and 4 & 5 Will. 4, c. 85, s. 19, expressly defines the quantity. Whether any other offence against the Revenue Acts than that charged has been committed we need not stop to inquire. We have only to deal with an offence against public order and morality under the Licensing Acts, and I fail to see what moral offence there may be in selling beer in pint instead of in quart bottles under those Acts.

Appeal allowed and conviction quashed.

Solicitor for the appellant, *H. Clifford Gosnell*, for *Pritchard*, Bangor.

Solicitors for the respondent, *Winter & Co.*, for *Owen & Roberts*, Bangor.

Q. B. Div. (Lord Coleridge, C.J., and Bowen, L.J.) Nov. 29.

VALENTINI v. CANALI. (a.)

Infant—Contract—Money paid under—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

An infant is not entitled to recover money paid under a contract void under section 1 *of the Infants' Relief Act*, 1874, *in respect of goods which he has used or consumed.*

Appeal from the Woolwich County Court.

In August, 1888, the plaintiff, who was an infant, entered into an agreement with the defendant, a keeper of a restaurant, to rent certain premises from him and to pay £102 for the furniture, trade fittings, and goodwill of the business. He paid £68 15s. on account, took possession, and paid rent up to the following September.

In January the defendant applied for rent due, and the plaintiff then claimed repayment of the £68 15s. on the grounds of (1) infancy at the time that he entered into the agreement, (2) fraud, in that he had been deceived and misled as to the business and had derived no benefit therefrom. The defendant distrained, and the plaintiff then abandoned the tenancy and commenced an action in the Chancery Division for rescission of the contract and recovery of the money paid under it. The action was ordered to be transferred to the county court. The judge found that there had been no fraud, but decided in favour of the plaintiff on the plea of infancy. He declared the contract void but refused to order the return of the sum already paid.

The plaintiff appealed.

J. R. Paget, for the plaintiff.—Under section 1 of the Infants' Relief Act, 1874, which it has been held must be strictly construed (*Coxhead* v. *Mullis*, 27 W. R. 136, 3 C. P. D. 439), this agreement is not voidable but absolutely void. There has, therefore, been complete failure of consideration, and the plaintiff is entitled to a return of the money already paid: *Corpe* v. *Overton*, 10 Bing. 252.

Forman, for the defendant, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that the learned county court judge, in ordering the agreement to be cancelled, but declining to order a restoration of the money paid under it, has given the plaintiff the measure of justice to which he is entitled. The Infant Relief Act, 1874, though no doubt strong in its general terms, must be construed reasonably, and so as, if possible, to avoid gross injustice. Cases have been relied on in the course of the argument which, it is admitted, involve absurdity and injustice on the supposition of the plaintiff's contention being correct. I think that the old rule of law applies to this case—namely, that when an infant has had something for which he has paid and cannot give back, nor put the seller in the same position as he was before, as he cannot replace the consideration, he cannot recover the money. The infant has had the house and the use of the furniture and fittings for some months, and has paid certain sums of money for the use of them, and the judge declined to order the repayment of the money thus paid, as the plaintiff could not replace the defendant in the same position, and he had had a benefit which he could not give back. That is in accordance with the old rule of law on the point, which has not been altered by the Act of 1874. It was supposed to have been somewhat frittered away by judicial decisions, and it was the object of the Legislature, by the Act of 1874, to restore it, but to restore it subject to the old qualification. The defendant, therefore, cannot be called upon to repay the money paid to him by the plaintiff, and this appeal must be dismissed.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *A. P. Jackson.*

Solicitor for the defendant, *A. W. Stone*, Woolwich.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Nov. 26.

WOOD v. BURGESS. (a.)

Trade-mark—Use of another's name without authority—No intent to defraud purchaser—Effect of Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-sections* (1), (2); *s.* 3, *sub-sections* (1) (3).

B., a mineral water manufacturer, made use of certain bottles, the property of, and moulded with the name of, W., with the intention of selling therein mineral water of his own make to his customers. It was proved that on the

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

bottles he affixed a label bearing his own name of B., and sent with the bottles an invoice which left no doubt that B. was the sender.

Held, that he was guilty of using a false trade description under sections 2 and 3 of the Merchandise Marks Act, 1887.

Case stated by metropolitan police magistrate.

The appellant, T. Wood, a mineral water manufacturer, was possessed, for the purposes of his trade, of glass bottles, on some of which were moulded his name and address, "T. Wood, 430, Hackney-road," and on others of which were moulded the words, "This bottle is the property of Thomas Wood, 430, Hackney-road." A considerable number of both kinds of bottles came into the possession of the respondent, T. Burgess, who was also a manufacturer of mineral waters. The respondent was in the habit of filling these bottles with mineral water of his own manufacture, but upon them he caused a paper label to be placed in the following form :—

Burgess's
LEMON,
215, Brick Lane,
Bethnal Green Road,

and with the bottles he used to send an invoice in the following terms :—"Received from T. Burgess, mineral water manufacturer." He had no authority from the appellant to use bottles bearing the name of T. Wood.

The respondent was summoned under sections 2 and 3 of the Merchandise Marks Act, 1887, for "having in his possession for sale goods to which a false trade description—namely, the false name of T. Wood—was applied."

The magistrate found as a fact that the name "T. Wood" was a false trade description within the meaning of section 3, sub-section (3), of the Act, and that it was applied to goods which had not been manufactured by the appellant, whose name was used, and that the name was used without authority; but he also found that the respondent had no intention to defraud his customers by representing the mineral waters to be those of the appellant, and, being of opinion that in the absence of any intention to defraud the purchaser the respondent had "acted innocently" within the meaning of section 2, sub-section (2), he dismissed the summons.

The questions for the opinion of the court were :—

1. Whether selling mineral waters in bottles bearing the name of another manufacturer, but without any intent to defraud the purchasers, was an offence against the Merchandise Marks Act, 1887.

2. Whether an intent to defraud was a necessary ingredient in the offence under section 2, sub-section (2).

3. Whether the words "acting innocently" in sub-section (2) had any different meaning from the words, "without intent to defraud" in sub-section (1).

Horace Avory, for the appellant.—The words "or otherwise acting innocently" in section 2, sub-section (2), must be read with the words in the preceding paragraphs, which treat of the case of a retail dealer who has innocently purchased goods with a false trade description applied to them without any reason for suspecting the falseness of the description. The word "otherwise" must refer to similar kinds of innocent action—as, for example, a man's acting under a mistaken impression that he had the authority of another to use his name. That could not have been the case here, because the name was stamped upon the bottles, and the person who used them must have known that he had obtained no authority for it. The words "or otherwise acting innocently" may mean the same thing as acting "without intent to defraud." But the latter words do not mean without intent to defraud the purchaser. The object of the Act is to protect the owner of the trade-mark and not the purchaser. Even if it were part of the object of the Act to protect purchasers, the precautions adopted by the respondent would not necessarily prevent subpurchasers from being deceived, because the labels might become detached, and they would not receive the respondent's invoices.

The respondent was not represented by counsel.

Lord COLERIDGE, C.J.—I am of opinion that the magistrate was wrong in the view which he took of this case, and that an intent to defraud the purchaser is not a necessary ingredient of the offence charged.

MATHEW, J.—I am of the same opinion.

Case remitted.

Solicitor for the appellant, *W. Webb.*

Q. B. Div. (Mathew and Wills, JJ.) Oct. 1.

In re AN ARBITRATION BETWEEN THE LONDON, TILBURY, AND SOUTHEND RAILWAY CO. AND THE TRUSTEES OF GOWER'S WALK SCHOOLS. (*a.*)

Railway company—Land injuriously affected—Ancient lights—Right to full compensation for damage—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Railways Clauses Act,* 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16.

The claimants were owners of a building which had acquired the easement of light and air for its windows, and, having pulled it down, they built up another building with some windows which did not coincide with the old ones. A railway company, in the exercise of parliamentary powers, obstructed the access of light of the new building before the windows in the new position had acquired an easement.

Held, that the claimants were entitled to compensation for the whole damage done to the building, and were not confined to the loss of the old easement.

Case stated by an arbitrator in a claim made under the Lands Clauses Act.

The claimants were trustees of certain schools situate in a street called Gower's-walk, and known as Gower's-walk Schools. In 1884 they purchased certain old buildings in Lambeth-street, Whitechapel, in which all the windows were ancient lights. These buildings they pulled down and on the same site they erected new schools. The windows in the new schools did not altogether coincide with the windows in the old buildings, and where they did coincide in position they differed in size.

In 1886 the London, Tilbury, and Southend Railway Co., in the exercise of powers conferred upon them by their special Act (which incorporated the Railways Clauses and Lands Clauses Acts), erected on the opposite side of the street a warehouse, which obstructed to some extent the windows of the new schools.

The trustees of the schools claimed compensation in respect of all the windows which were obstructed, including those which did not coincide with any of the ancient lights. The company, on the other hand, contended that they were bound to pay compensation for that damage only which was done to the windows which did coincide with the old ones.

The arbitrator assessed the compensation at £1,450 if the claimants were entitled to have it assessed on the former basis, and at £725 if they were only entitled to have it assessed on the latter basis.

The question for the opinion of the court was which basis of assessment was correct.

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Bosanquet, Q.C. (*Houghton* with him), for the claimants.—It has been decided in *Newson* v. *Pender*, 33 W. R. 243, 27 Ch. D. 43, and *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554, that the claimants have a legal right to the access of light only to those windows or portions of windows which coincide with the old ones, and it must be admitted that if this were an action for damages the measure of damages would be limited to the injuries inflicted on the ancient lights. But the case is altogether different in a claim for compensation under the Lands Clauses Act. The railway company have inflicted the injury now complained of in the exercise of their statutory powers; for otherwise they might have been prevented by an injunction from completing the warehouse which has obstructed the light. These statutory powers are contained in section 16 of the Railway Clauses Act, which provides that the company is to make full satisfaction for all damage sustained by reason of the exercise of such powers. No distinction is made between legal or other damage, and no distinction is to be drawn between a case in which a claim is made for compensation on the ground of land having been taken and a claim made on the ground of disturbance of an easement. No distinction is made between lands and other interests affected either in section 6 or section 16. The words are "all damage sustained by such owners, occupiers, and other parties by reason of the exercise of such powers." In the case of land taken the claimant is entitled to be placed in exactly the same position pecuniarily as if the railway company had not exercised its powers: *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418, and *Cowper Essex* v. *Local Board for Acton*, *ante*, p. 209, 14 App. Cas. 153.

R. S. Wright (*C. Haigh* with him), for the company.—This principle has never yet been applied to any case in which land has not been taken, and ought not to be extended to a case in which land is injuriously affected. In *Buccleuch* v. *Metropolitan Board of Works* Lord Chelmsford argues that the deprivation of an easement must in that case amount to a taking of land, because in the Thames Embankment Act, with which the court was dealing, "lands" were defined to include "easements."

MATHEW, J.—In my opinion the claimants in this case are entitled to the sum of £1,450. The position of things appears to be this. The building now occupied by the school, which is a new building, contains some windows coinciding in position with the windows of the old building, it also contains a number of additional windows which do not so coincide, and in respect of which it is clear that the owners of the school had no legal right to the access of light. The railway company, in the exercise of its powers, erected a warehouse which had the effect of darkening the windows of the school. The result of that was that the easement undoubtedly possessed by those of the windows of the school which took the precise place of the old windows was destroyed or materially injured, and the question for us is whether the destruction of that easement lets in the entire claim for damage to the schools in consequence of the exercise by the company of the powers conferred on them by the Act of Parliament. It appears to me that, having regard to the language of the Act, that claim is let in. It is only necessary to refer to section 16 of the Railways Clauses Act, under the authority of which this warehouse was erected, to make it clear that the Legislature so intended, because the language of the section is this, "That in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." What, then, is the damage which the school trustees have sustained here? Obviously a depreciation of their property which might never have taken place if the company had not exercised its powers; and their property has, according to the finding of the arbitrators, been thus depreciated to the extent of £1,450.

There are numerous authorities upon the construction of this section, and also of section 6 of the same Act, and section 68 of the Lands Clauses Act, all of which sections are *in pari materiâ*, and in all the cases, if I understand them correctly, from *Reg.* v. *Chester Clerk of Peace* (*Stockport case*), 12 W. R. 762, down to the last case in the House of Lords, the case of *Cowper Essex* v. *Local Board of Acton*, the principle is recognized that when once a legal right of a claimant has been interfered with by the exercise of the powers conferred on the company, whether the right so interfered with was a right to the possession of land or a right to an easement, all the damage done to him as the consequence of that interference is the subject of compensation.

WILLS, J.—I am of the same opinion. It seems that the structure erected by the railway company has obstructed the access of light to a number of new windows which are entitled to no legal protection, but it has also obstructed a certain number of other windows which are admittedly entitled to protection as ancient lights, and the question which the arbitrator submits to us is this—Under such circumstances as these, are the claimants confined to the legal damage which they would have been entitled to claim against the company in an action had the company not been acting under statutory powers, or are they entitled to all the damage which they have actually sustained by reason of the construction of this warehouse? To my mind the question so stated answers itself. Section 6 of the Railways Clauses Act provides, with respect to the construction of the railway and the works connected therewith, that, "in exercising the power given to the company by the special Act . . . the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway or injuriously affected by the construction thereof, full compensation . . . for all damage sustained . . . by reason of the exercise of the powers . . . vested in the company."

The authorities, which run in a clear and even channel, establish beyond dispute that the word "damage" there means the real loss which the claimant has sustained by reason of the construction of some work which could not have been constructed without the statutory authority, and is not limited to the damage which would be recoverable against a person constructing a similar work without statutory powers.

To put it in another way, the party injured by the construction of the works would, but for the statutory powers, be entitled to an injunction, which would prevent the works from being constructed altogether. Then the intention of the Act, as I understand it, is that the injured party shall, so far as money can do it, be put in the same position as if he had had that injunction, and as if things had been preserved *in statu quo*.

Order accordingly.

Solicitors for the claimants, *Hanbury, Hutton, & Whitting.*

Solicitors for the company, *Mathews & Browne.*

C. C. R. Feb. 1, 8.

REG. v. MILES. (a.)

Criminal law—Plea in bar—Autrefois convict—Nemo debet bis puniri pro uno delicto—*Previous conviction followed only by giving security for good behaviour.*

To an indictment for unlawfully wounding, unlawfully inflicting grievous bodily harm, assault occasioning actual bodily harm, and common assault, the prisoner pleaded as a plea in bar a conviction before a court of summary jurisdiction upon the same facts; but that court had inflicted no punishment beyond requiring the defendant to give security to be of good behaviour.

Held, that such conviction was a good plea in bar.

At a session of the Central Criminal Court held before the Recorder of London, George James Miles was arraigned on an indictment which charged him, in the first count, with unlawfully and maliciously wounding Charles Living; second count, unlawfully inflicting grievous bodily harm on the said Charles Living; third count, assaulting the said Charles Living, and thereby occasioning him actual bodily harm; fourth count, a common assault on the said Charles Living; fifth count, a common assault on Harry Anstey.

The prisoner handed in a special plea in the nature of *autrefois convict* as a plea in bar of his prosecution so far as the first four counts of the indictment were concerned, and pleaded Not Guilty as to those counts and the fifth count, and a special reply was put in by the prosecution.

The evidence offered by the defendant in support of his plea consisted of an examined copy of a record of a court of summary jurisdiction sitting at West Ham. It was further proved that the offences charged in the first four counts of the indictment related to the same matter as the offence mentioned in the said record. The counsel for the prosecution did not dispute that the first four counts of the indictment referred to the same matter as the offence mentioned in the said record, but argued that the said record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, on the ground that the court had neither ordered the defendant to pay a fine nor to be imprisoned, and in support of that contention the case of *Hartley* v. *Hindmarsh*, 14 W. R. 862, L. R. 1 C. P. 553, was referred to. The counsel for the defence argued that by the 42 & 43 Vict. c. 49, s. 16, sub-section 2, express power was given to the magistrate, upon convicting a person of assault, to discharge him conditionally on his giving security to be of good behaviour, and that the 24 & 25 Vict. c. 100, s. 45, must now be read with the section of 42 & 43 Vict. c. 49 above referred to, and that, consequently, the case quoted by the counsel for the prosecution was no longer in point.

The defendant was ultimately convicted on the first four counts of the indictment, and acquitted on the fifth count, and the question of the sufficiency of the plea in bar was reserved for the opinion of this court.

Feb. 1.—*Poland, Q.C.*, and *Warburton*, for the defendant.

Lockwood, Q.C., and *Besley*, for the prosecution.

Cur. adv. vult.

Feb. 8.—HAWKINS, J.—In this case the plea alleges, and the jury must be taken to have found, that the assault and battery of which the defendant was previously convicted and the wounding, assault, and battery in the first four counts mentioned, are the same. No certificate of dismissal was given, nor is any punishment fixed or determined in the conviction, and no fine or imprisonment had been inflicted or suffered. The Summary Jurisdiction Act, however, provides that the court, upon convicting the party, may discharge him on giving security, &c. In cases of assault where the complaint is dismissed, it seems to me that a certificate of dismissal is still necessary to entitle a defendant to the benefit of the provisions contained in section 45 of 24 & 25 Vict. But in cases where the justices, though they have convicted, think the offence deserving only of a nominal punishment, or of no punishment at all, and, acting under the power contained in the 2nd sub-section, determine to discharge the defendant without any punishment on his giving merely security to be of good behaviour, and such security is given, I am, without expressing any settled opinion upon the point, strongly inclined to think that nothing more is necessary to entitle him to the privileges conferred by the 24 & 25 Vict. c. 100, s. 45. For I think the giving of security for good behaviour under such circumstances is intended as a substitute for punishment, and that the effect of such substitution, coupled with the performance of the condition—*i.e.*, the giving the security for good behaviour—would place the defendant precisely in the same position as if punishment had actually been inflicted and suffered. It certainly never could have been intended by the Legislature that a person whose offence at the most deserved nothing beyond a nominal punishment, which had been foregone on his recognizances for good behaviour, should be in a worse position than a person whose offence had been visited by a substantial punishment which he had suffered. There may be, and I think are, objections to the form of the plea as framed, but, thinking as I do, that the common law defence I am about to refer to is such as entitles the defendant to have the conviction in question quashed, it is not necessary to discuss them upon the present occasion. I would, however, observe that, inasmuch as these common law defences to the indictment would afford no defence to civil proceedings, it would be expedient in future, if justices desire to give to a defendant the protection afforded by the 44th and 45th section of the 24 & 25 Vict., that they should found their proceeding and judgment upon the provisions of that Act rather than upon the later Summary Jurisdiction Act, the provisions of which are not very clear, and when they were framed, the previous enactments of 24 & 25 Vict. c. 100 were evidently not clearly remembered by the draftsman. The justices will do well also to bear in mind that they may also award damages under the later statute if they think right to do so.

With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J., said in *Wemyss* v. *Hopkins*, 23 W. R. 691, L. R. 10 Q. B. 381, "on the well-established rule at common law that whenever a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatum*—that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited (*Wemyss* v. *Hopkins*), where the appellant had been summarily convicted by justices under the Highway Act (5 & 6 Will. 4, c. 50), s. 78, for an offence which,

(a.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under section 42 of 24 & 25 Vict. c. 100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rules of law. The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this—that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the committal of the offence was followed by serious consequences. In this respect the criminal law is in unison with that which prevails in civil proceedings. Who ever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action, simply on the ground that the damages were insufficient, or that the conduct of the defendant was, since the verdict and judgment, discovered to be more malicious than it was deemed to be at the trial? Judgment recovered in a former action was always a good plea in bar.

In *Reg.* v. *John Walker*, 2 Moo. & R. 446, it was held by Coltman, J., that a conviction, for an assault by wounding, before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm. In *Reg.* v. *Stanton*, 5 Cox C. C. 324, the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault, founded upon the same facts. The jury found the prisoner guilty of a common assault. In answer to a question of Erle, J., why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction for an assault to a charge of felony, whereupon that learned judge said that, in his opinion, the conviction would, if pleaded, have been an estoppel to the judgment for the felonious assault, and, though not pleaded, he treated the charge as having been adjudicated upon. Ten years later the same point was decided in *Reg.* v. *Elrington*, 10 W. R. 13, 1 B. & S. 688, where to an indictment for assault and maliciously wounding and causing grevious bodily harm, &c., a plea that on the hearing of the charge for the same assault treated as a common assault before justices, they had dismissed the complaint, was held to be a bar. The true ground upon which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same assault; and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment. No doubt it seems a little startling that a conviction for a common assault, accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a court having jurisdiction, that adjudication ought to be final, and, after all, such miscarriages are very rare. No system of judicature can be suggested in which occasionally failure to insure complete justice may not arise. After the most solemn and careful trial of an indictment for murder, resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime. Yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicated, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decisions upon matters within their jurisdiction cannot, as I have already shown, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form. But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element.

It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter. See *Reg.* v. *Morris*, 15 W. R. 999, L. R. 1 C. C. R. 90. So, again, a conviction for a common assault could not be pleaded in bar to an indictment for rape, though possibly it might be for an assault with intent to commit rape; for the essence of the crime of rape is a felonious assault by penetration of the person of the prosecutrix, which justices have no jurisdiction to adjudicate upon, and, although it is quite true that, on a charge of common assault, evidence may be given of circumstances which, if true, would constitute a rape, and true also that the justices must form in their own minds an opinion as to the credibility of that evidence, with a view to determining whether their jurisdiction to deal with the matter has been ousted or not, and true also that if they disbelieve that evidence they may nevertheless believe that an assault, though not one of the particular character constituting a rape, has been committed, and convict the person charged accordingly, as was done in *Wilkinson* v. *Dutton*, 32 L. J. M. C. 152, 11 W. R. C. L. Dig. 7. Their conviction, nevertheless, would be no bar to an indictment for rape, for though incidentally they might be obliged to consider the evidence in order to determine whether they had jurisdiction over the charge before them, they would have no jurisdiction whatever to adjudicate upon the offence of rape, and their disbelief of the evidence would have no greater effect upon the charge of rape than if they had simply refused to commit for trial upon it, in which case nobody would question that an indictment might be presented by anybody who was dissatisfied with the justices' refusal. This subject was a good deal discussed in the Court of Exchequer in *In re Thompson*, 9 W. R. 203.

It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that, by convicting of a common assault when the facts point to a serious felony, justice may be defeated and a great criminal may escape the punishment due to his crime. True it is that it may so happen; so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy. Such misfortunes are mere accidents, and of very rare occurrence, and are very unlikely to happen by reason of any default of the justices if they will pursue, as I am sure they ever endeavour, the simple course of steadily bearing in mind the charge before them. If that charge be one of

felony, or misdemeanour punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial or refuse so to do. In matters before them upon which they are called upon to adjudicate they must do so, unless they have upon the facts an alternative to send for trial upon indictment. In assault cases especial provision is made to this effect by section 46 of 24 & 25 Vict. c. 100. In the case before us the doubts I once entertained are removed—the one and same assault of which the defendant was convicted is the sole foundation upon which the conviction at the Central Criminal Court is rested, although aggravations are added to it which at first sight make the offences appear different—more particularly the count for wounding; but I find it alleged and found as a fact that that wounding formed part of the assault and battery of which the defendant was convicted, as well it might, without amounting to an unlawful and malicious wounding, which is purely an indictable offence under section 20 of 24 & 25 Vict. This is recognized law (see *Reg.* v. *Taylor*, 17 W. R. 623, L. R. 1 C. C. R. 194). For the reasons I have given I am now satisfied that the conviction before us ought to be quashed.

The following judgment of POLLOCK, B., was read by HAWKINS, J.—This conviction ought, in my opinion, to be quashed. If the question depended solely upon whether the previous conviction pleaded by the prisoner was a good bar to the present indictment, as coming within the provisions of the 24 & 25 Vict. c. 100, s. 45, I should pause before I came to such a conclusion, as the language of this section is certainly not in accord with that of section 16 of 42 & 43 Vict. c. 49. My decision is based on the broader ground that the conviction pleaded and the evidence given in support of it formed a good bar at common law to the present indictment. At the trial it was proved on behalf of the prisoner and admitted by counsel for the prosecution that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred, and, therefore, the rule of law *Nemo debet bis puniri pro uno delicto** applies, and, if the prisoner were guilty of the modified crime only, he could not be guilty of the same acts with the addition of malice and design.

In *Reg.* v. *Walker* it was held that a plea of *autrefois convict* of an assault before magistrates is a bar to an indictment for feloniously stabbing in the same transaction. *Reg.* v. *Stanton* is to the same effect. These are decisions by single judges, but they were cited and approved of by the Court of Queen's Bench in *The Queen* v. *Elrington*, where Cockburn, C.J., says:—"We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted he shall not be charged again on the same facts in a more aggravated form." This is not only the law, but it is consonant with sound sense and the just treatment of defendants. One case only was cited by the prosecution which might at first sight seem to be contrary to this view—*Hartley* v. *Hindmarsh*, but, upon looking at the decision in that case, it will be found that the conviction was not pleaded as a bar at common law, but under the statute 24 & 25 Vict. c. 100, s. 45; and the judgment of the court proceeded upon the grounds that there was no record of any conviction, and, further, that the magistrate did not adjudicate upon the case, but, as a conservator of the peace, ordered the defendant to enter into recognizances.

* See Broom's Legal Maxims, 6th ed., p. 330.

The following judgment of CHARLES, J. (with which Lord COLERIDGE, C.J., and GRANTHAM, J., concurred), was read by

Lord COLERIDGE, C.J.—The facts upon which the plea in this case was based were proved at the trial, indeed it was not disputed that the offences charged in the first four counts related to the same matter as the offence mentioned in the record, but counsel for the prosecution argued that the record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, the court having neither ordered the defendant to pay a fine nor to be imprisoned. The counsel for the defendant argued that by 42 & 43 Vict. c. 49, s. 16, sub-section 2, express power was given to the magistrate upon convicting a person of assault to discharge him conditionally on his giving security to be of good behaviour, and that 24 & 25 Vict. c. 100, s. 45, must be read with the section above referred to. The defendant was convicted on the first four counts of the indictment, and the recorder reserved the question for the opinion of the court—Whether the proceedings before the court of summary jurisdiction against the defendant in respect of the assault on Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence? The answer to this question does not, in my opinion, in any way depend on the construction of the 45th section of 24 & 25 Vict. c. 100, and the 16th section of 42 & 43 Vict. c. 16. I think the proceedings were a bar apart from any statutory provisions, and that the conviction should be quashed in accordance with the well-established rule at common law—that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again, and I can see no reason why it should not be acted on in this case. It cannot be material that a magistrate has power by statute to deal with a convicted person otherwise than by fine or imprisonment, for it is the conviction and not the nature of the sentence which constitutes the bar. The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. This being the view which I take of the case, it is unnecessary to decide whether the defendant is entitled to the protection provided by 24 & 25 Vict. c. 100, s. 45. I may add that upon the question reserved no point arises on the form of the special plea, which, however, I think may be regarded as an informal plea of *autrefois convict*.

Conviction quashed.

Solicitor for the defendant, *C. Sharman.*

Solicitors for the prosecution, *Seeley & Son.*

C. C. R. Feb. 1.

REG. v. CROSS. (a.)

Criminal law — Procuring abortion — Conviction of patient for conspiracy — Absence of evidence of pregnancy.

A woman was jointly indicted with others for conspiring to procure her miscarriage by unlawful means. There was no evidence of her being with child so as to render the acts criminal if done by herself alone.

Held, that she might nevertheless rightly be convicted of conspiracy to commit a felony.

At the assizes held for the county of Northampton Thomas William Whitehurch, John Howe, and Elizabeth Cross were indicted for that they "believing that the said

(a.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

Elizabeth Cross was then pregnant and that in due course of nature she would be delivered of a child begotten by the said John Howe, and wickedly intending and contriving to conceal such pregnancy, and to prevent such her delivery in due course of nature, on the 1st day of June, A.D. 1889, did amongst themselve unlawfully, knowingly, and wickedly conspire, combine, confederate, and agree together feloniously and unlawfully to procure the miscarriage of the said Elizabeth Cross by unlawfully administering to and causing to be taken by her certain noxious things, and by unlawfully using certain instruments and other means with intent to procure the miscarriage of the said Elizabeth Cross."

The indictment further set out a number of acts done in pursuance of the conspiracy.

At the trial, before Wills, J., the evidence established that the prisoners all believed that Elizabeth Cross was pregnant, and that, for the purpose of procuring abortion, Whitchurch and Howe, with her consent and by her procurement, both administered to her noxious drugs, and used or caused to be used upon her, instruments; but there was no evidence that she was in fact pregnant, and it is therefore assumed in her favour that she was not so.

On behalf of Cross it was objected that for a woman, not being pregnant, to do or cause to be done acts upon herself for the purpose of procuring abortion was no offence either at common law or by statute, and, therefore, she could not be convicted of conspiracy with other persons that they should do upon her and she should suffer the same acts.

The learned judge was of opinion that, whether or not it was no offence for a woman not pregnant to do acts to herself intending thereby to procure an abortion, which was actually impossible, it would none the less be criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant: see 24 & 25 Vict. c. 100, s. 58), because the commission of the felony was rendered impossible by circumstances unknown to her.

He was further of opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone, and without the help of the men, might not have been criminal, and accordingly he directed the jury, if they believed the evidence, to convict the prisoners.

The jury convicted all the prisoners.

The question for this court was whether the conviction against the woman could be sustained.

Hammond Chambers, for the prisoner.—It is submitted that a charge of conspiracy cannot be maintained against a person who would not, in the event of the scheme succeeding, be guilty of any offence whatever. In the present case the prisoner (not being pregnant) in attempting to procure abortion, in herself committed no offence either at common law or by statute. The consequences of upholding this conviction would be far reaching—if, for instance, under the Criminal Law Amendment Act of 1885 a man were charged with the defilement of a girl under the age of sixteen, it would logically follow that the girl might be indicted for a conspiracy to commit the offence. It is an essential element in a criminal conspiracy that the object of the combination is injury to some third person: *Reg.* v. *Warburton*, 19 W. R. 165, L. R. 1 C. C. R. 274.

Etherington Smith, for the prosecution, was not called upon.

Lord Coleridge, C.J.—The offence charged in this case is not an attempt, but a conspiracy, to commit a crime. These offences are totally different in their nature, and the gist of the offence of conspiracy is the act of combining with the convicted persons to commit the felony. It is difficult to feel any doubt that they are all equally liable on this indictment, although the person on whom the offence was committed would not if alone have been guilty of any offence.

Pollock, B., Hawkins, Grantham, and Charles, JJ., concurred.

Conviction affirmed.

Solicitors for the prisoner, *Becke & Green*, Northampton.

Solicitor for the prosecution, *W. G. C. Mitchell*, Bedford, Solicitor to the Treasury.

Erratum.—*Reg.* v. *Miles*, *ante*, p. 334: In the report of this case, immediately following the sentence contained in the statement of facts (p. 334), "*The evidence offered by the defendant in support of his plea consisted of an examined copy of a record of a court of summary jurisdiction sitting at West Ham,*" the following statement should be inserted: "*This record was as follows: 'George James Miles is this day convicted for that he . . . did unlawfully assault and beat one Charles Living. But the court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant, having given security to the satisfaction of this court to be of good behaviour, is discharged.'*"

Court of Appeal.

From Chan. Div. Feb. 14, 15.

Whitby v. Mitchell. (a.)

Perpetuity—Remoteness—Legal limitations—Limitation to unborn person for life, with remainder to her children born within the limits of the rule against perpetuities—Rule against a "possibility on a possibility."

That an estate cannot be limited by way of remainder (after a life estate to an unborn person) to children or issue of such unborn person, is an absolute and still existing rule of law (applicable to legal limitations), and exists independently of the rule against perpetuities, and such a remainder or gift over is not rendered valid by the insertion of words having the effect of restricting it to children or issue born before the expiration of the period allowed by the rule (known as the rule against perpetuities), which prevents property being tied up for a longer period than a life or lives in being and twenty-one years afterwards.

By a marriage settlement lands were limited to the use of the husband and wife successively for life, with remainder to the use of any one or more of their children, grandchildren, or more remote issue (born before any appointment made), as the husband and wife should by deed appoint.

The husband and wife, in exercise of their power, appointed part of the lands, by deed, to the use of a married daughter for life for her separate use, and after her decease to the use of her children living at the date of that deed, as tenants in common in fee.

Held, that the limitation, to the children of the married daughter, contained in the deed of appointment, when

(a.) Reported by R. H. Deane, Esq., Barrister-at-Law.

read, as it must be, as part of the original settlement, was void, as offending against the first above-mentioned rule, notwithstanding the fact of the limitation being restricted to children living at the date of the deed of appointment.

Judgment of Kay, J. (ante, *p.* 5, 42 *Ch. D.* 494), *affirmed.*

Appeal from Kay, J.

The case is reported below, *ante*, p. 5, and 42 Ch. D. 494.

By marriage articles dated the 4th of November, 1821, and made in contemplation of a marriage between Charles Dennis and Mary Elizabeth Maddy, which was shortly afterwards solemnized, it was agreed that certain lands belonging to Charles Dennis in fee simple should be settled.

By a settlement made in pursuance of the marriage articles (but more than eighteen years afterwards), and dated the 7th of May, 1840, the lands were settled to the use of Charles Dennis for life, with a limitation to trustees to support contingent remainders, with remainder to Mary Elizabeth Dennis for life, with a like limitation to trustees to support contingent remainders, with remainder "to the use of a child, grandchild, or more remote issue, or all and every, or any one or more, of the children, grandchildren, or more remote issue of the said Charles Dennis by the said Mary Elizabeth his wife, such child, grandchildren, or more remote issue being born before any such appointment as hereinafter is mentioned shall be made to him, her, or them respectively, for such estate or estates, interest or interests, and in such parts, shares, and proportions (if more than one), and with such limitations over, such limitations over being for the benefit of some or one of the objects of this present power, and in such manner and form, as the said Charles Dennis and Mary Elizabeth his wife" should by deed appoint, and in default of appointment, to the use of the child or children of Charles and Mary Elizabeth Dennis equally as tenants in common in fee, with a limitation over in case any of such children should die under twenty-one without leaving issue.

The settlement contained a power of sale.

Mr. and Mrs. Dennis had two children only, of whom Mrs. Burlton was one.

By an indenture of the 15th of March, 1865, Mr. and Mrs. Dennis appointed one moiety of the lands comprised in the settlement, or the proceeds of sale thereof, after their own life interests, to the use of Mrs. Burlton for life for her separate use, without power of anticipation, with remainder to the use of such person or persons as she should by will or codicil appoint, and, in default of appointment, to the use of her children living at the date of that indenture as tenants in common in fee, with a gift over in the event of all of such children dying under twenty-one without leaving issue.

The power of sale given by the settlement having been exercised, a sum of £4,700, part of the proceeds, came into the hands of the plaintiff and the defendant, J. Turner, as trustees in respect of the moiety appointed by the indenture of March, 1865, and in December, 1877, they lent that sum to the defendant, G. W. Mitchell, upon the security of a bond and equitable mortgage. Turner having absconded, this action was brought against him and Mitchell for an account of what was due upon the loan, and for foreclosure or sale. Mitchell alleged in his defence that he had repaid to Turner £2,700 out of the £4,700, and by a counter-claim against the plaintiff, Turner, Mrs. Burlton and three of her children who were in existence at the date of the deed of March, 1865, he alleged that the sum had been so repaid at the request of Mrs. Burlton, and had been applied by Turner at the like request for the maintenance, education, and advancement of those three children, and he contended that Mrs. Burlton was absolutely entitled to the £4,700, on the ground that the appointment of March, 1865, to the children of Mrs. Burlton living at the date of such appointment was void.

The question of its validity was argued before Kay, J., who held that the rule that an estate cannot be limited to an unborn person for life followed by an estate to a child of such unborn person, is a rule existing independently of the rule against perpetuities; that the settlement must be treated, for the purpose of deciding the present question, as made before the marriage of Mr. and Mrs. Dennis; and that consequently the appointment of March, 1865, which must be read as part of the settlement, was invalid so far as it purported to give the property (in default of Mrs. Burlton appointing it by will, the power to do which, was admittedly bad) to her children then living, and also so far as it purported to restrain her from anticipation.

From that decision the said three children of Mrs. Burlton appealed.

Marten, Q.C., and *W. Baker*, for the appellants.—The appointment in favour of these children is effectual, and is not affected by the interposition of a void power of appointment. The learned judge decided the case on the authority of the *dicta* of Mr. Joshua Williams, but there is no sufficient authority to show that the rule in question, if it is a rule at all, has any existence independently of the rule against perpetuities. The rule against a "possibility upon a possibility" is obsolete except so far as it is merely a branch of the rule against perpetuities. Secondly, even assuming there is such a rule against a *general* limitation of that nature, in the present case the limitation is not *general*, but is restricted to children born at the date of the appointment. Mr. Joshua Williams is the first and only authority who without qualification asserts the existence of the rule: Williams' Real Property, 15th ed., pp. 321—3 and 647; 16th ed., pp. 314, 315, 624. Other authorities deny its existence: Lewis on Perpetuities (1843), pp. 419, 420, and Supplement (1849), pp. 97, 112, 136, *et seq.*; Cases and Opinions (Mr. Booth's and Mr. Yorke's opinions on the will of Charles Baker), pp. 432, 434, *et seq.* The rule is not there stated as an absolute one, and, secondly, it is stated as a rule against a *general* limitation to unborn sons of unborn sons. It does not say a gift is invalid when made to issue to be born within the proper period, merely on the ground that they are the issue of an unborn person who takes an estate for life. In the case of *Hay* v. *The Earl of Coventry*, 3 T. R. 83, decided by Lord Kenyon, there was nothing to limit the time of birth. Such a limitation as that in the present case is good if it does not violate the rule against perpetuities: *Brudenell* v. *Elwes*, 1 East, 442; *Cattlin* v. *Brown*, 11 Ha. 372, at p. 375; *Mogg* v. *Mogg*, 1 Mer. 654, at p. 664 (where Mr. Preston said that a remainder to issue (as purchasers) of an unborn child, following a gift to the unborn child for life, is not good unless it is to take effect within a limited time); *Routledge* v. *Dorril*, 2 Ves. 356, 366; Sugden on Powers, 8th ed., p. 393, and p. 397, paragraph 8; *Cole* v. *Sewell*, 4 Dr. & War. 1, at p. 32; 1 Jarman on Wills, 4th ed., pp. 279, 281; 2 Jarman (Appendix), p. 845; Tudor's Leading Cases on Real Property, 3rd ed., notes on *Cadell* v. *Palmer*, p. 473, *et seq.*; Davidson's Conveyancing, 3rd ed., vol. 3, part 1, pp. 336—338. [LINDLEY, L.J., referred to Jarman, 3rd ed., p. 262, note *y*, where something is said as to an observation made by Lord St. Leonards on *Cadell* v. *Palmer* in the last sentence on p. 324 of Sugden's Law of Property.] Our third point is that, although for most purposes the appointment must be read into the original settlement, yet it takes effect as a springing use, and Mr. Joshua Williams himself states the law as to springing uses as entirely independent of this artificial rule—they take effect by virtue of the Statute of Uses. This old rule is, moreover, a restrictive rule merely—not one in reliance on which titles have been accepted—it is simply a matter of the

opinion of conveyancers, so that no harm could be done by a formal recognition of its disappearance. Nothing was settled before *Cadell* v. *Palmer*. In every case decided against these limitations, they were bad under the rule against perpetuities.

They also referred to *In re Frost, Frost* v. *Frost*, *antè* p. 264.

Farwell, for Mrs. Burlton.—The rule relied on by the learned judge is perfectly well settled. The modern rule against perpetuities was invented by way of analogy to the common law rule against a possibility upon a possibility: *Porter* v. *Bradley*, 3 T. R. 143; *In re Ridley, Buckton* v. *Hay*, 27 W. R. 527, 11 Ch. D. 645, at p. 649. The old rule has not disappeared: Sugden on Powers, 8th ed., p. 393. In *Cole* v. *Sewell* it was pointed out that the rule against perpetuities had no application to limitations by way of legal remainder. Therefore the old rule must apply to such cases. In *Hay* v. *Earl of Coventry* Lord Kenyon said the law was clearly settled that an estate for life might be limited to unborn issue, provided the devisor did not go farther and give an estate in succession to the children of such unborn issue. In *Brudenell* v. *Elwes*, 1 East, at p. 454, he said the same thing. [CotTON, L.J.—Mr. Marten pointed out that the remainder there was clearly bad under the rule against perpetuities.] In all these cases in which there were legal remainders, what Lord St. Leonards said in *Cole* v. *Sewell*, as to the rule against perpetuities having no application to such estates, is a complete answer to that argument. In *Monypenny* v. *Dering*, 2 De G. M. & G. 145, at p. 170, he said the rule was too well settled to be broken in upon. In Fearne's Contingent Remainders, 10th ed. (1844), p. 565, chap. 4, on executory devises, section 21, Mr. Butler's note states the rule as an existing one. Again, on p. 251, note C., he refers to the rule against a possibility upon a possibility as existing. The rule was a common law rule, and never had any application either to equitable estates or to personalty, because there are at law no such estates as remainders in personalty. In *Cattlin* v. *Brown* the *dictum* simply approved a statement of Mr. Preston in *Mogg* v. *Mogg*, and applied it to equitable estates. *Mogg* v. *Mogg* was also a case of equitable and not legal estates. *Routledge* v. *Dorril* was a case of personal estate. The law never recognized a remainder in personal estate, and this is purely a rule of law. The rule is an old rule of the common law which has never been abrogated, and could not be, except by the Legislature.

He also referred to Burton's Compendium, 7th ed., p. 256; Joshua Williams on Real Property, 11th ed., Appendix F., p. 521; 15th ed., p. 647; Sugden's Law of Property, pp. 120, 121; *Cadell* v. *Palmer*, 1 Cl. & Fin. 372; Preston on Abstracts, vol. ii. pp. 114, 166; Fearne on Contingent Remainders, 502—3, s. IV.; and *Hockley* v. *Mawbey*, 1 Ves. jun. 143.

Renshaw, Q.C. (*Swinfen Eady* with him), for the defendant Mitchell.—That the power to Mrs. Burlton to appoint by will is bad, is not disputed. Where a power to appoint by will is void for remoteness, the limitations over in default of appointment are bad too: *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq. 165.

Alexander Young, for the plaintiff.

W. Baker in reply.—In *Porter* v. *Bradley* Lord Kenyon said the time allowed by law in the case of an executory devise was borrowed by analogy from legal formal limitations—namely, for a life or lives in being, with a remainder in tail to unborn children, who cannot bar it till twenty-one. That shows the rule against perpetuities is really only the adaptation of the common law rule. The perpetuities rule is first crystallized in *Cadell* v. *Palmer*, since which the old rule has never been recognized. [CotTON, L.J. — Because the rule against perpetuities has sufficed for all the cases that have arisen.] The opinion of Jessel, M.R., was in our favour: *In re Ridley, Buckton* v. *Hay*. The case of *Hockley* v. *Mawbey* also disposes of the old rule—it lays down that an appointment in exercise of a power to appoint as the donee pleases among issue, however remote, is good as to issue living at the time of appointment if made during the donee's life. Is there any difference in principle between dividing an estate between two persons both now living, giving Blackacre to one and Whiteacre to the other, and dividing it in such a way as to give a life estate to one and a remainder to the other? The case of *In re Ridley* shows that the rule against perpetuities, which only took its present shape in 1833, was intended to apply to legal contingent remainders as well as to springing uses and executory devises. The rule that you cannot limit an estate for life to an unborn person with remainder to issue of that unborn person is simply a branch of the rule against perpetuities, but there is no rule which makes such a limitation void where it includes a proviso that the issue are to be born within the time allowed by the rule against perpetuities. As to the case of *Wollaston* v. *King*, Mrs. Burlton has released that void power of appointing by will, and the gift in default, is not dependent on that void power, but is by way of substitution for it.

CotTON, L.J.—This is an appeal against a decision of Kay, J., declaring that certain limitations of legal estates introduced into a settlement made on the marriage of Mr. and Mrs. Dennis are void, and that they are void, not on the ground of remoteness, but because they are of a kind which the law does not allow. The limitations in question are to an unborn child of the marriage for life and then to her unborn children. It is said that that does not transgress the rule against perpetuities, and that there is no other rule which prevents such a limitation from being good. Kay, J., has decided, rightly as I think, that there is a rule which prevents such a limitation from being good. That rule is sometimes described as a rule against making a remainder depend upon the event of a double possibility, or a possibility on a possibility, but it is, I think, better defined as a rule against legal limitations of land by way of remainder or otherwise (after an estate for life to an unborn person) to the issue of that unborn person, so that such issue should take as purchasers. Then it was said that though there was that old rule formerly, it had long ago been done away with and superseded by the modern rule against perpetuities. In my opinion, it is impossible for us to come to the conclusion that it has been done away with.

It was conceded that the old rule existed long before the modern one against perpetuities came into existence. Can one say it has been superseded? Mr. Joshua Williams says it is still existing; other text-book writers say it is not. One must see what views have been expressed by judges and other authorities bearing directly or indirectly on the question. What one finds is this. We have Mr. Butler's note in Fearne's Contingent Remainders, in which he says the rule has not been superseded, and though there has been a good deal of argument on the other side, based on the statements of text-writers and certain *dicta* of judges, and considerable doubt is expressed by various text-writers on the subject, yet, in my opinion, the rule must be considered as still existing, and as preventing the limiting of estates in a way which infringes it, though not offending against the rule against perpetuities.

Lord Kenyon refers to it in the case of *Hay* v. *Earl of Coventry*. He says: "It is not necessary for me to say what effect that would have had in the present case if that point"—whether an estate for life could be given to unborn issue—"had remained undecided; because

the law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue." But it was contended that was really only because such a limitation to unborn issue generally would necessarily be void under the rule against perpetuities. But we find this old rule referred to by judges in other cases as still existing, long after the rule against perpetuities was established. In 1852 we find Lord St. Leonards, in *Monypenny* v. *Dering*, saying: "Then the rule of law forbids the raising of successive estates by purchase to unborn children—that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." Now he said that at a time when, according to the argument for the appellants, the old rule had ceased to exist or had been superseded by the rule against perpetuities.

Then we have Mr. Butler's note in Fearne, where he distinctly lays down that there had not been any superseding of the old rule. He says: "The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." There he recognizes the two rules as both then existing. Then we have the passage in Mr. Burton's Law of Real Property which was read by Mr. Farwell:—"Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn. . . . But no remainder can be given to the child of a person who is not in existence." So he, too, does recognize the old rule as still subsisting. Now, although there has been a very ingenious and learned argument to show that the old rule has been done away with or superseded by the modern rule against perpetuities, and a passage in *Cole* v. *Sewell* was read by Mr. Marten, in which Sir E. Sugden said that the effect of the modern rule against perpetuities has been to render the old rule obsolete, yet by that, Sir E. Sugden only means that it is not now necessary to refer to it, because the modern rule is generally sufficient to meet the necessities of the case, and he nowhere lays down that the old rule is no longer in existence. But then, if Mr. Marten refers to that passage as in his favour, I prefer what Lord St. Leonards said on the bench at a later period (*Monypenny* v. *Dering*), which shows he did not consider that the old rule had been superseded or done away with. In my opinion, therefore, the judgment of Kay, J., was right, and this appeal fails.

LINDLEY, L.J.—I have no doubt that the observations of Mr. Joshua Williams on this subject are correct from beginning to end, and I do not think I could express my own view better than by reading what he says. But I am in a difficulty, as it is obvious he was, to understand the old rule or doctrine as to a possibility upon a possibility, and if anyone will turn to the passage in Coke upon Littleton where it is discussed, I hope he will understand it better than I do. I do not understand it now, and never did. But still it has given rise to an intelligible rule. Mr. Butler, in his note in Fearne's Contingent Remainders, at p. 565, says: [His lordship read the passage read by Cotton, L.J., and continued:—] That is intelligible, and there is also a passage to the same effect on pp. 502, 503. I always understood that it was a settled rule of law, and I am not aware of any authority or *dictum* which in any way impugns it. Then it is contended that the old rule is antiquated and obsolete, and that it has been merged in or superseded by the modern rule as to perpetuities. I think the same note of Mr. Butler is an answer to that. It points out that the old rule has nothing at all to do with perpetuities, the rule against which was invented later. When springing uses and executory devises were invented, it became necessary to consider how far they could be allowed, and so the rule against perpetuities was introduced to impose bounds upon the limitation of future estates. In my opinion the old rule has never been abrogated, and the principle of it seems to me to be grounded on very good sense. After all the practical question is whether, upon the grounds now put forward, we ought to allow land to be tied up for a longer term than has been generally allowed. But in my opinion, so far from lending our assistance to support ingenious devices to tie it up as long as possible, our inclination ought rather to be to discountenance such a proceeding as a retrograde step. I think the time has long gone by for supporting devices tending to the indefinite tying up of land.

I am clearly of opinion that the decision of Kay, J., was right, and that this appeal ought to be dismissed.

LOPES, L.J.—That there was an old rule that an estate could not be limited to unborn children of an unborn person is admitted, and could not in fact be denied. But it is said that it has been superseded by the rule against perpetuities. No direct authority for that assertion, however, has been brought before us, nor could any such authority be found. Certain *dicta* by text-book writers of more or less doubtful import and authority, were brought to our notice. In the year 1789, however, the old rule was recognized as existing by Lord Kenyon in the case of *Hay* v. *Earl of Coventry*, and again in the year 1852 it was recognized as still existing by Lord St. Leonards in the case of *Monypenny* v. *Dering*; and it is to be noted that both these cases were decided after the rule against perpetuities was in existence. No doubt, therefore, these rules are two independent and co-existing rules. The origin of the rule against perpetuities was the rise or invention of executory devises and springing uses, against which the old rule afforded no sufficient protection. I am clearly of opinion that this decision was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors, *Sanderson, Holland, & Adkin; W. Montgomery White; Cowdell & Son.*

From Chan. Div. Dec. 11.

TURNOCK *v.* SARTORIS. (*a.*)

Arbitration—Agreement to refer—Application to stay proceedings—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.

A lessor covenanted with the lessee to lay down all apparatus necessary for supplying with water a reservoir of the lessee's, and to cause to be delivered such a quantity of water as would enable the lessee to furnish his works with the supply necessary for the purposes of his business, such supply not to exceed a certain limit. The lease contained a clause for referring to arbitration any dispute "touching these presents or any clause, matter, or thing herein contained, . . . or any matter in any way connected with these presents, . . . or the rights or liabilities of either party in connection with the premises."

Several years afterwards, and during the continuance of the lease, an agreement in writing was entered into

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

between the plaintiff and the lessor, the effect of which was to some extent to modify the rights of the parties under the lease and to impose fresh liabilities on the lessor; there was, however, no arbitration clause in the agreement.

The plaintiff (an assignee of the original lessee), some time after the date of the agreement, commenced an action against the lessor, and, by the statement of claim, alleged breaches by the defendant of the stipulation contained in the agreement and also breaches of the covenant contained in the lease, and claimed damages "by reason of the matters aforesaid."

The defendant, before putting in a statement of defence, took out a summons for a stay of the action, and that all matters in dispute should be referred to arbitration.

Held, that the arbitration clause in the lease did not cover matters arising under the subsequent agreement, and that, even if it did, the judge had properly refused to refer the action under this clause, as the action raised questions as to the construction of the agreement and its effect on the previous lease, which could not come within the powers of the reference under the clause.

Held, also, that it would not be right to separate the litigation into two actions by referring to arbitration the questions arising under the lease, and allowing the action to proceed only as to matters not arising under the lease.

Decision of North, J., *affirmed.*

Appeal from North, J.

By a lease dated June 21, 1870, the predecessor in title of the present defendants demised to the predecessor in title of the plaintiff, a factory for the manufacture of tin plates, and the lessor covenanted to lay down all apparatus necessary for supplying with water a reservoir (to be constructed by the lessee); and by means of such apparatus to cause to be delivered into the reservoir such a quantity of water as would enable the lessee to furnish the manufactory and works with the necessary supply of water for the purposes of the business, such supply not to exceed 110,000 gallons per day. The lease contained a clause which provided "that if any dispute, question, difference, or controversy shall arise between the said parties to these presents, their respective heirs, executors, administrators, or assigns, touching these presents or any clause, matter, or thing herein contained, or the construction hereof, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises, then and in every such case the matter in difference shall be referred to two arbitrators or their umpire, pursuant to, and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof."

The lessee constructed the reservoir, and prior to 1880 assigned his interest in the lease to the plaintiff.

In 1884 disputes arose between the plaintiff and the lessor as to the quality and quantity of water supplied; and in 1885 an agreement in writing was entered into between the plaintiff and the original lessor whereby it was agreed that the lessor should obtain at his own expense the requisite easements for laying down new pipes by a new and less circuitous route; that the new line of pipes was to be kept in repair by the plaintiff; that the plaintiff was to undertake the whole charge of the waterworks upon certain terms specified in the agreement, if so required by the lessor, and that if the plaintiff was so required by the lessor, then that the lessor was to be freed from any liability under the covenant in the lease as to the supply of water, provided that the lessor should be liable to maintain such a supply of pure water as would enable the plaintiff to convey to the factory a quantity not exceeding 110,000 gallons per day.

There was, however, no arbitration clause in this agreement.

The present action was instituted in April, 1888, against the lessor, and he having died before trial, the action was in February, 1889, revived against the present defendants as executors and trustees of the lessor.

The 8th paragraph of the statement of claim alleged that since the agreement of 1885 neither the lessor nor the defendants had obtained, nor attempted to obtain, the requisite easements for laying down the new pipes; that the lessor had failed to furnish the plaintiff's reservoir so as to enable the plaintiff to furnish, and that the lessor neglected himself to furnish, the works with a necessary supply of water, though such necessary supply would never have exceeded 110,000 gallons per day.

The 10th paragraph of the statement of claim alleged that, by reason of the insufficiency of the supply of water to the plaintiff's works, the plaintiff had suffered, and still continued to suffer, considerable damage in the manufacture of tin plates. The claim was for an inquiry "as to the damages sustained by the plaintiff by reason of the matters aforesaid," and for judgment for the amount that might be certified as the result of such inquiry, if the defendants admitted assets, and if they did not, then for administration of the testator's estate.

The defendants, before putting in any defence, issued a summons asking that all further proceedings in the action might be stayed pursuant to section 11 of the Common Law Procedure Act, 1854.

North, J., refused to stay the action, and dismissed the summons.

The defendants appealed.

Crackanthorpe, Q.C., and *S. Woolf*, for the appellants.—Though the 8th paragraph of the statement of claim alleges a breach of the agreement of 1885, yet no relief is claimed in respect of that; the only relief claimed is in respect of the allegation in paragraph 10 of breach of the covenant contained in the lease itself. At all events we are entitled to have the question of the breach of covenant in the lease referred to arbitration. The lease and the agreement should be read together, and the arbitration clause is therefore applicable to both: *Wade-Gery* v. *Morrison*, 37 L. T. N. S. 270, 26 W. R. Dig. 10. The arbitrator can decide what questions are within the reference: *Willesford* v. *Watson*, 21 W. R. 350, L. R. 8 Ch. App. 473. [*Cozens-Hardy, Q.C.*, referred to the observations of Jessel, M.R., in *Piercy* v. *Young*, 28 W. R. 845, 14 Ch. D., at p. 208.]

Cozens-Hardy, Q.C., and *H. Terrell*, for the plaintiff, the respondent, were not called on.

COTTON, L.J.—This is an appeal from the refusal of North, J., to stop the action and send the matters in dispute to arbitration. Two questions seem to me to be involved—first, whether the matters in dispute come within the clause of arbitration, and, secondly, if that be so, whether there has been a proper exercise of his discretion by the judge in saying that the matters ought not to be referred.

The lease under which the plaintiff claims, contained a covenant by the lessor, whom the defendants represent, to supply a certain quantity of water to the demised premises. Disputes having arisen as to the supply, in 1885 an agreement was entered into (which in my opinion cannot be read as part of the agreement contained in the original lease) imposing on the lessor fresh liabilities, and to some extent modifying the previous rights of the parties.

In my opinion the present action is for breach both of the covenant in the lease and of that contained in the agreement of 1885. Mr. Crackanthorpe argued that the action was brought only in respect of breaches of the covenant contained in the lease; in my opinion, however, that is not so. Paragraph 8 of the statement of claim distinctly refers to breaches of the contract contained in the agreement, and although paragraph 10 seems to refer only to breaches of the covenant in the lease, yet the plaintiff expressly claims damages sustained "by reason of the matters aforesaid," so that he cannot be precluded from claiming damages in respect of all matters previously referred to in the statement of claim, and the claim cannot, therefore, be confined to breaches of the covenant contained in the lease.

Then it was said that the arbitration clause in the lease would include and apply to matters of dispute arising under the subsequent agreement. In my opinion that is not so. [The Lord Justice read the clause, and proceeded:—] The words are, "any dispute . . . touching these presents," that is, the lease; "or any clause, matter, or thing herein contained," that is, contained in the lease; "or any matter connected with these presents, . . . or the rights, duties, or liabilities of either party in connection with the premises"; that, to my mind, refers simply to questions arising under the lease alone, and I therefore hold that the clause does not include the matters arising under the subsequent agreement.

The case of *Wade-Gery* v. *Morrison* was entirely different from the present case. In that case there were two contemporaneous documents, one of which contained, and the other of which did not contain, a stipulation for reference to arbitration; the learned judge decided that those two documents should be treated as together forming one agreement, and therefore that the clause as to reference to arbitration was to apply to matters arising under either of the two documents which together made up the agreement.

Then it was said that, at all events, the question arising under the lease ought to be referred to arbitration, leaving the action to proceed only as to matters not arising under the lease. I do not think that would be right. It cannot be right to cut up this litigation into two actions in that way.

But even if the arbitration clause could be construed so as to include all the matters in respect of which the plaintiff claims damages, yet I think it would be a right exercise of discretion on the part of the judge to refuse to refer it, because there are questions arising as to the construction of the agreement, and its effect on the previous lease, which could not come within the powers of the arbitrators.

Whether or not it will be reasonable, when the plaintiff knows what the defence put in by the defendants is, to refer the whole matter is another question. The appeal therefore fails.

BOWEN, L.J.—I am of the same opinion. The only word I will add is to recommend that, as soon as the defence has been put in, the parties should consent to the cause being tried by an official referee. I think the case is one which it is the duty of the solicitors on both sides to agree to refer, otherwise there will be a double expense and a double litigation.

FRY, L.J.—I am of the same opinion. It appears to me to be reasonably plain that the arbitration clause does not cover all the matters in dispute in the action.

After what has been said, especially by Bowen, L.J., I cannot help adding a word or two on the subject. I view with considerable regret the number of cases in which the court is called upon to try matters twice over—viz., to try the question whether there ought to be an inquiry as to damages, and then to try the matter again upon an inquiry as to what the damages are. I think, so far as possible, those double inquiries ought to be avoided.

Appeal dismissed.

Solicitor for the appellants, *Oliver Green.*

Solicitors for the respondent, *Bridges, Sawtell, Heywood, Ram, & Dibdin*, for *Rees & Edwards*, Llanelly.

From Q. B. Div. Feb. 18.

ROCKE v. MCKERROW. (a.)

Practice—Appeal—Trial with jury—Application to set aside judgment—Judgment entered upon further consideration—Jurisdiction of Court of Appeal—R. S. C., 1883, *ord.* 39, *r.* 1; *ord.* 40, *rr.* 4, 5.

At the trial of an action with a jury, the jury found a verdict for the plaintiff, assessing the damages. The judge, upon further consideration, held that there was no evidence of liability on the part of the defendant, and entered judgment accordingly.

Held, that an application to set aside the judgment so entered must be made to the Divisional Court, and not to the Court of Appeal.

In an action to recover damages for breach of covenant for quiet enjoyment tried before Stephen, J., with a jury, the learned judge left the case to the jury, who found a verdict for the plaintiff for £80. The learned judge, having reserved the case for further consideration, held that there was no evidence of liability on the part of the defendant, and gave judgment accordingly.

The plaintiff appealed to the Court of Appeal.

Gully, Q.C. (*Hopkinson* with him), took the preliminary objection that the appeal lay to the Divisional Court under ord. 39, r. 1, as the trial had taken place with a jury. It is the same as if the judge had directed the jury to return a verdict for the defendant: *Etty* v. *Wilson*, 3 Ex. D. 359, 27 W. R. Dig. 160; *Davies* v. *Felix*, 27 W. R. 108, 4 Ex. D. 32.

He also referred to ord. 58, r. 5.

Ambrose, Q.C. (*W. S. Robson* and *Compton Smith* with him), for the plaintiff.—The case comes within ord. 40, rr. 4, 5. Rule 4 provides that "where at or after a trial by a judge, either with or without a jury, the judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong." By rule 5 an application under rule 4 shall be to the Court of Appeal. The application here is to set aside the judgment and to enter judgment for the plaintiff in accordance with the verdict of the jury.

Gully, Q.C., in reply.—Ord. 40, r. 4, does not apply where the finding of the jury is not accepted by the judge. It applies to a special verdict where the judge accepts the findings and enters judgment upon them. Here the judge set aside the verdict.

Lord COLERIDGE, C.J.—We are all of opinion that the appeal has been brought to the wrong court, and therefore we cannot hear it. The appeal ought to have been to the Divisional Court.

Lord ESHER, M.R.—After consideration I have come to the same conclusion. Supposing the judge at the trial directs the jury to find a verdict for the defendant, the only way of questioning that would be by an application to the Divisional Court for a new trial on the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ground of misdirection. Supposing, again, the judge leaves the question to the jury, and before it is answered he changes his opinion and directs the jury to find for the defendant, there again that would be a case of misdirection, and the application must be to the Divisional Court. In the present case the judge left the question to the jury and the jury found a verdict for the plaintiff. Upon further consideration, however, he came to the conclusion that he was wrong in leaving any question to them at all, and he thereupon directed judgment to be entered for the defendant. That, in my opinion, was not a case of entering judgment upon the findings of the jury as correct. The judge did not assume that the question was properly left to the jury and properly answered, and enter judgment accordingly. He came to the conclusion that he was wrong in leaving the question to the jury, and he set aside their verdict and entered judgment for the defendant just as if he had never left the question to them at all. In reality it amounted to the same thing as if he had directed the jury to find a verdict for the defendant. The application ought, therefore, to have been to the Divisional Court.

Fry, L.J.—I am of the same opinion. The case is not within ord. 40, r. 4. That rule applies where the findings of the jury are assumed to be correct, and judgment is entered upon them, and an application is made to set aside the judgment on the ground that upon the findings the judgment has been wrongly entered. In other words, that, the finding standing as it is, the judge has drawn a wrong inference from it, and has entered judgment wrongly.

Appeal dismissed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *R. A. Gartside*, Manchester.

Solicitors for the defendant, *Bower, Cotton, & Co.*, for *J. H. Boardman*, Manchester.

From Q. B. Div. Nov. 28; Dec. 19.

In re An Arbitration between the London, Tilbury, and Southend Railway Co. and the Trustees of Gower's-walk Schools. (*a*.)

Railway company—Land injuriously affected—Obstruction of windows—Ancient lights—Measure of compensation—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16.

The owner of certain ancient lights pulled down the old buildings and erected others, of which some of the windows corresponded, and others did not correspond, with the ancient lights. Before any right to the access of light had been acquired by the new windows, a railway company, under its statutory powers, erected a building on adjacent land belonging to them which obstructed the light of all the windows.

Held, affirming the decision of the Queen's Bench Division (ante, *p.* 332, 24 *Q. B. D.* 40), *that compensation must be given in respect of all the windows obstructed, and not merely in respect of those which corresponded with ancient lights.*

Appeal from the decision of a divisional court (Mathew and Wills, JJ.), reported *ante*, p. 332, 24 Q. B. D. 49.

In 1884 the trustees of the Gower's-walk Schools removed them to a site in Lambeth-street, Whitechapel, upon which some buildings were standing which were pulled down and the schools erected. Some of the window spaces in the new building included substantially some of the windows in the old building, all of which were ancient lights, but other of the new windows did not correspond with any of the old window spaces.

In 1886 the London, Tilbury, and Southend Railway Co. under their special Act, which incorporated the Railways Clauses and Lands Clauses Acts, erected on the land on the opposite side of the street to the schools, a warehouse which obstructed the light coming to the schools.

The trustees claimed compensation in respect of the whole of the windows. The company contended that they were only entitled to compensation in respect of such of the windows as corresponded with ancient lights. The arbitrator assessed the compensation at £1,450 if the trustees were entitled to compensation for the whole, and at £725 if they were only entitled to compensation in respect of ancient lights, and stated a case for the opinion of the court. The court held that the trustees were entitled to compensation in respect of the whole of the windows obstructed, and gave judgment accordingly.

The railway company appealed.

R. S. Wright and *Charles Haigh*, for the appellants.—Compensation can only be given for damage in respect of which an action could have been brought: *Metropolitan Board of Works* v. *M'Carthy*, 23 W. R. 115, L. R. 7 H. L. 243, unless land of the claimant has been taken: *Reg.* v. *Chester Clerk of the Peace* (*Stockport case*) 12 W. R. 762; *Cowper Essex* v. *Acton Local Board*, *ante*, p. 209, 14 App. Cas. 153. What is taken may be only an easement, as in *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, but in this case nothing has been taken, and therefore the rule in *M'Carthy's case* must prevail.

Bosanquet, Q.C., and *Houghton*, for the respondents.—It is impossible for the building to obstruct the ancient lights without also affecting the windows which are not ancient lights. Wherever an owner of land has his interest injuriously affected by an act which can only be legally done under a statutory power, he is entitled to compensation for all the damage he sustains by the exercise of the statutory power, even although no part of his land is taken, and although the damage is not damage for which he could recover in an action at law.

R. S. Wright, in reply, cited *Ricket* v. *Metropolitan Railway Co.*, 15 W. R. 937, L. R. 2 H. L. 175.

Cur. adv. vult.

Dec. 19.—The following judgments were delivered:—

Lord Esher, M.R.—In this case the defendants were authorized by statute to erect a large warehouse close to one side of a street. On the other side of that narrow street stood the plaintiffs' schoolhouse, and in that schoolhouse there were several windows, some of which were, and some of which were not, ancient lights. The warehouse undoubtedly diminished the light coming to all those windows, and the defendants became liable to indemnify the plaintiffs for any damage properly suffered by the injurious affecting of their property. If they were only bound to compensate the plaintiffs for the injury to their ancient lights, the arbitrator has fixed one sum; if, however, they were bound to indemnify them for the diminution of light coming to all the windows, whether ancient lights or not, the arbitrator has fixed another sum. It is not denied that they were liable to compensate the plaintiffs for the injurious affection of the ancient lights, but the question is, whether they are liable to pay the larger sum for the interference with the light of the other windows which are not ancient lights. I confess that I at one time entertained considerable doubt on the question. If none of these windows had been ancient lights, the

(*a*.) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

plaintiffs would not have been able at common law to sue adjoining owners who had interfered with the access of light to those windows. Ought they, therefore, under the Act of Parliament, to be compensated for the injury done to the modern windows. Supposing that the railway company had not had the Act of Parliament, but had been ordinary owners, and had erected this warehouse on their land, what would have been the effect of a common law action brought against them by the plaintiffs for the injury to their ancient lights? The interference with the ancient lights would have been a wrongful act, and where a man does a wrongful act he is liable for all the direct damage caused by that act. Therefore, since the inevitable consequence of putting up such a warehouse would be not merely to obstruct the access of light to such of the windows as were ancient lights, but also to the modern windows, I am of opinion that even in a common law action the plaintiffs would have been entitled to compensation for the whole injury done to their building by the wrongful act of the defendants, and that that would include the damage done to the new windows as well as that done to the old. If that is so, it is obvious that compensation must be given under the Railways Clauses Act to the same extent. But if that is not so, and in a common law action the plaintiff could only have recovered for the injury to the ancient lights, then what are his rights under section 16 of the Railways Clauses Act? Is he entitled to compensation for anything for which in a common law action he could not have recovered damages. The section speaks of "full satisfaction for all damage." Supposing that it ran "shall make satisfaction for damage by them sustained." That would carry all legal damage, and therefore, if "full satisfaction for all damage" means nothing more, the words "full" and "all" are tautologous. Nevertheless, had it not been for a superior authority, I confess I should not have thought that the Act meant to give compensation for anything more than actual legal damage, but in the case of *Cowper Essex* v. *Acton Local Board* the House of Lords have laid down the principle which must guide us. In that case some land had been taken from Mr. Cowper Essex, and what was done on that land injuriously affected the value of the adjoining land, which also belonged to him. The House of Lords, as I understand them, said that Mr. Cowper Essex was entitled to compensation for something more than the legal damage which he had sustained. The Lord Chancellor says:—"When part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of a neighbouring proprietor from whom nothing has been taken for the purpose of the intended work." That is to say, that, under the section which we are now considering, there may be an injurious affecting, for the purpose of compensation, by something which would not, in an action at law, give rise to damages. That case affirmed what are known as the *Stockport case* and the *Duke of Buccleuch's case*. In the present case it is true no land of the plaintiff's was taken by the defendants, but how can that signify? If the case once comes within the statute, then it seems that the words "full satisfaction for all damage" are to include, not only legal damage, but all the damage which the property has in fact sustained. Therefore, even though no land is taken, yet, if there is an injurious affecting, the case comes within the statute just as much as if land had been actually taken, and the interpretation put on the section by the House of Lords must be put on the one case just as much as the other. Therefore, even though this damage to the new windows could not be recovered for in a common law action, yet I think compensation must be made for it under the section. In my opinion the defendants are liable to pay to the plaintiffs the larger sum found by the arbitrator, and the appeal must be dismissed.

Lindley, L.J.—I am of the same opinion. The key to the case is found in considering what the railway company have in fact done. They have erected a large building, and in so doing have infringed the rights of the owners of the schools by darkening their ancient lights, and, as a necessary consequence, have diminished the value of those schools. That is the necessary physical consequence of their wrongful act. On what principle ought the company not to pay compensation for this? They cannot reduce their liability for what they have actually done by saying that they might have blocked up the access of light to the plaintiff's modern windows. No action will lie against the company because they have acted under their statutory powers, but they are bound, under section 16 of the Railways Clauses Act, to make to the plaintiff full compensation for all the damage they have done in the exercise of those powers—that is to say, they must make up the difference in value between the land as it was and as it now is. I can see no authority to the contrary, and all the authorities appear to me in favour of that proposition. No doubt in the *Cowper Essex case* and in the *Stockport case* section 63 of the Lands Clauses Act was in question, but the difference is not important, whether land is taken and other land of the same proprietor injuriously affected, or whether the land is injuriously affected without any land being taken. The moment there is an injurious affecting for which compensation is payable, full compensation for all damage must be made. That seems to me to be the short answer to this case.

Lopes, L.J.—Having regard to the authorities and to section 16 of the Railways Clauses Act, I do not consider this case a difficult one. It must be borne in mind that, as a matter of fact, it is physically impossible to obstruct the access of light to the new windows without also interfering with the ancient lights and *vice versâ*. If an unauthorized individual had attempted to erect this warehouse without any Act of Parliament, the owners of the school would have been entitled to an injunction to restrain him from interfering with their ancient lights. Now, the owners of the school are compelled by Act of Parliament to submit to the erection of the warehouse, and have lost their legal remedy. The result is that the light both of its old and its new windows has been diminished, and the value of the property has been deteriorated. The company are bound to make full satisfaction for all the damage they have caused to the plaintiffs, and therefore I think the larger sum is payable. I think that the principle which may be deduced from the authorities is this, that directly a party brings himself within the statute and is entitled to compensation, then he becomes entitled to receive full compensation for all damage, and not only for the strictly legal damage which he has sustained.

Appeal dismissed.

Solicitors for the plaintiffs, *Hanbury, Hutton, & Whitting.*

Solicitors for the defendants, *Matthews & Browne.*

From Prob. Div. and Adm. Div. Dec. 9, 10.

"THE CITY OF LINCOLN." (a.)

Ship—Collision—Measure of damages—Loss of instruments of navigation—Subsequent loss of vessel.

A barque, having been run into by a steamer, which was solely to blame, lost in the collision her instruments of navigation. She made for a port of safety, but, while on her way thither, without any negligence or want of skill, ran aground and was lost.

Held, that this was a reasonable and natural consequence of the collision, and that the owners of the steamer were liable for it.

Appeal from the decision of Butt, J., reversing the registrar's report.

On the 7th of November, 1888, the barque *Albatross* was run into by the steamer *City of Lincoln* in the North Sea, *The City of Lincoln* being alone to blame for the collision.

The starboard quarter of *The Albatross* was cut off by the blow, and she lost her steering compass, log, and log glass, and large, and coasting, charts. Her master, however, made for the Thames, steering by another compass which he found, but being unable to calculate his distance he ran the barque aground, and she had to be abandoned.

The registrar held that the grounding was not caused by any negligence on the part of those on board *The Albatross*, and that the owners of *The City of Lincoln* were liable. Butt, J., reversed the report, holding that the persons in charge of *The Albatross* had been negligent.

The owners of *The Albatross* appealed.

Barnes, Q.C., Stubbs, and *Stokes*, for the appellants.—The loss of *The Albatross* was caused by the wrongful act of *The City of Lincoln*, since it was the direct consequence of that act.

They cited *Jones* v. *Boyce*, 1 Stark, 193; *Wilson* v. *Newport Dock Co.*, L. R. 1 Ex. 177; *The Pensher*, Swa. 211; *The Countess of Durham*, 9 Monthly Law Mag. 357, Part 2, 279; *The Notting Hill*, 32 W. R. 764 9 P. D. 105; *The Argentino*, 37 W. R. 210, 14 App. Cas. 519; *The Mellona*, 3 Wm. Rob. 7.

Sir W. G. F. Phillimore and *J. P. Aspinall*, for the respondents.—The intervention of the acts of those on board *The Albatross* breaks the chain of consequence, and *The City of Lincoln* is not therefore responsible for her loss.

They cited *The Flying Fish*, Br. & L. 436, 13 W. R. H. L. Dig. 11; *Adams* v. *Lancashire and Yorkshire Railway Co.*, 17 W. R. 884, L. R. 4 C. P. 739.

Barnes, Q.C., replied.

LORD ESHER, M.R.—In this case the bad navigation of *The City of Lincoln* not only damaged *The Albatross*, but also deprived her captain of his charts, compass, and log. I think he was right, however, in resolving to make for the Thames. He laboured under great difficulties, and we are advised that he was not negligent in anything that he did. But even where there is no negligence there may be intermediate circumstances which prevent the ultimate damage from being the direct result of the wrongful act. In this case, however, I think that the loss of the ship was caused by the captain's having been deprived of the means of finding out where he was, and that deprivation was the direct result of the wrongful act of *The City of Lincoln*. The owners of that vessel are, therefore, responsible for the accident which subsequently happened in consequence of that deprivation. The appeal must, therefore, be allowed.

LINDLEY, L.J.—I am of the same opinion. The view taken by the registrar was correct. We are advised that there was no negligence on the part of those on board *The Albatross*, and, therefore, on the facts, we differ from Butt, J. Then comes the question whether the loss of *The Albatross* was too remote a consequence of the collision to render the owners of *The City of Lincoln* responsible for it. The rule is well laid down in Mayne on Damages, 4th ed., pp. 44, 45: "Damage is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily follow from it as that the offending party can be made responsible for it. . . . The first, and in fact the only, inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume that character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act." That rule was adopted by Lord Herschell in *The Argentino*. What, then, is the meaning of "the ordinary course of things"? In my opinion it includes reasonable human conduct. That was the principle acted upon in *Jones* v. *Boyce*, which I have always thought to be sound law. In this case I think that the captain of *The Albatross* acted reasonably and without any negligence. The loss of the ship was caused by the bad state she was in and by the deprivation of her charts, logline, and compass. I think, therefore, that the case falls within the rule I have laid down, and that the owners of *The City of Lincoln* are responsible for the loss of *The Albatross*.

LOPES, L.J.—The case may be thus stated:—By the misconduct of the defendants the plaintiffs' ship was placed in a position of the utmost peril, and this was caused entirely by the defendants' fault. To save their ship, and to minimize as far as possible the loss to the defendants, the plaintiffs endeavoured to reach a place of safety, and while so doing, without any negligence or any want of skill, and also without any independent intervening cause, the ship runs aground and is lost. Under those circumstances, in my opinion the defendants are liable for that loss. The original fault was theirs, and they are responsible for what followed. They are responsible for the natural consequences, not only of the collision, but of the deprivation of *The Albatross* of the usual means of navigation. If there had been negligence or want of skill on the part of those in charge of *The Albatross* the result would be different, but we are advised that there was none. Nor was there any intervening interposition, but the loss of the ship was the direct consequence of the collision and the deprivation of her instruments of navigation. I therefore agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Stokes, Saunders, & Stokes.*

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.*

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. North, J. — Nov. 23.

Emeris v. Woodward. (a.)

Compromise of action—Application to set aside—Summons—Jurisdiction.

An agreement for the compromise of an action cannot be set aside by a summons in the action; a fresh action must be brought for the purpose.

Adjourned summons.

The plaintiff in this action claimed an order that the defendant, who was an executor, should execute transfers to the plaintiff of three mortgages in pursuance of an alleged agreement.

On the 2nd of August, 1887, an agreement was entered into between the plaintiff and the defendant for the compromise of the action on certain terms therein mentioned. This agreement was made subject to its being approved by the judge before whom another action, which had been brought to administer the testator's estate, was pending, and that approval had been obtained.

On the 4th of February, 1889, the plaintiff took out a summons entitled in both actions, asking that so much of the agreement of the 2nd of August, 1887, as provided that the defendant should forthwith make and execute (*inter alia*) an assignment to the plaintiff of a mortgage dated the 30th of December, 1878, might be varied as in the summons mentioned.

On the 16th of July, 1889, the plaintiff took out a second summons asking to be at liberty to amend the first summons by adding thereto the words "or that the said agreement may be set aside *in toto*, or that the plaintiff may be at liberty to continue the action of *Emeris* v. *Woodward*, or to take such proceedings against the defendant as he may be advised."

Cozens-Hardy, Q.C., and *B. Eyre*, for the plaintiff.

Napier-Higgins, Q.C., and *T. L. Wilkinson*, for the defendant.—We have a preliminary objection to make. We say that a compromise of an action cannot be set aside upon a summons. The plaintiff should have brought a fresh action to set aside the compromise.

They referred to *Gilbert* v. *Endean*, 27 W. R. 252, 9 Ch. D. 259; *Pryor* v. *Gribble*, 23 W. R. 642, L. R. 10 Ch. 534; *Scully* v. *Lord Dundonald*, 27 W. R. 249, 8 Ch. D. 658.

Cozens-Hardy, Q.C., and *B. Eyre*, for the plaintiff.—This objection ought to have been taken in chambers. At any rate, if it was taken in chambers, the defendant, by filing affidavits in answer to the plaintiff's affidavits, has waived such objection.

North, J.—In my opinion the objection must prevail. The plaintiff's proper course, in my opinion, is to bring a fresh action to set aside the compromise; he cannot by a summons set aside the agreement and reopen the controversy. It is said the defendant has, by his conduct, waived the objection. It is clear, I think, that such an objection could be waived by conduct. But the chief clerk's notes show that the objection was raised in chambers at an early stage, and that it was clearly pointed out to the plaintiff that he ought to bring a fresh action. In my opinion the defendant has done nothing to waive the objection. Knowing of the objection the plaintiff chose to put in his evidence, and after that it was incumbent on the defendant, for his own protection, to put in and complete his evidence in answer. I must dismiss both the summonses with costs.

Solicitors, *G. L. P. Eyre; Long & Gardiner.*

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

Chan. Div. North, J. — Feb. 12.

Marquis of Northampton v. Pollock. (a.)

Mortgage—Mortgagor and mortgagee—Redemption—Agreement excluding right to redeem in particular event—Validity—"Once a mortgage always a mortgage."

A. mortgaged his reversionary interest in land contingent on his surviving B., to secure an advance of £10,000. The mortgagees were to effect a policy of assurance for £34,000 on the life of A. against that of B., and, if they paid the premiums, to add them to the debt. The policy, in the event of A. predeceasing B., was to belong to the mortgagees absolutely. On A.'s death in B.'s lifetime, A.'s administrator brought an action to redeem the policy.

Held, on the principle that "Once a mortgage always a mortgage," that the condition that the policy should belong absolutely to the mortgagees was void, and that the plaintiff was entitled to redeem on the usual terms.

Argument of a point of law raised by the pleadings under ord. 25, r. 2.

This was a redemption action, in which the point was raised, whether an express agreement between the mortgagor and the mortgagees, that the title of the latter to a portion of the mortgaged property, on the happening of a certain event, should become absolute, was binding on the mortgagor.

In the year 1879 the National Life Assurance Society advanced to Earl Compton a sum of £10,000 on the security of a mortgage in Scotch form (dated the 26th of May, 1879) of a reversionary interest in freehold property in Scotland, to which he was entitled as tenant in tail in remainder expectant on the death of his father, the plaintiff. By an agreement of even date between the same parties, it was provided that the society should insure the life of Earl Compton against that of his father in the sum of £34,000, and that they should pay the premiums during the first five years, and afterwards should continue to do so if Earl Compton failed to pay them, and that the payments made should be added to the debt. In the event of Earl Compton paying the mortgagees the whole sums due to them in the lifetime of his father, the mortgagees were to assign the policy to Earl Compton, but in the event of his death in the lifetime of his father, the mortgagees should prepare an account of what was due to them, and, after paying themselves out of the policy moneys, pay over any excess to the representatives of Earl Compton. By an agreement dated the 14th of June, 1879, after reciting that the prior agreement did not accurately state the terms on which the advance was made, it was agreed that, in the event of the death of Earl Compton before his father without repayment of the mortgage debt, the policy moneys should belong absolutely to the mortgagees.

Accordingly the defendants, who were the trustees of the society, took out a policy in the society's office. The policy was duly kept up, but nothing was ever paid as premiums, interest, or otherwise by Earl Compton up to his death in 1887, in the lifetime of his father. The plaintiff, as his administrator, sought by this action to redeem the policy and obtain payment of the amount assured, less the mortgage debt, interest, premiums, and other charges due from the deceased. The defendants by their statement of defence alleged that it had been expressly agreed between themselves and the mortgagor that, in the event which had happened, the sum secured by the policy should belong absolutely to the society; that the agreement was not within the evil aimed at by

(a.) Reported by Francis T. Duke, Esq., Barrister-at-Law.

the old rule, "Once a mortgage always a mortgage"; and that it was no hardship on the mortgagor, who had received £10,000 and paid nothing, but that this was an attempt to obtain a still further sum from the mortgagees.

Crackanthorpe, Q.C., and *R. Winslow*, for the plaintiff.—This transaction is a mortgage, and the agreement set up by the defendants that the policy should, in a certain event, belong to them is a breach of the equitable rule, "Once a mortgage always a mortgage." A mortgage cannot be made irredeemable: *Howard* v. *Harris*, 1 Vern. 194; *Jennings* v. *Ward*, 2 Vern. 520; *Toomes* v. *Conset*, 3 Atk. 261; *Spurgeon* v. *Collier*, 1 Eden. 55. It makes no difference that the policy was effected in the names of the trustees of the society: *Drysdale* v. *Piggott*, 4 W. R. 773, 8 De G. M. & G. 546; *Lea* v. *Hinton*, 5 De G. M. & G. 823, 3 W. R. Dig. 24; *Courtenay* v. *Wright*, 9 W. R. 153, 2 Giff. 337; *Morland* v. *Isaacs*, 3 W. R. 397, 20 Beav. 389. Earl Compton was liable to pay the premiums on the policy, the taking out of which was part of the mortgage agreement, and no bargain that the policy should become the absolute property of the mortgagees was binding: *Freme* v. *Brade*, 6 W. R. 739, 2 De G. & J. 582; *Holland* v. *Smith*, 6 Esp. 11.

They also cited *Brown* v. *Price*, 6 W. R. 721, 4 Jur. N. S. 882; *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449; *Williams* v. *Owen*, 5 Myl. & Cr. 303; and *Goodman* v. *Grierson*, 2 Ball & B. 274.

E. Beaumont (*Sir Horace Davey, Q.C.*, with him), for the defendants.—The plaintiff cannot set aside part of the agreement and insist on the rest. This policy was never Earl Compton's. He never paid anything. In the cases cited in which there were policies there was no contract about them. His only right to the policy was in the event of making certain payments: *Brown* v. *Freeman*, 4 De G. & Sm. 444. [North, J., referred to *Foster* v. *Roberts*, 9 W. R. 605, 29 Beav. 467].

Crackanthorpe, Q.C., replied.

North, J.—I think in this case the plaintiff is entitled to relief.

An arrangement is made between Earl Compton on the one hand, and the insurance office on the other, through the medium of certain persons, trustees for them, that he is to receive an advance of £10,000, that a policy is to be effected, which is effected in the names of those trustees, and it is to be with any office this society may select. They select their own office, and it is effected therefore in the names of the trustees of that office. The arrangements for effecting the policy provided that the premiums for the first five years were not to be paid by Earl Compton, but by the insurance office, and there were certain provisions with respect to redemption. The policy or policies were to be on the life of Earl Compton, who was entitled to a reversionary interest in certain real estate, and, in the event of his surviving his father, the advance is charged upon that reversionary interest, and the object of the policies is to provide a fund out of which the lenders may be safe in the possible event of their security not taking effect by the death of the borrower in the lifetime of the father. The office is to find the money for the premiums for the first five years, and it was part of the bargain made between the parties that that should be done. In my opinion the result of the transaction must be taken to be exactly the same as if this office had selected another office as that in which the policies should be effected. If they had been effected with another office, on the death of Earl Compton this office, or its trustees, would have received the total amount insured, and have had the £34,000, or whatever the sum was, actually in hand. They chose, however, themselves to effect the risk in their own office. It was unfortunate for them, because the risk has turned out to be a bad one, Earl Compton dying young; but it is only one of many transactions of the same sort in which they engage, upon the result of the whole of which, unless they are very unfortunate, there will be a profit. This therefore is not, from their point of view, an isolated transaction at all, and I must hold their position therefore to be the same as if, instead of effecting it with their own office, the insurance had been effected actually with another office. In that case, on the death of Earl Compton this money would have been received, and the question would be to whom the surplus belonged after applying it for the purpose for which it was effected—viz., securing the insurance office everything that was due to them under the security for principal, interest, and costs and premiums.

This transaction was from beginning to end, in my opinion, a mortgage transaction and nothing else. What the rights of the parties in the policies may be is not concluded by that; but looking at the whole transaction I have not the least doubt that it was, and intended to be, a borrowing of money by Earl Compton, which he covenanted to repay, for which he gave security, and for which the lenders of the money had the security either of the land or the proceeds of the policies as the event might turn out, and they were intended to be repaid in that way.

Then there are certain provisions made as to redemption, and then there is this peculiar provision only found in the instrument bearing date the 14th of June, in which there is a memorandum of what was the bargain between the parties from the first. Unfortunately the original bond did not correctly express that bargain, and the minute of arrangement which was drawn for the purpose of correcting it, was itself insufficient to substitute what was right for what was wrong. It merely substituted one wrong thing for another, and it was not until the last memorandum of the 14th of June that there was really expressed what was the bargain of the parties at the time the advance was made. That bargain is contained in these words in the witnessing part:—

"Now these presents witness that, in consideration of the said advance being made to the said Earl Compton, it is hereby agreed and declared by and between the said parties hereto that in the event of the said Earl Compton predeceasing his father, the Marquis of Northampton, without having paid all principal moneys, interest, and costs due to" the defendants, "under or by virtue of the bond in the said recited agreement mentioned, that then and in such case the policy or policies, and all moneys thereby secured, shall belong absolutely to the trustees." In other words, the policies were to belong to the society.

Now Earl Compton, in point of fact, never did pay any premium. According to my view of the agreement the society were bound to effect the policies under the contract between them, and they were bound to find the premiums for the first five years, and although they may not have been bound to do it afterwards they, at any rate, had the option of doing it, and had the right to charge the premiums so paid with interest against the security, the policy moneys or the land, as events might turn out, and in point of fact they did make the advance, and the policies were kept up, and the money would, if it had been in another office, actually have been received, and being effected with the same office it must be taken to be now in their hands. It is said that there is a distinction by reason of the fact that Earl Compton never himself did advance any part of the premiums, and Mr. Beaumont very fairly admitted that he would have been in a difficulty if even one premium had been paid by Lord Compton. I do not wish to take what he admitted as prejudicing his clients at all, because it was said there was another way out of the difficulty in that

case; but the distinction of the case between Earl Compton having advanced something and having advanced nothing was admitted, and the fact that he had not actually paid anything was relied on here. In my opinion that does not make any difference. If the bargain had been that he, from the first, was to pay the premiums, if he went to the office and said: "I have not the money here, will you advance it for me, I will repay you," and they had done it, it would have been a payment by him, and, I think, instead of going through that form, where it was agreed between them that the premiums should be provided by the office for him, and they should be his creditors for the amount, his position in respect to the policies was exactly the same as if, instead of that agreement, he had actually found the money.

Under these circumstances, I take it there was a mortgage transaction between the parties as part of which policies are effected on the responsibility and on the credit of Earl Compton, although, in point of fact, the cash for the purpose as between the two must be taken to be advanced by the society. In point of fact it never was advanced at all, because the whole arrangement is a book-keeping matter, but, in my opinion, he was liable to them for the premiums exactly in the same way as if he had paid the cash; and he had the same rights in respect of the policies as if he had, instead of borrowing the premiums from them, paid them cash for it. Under those circumstances it is a mortgage transaction which has to be worked out in some way or another. It seems to me that, that transaction standing, the legal right of the society will be to sue Earl Compton's representatives for the advance that was made. Mr. Beaumont says that the insurance society have never contemplated doing anything of the kind, but I cannot test the rights of the parties by any intention they may have, if it is distinct from or raises any question as to the legal rights of the parties, and it seems to me, as the bargain stands, they would have a right at this moment (if it is binding) to sue for the return of the money, and, in point of fact, if the contract is not binding, if it was set aside altogether, they would be creditors of Earl Compton's estate for the money so advanced, and have a right to sue him for so much money lent.

Then we come to the terms of redemption. What his representative says, is:—I admit his liability. An account must be taken of what is due, the insurance society must have full credit for everything due to them, if they have really done what is actually entered in their books, but then the question is as to the policies. As to that, the insurance society rely on this particular clause, which says in a certain event the policies are to be the property of the society. It is a very startling clause, because it comes to this, if, in point of fact, Earl Compton had paid the principal, interest, and costs, the policies would be his, but if he paid the principal and interest, but, by reason of a bill of costs not having been delivered, costs had not been paid, the policies would become distinctly out and out, the property of the insurance company. In my opinion a provision of that sort in a mortgage transaction is not one the law recognizes, and would not give effect to, and the result is that I must treat it, as not giving them an absolute title, but giving them a title to the policies as part of their security and nothing else. The case Mr. Beaumont puts, of the policies being entirely outside the transaction, does not seem to me to be the fact? There is a bargain existing between the parties, and the policies are part of the transaction, and I think the right to the surplus arising from them belongs to the mortgagor or his representatives, after all the liabilities have been paid. I quite feel what Mr. Beaumont says about the hardship of asking the society, who have paid Earl Compton £10,000 and have never had a farthing from him, to pay him something more; but that hardship disappears altogether when one recollects that this was a transaction which was one of many, and if they had effected the policy in another society they would have had money in their hands to repay themselves the amount advanced for yearly premiums and interest upon them, and it is only after that has been done that the parties can see what their rights are.

Solicitors, *H. T. Boodle; Wilde, Berger, & Wilde.*

Q. B. Div. (Denman and Vaughan Williams, JJ.) Feb. 20.

NEWMAN v. LONDON AND SOUTH-WESTERN RAILWAY CO. (*a.*)

Practice—Discovery—Interrogatories—Security for costs—Payment of deposit—Discretion to dispense with payment—Ord. 31, *rr.* 25, 26.

The court or a judge has a discretionary power to dispense with payment of the deposit imposed by ord. 31, *r.* 26, *on a party seeking discovery.*

Boarder *v.* Lindsay, Gracie, & Co., 34 *W. R.* 473, *disapproved.*

Appeal from an order made by Day, J., at chambers.

The plaintiff brought an action under Lord Campbell's Act to recover damages in respect of the death of her husband, which she alleged to have been caused by the negligence of the defendants.

The plaintiff applied for leave to administer interrogatories to the defendants without giving security for costs by paying the deposit prescribed by ord. 31, rr. 25, 26.

The master made an order giving the plaintiff leave to interrogate the defendants, and dispensing with the payment of any deposit.

On the defendants appealing, Day, J., reversed the order of the master.

The plaintiff appealed.

By ord. 31, r. 25, "In every cause or matter the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court or a judge, be secured, in the first instance, as provided by rule 26 of this order, by the party seeking such discovery."

By rule 26, "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of £5, and if the number of folios exceeds five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court to a like account, to abide further order, the sum of £5, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge shall direct."

C. G. Ellis, for the appellant.—There is a discretionary power to dispense with security in proper cases. Rule 25 says security is to be given "unless otherwise ordered by the court or a judge." Rule 26 merely prescribes the method in which security is to be given, and must be read subject to rule 25. In *Boarder* v. *Lindsay, Gracie, & Co.*, 34 W. R. 473, a divisional court held that security could not be dispensed with. The *ratio decidendi* of that case seems to be that rule 26 is absolute, and is unqualified by rule 25. This view had been previously taken by a divisional court in *Aste* v. *Stumore*, 32 W. R. 219, 13 Q. B. D. 326; but in the Court of Appeal Brett, M.R., and Bowen, L.J., expressed disapproval of that view, although it was not necessary to decide the point.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

E. R. Turton, for the respondents.—*Boarder* v. *Lindsay, Gracie, & Co.* is an express decision that there is no discretion to dispense with the deposit. It has not been overruled, and ought to be followed.

DENMAN, J.—I think that where two members of the Court of Appeal say they do not agree with a view taken by the Divisional Court the matter is put at large, and we are entitled to act in accordance with our own opinion. My opinion is that there is a discretionary power in the court or a judge to dispense with the deposit in a proper case. Otherwise the words in rule 25, "unless otherwise ordered," have no meaning and are idle. This is quite consistent with rule 26, which applies to the mode in which security shall be given.

The appeal must be allowed.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitor for the appellant, *Robert Jenkins*, for *Ewart Jukes*, Staines.

Solicitors for the respondents, *Bircham & Co.*

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 7.

MAYOR *v.* COLLINS. (*a.*)

Practice—Interrogatories—Power to interrogate infant.

An infant will not be ordered to file an affidavit in answer to interrogatories.

This was an action for libel in which the plaintiff was an infant suing by his next friend. The master made an order allowing the defendant to administer interrogatories to the plaintiff. On appeal to Pollock, B., at chambers, he referred the question to the court.

Aspland, Q.C., and *Blake Odgers*, for the plaintiff.—The plaintiff cannot be interrogated. Under the old chancery practice the guardian of an infant could not be compelled to answer interrogatories: *Savage* v. *Carroll*, 1 Ball & B., p. 548; *Lucas* v. *Lucas*, 13 Ves. 274; *Holden* v. *Hearn*, 1 Beav. 445; and the infant could not be called upon to answer for himself: *Attorney-General* v. *Lambirth*, 5 Price, at p. 398. The practice has not been altered by the Judicature Acts: *Ingram* v. *Little*, 31 W. R. 858, 11 Q. B. D. 251; *Dyke* v. *Stephens*, 33 W. R. 932, 30 Ch. D. 189. An infant cannot be bound by admissions which are not for his own benefit: *Rhodes* v. *Swithenbank*, 37 W. R. 457, 22 Q. B. D. 577. There is no distinction between infants of tender and mature years: *Morgan* v. *Thorne*, 7 M. & W., at p. 408.

He also cited *Eccleston* v. *Petty*, Carthew, 79; *United States Company* v. *Wagner*, 15 W. R. 1026, L. R. 2 Ch. 582; ord. 16, rr. 16—21; ord. 19, r. 13; ord. 34, r. 4; and referred to Daniel's Chancery Practice, 4th ed., p. 165.

Hansell, for the defendant.—The order of the master ought to be affirmed. There is nothing to show that it was a rule before the Judicature Acts that an infant could not make admissions if he made them himself: Taylor on Evidence, 8th edition, sec. 740; Daniel's Chancery Practice, 5th ed., p. 153. An infant can be examined and cross-examined in the witness-box, and there is no reason on principle why he should not be put under discovery: *O'Neill* v. *Read*, 7 Ir. L. R. 434; *Shaw* v. *Wilder*, 2 Molloy, 532.

Aspland, Q.C., replied.

CAVE, J.—I am of opinion that the order for interrogatories must be disallowed. I cannot read the cases cited by Mr. Aspland without coming to the conclusion that the practice of interrogating an infant defendant was utterly unknown in the Court of Chancery. The very fact that under the old chancery practice discovery was sought from the next friend, shows that there was no power to interrogate the infant himself. The rule as to infant defendants applies equally to infant plaintiffs. The Judicature Acts have made no difference in the practice. They would have contained express provision if it had been intended that interrogatories to infants should be allowed. So great a change would not have been carried out *sub silentio*. The defendant has failed to prove that the change has been made either directly by statute or by the rules, nor has he produced a single case where interrogatories have been administered to an infant. This being so, we cannot accept the argument which he has attempted to draw from the reason of the thing. We can only take the practice as we find it.

A. L. SMITH, J.—I am of the same opinion. I confess that I was at first startled by Mr. Hansell's point as to the position of an infant who could go into the witness-box and give evidence, and be cross-examined, but must not be put upon discovery. I am convinced, however, that such has always been the practice. Neither the Judicature Act nor the Common Law Procedure Act have altered it.

Appeal allowed.

Solicitors for the plaintiff, *Bower, Cotton, & Bower*, for *Ainsworth, Sanderson, & Howson*, Blackburn.

Solicitors for the defendant, *Brooks, Jenkins, & Co.*, for *S. Sandeman*, Accrington.

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Q. B. Div. (Pollock, B., and Wills, J.) Jan. 16; Feb. 6.

MCLARDY *v.* SLATEUM. (*a.*)

Practice—Application for judgment on specially indorsed writ—Delay—Statement of defence delivered—Right of plaintiff to apply after defence delivered—R. S. C., 1883, *ord.* 14, *r.* 1.

An application by a plaintiff for judgment under ord. 14, *r.* 1, *may be made after the statement of defence has been delivered, but when so made, the* onus *is cast on the plaintiff of explaining the delay, as the proper time for such application is before the defence is delivered in the usual way, though the delivery of the defence is not an absolute bar to a subsequent application under the order.*

Appeal from an order of Field, J., at chambers.

An action was brought to recover a sum of £129 17s. 6d. for principal and interest on a bill of sale, and the writ was specially indorsed. The writ was issued in February, 1889, but the defendant did not appear until October. The defendant, having obtained additional time for delivering a defence, delivered his statement of defence on the 6th of November, and on the 19th of November the plaintiff took out a summons under order 14 for leave to sign final judgment for the amount claimed. This summons was heard before a master on the 25th of November, and an objection was then taken, on behalf of the defendant, that the plaintiff's application was too late, as the defence had already been delivered.

The master overruled this objection, holding that it was not necessarily too late to apply under order 14 after a defence had been delivered, and he heard the application

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

on the merits, when he gave the plaintiff leave to sign judgment for the amount claimed, unless the defendant brought the whole amount into court within ten days.

Field, J., reversed this order, without going into the merits of the case, on the ground that the plaintiff was too late in applying after a defence had been delivered, and he gave the defendant unconditional leave to defend.

The plaintiff appealed.

Herbert Reed, for the plaintiff.—It is said, in the first place, that a plaintiff cannot apply, under order 14, after a defence has been delivered; if this were so it would be within the power of the defendant to defeat the operation of order 14 altogether by setting up a wholly frivolous defence—as, for example, if a plaintiff sues on a deed, a defendant might put in a defence that the deed was not his deed, a sham defence which he would not be able to sustain by oath under order 14, and in that way he would defeat the plaintiff's claim under the order. Again, a defendant might, immediately after the service of the writ upon him, rush in a defence, and so defeat the plaintiff's claim. It never could have been intended that the delivery of a defence could have so defeated the plain intention of the order. As to the point of the delay, there has only been a delay of one month after the appearance by the defendant, and it would be very arbitrary to say that a month's delay shall prevent the plaintiff from applying under the order.

Wilfred B. Allen, for the defendant.—If a plaintiff applies under order 14 he must do so punctually; this has always been the practice at chambers, and the plaintiff must make his application within a reasonable time after appearance, but before any defence has been delivered. Rule 6 of the same order says that a defendant may get leave to defend; "leave to defend" here means leave to deliver a defence, which shows that the order contemplates that an application under order 14 is to precede defence. If a frivolous defence be put in the plaintiff ought to proceed, not under order 14, but under ord. 25, r. 4, under which rule he can have such frivolous defence struck out and obtain judgment. There are some Irish cases referred to at p. 274 of the Annual Practice—*Hackett* v. *Lalor*, 12 Ir. L. R. 44, 31 W. R. Dig. 158; *Stewartstown Loan Co.* v. *Daly*, 12 Ir. L. R. 418, 32 W. R. Dig. 167; and *Sketchley* v. *Corrigan*, 12 Ir. L. T. R. 50—where a plaintiff was not allowed to proceed under the order after a defence had been delivered.

Reed, in reply.—These Irish cases are not in point, as there the plaintiff had himself done something which disentitled him from proceeding under the order; in the one case he had joined issue on the defence, and in the other he had delivered a statement of claim.

Cur. adv. vult.

Feb. 6.—The judgment of the Court was delivered by

POLLOCK, B.—In this case the learned judge at chambers overruled the master's order, and gave the defendant unconditional leave to defend. That order of Field, J., proceeded on the construction of rule 1 of order 14, and the learned judge thought that the plaintiff was bound to make his application under the order, before the defendant had put in any defence. We took time to consider the question, partly because we wanted to find out the practice of the other judges in the matter, and partly because of the case cited to us that it was peremptory under order 14, if a statement of defence was delivered, to refuse the plaintiff's application for judgment under that order. As far as I can learn, Field, J., appears to have adopted the view that, in the absence of fraud or misconduct, the intention of the order was that the plaintiff should make his application after service of the writ, but before delivery of the defence. We do not think the rule is so absolute as that, though, no doubt, the intention was that the plaintiff should make his application before the statement of defence was delivered in the usual course. The learned judge also says that there may be peculiar circumstances, such as misconduct on the part of the defendant, or where the defendant at once delivered a defence, where that rule would not apply. Some other learned judges and masters have a different practice, and they think that the plaintiff's application should be made within a reasonable time, and they think that in some cases the defendant may by his defence disclose facts which show that judgment should be given against him.

We adopt this view, and we think that it is not compulsory that the application should be made before defence, though the intention of the rule is that the application must be made within a reasonable time, and that will in general be before the defence, though that rule is not an absolute or compulsory one, and does not absolutely preclude the plaintiff from making his application after the delivery of the defence.

Our conclusion, therefore, is that the plaintiff was not necessarily too late, and, if the facts warranted that view, the master was right in the order he made. We think that where a defence has been delivered in the ordinary way and at the usual time, if the plaintiff afterwards applies under the order, the *onus* is cast on him of explaining the delay and showing why he had not applied earlier.

Case remitted to chambers for rehearing, with the intimation that the onus *is on the plaintiff to explain the delay.*

Solicitors for the plaintiff, *Jacques & Co.*, for *Edward Heath & Sons*, Manchester.

Solicitors for the defendant, *Williamson, Hill, & Co.*, for *E. Roberts*, Rhyl.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Nov. 21, 22.

PREECE *v.* HARDING. (*a.*)

Municipal election—Petition—Persons reported guilty of corrupt practices—Jurisdiction of High Court to deal with commissioner's report—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 92, 93, 100—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23, *3rd schedule, part* 2—*Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 38.

When a commissioner appointed to try a municipal election petition has reported persons guilty of corrupt practices, the High Court has no power to interfere with his report on the ground that the notices prescribed by section 38 *of the Corrupt and Illegal Practices Prevention Act*, 1883, *which is incorporated in part* 2 *of schedule* 3 *of the Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884, *were not given to the persons so reported.*

This case arose out of an election petition brought against two persons who had been elected councillors for the Ledbury Ward in the City of Hereford. Mr. Mansel Jones, the commissioner appointed to try the petition, had reported certain persons as guilty of corrupt practices. These persons then obtained a rule calling upon Mr. Mansel Jones to show cause why so much of the schedules to his report as contained their names should not be struck out, amended, or set aside, on the grounds, first, that the applicants, before being reported by the

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

election court, did not receive any such notice as is required by section 38 of the Corrupt and Illegal Practices Prevention Act, 1883, which section is incorporated in part 2 of the 3rd schedule to the Municipal Elections (Corrupt and Illegal Practices) Act, 1884; secondly, that the applicants were given no opportunity of being heard by themselves; or, thirdly, of calling evidence to show why they should not be reported.

This was the argument of the rule.

R. S. Wright (*Sir R. E. Webster, A.G.*, and *Gresham Wells* with him), showed cause.—This court has no jurisdiction to interfere. The Municipal Corporations Act, 1882, s. 92, sub-section 6, gives the election court the same power as a judge of the High Court trying a parliamentary election petition. These powers are the same as those of a judge of assize: Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 29. There are express provisions in the Acts of 1882 and 1884 as to the jurisdiction of the High Court with respect to a municipal election petition: sections 100, 93, sub-section 8. Except in the cases expressly provided for, there is not intended to be any appeal.

He cited *Ex parte Ayres*, 54 L. T. N. S. 296, 34 W. R. Dig. 66; *Reg.* v. *Mayor of Maidenhead*, 9 Q. B. D. 494, 30 W. R. Dig. 79; *Stevens* v. *Tillett*, 19 W. R. 182, L. R. 6 C. P. 147; *Reg.* v. *Hall*, 7 Q. B. D. 575, 29 W. R. Dig. 81; *Ex parte Fernandez*, 9 W. R. 832, 10 C. B. (N. S.) 3.

Lewis Coward, for the petitioners.

Channell, Q.C. (*Gwynne-James* with him), for the applicants, supported the rule.—The election court had no jurisdiction to report the applicants unless the notices prescribed by the Act had been given. It is in effect a branch of the High Court—Municipal Corporations Act, 1882, s. 100, sub-section 4—and if it makes a mistake in the exercise of its powers this court can set it right.

The judgment of the COURT was delivered by

MATHEW, J.—We are of opinion that this rule should be discharged. The applicants have admitted that this court can exercise no appellate jurisdiction over the commissioner, and therefore it follows that if the commissioner has said that certain persons shall be scheduled upon any ground, we are not entitled to inquire upon what evidence he proceeded. But it has been argued that, having regard to section 100 of the Act of 1882, the commissioner is practically constituted a branch of the High Court, and that, as he has exceeded that which he was delegated to do, it is the duty of this court to correct his error. This is, however, an application to this court to exercise functions which we have never known it to exercise. There is no reason to conjecture, from anything that appears in any of the Acts which have been referred to, that it was intended that we should treat the commissioner as a branch of the High Court or exercise any supervision over him. If we have no power to review his decision on any of the very important questions of fact intrusted to the decision of the commissioner, it cannot be supposed that it was intended that we should have the power to review his decision on such a matter as this. We need not, therefore, go into the question of whether there was or was not evidence before him on which he might have acted. We assume that no notice was given to these persons in order to decide the question of our jurisdiction, and we are satisfied that we have no jurisdiction.

Rule discharged.

Solicitors for the applicants, *Thomas White & Sons, for Garrold*, Hereford.

Solicitors for the petitioners, *Meredith, Roberts, & Mills.*

Solicitor for the commissioner, *Solicitor to the Treasury.*

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IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 14, 17.

Ex parte BARNETT.
In re TAMPLIN & SON. (*a.*)

Bill of sale—"True owner"—Partnership—Bill of sale executed by one of two partners over partnership property—Validity—Undivided moiety—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.

The words "true owner" in section 5 of the Bills of Sale Act, 1882, *are used in their natural, and not in an artificial sense, and a man does not cease to be the true owner of personal chattels within the meaning of that section because they may be subject to some lien or equitable right.*

In 1885 *the bankrupts commenced to carry on business in partnership, and in* 1888 *a bill of sale was executed by the elder partner, with the consent of the younger, upon partnership property as security for an advance for partnership purposes. This bill of sale was set aside by the county court judge, on the ground that the grantor was not the "true owner" of either the whole or a moiety of the goods specified in the schedule within section 5 of the Bills of Sale Act*, 1882, *and the bill of sale holder was ordered to repay the value of the goods to the trustee in bankruptcy.*

Held, that the county court judge was wrong in ordering the bill of sale holder to pay back the whole of the money; that the grantor was the true owner of his moiety of the goods; and that the bill of sale holder was entitled to retain one-half of the money realized.

Appeal from an order of his Honour Judge Williams in the county court at Pontypridd, by which he declared that the title of one Louis Barnett under a bill of sale to certain goods specified in the schedule thereof was bad, and directed him to pay the value to the trustee in bankruptcy.

The bankrupts, E. & E. W. Tamplin, were father and son, who carried on business together as butchers at Llantrissant, the business being commenced by the father in 1884, and the son joining him in 1885. In 1888 the elder bankrupt obtained from Barnett, who is a money-lender, the sum of £60 as a loan upon certain goods, for which he executed a bill of sale. A receiving order was subsequently made against the bankrupts, and the trustee in the bankruptcy applied to set aside this bill of sale on the ground that the goods covered by the bill of sale were partnership goods, and that the grantor, not being the "true owner" within the meaning of section 5 of the Bills of Sale Act, 1882, of either the whole or a moiety of the partnership property, the bill of sale was wholly invalid.

The bill of sale holder now appealed from the order of the county court judge setting aside the bill of sale.

Bigham, Q.C., and *Glascodyne*, for the bill of sale holder.—The trustee alleges that the two bankrupts were partners, and that the goods were partnership goods. But there is no evidence that the goods specified in the bill of sale were partnership goods; and further, even if they were, the bankrupts and their trustee in bankruptcy would be estopped from setting up any such defence. Both the bankrupts were aware that the money was being lent on these goods for partnership purposes.

Channell, Q.C., and *Benson*, for the trustee in bankruptcy.—There is ample evidence that the goods were partnership property. There can be no possible doubt as

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

to a partnership having existed between the bankrupts, and there is nothing to show that it did not include these goods, as the county court judge has found. The moment you arrive at the fact that the goods were partnership property you come to the Bills of Sale Acts. Section 5 of the Bills of Sale Act, 1882, provides that a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the "true owner" at the time of the execution of the bill of sale. Apart from the Act, the bill of sale being executed by one partner with the consent of the other for the benefit of the partnership would probably be good, but under the Act the grantor was not the "true owner" at the time of the execution of this bill of sale. [A. L. SMITH, J.—Was he not the true owner of an undivided moiety?] He was only owner of a share. He was not the "true owner" of the goods.

They referred to *Ex parte Owen, In re Bowers*, 20 L. J. Bkcy. 14; *Skipp* v. *Harwood*, 2 Swanst. 586; *Tuck* v. *Southern Counties Deposit Bank*, 37 W. R. 769, 42 Ch. D. 471.

Glascodyne, in reply, referred to *Fox* v. *Hanbury*, Cowp. 445; *Fennings* v. *Lord Grenville*, 1 Taunt. 241; *Richards* v. *Johnston*, 4 H. & N. 660, 7 W. R. C. L. Dig. 13; *Richards* v. *Jenkins*, 35 W. R. 355, 18 Q. B. D. 451.

CAVE, J.—I am of opinion that the order of the county court judge should be modified. The two bankrupts appear to have been carrying on business together as butchers, and were made bankrupt in that business. The business was begun by the father in 1884, and the son joined him in 1885. In 1888 they were in want of money, and thereupon the father applied to the appellant to advance money on a bill of sale, and a bill of sale was prepared by which certain property, alleged to be partnership property, was charged with the repayment of £69 borrowed by the father.

Now the first contention raised was that there was not, in fact, a partnership between the father and the son, or, if so, that it did not extend to the goods which were the subject of the bill of sale. We have had great difficulty in ascertaining what really took place before the county court judge. Undoubtedly no one is at liberty to stand by and not take a point in the court below and then come and take it in the court of appeal, when if it had been gone into in the court below evidence could have been given to meet it. In the present case I hardly think the point was taken with the particularity necessary in cases of this kind. It is not sufficient to say merely that such a point is taken, leaving the court to find out the ground on which it was taken, and leaving counsel on the other side to see how he can meet it. When the objection is taken it should be taken before the court and argued, and not reserved for the court of appeal. It must be taken and argued, and the points supporting it must be brought to the knowledge of the judge and the counsel on the other side. I can quite understand how, in the present case, this contention was shortly passed over in the court below. The county court judge had come to the conclusion in another case that there was a partnership, and that these goods were partnership property, and when he came to consider this case he would have in his mind the facts previously before him, and counsel who knew that would not deal so strongly with the case. I think there are circumstances here which would justify the court in coming to the conclusion that there was a partnership. Two points are important on that head—first, that when, in 1885, the son joined the father, the father and son joined in mortgaging some property in order to raise money to put it into the firm; and, secondly, that in 1886 bills were printed the heading of which showed that the business was carried on in partnership. If those facts were made out they would justify the county court judge in saying that there was a partnership, and that this property was partnership property. The evidence of the bankrupts themselves is of no value, and I can quite understand the court placing no reliance on it.

The contention that there was no partnership therefore fails, and that point failing, it is admitted by the respondent that by the common law, and apart from the Bills of Sale Acts, the bill of sale holder would have a good title here. Two partners want money for partnership purposes, and agree to raise this money by mortgaging property to the bill of sale holder, and mortgaging it by holding out that the property was the sole property of the elder. That, it is admitted, apart from the Bills of Sale Acts, would give the grantee of the bill of sale a good title as to the whole. It is not necessary to deal with the doctrine of estoppel at all, because it is a fact that the younger, being a partner, did assent to the bill of sale to raise money for partnership purposes, and that would be strong evidence of authority from him to the elder bankrupt to execute the bill of sale and transfer the joint property to Barnett, and that being so, would be sufficient to give Barnett a good title if the matter had stood at common law.

But the respondent relies upon section 5 of the Bills of Sale Act, 1882, which provides that a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the "true owner" at the time of the execution of the bill of sale. The marginal note to that section shows that what was in the mind of the Legislature at the time when it was passed was that a bill of sale shall not affect after-acquired property, but the words of the section are general, and are wide enough to include a case like the present. Then comes the main question in this case—namely, what is the meaning of that section, and to what extent it applies where one of two partners executes a bill of sale of partnership property purporting to convey not his moiety, but the whole of it. I cannot agree that it does empower the owner of any share of the partnership property, however small, to execute a bill of sale of the whole of the partnership property which shall be good under this section against the trustee and the creditors. I think that in section 5 the words "true owner" are used in their natural and not in an artificial meaning. They mean what an ordinary man would understand by them—namely, that a man must at the time be the true owner of the goods he purports to convey. I do not think it follows that because he is the true owner subject to a lien or some equitable right he ceases to be the "true owner" since the words are used in the popular sense. I do not think the existence of a right of that kind prevents the true owner parting with his interest, and that is very much the condition of a partner. The two partners are in want of money for partnership purposes, and if the two partners joined, the bill of sale would be good, and it seems in the same way in the present case, the elder partner is within the meaning of the section the true owner of his moiety, and the younger the true owner of his moiety. If the elder had been conveying his moiety for the purpose of raising money for his own purposes it might be the conveyance of his moiety subject to some equitable right. But nothing of that kind arises here. This was a conveyance by the elder, of the whole, and so of his half, with the intention, both of him and his son, that the conveyance should be an absolute one, and when one alone conveys, even though he conveys the whole, he is still the true owner of his own moiety, though not the true owner of the other moiety. It is no doubt very desirable that the person who is the grantor should be the true owner of the things conveyed, and if a man should give a bill of sale in a name not his own, and put forward some other person as being the owner, section 5 would not

be complied with. But where, as here, there are two true owners each the owner of a moiety, when one conveys the whole, so far as the moiety is concerned he is the true owner of that moiety, though not the owner of the other part. The county court judge was therefore wrong in ordering Barnett to pay back the whole of the money, and the proper order would have been that he should retain one-half, and pay over to the trustee the other half.

A. L. Smith, J.—I entirely agree that there was a partnership formed in 1885, and that the goods specified in the bill of sale were partnership property. That being so, the trustee contends that the bill of sale is *in toto* void by reason of section 5 of the Bills of Sale Act, 1882. The question is what is the meaning of the words "true owner" in that section. Now supposing, in a case where there are two partners, one partner becomes an execution debtor, what steps can the sheriff take on the part of the execution creditor? The law is that the sheriff goes in and seizes the undivided moiety of that partner. When he proceeds to sell he puts the vendee as tenant in common with the solvent partner and leaves him to find out his own rights. The sheriff goes in at first and seizes the undivided moiety of the debtor partner. That seems pretty clear from *Holmes* v. *Mentze*, 4 A. & E., p. 131. Here apart from the agreement the elder bankrupt had an undivided moiety in this partnership property, and he was the true owner of that undivided moiety within section 5 of the Bills of Sale Act, 1882.

Order varied accordingly.

Solicitors for the bill of sale holder, *H. Smith & Co.*, for *B. Barnett*, Cardiff.

Solicitors for the trustee, *Crowders & Vizard*, for *W. R. Davies*, Pontypridd.

House of Lords.

From C. A. (England). May 20, 21, 23, 24, 27, 28, 31; June 4; Aug 1, 1889.

Lyell v. Kennedy.
Kennedy v. Lyell. (a.)

Limitations, Statute of—Action to recover land—Possession—Agent—Trustee—3 & 4 Will. 4, c. 27, ss. 2, 3, 8, 9, 14, 34—37 & 38 Vict. c. 57, s. 1—Evidence—Pedigree—Parish registers—Res inter alios actæ.

D. was devisee in fee of certain hereditaments let to yearly and weekly tenants under the will of L. B., who died in 1859. *D. and K. were executors of that will, but as such had no interest in the property in question. K., by arrangement, managed this property in the name of "the executors of L. B.," gave receipts for rents, and paid them into an account so entitled. D. died in* 1867, *intestate as to this property, but no change was made in the management of the property. K. frequently acknowledged that he was acting for D.'s heir down to* 1880, *when he claimed to be in receipt of the rents and profits for himself.*

L., the assignee of the co-heiresses of D., brought this action in 1881 *against K. to recover possession of the land, and for an account of the rents and profits.*

Held (reversing the decision of the Court of Appeal, 35 *W. R.* 725, 18 *Q. B. D.* 796) *that K. was an agent, whose acts were ratified by bringing this action; that he was never in actual possession, which was in the heirs; that the rents were received in a fiduciary character; and, consequently, that, subject to the existing tenancies and all just allowances, the plaintiff L. was entitled to the judgment claimed.*

Scottish parochial registers and certified extracts from them are receivable in evidence in England.

Proceedings in the Sheriff's Court in Scotland held admissible in questions of pedigree.

Appeal and cross-appeal from a decision of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.), 35 W. R. 725, 18 Q. B. D. 796, where the facts are given at length.

The action was commenced on January 4, 1881, to recover a mill and factory and about seventy workmen's cottages at Manchester, and for mesne profits.

Ann Duncan took the property in question as devisee of Lawrence Buchan, her maternal uncle, who died on July 21, 1859. She and the respondent Kennedy were executrix and executor of Buchan's will. Kennedy gratuitously managed the property for Miss Duncan, received the rents, and carried them to an account at a bank in the name of "the executors of Lawrence Buchan."

At Ann Duncan's death, in November, 1867, the property was let to tenants, one annual, and the others weekly, without writing.

Miss Duncan, having left a will disposing only of her Scotch real estate, advertisements for her heirs were issued, and in England actions were brought against Kennedy. After her death, and until 1880, Kennedy continued to manage the property, giving receipts and paying in the rents as before, the tenants not apparently being informed of her death. Kennedy had stated that he was acting for the heir, and that he was ready to account to him as soon as he was ascertained. In 1880 Kennedy claimed to be in receipt of the rents and profits for himself.

By deed dated December 24, 1880, three sisters, E. Bradock (widow) and C. and J. Cuningham (unmarried), alleged to be the co-heiresses of Ann Duncan, assigned their interest to the appellant Lyell, who brought this action, and, in support of this claim, gave evidence of their pedigree.

Kennedy relied on the Statute of Limitations, and he also now set up a title of his own as assignee of a person who, he alleged, was the true heir of Miss Duncan.

At the trial before Stephen, J., without a jury, in June, 1886, judgment was given for the appellant, it being found that the three sisters were the co-heiresses of Ann Duncan, and that the Statutes of Limitations were no bar.

If the three sisters were Ann Duncan's heirs (Mrs. Bradock being under disability of coverture till 1877) the Statute of Limitations did not apply as to one-third.

The Court of Appeal were of opinion that the three sisters were Ann Duncan's heirs, but that the Statute of Limitations applied as to two-thirds, and gave judgment accordingly.

The appeal which raised the question of the Statute of Limitations was heard first.

Sir C. Russell, Q.C., and *Rigby, Q.C.* (*A. T. Lawrance* and *Robert Wallace* with them), for the appellant.—The heirs of Ann Duncan became seised in fact upon her death intestate: Williams on Seisin, p. 45; Watkins on Descents, p. 56, 57, 4th ed.; Sugden's Real Property Statutes, 2nd ed. (1862), p. 46, 47; *Bushby* v. *Dixon*, 3 B. & C. 298. Mere payment to a stranger during the continuance of the term does not work an ouster at common law: 2 Smith's Leading Cases, 9th ed., p. 759. The rents were received as agent, and the statute made no alteration in the general law as to possessions. The character of the possession must be considered, and here there was no possession by

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

Kennedy on his own account, for he received the rents in a fiduciary character: *Baron de Bode's case*, 8 Q. B. 208; *Smith* v. *Bennett*, 30 L. T. N. S. 100, 22 W. R. Dig. 136; *Davies* v. *Lowndes*, 5 Bing. N. C. 161, 172, 6 M. & G. 471, 520; *Williams* v. *Pott*, L. R. 12 Eq. 149, 19 W. R. Ch. Dig. 106; *Pelly* v. *Bascombe*, 11 W. R. 766, 4 Giff. 390; *Shaw* v. *Keighron*, Ir. R. 3 Eq. 574, 18 W. R. Ch. Dig. 133. Besides, there must be a clear unequivocal possession: *Doe* v. *Groves*, L. R. 10 Q. B. 486. And not only must the true owner be out, but another in, to bring case within statute: *Trustee and Agency Co.* v. *Short*, 37 W. R. 433, 13 App. Cas. 793; *Smith* v. *Lloyd*, 9 Ex. 562; *Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264; *Sanders* v. *Sanders*, 30 W. R. 280, 19 Ch. D. 373; *Rackham* v. *Siddall*, 16 Sim. 297; *Doe* v. *Danvers*, 7 East, 299; *Doe* v. *Beckett*, L. R. 4 Q. B. 601: *Foster* v. *Bates*, 12 M. & W. 233, were also referred to.

Sir Horace Davey, Q.C., and *Smyly*, for the respondent.—The old law as to adverse possession is swept away, and we have merely to consider the interpretation of 3 & 4 Will. 4, c. 27. Agency is only created by contract or ratification; until ratification there is no agency, and the statute may have run in the interval. (1) By receipt of profits for twelve years action is barred; (2) There is no acknowledgment to save the bar, except under section 14; (3) Agency must be by contract or ratification; (4) There can be no ratification unless within statutory period. A mere statement of a legal fact does not alter the case. Kennedy had no answer for twelve years to the heir. Agency, as a fact, discontinued at Ann Duncan's death.

Pelly v. *Bascombe*, 13 W. R. 306; *Dawkins* v. *Lord Penrhyn*, 27 W. R. 173, 4 App. Cas. 51, 59; *Nepean* v. *Doe*, 2 M. & W. 894; *Dixon* v. *Gayfere*, 17 Beav. 421, were referred to.

The House took time for consideration.

The cross-appeal was then heard, and involved questions of pedigree, and the admissibility of evidence thereon, which will be found treated at length in the judgment of the Earl of Selborne.

Sir Horace Davey, Q.C., and *Smyly*, for the defendant, appellant in cross-appeal.—As to the parish registers being admissible: 2 Dickson's Evidence in Scotland, s. 1126; Bell's Principles of the Law of Scotland, s. 2212A; *Sturla* v. *Freccia*, 29 W. R. 217, 5 App. 623, 633, 642; *Goldie* v. *Christie*, 6 Court Sess. Cas., 3rd ser., 546. It is not like *Davis* v. *Lloyd*, 1 Car. & Kir. 275, the Jewish rabbi not being a public officer. The *Airth Peerage case*, see the Printed Minutes of Evidence, 68; The *Lovatt Peerage case*, see Printed Minutes of Evidence, 72; *Greaves* v. *Greenwood*, 25 W. R. 639, 2 Ex. D. 289, was also referred to. The proceedings in Sheriff's Court are admissible to show character in which the defendant was sued and the like.

Sir C. Russell, Q.C., and *Rigby, Q.C.* (*A. T. Lawrence* and *Robert Wallace* with them), for the respondent in the cross-appeal.—The rules of hearsay evidence are different in Scotland, and the registers of Dissenters are admissible there. In England the entries in the official registers, to be admissible, must be made by the regular custodian. There is no evidence to show these registers are properly kept or kept by the ministers: see Taylor on Evidence, 8th ed., ss. 1591-5, 1774; *Doe* v. *Bray*, 8 B. & C. 813; *Davies* v. *Gatacre*, 8 Car. & P. 578. There are no signed admissions in this case, and the proceedings in Sheriff's Court are *res inter alios actæ*.

Sir H. Davey, Q.C., replied.

The House took time for consideration.

Earl of Selborne.—The question first in order in this case is that of title, raised by the cross-appeal. I shall throughout speak of Dr. Lyell as appellant and of Mr. Kennedy as respondent, though, in the cross-appeal, those positions are reversed.

I do not think that all the evidence which the courts below thought inadmissible (though, in the court of first instance, it was received *de bene esse*, and its effect was considered) ought to be rejected. Foreign registers of baptisms and marriages, or certified extracts from them, are receivable in evidence in the courts of this country, as to those matters which are properly and regularly recorded in them, when it sufficiently appears (in the words of Mr. Hubback's learned work on Evidence) that they "have been kept under the sanction of public authority, and are recognized by the tribunals of the country" (*i.e.*, of the country where they are kept) "as authentic records."

I am of opinion that this does sufficiently appear, as to the Scottish parochial registers, speaking generally, from Mr. Dickson's work, from Mr. Bell's Principles, and from the admission of registers, exactly like those now in question, by this House in the *Airth Peerage* and other cases (see Hubback, pp. 519, 526). Certified extracts from Scottish parochial registers have been produced in this case from the General Register Office in Scotland, where they are now kept, under the statutes 17 & 18 Vict. c. 80, 18 Vict. c. 29, and 23 & 24 Vict. c. 85. Those statutes do not make anything evidence, either here or in Scotland, which without them would not have been so. But if your lordships may act upon that judicial knowledge of Scottish law which you possess, as the court of ultimate appeal from all parts of the United Kingdom (and within my experience you have so acted upon your knowledge of English law, when questions of English law have arisen in Scotch appeals), it is certain that these registers would be receivable in Scotland, subject to just exceptions as to particular entries in them, as parochial registers kept under the sanction of public authority, for whatever they may be worth; anything imperfect or unsatisfactory in the way in which they were generally kept affecting only their weight *in re dubia*, and not their admissibility.

Nor do I think it less certain that they were kept in Scotland under public authority, from a time not later than the first half of the seventeenth century, because there is some obscurity about the origin of the legal obligation to keep them. Entries of matters not properly finding place in the particular registers (as, for instance, the entry of a baptism in the parish of St. Madoes in the register of births and baptisms for the parish of Kinfauns, which is among the extracts tendered in the present case) may be properly rejected, although entries appearing to have been regularly made in the proper registers may be received. The interests of justice would not be promoted if such evidence as this, receivable in Scotland, could not be received in England, in a question of Scotch pedigree, relating to persons and families always resident and domiciled in Scotland. If the law were so, it must prevail; but I am glad to be able to come to the conclusion that it is not so. For the decision of that question the courts below had not equal advantages with your lordships; though, for my own part, I think it might have been possible to come to the same conclusion on Mr. Ritchie's evidence, referring, as he did, to Mr. Dickson's books as of authority in Scotland.

With respect to the proceedings in 1766 in the sheriff's court of Perthshire (which were produced from the proper custody), I consider them also admissible, on the same principle on which answers and decrees in chancery have been admitted by this House in peerage cases as to matters of pedigree, "when the facts of the pedigree were not in dispute, but only incidentally

stated" (Phillips on Evidence, vol. 1, 8th ed., p. 232; Hubback, p. 682). This has been done since as much as before the opinion of the judges in the *Bambury Peerage case*, 2 Selw. N. P., 10th ed., p. 756, with which, and with the judgment in *Boileau* v. *Rutlin*, L. R. 2 Ex. 665, it does not seem to me inconsistent. The question in those cases was as to statements in bills; and the latter case was not one of pedigree. In the *Shrewsbury Peerage case*, 7 H. L. Cas. 33, this House received an Irish answer as to matter of pedigree, though the answer was without oath or signature; Lord Wensleydale (the same judge who decided *Boileau* v. *Rutlin*) saying:—"It" (the answer) "must be received as the statement of the party making it; and, being found on the files of the court, it must be presumed that it got there by proper authority." To make an answer evidence, the bill to which it was an answer must always be put in; but the bill itself is not evidence, unless made so by the answer.

In the present case I regard the notarial protest of 1764, and the proceedings in the sheriff's court in 1766, as admissible for the purpose (and only for the purpose) of showing that at that time when there was no question of pedigree in dispute, one James Martin, described as "in Cottarstown of Pitfour," was sued by the Duke of Athol (claiming by assignment from Lady George Murray, of Glencarse) as representative, by right or by wrong, of one Elspeth Duncan, described as "late in Glencarse and afterwards in dwelling in Perth," upon a bill of exchange accepted by that Elspeth Duncan in 1764 for arrears of rent in Glencarse, due by her to Lady George Murray; and that James Martin (not disputing any of those matters), by his defence in the last stage of those proceedings, spoke of that Elspeth Duncan as his mother; and that a decree passed against him for the amount claimed, on proof of service of summons upon him in Cottarstown, the validity of which service he did not, in the subsequent proceedings, call in question.

It was urged that, to make the statement of that James Martin (that Elspeth Duncan was his mother) evidence in favour of the pedigree set up by the respondent, it was necessary, by evidence *aliunde*, to connect him or his mother with the family of George Duncan, of Waltree; and to this I agree. But all that was necessary, in my opinion, was to give such *primâ facie* evidence of that connection as might be sufficient, if not met by evidence on the other side. This, I think, the respondent did, by proof *aliunde* of the marriage of Elspeth, daughter of George Duncan, of Waltree, to John Martin, of the Mill of Glencarse, on the 1st of November, 1728, and of the baptism of James, son of John Martin, of Glencarse, on the 24th of August, 1729, little more than nine months after that marriage. If the matter had stood upon the respondent's evidence only, I should probably have thought the agreement of names and descriptions in the protest and proceedings of 1766 enough to show the identity of the Elspeth of those proceedings with the daughter of George Duncan, of Waltree, and of the James Martin of those proceedings with the person of that name baptized in 1729.

That, however, is not the state of the evidence before your lordships; and I proceed (treating the respondent's evidence, with some exceptions not necessary to be particularly mentioned, as admissible) to consider its value and effect in conjunction with that on the other side.

The appellant proved that there were in and near Perth many Duncans and Martins, and not unfrequently the names Elspeth Duncan and James Martin; many Dowies also, of whom a John and George, "fleshers in Perth," were son-in-law and grandson of George Duncan, of Waltree, and another John and George Dowie (also fleshers in Perth, and father and son, the son baptized in 1723) might also have been living in 1766. The parishes of Kinfauns and St. Madoes, in that neighbourhood, adjoin each other—Glencarse is in Kinfauns; Pitfour, with its hamlet of Cottoun, or Cottarstown, is in St. Madoes. An Elspeth Duncan, "daughter of Patrick Duncan, of Cottoun, in Pitfour," was baptized in St. Madoes parish on the 20th of July, 1703. There is nothing to show that she intermarried, or lived as married, with a person named Martin, or had a son called James Martin; if, however, she had such a son, it would be consistent with the whole evidence that he might have been the defender in the Duke of Athol's suit. In Scotland marriage may be irregular as well as regular; if irregular, it would not be likely to be registered; and the parochial registers, both of marriages and of baptisms, were too loosely kept to give weight to any presumption from their silence. It does not appear that John Martin, the miller of Glencarse, ever held land under Lady George Murray; or that Elspeth Duncan, named in the notarial protest of 1764, lived at the mill of Glencarse. As to the Dowies, the only relation between them and Elspeth Duncan, mentioned in the proceedings of 1766, was that of debtor and creditor. The residence in Cottoun, in 1766, of a son of Elspeth, who was a native of Cottoun, might, perhaps, be more probable than that of the son of the miller of Glencarse; at all events, it would be as likely that an Elspeth Duncan, born in Cottoun, might have lived for a time and held land in Glencarse, as that the son of the miller of Glencarse should, when thirty-seven years old, be found living in Cottoun. I do not think there is any force in the appellant's argument from Elspeth Duncan, the miller's wife, not being named in her mother's will, dated the 17th of August, 1747.

I have endeavoured to give due weight to all these considerations, which show that it is possible that James Martin, the defender to the Duke of Athol's suit, may not have been the grandson of George Duncan, of Waltree; and, after having done so, I still think it probable that, if it were necessary to decide that point, my opinion upon it would not be against the respondent. But this would do the respondent no good, unless he could also identify with that James Martin the person of the same name who married Mary Ducat in 1771, or could otherwise connect the husband of Mary Ducat with the family of George Duncan, of Waltree. He has not attempted any other mode of connection; and for the identification of Mary Ducat's husband with the defender to the Duke of Athol's suit, he relies only on the St. Madoes baptismal register of 1772, decribing James Martin and Mary Ducat, the parents of Christian Martin, then baptized as "in Cottoun." From this, the inference is sought to be drawn, that James Martin, the father of Christian, was the party to the proceedings of 1766; which, if proved, would be subject to the question already discussed as to the family to which the James Martin of those proceedings really belonged. But the identity of the James Martin who married Mary Ducat with that person cannot be shown by the mere fact that the one in 1766 and the other in 1772 were described as "in Cottarstown" or "in Cottoun." It is proved that there were at least two other persons named James Martin baptized in the parish of St. Madoes, in which Cottoun is situate, in 1733 and 1746 respectively; either of whom, for anything that appears, may have been living in Cottoun in 1772, and may have married Mary Ducat in 1771.

If the case rested there the cross-appeal would, in my opinion, fail; but, besides this, there are weighty grounds for the conclusion that the persons whom the respondent has so failed to connect by satisfactory evidence with the family of George Duncan, of Waltree, were really not related to that family. There was

neither knowledge nor reputation of such relationship in the line represented by these persons; nor was there on the part of Ann Duncan. Ann Duncan was living in Perth down to 1836; and Christian, the daughter of that James Martin who married Mary Ducat, and her descendants, also lived there or in the immediate neighbourhood. The relationship, if there had been any, was not so distant as to be likely to be forgotten; and, if Ann Duncan was in better circumstances than her supposed relations, it was all the more likely to be remembered and talked about, at least on their part. She was nearly of the same age with John Moneur, son of Christian Martin, baptized in 1772, who lived in Perth at the same time with herself, in the respectable position of rector of the academy there, and died in circumstances which attracted public notice. In the course of the numerous suits relating to the succession of Ann Duncan, advertisements for the discovery of her relatives were repeatedly published in the local and other papers, and the searches and inquiries for them (particularly those of the respondent and his agents) were so exhaustive and unremitting as to make it clear, with more than usual certainty, that everything which was possible has been discovered concerning her family. Under those circumstances I agree with the conclusion of the courts below, that the respondent's case in the cross-appeal fails, and that the title of the co-parceners in the Cunningham line, under whom the appellant claims, has been sufficiently made out, a conclusion at which it is, to me at all events, much more satisfactory to arrive, after admitting and considering the weight of the respondent's evidence generally, than it would have been if I had found myself obliged to exclude it.

Then there arises the question raised by the first appeal, of the Statute of Limitations, as to which Stephen, J.'s judgment in favour of the appellant has been reversed, as to two-thirds of the property claimed, by the Court of Appeal. The action was brought on the 4th of January, 1881, and if the appellant is entitled to say that, down to a time less than twelve years before that date, the rents of the property at Manchester were received by the respondent as agent, bailiff, receiver, or trustee for the heirs-at-law of Ann Duncan, it appears to me to follow that the statute 3 & 4 Will. 4, c. 27, is no bar, either as to the land, which has been, ever since Ann Duncan's death, in the possession of tenants from year to year whose rent has been regularly paid, or as to the rents and profits which the respondent received.

Ann Duncan was entitled at law in fee simple, for her own absolute use and benefit, to the property in question, under the will of a testator named Lawrence Buchan, who died in July, 1859. She and the respondent were executors of that will; but, as such executors, they had neither interest in, nor duty with respect to, the English real estate. Ann Duncan, however, lived in Fifeshire, and the respondent lived at or near Manchester, and by arrangement between them for her convenience, the respondent managed that property in the name of "the executors of Lawrence Buchan," under which designation he received and gave acknowledgments for the rents paid by the tenants, and paid them into an account, so entitled, kept by him with bankers at Manchester, separate and apart from his own private and personal account. That designation and that form of account (though the land was vested in Ann Duncan alone, and not in Lawrence Buchan's executors), was indicative of some sort of trust; it was certainly not indicative of a personal right, claim, or interest on the part of the respondent.

After the death of Ann Duncan, on the 5th of November, 1867, no break or change was made in that course of management. Ann Duncan left a will, in Scotch form, as to her personal estate only; of that will a gentleman named John Todd was executor. It was part of his duty to ascertain the persons entitled to her undisposed of personalty, who would be sought for, according to Scotch law, preferably in the paternal line; and, though Mr. Todd, as executor, had no duty to perform as to the English real estate, it appears, from what is stated in the letter of Messrs. Drummond & Nicholson (Mr. Todd's solicitors at Edinburgh) of the 2nd of December, 1867, to the respondent, and not denied or disputed in the reply of the respondent's solicitors, Messrs. Earle, dated the 11th of December following, that he took sufficient interest in the care and management of the English real estate to communicate on that subject with the respondent; and that the respondent "promised him to look after the English estates." The course of management which had been established in Ann Duncan's lifetime enabled the respondent to go on receiving the rents as before, and he did so. The tenants paid him on the same footing as before; it does not appear that they were aware of Ann Duncan's death; the probable inference from the facts in evidence appears to me to be that they were not. Receipts continued to be given by the respondent, as for "the executors of Lawrence Buchan"; and the rents continued to be paid by him to the separate account with the bankers, entitled as the account of those executors.

For whom, and on whose behalf, were those rents received after Ann Duncan's death? Not by the respondent for himself, or on his own behalf, any more than during her lifetime. He knew, and down to 1880 frequently acknowledged, that they belonged to her heirs. He was, indeed, disappointed that she had not made a will in his favour; but to me it is clear that he knew there was no such will. Taking upon himself so to receive the rents of property which to his knowledge belonged to others, though to persons unascertained, and whom it might take time to ascertain—a circumstance which disabled them from looking after their own interests—I should have said, if there had been no authority, that he was chargeable in a fiduciary character with the rents which he received; just as I should have said the same thing of any solicitor or other agent receiving rents under a power of attorney, and continuing to receive them after the death of his client or principal; the tenants being ignorant of the revocation, and taking receipts as before from the attorney. These are questions of fact and of equity, unaffected by anything to be found in any Statute of Limitations.

The respondent's acts, in so receiving the rents, could not, in my opinion, dispossess the heirs of Ann Duncan, so as to put them to their action, either under the 2nd and 3rd, or under the 8th section of the statute 3 & 4 Will. 4, c. 27. If he received on behalf of the heirs, and if they could and did adopt and ratify his agency, they were in, and never out of, possession. I find nothing in the statute to displace or disturb, under such circumstances, the actual possession by their tenants, which (apart from the effect of the statute in the cases to which it applies) the law would ascribe to them, according to *Bushby* v. *Dixon* and other authorities. The respondent had no title to the land; he was never in actual possession of it; and, until he claimed a right to change his position, and to be in receipt of the rents and profits as for himself (which he never did till 1880) I do not see how there could be a right of action against him for recovery of that land. How the matter stood as to the rents which he received I shall presently consider.

Lord Coke's doctrine as to the effect of entry by an unauthorized stranger on behalf of the true owner seems to me applicable, in reason and principle, to such a receipt of rents as that of the respondent in this case down to 1880. "If an infant, or any man of full age, have a right of entry into any lands, any stranger, in the name and to the use of the infant or man of full age, may enter into the lands; and this regularly shall vest the lands in them, without any commandment, pre-

cedent, or agreement subsequent" (Co. Litt. 258a.). The law in this case vested not only the lands, but the actual possession of them, in the heirs, unless something was done to displace or interrupt that possession; and that which, in the case of entry, would have the effect ascribed by Lord Coke to the act of a stranger in the name and to the use of the true owner, could not (as it seems to me), in the case of receipt of rents, put the true owner to his action under the statute; but must, on the contrary, operate to confirm and strengthen his legal possession. If there was no interruption of the legal possession of the land by the true owner for more than twelve years before action brought, no acknowledgment under the 14th section of the statute was necessary.

As to the rents and profits received by the respondent, and the accumulated fund which arose from them in the banker's hands, there was a series of declarations, oral and in writing, by the respondent, sufficient in my judgment to establish against him, by his own admission, a fiduciary character. A man who receives the money of another on his behalf, and places it specifically to an account with a banker earmarked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a court of equity that the money was received in a fiduciary character is enough. It is not requisite that any acknowledgment of such a trust should be made to the *cestui que trust* or his agent; to whomsoever made it is evidence against the trustee.

Of the respondent's declarations in the present case I will mention some. On the 15th of January, 1869, in reply to a letter from the appellant, who then asserted that he was Ann Duncan's heir (which in fact he was not) the respondent wrote: "I am in receipt of your letter, and can assure you that, if you are Miss Duncan's heir, you will have no difficulty with me. Messrs. Drummond & Nicholson have all the particulars of Miss Duncan's estate, and the rents are all placed in bank as they accrue, and regular accounts kept." Again, on the 18th of the same month: "As an old friend of Miss Duncan's and Mr. Buchan's, I should advise those concerned to avoid litigation as much as possible. The property will be given up to the rightful owners as soon as it can be satisfactorily settled who they are." In the same month the respondent saw Colonel Tulloch, who deposes: "When I spoke with him about Mr. Lyell's claim to the property, Mr. Kennedy said: 'Don't let him make any fuss or claim on the tenants, or the whole thing will go to ruin. I am taking care of the place for the heir, whoever he may be.' He handed me a large book of account and several other books which he said were all in order for examination when the heir, whoever he might be, turned up. He said, 'Leave everything in my hands'; and 'I will take care of everything till the right heir turns up; everything is safe in my hands.'" In February, 1870, the defendant wrote to Messrs. Drummond & Nicholson: "When the claimants to Miss Duncan's estate are ascertained, the property will be found in good repair, the money ready, and the accounts in order." In 1872 (within twelve years of the commencemet of this action) he made claims against Ann Duncan's personal estate in the Scotch administration suit, on the footing of his being manager of this property after her death, and those claims were partly allowed. On the 16th of April in that year he wrote to Mr. Buchan, of Toronto (a relative of Ann Duncan, and a possible heir): "I am acting for the heir-at-law whoever he may be. . . . I claim, on the part of the heir-at-law, that the repairs on the mill property should be charged on the personal property."

It was suggested in argument for the respondent that all this might be explained by his legal liability for rents received by him until the statute had run. But (not to insist on his letter of the 29th of October, 1879, in which he assented to the proposition that he was not capable of setting up the Statute of Limitations against the parties entitled to the property) the declaration to Colonel Tulloch, and the letter of the 16th of April, 1872 (with which all his other letters and acts down to 1880 were consistent), appear to me to repel that explanation.

In order to test the effect in equity of these acts and declarations of the respondent, I will suppose the case of his having become bankrupt at any time before 1880. Would the accumulated fund which had arisen from the rents received after Ann Duncan's death, and was standing to the account of "the executors of Lawrence Buchan," or any part of it, have passed to the respondent's trustee in bankruptcy, as against a claim by Ann Duncan's heirs-at-law? The account was earmarked; none of the moneys credited to it were, or had ever been, the property of the respondent; it did not stand in his name; it was under a title, both *primâ facie* and when explained by tracing it to its origin, significant of trust. I am of opinion that such an account, even if it had stood in his name, would be within the principle of *Pennell* v. *Deffell*, 1 W. R. 499, 4 De G. M. & G. 381; and that no part of it, neither that part received more than six years before the bankruptcy, nor what was received since, would have passed in the case supposed to the respondent's trustee in bankruptcy.

No authority was cited for the respondent to show that he was not chargeable in a fiduciary character under these circumstances, or that as long as he acted as agent and receiver for the heirs (though unascertained) any Statute of Limitations would run against them in his favour. In the absence of authority, I should have been content to decide such a case on principle, but for the principle which I consider applicable to it, *Rackham* v. *Siddall* and its sequel, *Life Assurance Society of Scotland* v. *Siddall*, 9 W. R. 541, 3 De G. F. & J. 69, seem to me to be authorities as high as any can be, short of a decision of this House. The principle of those decisions, as stated by Turner, L.J., in the latter case, was that a person who had assumed to be a trustee "could not be heard to say, for his own benefit, that he had no right to act as a trustee." Mr. Lewin, in his learned and accurate treatise upon the Law of Trusts, thus puts it (7th ed., p. 191): "If a person, by mistake or otherwise, assume the character of a trustee when it really does not belong to him, and so becomes a trustee *de son tort*, he may be called to account by the *cestuis que trust* for the moneys he received under colour of the trust."

Other authorities were cited by the appellant's counsel at your lordships' bar, which, though not decisions, have the weight due to opinions of eminent judges, reasonable in themselves and with nothing against them. In *Gawton* v. *Lord Dacres*, 1 Leon. 219, Anderson, J., said, "If one become my bailiff of his own wrong, without my appointment, he is accountable to me." In *Shaw* v. *Keighron*, Ir. Rep. 3 Eq. 574, Walsh, Master of the Rolls of Ireland (that case being under the 9th section of the Statute of Limitations), said, "I think it is necessary to go beyond the mere circumstance that someone not entitled to the rent has received and kept it. The section requires not only that the rent should have been received by a person other than the person rightfully entitled, but that it should have been received under some claim of title, and that a wrongful one. For example, if rent were received by a person falsely pretending to be agent to the rightful owner, who never accounted for it, this would not bar the rightful owner. The mere fact that the rent was received and kept by a person other than the right owner no doubt raises a presumption that it was received under a wrongful claim of title; but this is only a presumption, and may be negatived by the

circumstances." Under the 9th section, a lessee for years, paying rent to a person "wrongfully claiming to be entitled," is supposed to be in possession: and a title can only be acquired against the true owner by a wrongful receipt of rents. The same words are not elsewhere used; but I am of opinion that what was said by the learned judge is equally true of any other case in which the statute is set up as a bar to the true owner by virtue only of the receipt of rent from tenants in possession. I think that such receipt of rent, in order to exclude the true owner, must always be by a person wrongfully claiming, and not receiving, or claiming a right to receive, on behalf of the true owner. When the true owner can and does ratify an agency undertaken on his behalf, though without his antecedent authority, the case is the same as if he had himself received the rents.

It is unnecessary to consider how the matter would stand, towards either the self-constituted agent or the tenants who paid rent to him, if the agency were (as it might be) repudiated. The true owner must either approbate or reprobate, he cannot do both. That, as was said of the option of a *cestui que trust* to take to or reject an improper mode of dealing with trust moneys by a trustee in *Pennell* v. *Deffell*, is a different matter, with which your lordships have not now to deal. Here the agency has been ratified, if when the action was brought it was capable of ratification, as in my opinion, it was.

The Court of Appeal seems to have considered that in a case in which the assumed agency for the management and receipt of the rents and profits of land was unauthorized by the true owner, it must be adopted and ratified within twelve years from its commencement; and that, otherwise, the true owner would be barred under the 8th section of the statute, as if no rent at all had been received during those years from the tenants (in this case tenants from year to year) in respect of their tenancies. These propositions appear to me to assume the main question as to the statute running during the continuance of the self-constituted agency between the true owner and the person taking upon himself to act as agent. I find nothing to support them in the Statute of Limitations itself; and I do not think them well founded in principle. It is enough, in my judgment, if the agency is ratified within such a time as is reasonable under the circumstances between the true owner and the assumed agent. In this case the ratification took place as soon as was reasonably possible after the co-heiresses had been ascertained, and hardly more than a year after the last of an uninterrupted series of acts by the respondent upon the footing of agency. That, in my opinion, was enough. The present question is not with the tenants; they have regularly paid rent in respect of their tenancies, and they cannot have any claim, under the 8th or any other section of the statute, against the reversioner, if he is entitled to take and does take, the benefit of their payments. Whether he is or is not entitled, as against the respondent, to an account of those rents and to receive future rents, is a question with which the tenants (so long as they are protected against a double claim) have no concern. There is not here a *jus tertii* complete before ratification, as there was in *Lord Audley* v. *Pollard*, Cro. Eliz. 561, and *Bird* v. *Brown*, L. R. 4 Ex. 786. Those cases are good law, but I think them inapplicable to a question between the self-constituted agent and the ratifying principal.

I am not sure that the form of Stephen, J.'s order, so far as relates to the recovery of the possession of the land, may not require amendment so as to show that the possession to be recovered by the appellant is subject to the existing tenancies; and I think that in taking the account directed, all just allowances must be made to the respondent. That would be the rule in equity (which, since the Judicature Acts must prevail), however the case might have stood in the old action of account at law. Subject to such formal variation, I think that the order of Stephen, J., was right, and ought to be, in substance, restored; and that the respondent ought to pay all the costs of this litigation, which, in my opinion, nothing but the controversy as to the true heirship to Ann Duncan could at all excuse.

I therefore move your lordships to declare that the recovery of possession adjudged to the plaintiff Lyell is to be subject to the existing tenancies, and that in taking the account directed, all just allowances are to be made to the defendant Kennedy; and with that declaration to reverse the order of the Court of Appeal and restore the order of Stephen, J., and dismiss the appeal of the defendant Kennedy with costs; the defendant Kennedy to pay all costs here and in the courts below.

Lord Fitzgerald.—I have read with care and studied the judgment which has just been delivered, expressed in such carefully considered and measured language by the noble and learned earl, and I entirely concur with that judgment and with its conclusions. I have nothing to add, save this, that the judgment expresses the conclusions at which I, speaking for myself personally, had arrived at the close of the full and lengthened hearing of this cause at your lordships' bar, after listening to, and having had a full opportunity of considering in the course of the case the very learned argument addressed to us, an argument so learned, so full, and so elaborate as to leave nothing to be desired.

Lord Macnaghten.—I, too, have had the advantage of reading and considering the opinion of the noble and learned earl on the appeal and cross-appeal. I desire to say that I entirely concur in that opinion.

I would only venture to add, with regard to the appeal, that it seems to me that the principle which must govern the case may be stated concisely in the words of the late Giffard, L.J. In *Burdick* v. *Garrick*, 18 W. R. 387, L. R. 5 Ch. 233, that learned judge expressed himself as follows:—"I do not hesitate to say that when the duty of persons is to receive property and hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

I think that is a sound proposition. I do not think it can make any difference what the nature of the property may be, whether it is a lump sum or whether it is collected in the shape of rents accruing from time to time. I do not think it can make any difference whether the person on whose behalf the property is professedly received is or is not under disability or unborn or unascertained. Nor do I think it can make any difference whether the duty arises from contract or previous request, or whether it is self-imposed and undertaken without any authority whatever. If it is established that the duty has in fact been undertaken, and that property has been received, by a person assuming to act in a fiduciary and representative character, the same consequences must, I think, in every case follow.

Lord Halsbury, C.—I have had an opportunity of reading the judgment of the learned and noble earl, and only desire to say that I entirely concur, both with the conclusions he has arrived at, and with the reasons by which he has arrived at them.

Order appealed from reversed, and order of Stephen, J., restored, subject to a declaration.

The cross-appeal of the defendant Kennedy dismissed,

with costs; the defendant Kennedy to pay all costs here and in the courts below.

Cause remitted to the Queen's Bench Division.

Solicitor for Lyell, *J. Balfour Allen.*

Solicitors for Kennedy, *Rooke & Sons*, for *Earle, Sons, & Co.*, Manchester.

Court of Appeal.

From Q. B. Div. Feb. 13.

VIBART *v.* COLES. (*a.*)

Administration — Preference of one simple contract creditor of intestate to another—Conflict of rules of law and equity—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25 (11).

After action brought against an administrator by a creditor of the intestate, the administrator paid another creditor in full, and pleaded that he had no assets out of which to satisfy the debt.

Held, that this was a good answer to the action.

Appeal from the decision of Bowen, L.J.

The action was brought against an administratrix to recover a sum of money lent to the intestate by the plaintiff. After action brought another simple contract creditor of the intestate sued the administratrix in respect of his debt, and judgment was given in that action against the administratrix by consent, but the consent order was not filed as required by section 27 of the Debtors Act, 1869.

The administratrix fully satisfied this judgment debt, and then pleaded to the plaintiff's action that she had exhausted the assets of the intestate, and had no assets out of which to pay the plaintiff.

Bowen, L.J., gave judgment for the defendant, and the plaintiff appealed.

Jelf, Q.C., and *H. Tindal Atkinson*, for the appellant.—The simple contract debt was merged in the judgment debt, and that judgment being void against other creditors for want of proper registration, the simple contract debt is gone, and the defendant ought not to have paid it. Secondly, it is the rule at common law that, after notice of action, an administrator has no right to pay another creditor of the intestate. The rule in equity, which was to the contrary effect, only applies to administration actions.

They cited *Gowan* v. *Wright*, 35 W. R. 297, 18 Q. B. D. 201; *Ex parte Brown*, 17 Q. B. D. 488, 35 W. R. Dig. 20; *Tolputt* v. *Wells*, 1 M. & S. 395; *Harris* v. *Harris*, 35 W. R. 710; *In re Radcliffe*, 26 W. R. 417, 7 Ch. D. 733.

Finlay, Q.C., and *Forman*, for the respondent, were not called upon to argue.

Lord COLERIDGE, C.J.—In this case I think that the judgment of my brother Bowen was right and must be affirmed. The action was brought by a creditor of an intestate against the administratrix. After the action was brought, another action by another simple contract creditor of the intestate was commenced against the administratrix, and in that action judgment was given against the administratrix by consent, but the consent order was not filed. The administratrix has satisfied that judgment debt, and pleads that she has no property of the intestate out of which to pay the present plaintiff. The plaintiff contends that the defendant had no right to pay the judgment debt. No doubt under the Act of 1869 the judgment, for want of the registration of the consent order, is null and void, and it is said that as between the parties the simple contract debt on which that judgment was, so to say, founded, was merged in the judgment debt. The judgment debt is a security of a higher kind, and no doubt that would be so as regards the parties to the original judgment. What, however, is the position of another creditor who is suing the administratrix? The administratrix alleges that she has exhausted the goods of the intestate in satisfying the judgment debt. The plaintiff contends that there was no debt to satisfy, since the judgment debt was void for want of registration, and the simple contract debt had been merged in the judgment debt. It is hardly necessary to state that proposition in order to see its fallacy. The judgment may be void, but that does not do away with the debt on which it is founded. That does not disappear because the judgment may be set aside. The simple contract debt therefore remained, and the administratrix had a perfect right to pay it, even after the action was brought. It is said that at common law the rule was that after action brought there could be no payment by the administrator, of another creditor, but it is admitted that for a very long time the rule in equity had been the other way. The Act of Parliament is perfectly clear and precise that where rules of law and equity conflict, the rule of equity is to prevail. There is here a plain conflict, and therefore the rule of equity must prevail. If we wanted authority, which I do not think we do, for such a proposition, we should find it in *In re Radcliffe*, where the principle is clearly stated by Jessel, M.R. I therefore think that the plaintiff cannot succeed, and that this appeal must be dismissed.

Lord ESHER, M.R.—In my opinion this case may be disposed of by two propositions. A creditor who alleges that a judgment is void cannot say that the debt in respect of which it is given is swallowed up by it, and becomes void also. Secondly, a rule of law says that an administrator cannot pay one creditor of an intestate in preference to another by whom an action has been brought. A rule of equity says that he can do so. Those rules are, therefore, in conflict, and where rules of law and equity conflict, the Judicature Act provides that the rule of equity shall prevail. I think, therefore, that the payment was a good one.

FRY, L.J.—I am of the same opinion. The arguments on behalf of the appellant are ingenious but untenable. It is said that the judgment debt is void for want of proper registration under the Debtors Act, 1869, but it is not void as between the parties to it, and therefore the judgment was good against the administratrix, though bad against other creditors. But it is said the simple contract debt was merged in the judgment debt, and therefore it also is void as against the creditors. That argument is fallacious. If the judgment was void there would be no merger. As to the other point taken, the provision of the Judicature Act is clear, that the rules of equity are to prevail where there is a conflict. It was said that this rule affects rights, but so do all rules, and there is no exception to the provision of the Act.

Appeal dismissed.

Solicitors for the appellant, *Robbins, Billing, & Co.*, for *Petgrave*, Bath.

Solicitors for the respondent, *Montagu Hawkins.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. Jan. 22, 23.

ROBINSON *v.* JENKINS AND ANOTHER. (*a*.)

Practice—Interpleader—Choses in action—*Shares—Ord.* 57, *rr.* 1, 2.

Shares are chattels within the meaning of ord. 57, *r.* 1, *and therefore an interpleader issue can be directed in respect of them.*

Appeal from the decision of a Divisional Court (Lord Coleridge, C.J., and Mathew, J.).

The plaintiff purchased 1,000 shares in the Great Sheba Gold Mine (Limited) in April, 1889. The shares were registered in the company's books in his name, and he obtained a certificate from them stating that he was the owner. Afterwards, being desirous to sell them, he instructed the defendants, who were stockbrokers, to sell them for him, and gave to them the certificates and a transfer executed in blank. While these documents were in the possession of the defendants they received notice from one Bebro that he claimed the shares, on the ground that the shares had been obtained from him by fraud by the plaintiff's vendor. The defendants gave the plaintiff notice of this claim, and refused to return the certificate and blank transfer to him. The plaintiff thereupon brought the present action for the return of the certificate and blank transfer. The defendants applied to be allowed to interplead under ord. 57, r. 1.

The master refused to make the order, and on appeal Field, J., at chambers referred the matter to the Divisional Court, who directed the action to be stayed pending the trial of an interpleader issue between the plaintiff and the claimant.

The plaintiff appealed.

T. W. Chitty, for the plaintiff.—The claim is in respect of shares, and there cannot be an interpleader with regard to them as they are not within the contemplation of ord. 57, r. 1 (*a*): *Walter* v. *Nicholson*, 6 Dowl. 517. The defendants were the plaintiff's agents, and to allow them to interplead in respect of these documents handed to them by their principal would be to allow an agent to set up the *jus tertii* as against his principal. The claimant only claims the shares which are vested in the plaintiff. He does not ask for the certificate and blank transfer in respect of which interpleader is claimed: *Dalton* v. *Midland Railway Co.*, 12 C. B. 458; *Baker* v. *Bank of Australasia*, 5 W. R. 253, 1 C. B. N. S. 515.

Henn Collins, Q.C., and *Loehnis*, for the defendants.—Shares are chattels, and therefore within the scope of the interpleader order. Although it is not permissible for an agent to set up a *jus tertii* against his principal, yet he may interplead: *Best* v. *Hayes*, 1 H. & C. 718, 11 W. R. C. L. Dig. 71; *Tanner* v. *European Bank*, 14 W. R. 675, L. R. 1 Ex. 261; *Attenborough* v. *London and St. Katharine's Dock Co.*, 26 W. R. 583, 3 C. P. D. 450; *Hollins* v. *Fowler*, L. R. 7 H. L. 757, 23 W. R. Dig. 238.

Forbes Lankester, for the claimant.

Chitty replied.

Lord ESHER, M.R.—In this case Messrs. Jenkins & Roylance have got something in respect of which the plaintiff has brought an action against them, and Bebro has threatened them with an action. They say that they have no real interest in it, and they are indifferent as to which of the claimants they are to give it up to, and therefore they ask the court to allow them to interplead in respect of it. Before the issue, which the parties agreed to settle is drawn up, the plaintiff appeals to this court. The ground of the appeal is that the court had no jurisdiction to order the interpleader issue. First, it is argued that the dispute between the plaintiff and Bebro is as to the shares, and that shares are not things in respect of which an interpleader can be directed. It is admitted, however, that shares are *choses in action*, but it is contended that they do not fall within the language of order 57, which regulates interpleader. Ord. 57, r. 1, says that relief by way of interpleader may be granted in respect of any "debt, money, goods, or chattels." The argument of the appellant is that we must restrict the meaning of the word "chattels" to tangible chattels. I can see no authority, nor am I inclined to read the word tangible into the order. *Choses in action* are chattels, and therefore, in my opinion, these shares are chattels in respect of which an interpleader can be ordered. Therefore I think that that point fails. The second point taken for the appellants was this. Even if the blank transfer and certificate, which are in the hands of the defendants, represent the shares, yet no interpleader order can be made in respect of them, because possession of them was given to the defendants as agents by the plaintiff as principal, and therefore the plaintiff has a right to demand them back from the defendants. That objection certainly seemed to me to be formidable for a time, because in an ordinary action by the plaintiff as principal against the defendants as his agents, the defendants would not be entitled to set up the right of a third party to the shares. An agent cannot in such a case set up the *jus tertii* against his principal. The case is, however, different when the defendants, instead of setting up an adverse claim, ask for an interpleader. That was determined by the cases of *Best* v. *Hayes* and *Tanner* v. *European Bank*, where the point was expressly raised, and where it was pointed out that in such a case an interpleader order may be made. Even if those cases stood alone, desiring as I do to keep the power of the courts as wide as possible, I should have said that the principle laid down by them was right, and could not be disturbed. The rule and order must be taken to have been made with a knowledge of those decisions. But those decisions have already been approved by the Court of Appeal in *Attenborough* v. *London and St. Katharine's Dock Co.*, and therefore that point also fails. The third point urged upon us was that the court had no jurisdiction to make the order, because it was impossible to draw up a just and reasonable issue. I do not think that is so. The issue need not be confined to the whole case, and need only contain questions which a judge may require to inform his mind of the facts of the case. That is a common occurrence. Therefore I think that there is no ground for saying that the court had no jurisdiction to make the order. I think the order was rightly made, and that the appeal must be dismissed.

FRY, L.J.—The circumstances of this case no doubt create a little difficulty. The main things in dispute are these shares, which are actually vested in the plaintiff, being registered in his name. But the certificate, which is the *primâ facie* evidence of title, and the blank transfer have been handed by the plaintiff to the defendants in order that they may sell the shares for him. Their authority to fill up the blank transfer which has been executed by the plaintiff is no doubt drawn from him. The shares are then claimed by Bebro, and the defendants apply to be allowed to interplead, on which the order appealed from has, as I think, been rightly made. It was urged for the appellant that an interpleader cannot be directed in respect of *choses in action*. I think that such an argument is entirely untenable. The order speaks of "chattels," which is one of the largest terms known to the law, and which certainly includes in its ordinary sense *choses in action*. Rule 2 of order 57 requires that the applicant for interpleader

(*a*.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

should satisfy the court that he is willing "to pay or transfer the subject-matter into court or to dispose of it as the court or a judge may direct." Disposition of a *chose in action* is the equivalent phrase to the payment of a sum of money or the transference of a chattel. Therefore, in my opinion, the order clearly contemplated *choses in action* as being the subject-matter of interpleader. Then it is said that the shares which are claimed are in the disposition of the plaintiff, and not of the defendants. I think that is special pleading. In claiming the shares against the defendants, Bebro claims everything relating to the shares, including, of course, the certificate and blank transfer.

I must confess I had some misgivings on the question of allowing an agent to set up the *jus tertii* against his principal, but those misgivings have been set at rest by the cases which have been cited. Obviously it is well that the law should be so settled, as otherwise the defendants would be exposed to the risk of serious damages being given against them in an action for conversion.

Then it is said that it is difficult to settle the form of the issue because the claimant claims the shares, and not the certificate and blank transfer. I think there ought to be no difficulty about it. The interpleader should go as to the certificate and transfer, which will involve the right to the shares. It follows, therefore, that I concur in thinking that the court had jurisdiction to make the order, and that the order was rightly made.

Appeal dismissed.

The following was the form of the interpleader issue as drawn up:—

"Whereas the above-named Marcus Bebro affirms, and the above-named William James Robinson denies, that certain shares, being Nos. 79,951 to 80,950, in a company called the Great Sheba Gold Mining Co. (Limited), and a share certificate relating to the said shares, and a transfer of the said shares (which said certificate and transfer were deposited in court pursuant to the order of the Queen's Bench Division dated the 25th of November, 1889) are the property of the said Marcus Bebro as against the said William James Robinson.

"And it has been ordered by the said order of the Queen's Bench Division of the High Court of Justice, dated the 25th of November, 1889, that the said question shall be tried in London.

"Therefore let the same be tried accordingly."

Solicitors for the plaintiff, *Smiles, Binyon, & Ollard.*

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *W. A. Jones*, Manchester.

Solicitors for the claimant, *Collis & Mallam*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

From Q. B. Div. Oct. 26.

Guardians of the West Derby Union *v.* Guardians of the Atcham Union. (*a*.)

Poor law — Settlement — Derivative settlement—Child under sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

By section 35 *of the Divided Parishes Act*, 1876, *it is provided that, "if any child in the section mentioned shall not have acquired a settlement for itself, . . . and it cannot be shown what settlement such child . . . derived from the parent, without inquiring into the derivative settlement of such parent, such child . . . shall be deemed to be settled in the parish in which he or she was born."*

Held (following the interpretation put upon the section by the House of Lords *in* Guardians of Reigate Union *v.* Guardians of Croydon Union, ante, *p.* 295, 14 *App. Cas.* 465), *that this did not apply to the case of a child under the age of sixteen.*

A pauper under the age of sixteen having become chargeable, the settlement of his deceased father could not be ascertained, and the settlement which he derived from his mother could not be shown without inquiring into her derivative settlement.

Held, that the section did not prohibit the inquiry, but that he took his mother's settlement, and not his own birth settlement.

Appeal from the decision of the Queen's Bench Division (Field and Wills, JJ.) on a case stated by quarter sessions.

It appeared that Arthur John Helme was a pauper lunatic, and was the legitimate son of E. W. Helme, deceased, and Mary Elizabeth, his wife, and was born on the 16th of October, 1873, in the township of Everton, in the West Derby Union. E. W. Helme, who died in the year 1877, never acquired any settlement in his own right, and his birth settlement could not be ascertained.

Mary Elizabeth Helme, the mother of the pauper, was born in the parish of Llandisilio in the Llanfyllin Union on May 29, 1841. She was the daughter of one Richard Roberts, who in 1847 acquired a settlement in the Llanfyllin Union. She lived with her father until she was sixteen years of age, when she went to service, and she never acquired any settlement in her own right either before her marriage or since the death of her husband.

Arthur John Helme became chargeable in the Atcham Union on July 26, 1886, being then under the age of sixteen years. The court of quarter sessions for the county of Salop adjudicated his settlement to be in the West Derby Union. The guardians of that union contended that he was settled in the Llanfyllin Union in right of his mother's birth settlement, but the Divisional Court upheld the decision of the quarter sessions, on the ground that it could not be shown what settlement he derived from his mother without inquiring into her derivative settlement, and that, as he had not acquired a settlement for himself, he must be deemed to be settled in the parish of Everton, in the West Derby Union, in which he was born.

The guardians of the West Derby Union appealed.

Jelf, Q.C., F. Marshall, and *Rohrweyer*, for the appellants.—The decision in *Guardians of Reigate Union* v. *Guardians of Croydon Union, ante*, p. 295, 14 App. Cas. 465, has put a new construction on the whole of section 35 of the Divided Parishes Act. The third clause, forbidding an inquiry into derivative settlements, has been held in that case not to apply to a child under the age of sixteen years. The words in it "any child in this section mentioned" refer only to children above the age of sixteen. Therefore, in this case, there is no objection to the inquiry into the derivative settlement of the mother, and the pauper must be deemed to be settled in the Llanfyllin Union.

Bowen Rowlands, Q.C., Poland, Q.C., and *Cunningham Glen*, for the respondents.—No doubt some of the language of Lord Watson in the House of Lords in *Reigate Union* v. *Croydon Union* supports the appellants' contention, but it was not material to that decision, and must, therefore, be treated as *obiter*, nor is it repeated by any other of the lords who gave judgment in that case.

Lord Esher, M.R.—The question in this case is as to

(*a*.) Reported by A. P. Perceval Keep, Esq., Barrister-at-Law.

the true construction of section 35 of the Divided Parishes Act, and as to its application to the facts before us. The section is one which has given the courts a great deal of trouble. It has been considered by various tribunals under various aspects, and judges have been by no means unanimous in the views they have taken of it. Under those circumstances this court expressed the hope, when we heard that several similar cases were going to the House of Lords, that the House of Lords would construe the whole section, and then apply it to the cases, so that the courts might know the view taken by the House of Lords as to the construction of the whole Act. Accordingly, the House of Lords heard all the cases before them most elaborately argued, and then they took time to consider their judgments. After careful consideration, judgment was delivered by four learned lords. The practice in the case of reserved judgments in the House of Lords is well known. Each lord considers the matter separately, and then they interchange their judgments, so that before judgment is delivered each lord has had the opportunity of reading the judgments of all the others. If, therefore, there is anything in the judgment of any one lord with which the other lords do not agree, they say so when they deliver judgment, and if they do not say so they must be taken to agree. In the *Croydon and Reigate case*, Lord Watson delivered the most elaborate judgment, but there is no doubt that his judgment had been read by all the other lords, and if they had disagreed with it they would have said so when they delivered their judgments. Lord Fitzgerald expressly says that he does agree with it, and the Lord Chancellor must, I think, be taken to do so. Nor does Lord Macnaghten express the slightest difference from the judgment of Lord Watson. In my opinion he adopts and agrees with it, and then he adds another reason of his own for the view he takes of the section. But giving an additional reason is not disagreement with Lord Watson's judgment. Therefore, I think the judgment of Lord Watson must be taken to be the judgment of the House of Lords. It lays down the view that they take of sections 34 and 35 of the Divided Parishes Act, and that view will be adopted by us in all future cases. Lord Watson says in terms that the words "any child in this section mentioned" in the latter part of section 35, do not apply to a child under the age of sixteen, and that such a child is dealt with by the two first paragraphs of the section. It is admitted that if we adopt that view of the section, the present appellants must succeed, but it is contended that we are not bound to adopt that view, because the remarks of Lord Watson were not necessary to the decision of the cases before him. In my opinion it would be disloyal to the traditions and rules of practice of this court if, after having asked the House of Lords to interpret the whole section, we were to disregard that interpretation when it was given. It would be wrong for us to do so. Therefore, I bow to the interpretation put upon the section in the House of Lords. I disregard everything that has been said upon the section prior to that interpretation, and, accepting that interpretation, I hold that this case is decided by it, and that the contention of the appellants is right.

Lindley, L.J.—I am of the same opinion. Before these cases went to the House of Lords there were a number of conflicting decisions on the section, which were most difficult to reconcile. Few modern Acts, in fact, have given rise to more discussion than this Divided Parishes Act. Now the House of Lords have intentionally put an interpretation on this difficult section which should be a guide to us and other courts. I think that it would be wrong for us to refuse to carry that interpretation into effect. On that interpretation it is admitted that this appeal must be allowed, and I think that it is our duty to adopt that interpretation, and to say, therefore, that this appeal succeeds.

Lopes, L.J.—I concur. I think the case is entirely governed by the decision of the House of Lords.

Appeal allowed.

Solicitors for the appellants, *Sharpe, Parkers, & Co.*, for *Cleaver, Holden, & Co.*, Liverpool.

Solicitors for the respondents, *Paterson, Snow, Bloxam, & Kinder*, for *J. Hawley Edwards*, Shrewsbury.

High Court of Justice.

Chan. Div. } Jan. 30; Feb. 4.
North, J. }

Barrett v. Day.
Day v. Foster. (a.)

Patent—Threats for infringement—Action for infringement—Action for injunction to restrain threats—"Person aggrieved" by threats—Stay of proceedings—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 32—*Rules of Supreme Court*, 1883, *ord.* 25, *r.* 4.

D., the patentee of an invention, who had granted F. an exclusive licence to use the invention on payment of royalties, on the 17th of December, 1888, *threatened F. with legal proceedings, on the ground that F. was manufacturing articles which infringed the patent without paying royalties therefor, and, on the 24th of April*, 1889, *commenced an action against F. for an injunction to restrain the manufacture of such articles, except subject to the terms of the licence. F. denied that the articles were an infringement of D.'s patent, and alleged that they were manufactured under B. and E.'s patent, of which F. was also licensee. B. and E., as "persons aggrieved" by D.'s threats against F., their licensee, on the 16th of August*, 1889, *commenced an action for an injunction to restrain D. from threatening F., and for damages. Summonses were then taken out by D. for a stay of proceedings in the action against him by B. and E., and by B. and E. for a stay of proceedings in the action of D. against F. until their action against D. had been heard.*

Held, on the hearing of the two summonses, that the action of D. against F. was an action for infringement brought with due diligence within the proviso to section 32 *of the Patents Act*, 1883; *and that there was no cause of action for the action of B. and E. against D.; and that all further proceedings in that action must be stayed.*

Adjourned summonses.

Joseph M. Day, the defendant in the action of *Barrett and Elers* v. *Day* and the plaintiff in the action of *Day* v. *Foster*, was the owner of a patent granted on the 31st of December, 1885, for "an improved bottle for aerated liquids"; and on the 13th of August, 1886, he granted to Foster, the defendant in the action of *Day* v. *Foster*, an exclusive licence to make and sell a portion, called the "trigger opener," of his invention, at a royalty of one shilling per gross, payable quarterly. The licence provided that Foster should not use the "trigger opener" otherwise than in accordance with the licence, and should not at any time dispute the validity of Day's patent.

Messrs. Barrett and Elers, the plaintiffs in the action of *Barrett and Elers* v. *Day*, were the owners by way of assignment of a patent called the Barrett and Varley Patent, granted on the 2nd of November, 1887, for "improvements relating to means for facilitating the opening

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

of internally stoppered bottles for aerated and other liquids." It appeared from the evidence that Barrett and Elers granted to Foster an exclusive licence to use their patent in November, 1888; but the formal assignment of the patent to Barrett and Elers was only executed on the 11th of January, 1889, and the licence to Foster was only executed on the 17th of January, 1889.

In 1888 Day obtained information that Foster was manufacturing "trigger openers" for which he was not paying royalty, of a pattern for which Foster had applied for a patent, but which Day alleged were made in accordance with his patent; and Day's solicitor wrote with respect thereto on the 25th of November, 1888. In reply Day's solicitor received a letter from Foster's solicitors stating that Foster would protect himself under his own patent and under a patent of Barrett and Varley, which was the first intimation Day received of the existence of Barrett and Varley's patent.

On the 17th of December, 1888, Day's solicitor wrote to Foster's solicitors as follows: "It was only on Saturday last that my client was enabled to procure a copy of Messrs. Barnett (meaning Barrett) and Varley's specification. It is clearly an infringement upon his patent. I thought it right to have this matter investigated before proceeding. I have now only to notify to you that, in the action against your clients, claims will be made in respect of this patent. I think it is only right to inform you of this before the writ is issued."

Messrs. Gard, Hall, & Rook, Foster's solicitors, also acted for Barrett and Elers, who assisted Foster against Day; and they wrote on behalf of Barrett and Elers requiring Day to withdraw his threats to proceed against Foster or to commence an action to make them good, and calling attention to section 32 of the Patents Act, 1883.

On the 24th of April, 1889, Day commenced his action against Foster, and by his statement of claim, delivered on the 29th of June, alleged as follows:—"The defendant has manufactured and sold trigger openers differing only colourably from those made in accordance with the plaintiff's letters patent, and has refused to pay royalties thereon, alleging as his reason that the trigger openers so manufactured and sold were made according to an alleged invention comprised in certain letters patent granted to Henry Barrett and John James Varley, and are not within the privilege granted by the plaintiff's letters patent or affected by the said licence. The trigger openers made according to the alleged invention of the said Messrs. Barrett and Varley do not differ in any material respect from the trigger openers protected by the plaintiff's said letters patent"; and he claimed "(1) a declaration that the said trigger openers in respect of which the defendant refuses to pay royalties are comprised within the plaintiff's said letters patent, and that the defendant is liable to pay royalties in respect thereof, in accordance with the said licence; (2) an injunction to restrain the defendant from making or vending (except subject to the terms of the said licence) trigger openers made in accordance with the description contained in the specification filed under the said letters patent granted to Barrett and Varley, or only colourably differing from the trigger openers manufactured in accordance with the plaintiff's letters patent; (3) an account of the royalties due to the plaintiff from the defendant under the said licence."

In his defence Foster stated that he had duly accounted for all royalties due to Day under his licence, and admitted that he had manufactured trigger openers under Barrett and Elers' patent, but denied that they were an infringement of Day's patent. This defence was not delivered until the 24th of October, 1889.

On the 16th of August, 1889, Barrett and Elers issued a writ against Day for an injunction restraining him from threatening to take proceedings against persons manufacturing, using, or selling his invention; and on the 24th of October, 1889, they delivered their statement of claim, in which they alleged that Day had threatened Foster with legal proceedings in respect of an alleged infringement, and that they had suffered damage by reason thereof; that they themselves had manufactured articles substantially the same as those manufactured by Foster under Barrett and Varley's patent; that Day had refused to join them as defendants in his action against Foster, or to allow Foster to contest the validity of Day's patent; that Foster's manufacture was not an infringement of Day's rights, because (1) it was not an infringement of Day's patent, and (2) Day's patent was bad; and they claimed an injunction restraining Day from threatening Foster, damages, and costs.

On the 31st of October, 1889, Day took out a summons in the action of *Barrett and Elers* v. *Day*, asking that all proceedings therein might be stayed; and on the 2nd of November Foster took out a summons asking that all proceedings in the action of *Day* v. *Foster* might be stayed until the action of *Barrett and Elers* v. *Day* had been tried. These two summonses now came on for hearing.

The Patents, Designs, and Trade-Marks Act, 1883, s. 32, provides that "where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats; provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for Day.—The action of *Barrett and Elers* v. *Day* ought to be stayed, on the ground that there is no cause of action. The action of *Day* v. *Foster*, which raises the question of infringement by Foster of Day's patent, is an action honestly brought with reasonable diligence against the person threatened, and satisfies the proviso of section 32 of the Act of 1883: *Challender* v. *Royle*, 36 W. R. 357, 36 Ch. D. 425. Therefore, Barrett and Elers have no cause of action against Day. The question raised in *Day* v. *Foster* is whether what Foster has been doing is an infringement of Day's patent. In his affidavit Foster states that he is willing to be bound by the decision in *Barrett and Elers* v. *Day*. He does this because he is precluded by the terms of his licence from Day from contesting the validity of Day's patent, but its validity can be contested in *Barrett and Elers* v. *Day*. Day's patent has been granted for four years, and no one has contested its validity, so that it must be regarded as valid, and Day's claim is a *bonâ fide* claim: *Wren* v. *Weild*, L. R. 4 Q. B. 730, 17 W. R. C. L. Dig. 91; *Halsey* v. *Brotherhood*, 29 W. R. 9, 30 *Ibid.* 279, 15 Ch. D. 514, 19 *Ibid.* 386. [They also referred to *Driffield Linseed Cake Co.* v. *Waterloo Mills Co.*, 34 W. R. 360, 31 Ch. D. 638; *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.*, *ante*, p. 233, 42 Ch. D. 665.] The action of *Barrett and Elers* v. *Day* should be stayed as frivolous and vexatious: Rules of Court, 1883, ord. 25, r. 4.

Moulton, Q.C., and *Thomas Terrell*, for Barrett and Elers, and Foster.—Barrett and Elers have a good cause of action, as Day's threats against Foster injure them, and Day will not join them as co-defendants with Foster, so as to enable them to contest the validity of

Day's patent, although they have also manufactured the articles Day complains of as an infringement of his patent: *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.* The action of *Day* v. *Foster* is not an action for infringement within the proviso to section 32 of the Act of 1883. It does not take away the cause of action of Barrett and Elers, and their action is not frivolous or vexatious. The case differs from *Challender* v. *Royle*. But instead of staying *Day* v. *Foster* until *Barrett and Elers* v. *Day* is decided, both actions might be heard together.

North, J., stated the facts, and proceeded:—With regard to the validity of Day's patent, it is now four years old, and as no proceeding has been taken by Barrett and Elers, or by Barrett and Varley, or anyone else, to have it revoked, I must for present purposes treat it as valid, according to the judgments in *Wren* v. *Weild*, and *Halsey* v. *Brotherhood*. Foster does not allege that it is invalid. The law estops him from doing so as a licensee, and, moreover, he has contracted that he will not at any time dispute its validity; and the complaint that Day will not allow Foster to do what he has not attempted to do, and has expressly contracted not to do, is absurd. Then as to the question whether what Foster has done is or is not within Day's patent, that is the very thing which has to be decided, and will be decided in the action of *Day* v. *Foster*. If it is not within Day's patent that action will fail; but if it is, there is no reason why it should not be decided against Foster alone. Day could not join Barrett and Elers as defendants in that action, for he has no cause of action against them for what Foster has done. The fact that Barrett and Elers have a patent for a thing which if made, would be an infringement of Day's prior patent, would not justify an action for infringement by Day against Barrett and Elers; that was laid down in the judgments of Cotton and Bowen, L.JJ., in *Challender* v. *Royle*. It is true that Barrett and Elers allege for the first time in their statement of claim that they have themselves manufactured and sold articles substantially the same as those claimed by Foster to be manufactured under Barrett and Varley's patent, but they give no details or admissions as to the nature of such articles, or as to the time or extent of their manufacture, and Foster has, ever since November, 1888, had a licence from them, which their counsel tells me is an exclusive one. But, however this may be, there is no possible ground upon which I can hold that Day is bound to combine in one action, his claim against Foster in respect of the manufacture and sale of certain articles, and any claim he may have against Barrett and Elers in respect of the manufacture or sale by them of other articles. Nor can I hold it unreasonable that Day, who is duly prosecuting an action against Foster for what Day alleges to be, but which Barrett and Elers, and Foster, all deny to be, an infringement of Day's patent, should wait the result of that action before commencing proceedings against other alleged infringers in respect of similar infringements. The only ground of complaint, therefore (if any), which Barrett and Elers have against Day is in respect of his solicitor's letter to Foster's solicitors of the 17th of December, and the question is whether that letter gives Barrett and Elers any ground for commencing or further prosecuting their action against Day. It is scarcely disputed that no such action could have been brought before the passing of the Patents Act of 1883. That letter was written to Foster's advisers as a fair warning that Day did not accept the excuse put forward by Foster as a justification of what he had done, and that Day would assert his right by action; and the concluding words of the letter, "I think it only right to inform you of this before the writ is issued," are exactly what it was right Day's adviser should say before entering into litigation. According to the decision in *Wren* v. *Wield*, which was approved in *Halsey* v. *Brotherhood*, Barrett and Elers could only have succeeded in an action founded upon that letter if they could prove affirmatively that Day's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he believed he had, but was a *malâ fide* and malicious attempt to injure them by asserting a claim of right, which he knew to be without any foundation; and no such case is suggested by the pleadings.

The *bona fides* of Day's action is not challenged, and no attempt was made before me to show that the articles manufactured by Foster are so entirely outside Day's patent that there is no reasonable and probable cause for Day's allegation that such articles are an infringement. But does the 32nd section of the Patents Act, 1883, give Barrett and Elers any right of action against Day in respect of that letter? Judges have frequently expressed strong opinions as to the propriety and fairness of warning an opponent by letter of intended proceedings against him before rushing into litigation, and in *Wren* v. *Wield*, and in *Halsey* v. *Brotherhood*, before the Master of the Rolls, such remarks were applied to patentees about to sue alleged infringers. But it has been held by Bacon, V.C., in the case of *Driffield Linseed Cake Co.* v. *Waterloo Mills Co.*, and by Kekewich, J., in the case of *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.*, that such a letter by a patentee's solicitor to an alleged infringer or his solicitor, threatening an action for infringement, does give a cause of action under this section, and I fear this will have the effect of preventing a patentee from adopting the course thus pointed out to be fair and reasonable, and that for the future the warning letter will only accompany instead of preceding the writ, and will consequently be useless. But, finding such decisions, I am bound to follow them, and to hold that the letter of the 17th of December gives a cause of action to any "persons aggrieved thereby." That section, however, contains a proviso at the end which qualifies the whole section: "Provided that this section shall not apply if the person making such threats, with due diligence commences and prosecutes an action for infringement of his patent." If, therefore, Day has, by his proceedings in *Day* v. *Foster*, brought himself within that proviso, there is no ground of action against him under section 32. It is said that Day's action is not an action for infringement within the proviso. It is the only action or proceeding with respect to which Day has used any threat, and, unless it is an action for infringement, I do not see how the threat to bring it, gives a right of action under section 32, as that section only applies to cases in which a patentee of an invention has used threats with respect to an alleged manufacture, use, sale, or purchase of an invention which is not in fact an infringement. If the action is not one for infringement of a patent, it is difficult to see how a threat to bring it can be a threat in respect of something done which is asserted to be an infringement of it, which, according to Bowen, L.J., in *Challender* v. *Royle*, is requisite to make the section applicable. Again, Foster treats it as an action for infringement, for he sets up, by way of defence, that the articles he has manufactured are not an infringement, and in his affidavit he says that the sole question in *Day* v. *Foster* is, whether articles manufactured under Barrett and Varley's patent are or or are not within Day's patent. Also Barrett and Elers, in their statement of claim, say that the proceedings threatened were in respect of an alleged infringement; and plead, by way of reply thereto, that what Foster did was not, in fact, an infringement. I hold that Day's action is an action for infringement within the section. Day is a patentee whose patent is clearly valid against Foster, and Day has, under his patent, the sole right to make and vend a particular article, and he sues Foster for making and sell-

ing that article. That certainly looks very like an action for infringement. But it is argued that it is not such, because Foster has a licence from Day to make and sell such articles, and, therefore, cannot be sued for infringement. I do not see how this would prevent the action being one for infringement, though it might give Foster, if that were all, a good ground of defence.

It is argued that Day does not ask for relief on the footing that Foster is making and selling what he has no right to make and sell, but only for payment of royalty upon the footing of the licence. But it is necessary to look at the whole case. The defence that Foster sets up, and that Barrett and Elers also set up for him in their statement of claim, is not that Foster is protected by his licence, but that the licence has nothing to do with the matter, and no royalty is payable under it, because the articles are not made under the licence, and are not within Day's patent; and that is the question to be decided. If Foster fails, it will be because he has infringed Day's rights. He might have had a good defence if he had relied upon the licence, paying the royalty. But he has refused to pay the royalty, and he cannot and does not attempt to say that, if the manufacture would have been an infringement but for that licence, the licence prevents it from being so. The licence is merely a licence to make the articles, paying the royalty; and when Foster repudiates all obligation to pay the royalty he cannot rely upon the licence as a justification for the manufacture. Foster denies that the articles he makes are within the licence, and claims to manufacture them because they are not protected by Day's patent. Day alleges that they are, and claims specifically an injunction to restrain the manufacture thereof, except subject to the terms of the licence—*i.e.*, on payment of the royalty; and if that is not an action for infringement, I do not know what is. It is said, further, that Day's action is not within the proviso, even if it is an action for infringement, because what the section contemplates is an action for infringement commenced after an action for threats under section 32, whereas Day's action commenced before it. If that were so, and Day desired to have the protection of that proviso, he would have had to dismiss the existing action of *Day* v. *Foster*, and, I suppose, pay the costs of it, and commence a fresh action against Foster on exactly the same lines, which new action Foster would doubtless have said was not commenced with due diligence after the threat. But I find nothing in the proviso warranting this contention, or pointing to the time when the action for infringement is to be brought, except that it is to be with due diligence. It must be borne in mind to what case the section is addressed — that of a patentee who causes damage by disseminating threats which he does not or will not justify by an action, who is "willing to wound but yet afraid to strike." It is not necessary for me now to express any opinion whether the bringing of an action for infringement with due diligence after the making of a threat renders an action for threats commenced in the meantime wrong from the beginning, as not being founded on any good cause of action, though I do not feel much doubt as to the meaning of the Act. But I do express a decided opinion that, if a threatened action for infringement is commenced and prosecuted with due diligence after such threat, there is no ground upon which an action under section 32 in respect of such threat can subsequently be commenced at all. To put it in another way, if a threat to bring an action for infringement is followed up by the *bonâ fide* commencement and prosecution with due diligence of the threatened action, there is no "person aggrieved" by the threat, and therefore no person who can bring an action under section 32, although I have no doubt that Barrett and Elers might have been "persons aggrieved" if no action for infringement had been commenced when they brought their action, or within a reasonable time afterwards.

In the present case I am of opinion that the action of *Day* v. *Foster* was commenced with due diligence, having regard to the date of the threat, the letters of Foster's solicitors, and the reasonable desire of Day to combine all his complaints against Foster in one action; and especially having regard to the nature of the threat, and to the fact that no action grounded thereon had been commenced when the writ in *Day* v. *Foster* was issued.

It was also argued for Barrett and Elers, as well as for Foster, that the action of *Day* v. *Foster* is not within the proviso, because it is not one in which the validity of the patent is in question. There is nothing, however, in this, in my opinion. If the action is for an infringement the proviso is satisfied, whatever defence the defendant may set up or omit to set up. It was admitted that the action would have been within the proviso if Foster could have pleaded that the patent is invalid, even though he had omitted to do so. But, in my opinion, it is equally within the proviso, though Foster does not plead invalidity, because he is incapacitated from doing so. If the action were in any sense a collusive one, the case might be different; but it is an honest action, brought hostilely against the only person threatened, being the only person whom Day knew to have infringed. For whatever the truth may be as to any manufacture by Barrett and Elers, it was not referred to in any correspondence between the solicitors, nor at all until the statement of claim was delivered in *Barrett and Elers* v. *Day*, and it is not suggested that Day had any materials which disclosed any ground of action against Barrett and Elers. Cotton, L.J., says in his judgment in *Challender* v. *Royle*: "It is my opinion, and I ought to express it, that, in order to bring the case within this proviso, the action must be an honest action, an action honestly brought in order to test the validity of the patent or the fact of infringement, whichever may be in question." And again: "In my opinion the proviso is satisfied if an action to test the validity of the patent, or the fact of infringement, is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made." In my opinion, Day's action stands the application of this test. I do not forget that Barrett and Elers allege in their statements of claim, after setting out the letter of December 17, 1888, that since writing that letter the defendant has continued the "said" threats, and has brought his action against Foster. In that pleading the phrase "the said threats" means the threat in that letter.

In his affidavit, filed on November 1, Day swears that, except by the letters of November 25th and December 17th, 1888, neither he nor any person on his behalf has at any time made any threat in respect of Barrett and Varley's patent; and although this affidavit was replied to on November 6 by affidavits of Foster and of the secretary of Barrett and Elers, Day's statement on this point is not contradicted. It may be that the non-withdrawal of that threat, coupled with the further correspondence between the solicitors, was in one sense a continuance of it down to the time of bringing the action; but it is obvious that the threat to bring an action came to an end when the threatened action was brought, and there is no suggestion by affidavit or pleading that any threat was ever made, except of bringing the action, or that, subsequently to the date of commencement, any threat was made at all. It follows, therefore, that the action must stand or fall by the letter of December 17th, which, in my opinion, for the reasons I have mentioned, gives no cause of action, unless it can be maintained upon the ground that Day may still fail to use due diligence in the prosecution of his action. But there has not been, in my opinion, any such failure down to the present

time, and Day's action is set down and stands high in my list for trial; and, as nothing which Day can do can prevent its coming on in due course, no question as to its due prosecution can now arise.

But there is one other matter which I cannot leave out of sight in considering whether the action of *Barrett and Elers* v. *Day* should now be stayed or not, under rule 4 of order 25, as being "frivolous and vexatious." Independently of this order, the court has undoubted jurisdiction to stay all proceedings or dismiss an action when, on the facts proved to the satisfaction of the court, it appears that the action is frivolous and vexatious, as appears from the cases of *Willis* v. *Earl Beauchamp*, 34 W. R. 357, 11 P. D. 59; *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210; and *Reichel* v. *Magrath*, 14 App. Cas. 665. In my opinion the prosecution of an action is vexatious when it is clear that no relief can be granted at the trial. The only relief sought by Barrett and Elers is an injunction to restrain Day from threatening them, or their licensees or assigns, with reference to alleged infringements, and damages and costs. As regards the threat to bring the action of *Day* v. *Foster*, no injunction to restrain such threat could be granted at the trial, nor could have been at any time since the writ in *Barrett and Elers* v. *Day*, as no such threat was any longer possible after the action had been brought, and no damages could be recovered in respect of a threat which did not give rise to any cause of action. And, as regards any other threats, none are proved or alleged, nor is there anything from which any intention on the part of Day to make such threats could be inferred; and no injunction can be granted to restrain a defendant from doing an act which it is not proved or even alleged that he ever intended or threatened to do, as appears from *Stannard* v. *Vestry of St. Giles, Camberwell*, 30 W. R. 693, 20 Ch. D. 190, and *Proctor* v. *Bayley*, *ante*, p. 100, 42 Ch. D. 390; nor could there, of course, be any damages for an act which was never committed. What Barrett and Elers avowedly desire to do is to try whether Day's patent is valid or not. But no such question can arise in their action, under the circumstances I have mentioned, as there is no issue to which it can be relevant, although, no doubt, according to *Challender* v. *Royle* and *Kurtz* v. *Spence*, 36 W. R. 438, 36 Ch. D. 770, such question might have arisen if any threatening or intention to threaten on Day's part was alleged and proved, and there was an issue to be decided at the trial whether such threatening was justifiable or not. Under these circumstances, I am of opinion that there is not, and never was, any cause of action in *Barrett and Elers* v. *Day* in respect of which relief can be granted at the trial, and that, this being so, the action is vexatious, and the proceedings therein should be stayed; and I accordingly direct such stay, and that the defendant Day's costs should be paid by the plaintiffs. In deciding that it is vexatious, I do not mean to impute to the plaintiffs that it was commenced for the purpose of annoyance. I have no doubt it was considered a legitimate move in the war game of litigation between the parties. But this is no reason why the defendant should be harassed by the continuance of proceedings which, in my opinion, cannot result in a decision in the plaintiffs' favour.

The summons taken out by Foster in the action of *Day* v. *Foster* seeks to have all proceedings in that action stayed until after the trial of the other action. I see no reason whatever for this. No question as to threats or as to the validity of Day's patent can be tried in the action against Foster, but that is the proper action in which to try whether the articles which Foster has made are or are not infringements of Day's patent. The questions in the two actions are entirely different. The affidavit by Foster in support of his summons says that if what he asks is granted he is willing to be bound by the decision in *Barrett and Elers* v. *Day* so far as the issues as to validity and infringement are concerned. Inadvertently he lets out that what he is really seeking is to impugn the validity of Day's patent—a thing which he has expressly contracted for valuable consideration that he will not do. I consider such an attempt not creditable, and vexatious in every sense and I dismiss his summons, with costs.

Solicitors, *Gard, Hall, & Rook; A. E. Sydney.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 20.

COLQUHOUN (SURVEYOR OF TAXES) *v.* HEDDON. (a.)

Inland Revenue—Income tax—Exemption—Premium on policy of life insurance—Insurance in foreign company—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 54—16 & 17 *Vict. c.* 91.

The provisions in the Income Tax Act, 1853, *s.* 54, *and the Act* 16 & 17 *Vict. c.* 91, *for the deduction of the amount of the annual premium paid for a life insurance from the profits or gains in respect of which the person insured is liable to be assessed under schedules* (*D*) *or* (*E*), *do not apply where the insurance is in a foreign insurance company.*

Where, therefore, a person had insured his life in an American company,

Held, that he was not entitled to deduct the premiums from the amount of his assessment under schedule (*D*).

Case stated for the opinion of the court under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59.

The following are the material facts set out in the case, and the statutory provisions bearing thereon:—

Heddon appealed to the Commissioners for the General Purposes of the Income Tax for the City of London against an assessment of £262 made upon him under schedule (D) to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), for the year ending the 5th of April, 1887, and claimed that he should be allowed, by way of deduction from the assessment, the sum of £6 4s. 2d. paid by him by way of premium on an insurance for £300 effected by him with the New York Life Insurance Co. This company was incorporated by special Act of the Legislature of New York dated the 21st of May, 1841, as a marine and fire insurance company, extended by an Act of State, dated the 18th of April, 1843, to life insurance.

The Income Tax Act, 1853, provides (section 54) as follows:—"Any person who shall have made insurance on his life . . . in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose, and which shall comply with the requirements of such Act . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he shall be liable to be assessed under either of the schedules (D) or (E) of this Act, or to have any assessment which may be made upon him under either of the said schedules reduced or abated by the deduction of the amount of the said annual premium from the amount of the profits or gains on which such assessment has been made."

No Act dealing with the registration of insurance companies (such as was contemplated in this section) was passed, but in the same session an Act was passed (16 & 17 Vict. c. 91) which, after reciting section 54, and that it might happen that an Act for the registration of insurance companies might not be passed in that session, provides as follows:—"Any person who shall have made

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

any such insurance or contracted for any such deferred annuity as in the said provision mentioned, in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act of the session holden in the 7th & 8th years of her Majesty, c. 110, for the Registration, Incorporation, and Regulation of Joint-Stock Companies, shall be entitled to all the benefits and advantages which by the said provision are expressed to be given in respect of the like insurance or contract in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose."

The commissioners were of opinion that the New York Life Insurance Co. came within the provisions of this Act, and that Heddon was entitled to a deduction, from the amount of his assessment, of the sum of £6 4s. 2d. premium paid by him. The surveyor of taxes expressed himself dissatisfied with this decision, and required the commissioners to state this case under 43 & 44 Vict. c. 19, s. 59.

Sir R. E. Webster, A.G. (*Sir E. Clarke, S.G.*, and *A. V. Dicey* with him), for the appellant.—The question is whether or not a person is entitled to deduct the premium paid on his life insurance where he has insured in a foreign company. We say that he is not so entitled. It is evident from the language of 16 & 17 Vict. c. 91 that English companies only are there referred to. They are divided into two classes—companies registered under 7 & 8 Vict. c. 110, and companies already in existence on the 1st of November, 1844 (the date when that Act came into operation), and therefore not requiring registration. Foreign companies could not be registered under that Act; it cannot be contended that the provision applies to English companies alone where they have come into existence since the 1st of November, 1844, but to all companies, foreign as well as English, existing before that date. A foreign company is unknown to the English law: *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764, 20 W. R. H. L. Dig. 19.

Finlay, Q.C. (*Bremner* with him), for the respondent.—The words of the Act 16 & 17 Vict. c. 91 are clear—"any insurance company existing on the 1st day of November, 1844." The commissioners have found that this is a company which was in existence then, and that is enough. The object of the provision was to encourage thrift, and as long as it is clear that the insurance was made and the premiums paid, the *locus* of the insurance company is of no importance.

He referred to the definition of "company" in the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 2.

Sir R. E. Webster, A.G., in reply.—The argument as to thrift is answered by the Act 18 & 19 Vict. c. 35, which extends the benefits of section 54 to insurances with friendly societies, but only such as are "legally established under any Act of Parliament relating to friendly societies."

POLLOCK, B.—The only conclusion to which I can come is that this appeal should be allowed. The case is no doubt one of importance, for it is common knowledge that there are many insurance companies established in America and elsewhere outside the United Kingdom in which many of her Majesty's subjects insure their lives. The question is governed by statute. It is not disputed that, except for some statutory abatement, this amount ought to be paid. Until the year 1853 it clearly would have been payable. It was in that year that the hardship of taxing the savings of thrift was felt to such an extent that the Legislature said that where a man's thrift had taken the form of life insurance instead of an ordinary investment there should be an exception in his favour to the extent of the annual premium which he paid. The exemption is to be found in section 54 of the Act of that year (16 & 17 Vict. c. 34). [His lordship then read the section, and continued:—] Now it is clear from this section that there was contemplated the passing of some Act dealing with the registration of companies n the then present session of Parliament. Such an Act icould only refer to companies established in England.

But, apart from that, I am quite clear that in an English Act of Parliament "company" means a company established in England and subject to the cognizance of English law. It is a legal entity, the nature of which depends upon the law of that country in which it is established; and in this country "insurance company" means an insurance company within the meaning of English legislation. Then by chapter 91 of the same session further provision is made, and here, again, the same argument arises on the words "insurance company." A date is mentioned—the 1st of November, 1844—and this has obvious reference to the Joint-Stock Companies Registration Act of 1844, which makes that the date when registration is to commence. The evident intention was that the company should be an English company and a registered company. The reference cannot be to any company in any part of the world; for who is to say what is a company in a foreign country?

There is another argument which seems to me conclusive—that is, that if Mr. Finlay's view were correct, the extraordinary result would follow that you never could get your deduction where your premium was paid to an unregistered English company; you could get it if the company was a foreign one and unregistered. That amounts, to my mind, to a *reductio ad absurdum*. On all these grounds I think the appeal must be allowed.

HAWKINS, J.—I am of the same opinion. The only question, to my mind, is, What is the meaning of the words in 16 & 17 Vict. c. 91, "any insurance company existing on the 1st day of November, 1844, or" registered under the Act of 1844. Mr. Finlay contends that these words apply to any insurance company without any limitation. In my opinion that is not so. It is clear that when the Income Tax Act, 1853, was passed it was contemplated that an Act should be passed that session with reference to the registration of insurance companies, but no such Act was passed. Then the later Act (chapter 91) was passed. [His lordship read it.] To my mind it is clear that there was some reason for the insertion of these words, "existing on the 1st day of November, 1844," and on turning to the Joint-Stock Companies Registration Act, 1844, I see that that Act was to come into operation on that day. That Act only deals with English companies. Therefore I am borne to the conclusion that the intention of the Legislature in chapter 91 of 16 & 17 Vict. was that we ought to construe the section as meaning any insurance company which existed and was carrying on business in England on the 1st of November, 1844, or was registered under the Act of that year. In my opinion this appeal ought to be allowed.

Appeal allowed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondent, *Ashurst, Morris, Crisp, & Co.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 17, 18.

Ex parte MAY.
In re SPACKMAN. (*a.*)

Costs—Solicitor—Employment of solicitor to arrange with creditors—Charge for costs—Bankruptcy—Right of solicitor to payment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *section* 4, *sub-section* 1 (a).

On November 9, 1886, *the debtor gave to a firm of solicitors, whom he had consulted with a view to a settlement with his creditors, authority to sell certain horses and carriages, and charged the proceeds with the costs and expenses being incurred by him with the firm. On November* 22, 1886, *an arrangement was come to whereby all moneys received from the sale of furniture and other effects, which constituted practically the whole of the available property of the debtor, was to be retained for the benefit of the creditors, and authority was given by the debtor to pay any such moneys into the bank for this purpose in the names of the solicitors and another person. On December* 14, 1886, *a receiving order was made against the debtor, the act of bankruptcy on which it was founded being stated to have been committed on December* 8, *but the county court judge held that the debtor had committed an act of bankruptcy on November* 22, *and he allowed the costs of the solicitors up to that date only.*

Held, that the county court judge was right in holding that an act of bankruptcy had been committed on November 22, *and that the solicitors were only entitled to their costs incurred up to that date.*

The principle laid down in Ex parte Payne, In re Sinclair, 15 *Q. B. D.* 616, 34 *W. R. Dig.* 19, *by which a trustee in bankruptcy is not entitled to recover moneys actually paid to a solicitor by a debtor in order to secure his services to defend him at the hearing of a bankruptcy petition, does not extend to a charge on moneys outstanding in the hands of other persons, or to costs incurred in negotiating with creditors with a view of averting bankruptcy proceedings.*

Appeal from an order of his Honour Judge Metcalfe, in the county court at Bristol, directing the appellants, Messrs. May, Sykes, & Batten, solicitors, to pay over to the trustee in the bankruptcy the sum of £56, being the difference between the proceeds of the sale of certain horses and carriages formerly belonging to the bankrupt and a certain portion of their bill of costs against the bankrupt.

The bankrupt was the registrar of the county court at Swindon, and in 1886, having got into difficulties, he consulted the appellants with a view to a settlement with his creditors. On November 9, 1886, the bankrupt gave the appellants the following authority and charge:—"Dear Sirs,—With reference to the horses and carriages, &c., sent to your Mr. Batten last week, I hereby authorize you to sell them at Tattersalls as soon as possible, and I authorize you to retain the purchase-money on my account. And I hereby charge such horses and carriages, &c., or the purchase-money thereof, with the costs and expenses being incurred by me with your firm."

On November 22, 1886, Messrs. May, Sykes, & Batten wrote to Messrs. Eyre & Co., the London agents for a Mr. Jones, the solicitor acting for several creditors, a letter, the material parts of which were as follows:—"We have seen Mr. Spackman this morning, and have arranged that all moneys received from the sale of furniture and other effects shall be retained for the benefit of the creditors, and shall not be handed over to Mr. Spackman. We have, moreover, taken his authority to pay any such moneys into the Wilts and Dorset Bank at Swindon in the names of this firm and Mr. Redway, the auctioneer, of Swindon."

On December 14, 1886, a receiving order was made against the debtor, the act of bankruptcy on which it was founded being stated to have been committed on December 3, but the county court judge held that the letter of November 22 was proof of an act of bankruptcy within the meaning of section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, and he only allowed the costs of the solicitors up to that date.

Messrs. May, Sykes, & Batten now appealed against that order, on the ground that there was no act of bankruptcy on November 22, and, further, that, even if there were, the case came within the principle laid down in *Ex parte Payne, In re Sinclair*, 15 Q. B. D. 616, 34 W. R. Dig. 19, and that, the charge being given for the purpose of defending the debtor from possible bankruptcy proceedings, and to keep him out of bankruptcy, they were entitled to all costs incurred up to the date of the receiving order.

Bigham, Q.C., and *F. C. Willis*, for the appellants.—The only evidence of an act of bankruptcy on November 22 was the letter written by the appellants themselves, and that is not sufficient. It does not show an assignment of all the debtor's property. It is not sufficient that the debtor is assigning something, but it must be practically the whole of his property. Moreover, in any case the principle laid down in *In re Sinclair* applies. These costs were incurred before the petition in negotiating with creditors in order to avoid a threatened bankruptcy. The reasoning in *In re Sinclair* is that a man ought to be allowed to use money in his control honestly to prevent an adjudication.

Poole, Q.C., for the trustee.—The furniture and other effects mentioned in the letter constituted practically all the debtor's property. The case of *In re Sinclair* cannot be extended to such a case as this.

CAVE, J.—I am of opinion that the county court judge was right. Two points were taken before him—first, whether there was an act of bankruptcy on November 22; and, secondly, if so, whether the case came within *In re Sinclair*. Now, as to the act of bankruptcy, it appears that all that the bankrupt had which his creditors could get at was certain furniture and other effects, and that, in consequence of the representations of certain creditors, an arrangement was come to on November 22 between the appellants and Spackman by which the proceeds of the furniture and other effects should be retained for the benefit of the creditors, and not handed over to Spackman. The letter goes on, "We have, moreover, taken his authority to pay any such moneys into the Wilts and Dorset Bank at Swindon in the names of this firm and Mr. Redway." Authority was given to certain persons—namely, the appellants and Mr. Redway—to receive the proceeds of the furniture and other effects representing the whole available property, and pay that into the bank for the benefit of the creditors, and not put it at the bankrupt's disposal. It seems to me that that is an assignment of property for the benefit of creditors within section 4, sub-section 1 (*a*), and therefore was an act of bankruptcy.

The other point also is one which appears to me to have no substance. In the case of *In re Sinclair* it was held that where a man goes to a solicitor and asks that solicitor to represent him and to act for him upon the hearing of a petition for adjudication, and pays a sum of money to the solicitor in order to secure his services, the payment being *bonâ fide* made and the services *bonâ fide* rendered, that money so paid for good consideration could not be recovered by the trustee on the ground that the solicitor had received it after he was aware of an act of bankruptcy. The case was likened to that of a debtor

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

who his creditors know has committed an act of bankruptcy going to one and paying ready money for an article of necessity. It is now sought to extend that, not merely to the case of money in the hands of a debtor and parted with in consideration of present services or goods presently purchased, but to extend it to all moneys outstanding in the hands of other persons and which undoubtedly would become the property of the trustee. That appears to be unwarrantable, because a man who takes a charge under those circumstances knows very well the money is the money of the trustee, and that the party charging has no right to do so. A man who comes with ready money offers something which, although *primâ facie* it is the property of the trustee, may not be so, because the debtor may have had presents of money for the purpose of obtaining someone to defend him or to provide himself with the necessities of life. On the other hand, if that principle is to be extended not only to payments in ready money, but also to charges on estate in the hands of other persons, it is difficult to see where a limit is to be placed. We have had occasion to say more than once that where a man has committed an act of bankruptcy and also executed a deed for the benefit of his creditors—the execution of which is an act of bankruptcy—when that takes place it is the duty of the trustee under the deed to wait to see if any creditor would take advantage of the act of bankruptcy, and that he ought not to deal with the estate until he is satisfied on that point by the three months having elapsed, and if he deals with the estate he must repay any moneys so received, however *bonâ fide* he may have acted. It seems to me here, also, impossible to say that what the appellants did was a necessity within the rule laid down in *In re Sinclair*. They were engaged in doing the same thing as a trustee under a deed of arrangement. They were trying to make arrangements to avoid bankruptcy, and to withdraw the estate from the Bankruptcy Court, and we never held that a man engaged in so doing is justified in charging the estate with costs incurred in that way. It would be still more monstrous if solicitors who are not trustees under a deed and must be presumed to know the law should be allowed to spend the money of the trustee in trying to get the creditors together and avoid proceedings when it would not be allowed in the case of an ordinary trustee. This case does not fall within the principle of *In re Sinclair*, and for my part I am not prepared to extend that case in either of the directions contended for, beyond the limit laid down there.

A. L. SMITH, J., concurred.

Appeal dismissed, with costs.

Solicitors for the appellants, *May, Sykes, & Batten.*

Solicitor for the trustee, *C. P. Jones*, Trowbridge.

Court of Appeal.

From Chan. Div. Feb. 13, 14.

In re DILLON.

DUFFIN *v.* DUFFIN. (*a.*)

Donatio mortis causâ—*Banker's deposit note payable on demand with cheque to bearer indorsed on it—"Not transferable"—Donor dying before money drawn out—Duty of executors.*

Four days before his death, D., being ill, gave his sister-in-law a banker's deposit receipt for £580 and interest. On the deposit receipt was a memorandum intimating that it was not transferable, that the amount was repayable on demand, and that, when the money was withdrawn or the interest paid, the depositor must sign the cheque on the back of the receipt after affixing a penny stamp, and that, if part were withdrawn, a new receipt would be given for the balance. A form of cheque was indorsed on the back of the receipt, which form was filled up for £580 and signed by the donor, but the document was not presented for payment at the bank till after his death, when the bankers said their authority to cash it was at an end.

Held (affirming the decision of Kekewich, J.), *that there was a good* donatio mortis causâ *of the deposit receipt and the money represented by it, and that the form of cheque (the filling up of which was merely a convenient means of obtaining, and preserving evidence of, the payment of the money) was not such an essential part of the document as to prevent it being made the subject of a good* donatio mortis causâ, *and that any difficulty arising from the non-negotiable character of the instrument was removed by the case of* Duffield *v.* Elwes, 1 *Bli. N. R.* 497, *which case was a conclusive authority to show that the donor's executors would, in such circumstances, be constituted trustees for the donee, and be bound to do whatever might be necessary to effectuate the gift.*

In re Mead, Austin *v.* Mead, 28 *W. R.* 891, 15 *Ch. D.* 651, *distinguished.*

Appeal from Kekewich, J.

This appeal raised the question whether a deposit note, or receipt for a sum deposited at a bank, with a form of cheque indorsed on it, which was intended to be filled up and signed when the depositor wished to withdraw the money, and which had in fact been so filled up and signed by the depositor, could be the subject of a good *donatio mortis causâ.*

The document was in the following form :—

Not Transferable.

No. 374. London and Westminster Bank (Limited).
£580. 91, Westminster-bridge-road,
Lambeth, August 25th, 1886.

Received from Mr. Jas. Dillon, Five Hundred and Eighty Pounds Sterling, to the Credit of his Deposit Account.

For the London and Westminster Bank (Limited).

Entd—GEO. BANKES, Accountant.
A. F. ESSE, *pro* Manager.

That was followed by the subjoined memorandum printed or lithographed in red :—

"This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn or the interest paid, the depositor must sign the cheque on the back hereof, first affixing a penny draft stamp. If part only is withdrawn, a new receipt will be given for the balance."

On the back of this document was the form of cheque, filled up, stamped, and signed by the depositor, as under :—

London, January 11th, 1888.

To the London and Westminster Bank (Limited),
Lambeth Branch.

Pay to self or Bearer *Bearer* Five Hundred and Eighty Pounds and Interest.
With Interest.

£580 0 0.

JAS. DILLON.

The word *bearer* occurring the second time, and also the words *with interest*, were written in manuscript by the depositor when he signed the cheque, the formal parts being printed.

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

Mr. Dillon, being ill in bed, sent for his sister-in-law, Miss Duffin, who came on the 11th of January, 1888, and attended to him. According to her evidence, which the court believed, the facts of the case were, that after she had been with him some little time, he took out the deposit note, and sent her for a stamp and writing materials, saying he was going to give it to her conditionally—if he got well, that is, she was to give it back to him—and that he filled in the cheque with the date and amount, "£580 and interest," and the above words, signed it across the stamp, and gave it to her.

Mr. Dillon died on the 15th of January, 1888, and Miss Duffin, who stood in the relation of deceased wife's sister to him, claimed that he had given her the deposit note as above mentioned for her own benefit in the event of his dying, and to be restored to him in case he should recover.

The bankers, upon the document being subsequently presented for payment said, that their authority to cash the cheque ended with Mr. Dillon's death.

This summons was taken out by a residuary legatee to decide the question whether there was a good *donatio mortis causâ*, and Miss Duffin was made defendant.

Kekewich, J., held that there was a good *donatio mortis causâ*.

The plaintiff appealed

Cozens-Hardy, Q.C., and *Methold*, for the appellant.—If there was a gift intended here, what was given was not a good subject for a *donatio mortis causâ*. What was given was a cheque—a cheque payable to bearer. That is not a good subject of *donatio mortis causâ*. The money could only be drawn out by filling up and signing the form of cheque on the back of the receipt. That made the deposit equivalent to an ordinary drawing account. There is a long series of authorities which have held that there cannot be a good *donatio mortis causâ* of a cheque not presented in the donor's lifetime: *Hewitt* v. *Kaye*, 16 W. R. 835, L. R. 6 Eq. 198; *In re Beak's Estate, Beak* v. *Beak*, L. R. 13 Eq. 489, 491, 20 W. R. Ch. Dig. 4. In *Clement* v. *Cheesman*, 33 W. R. 40, 27 Ch. D. 631, Chitty, J., took exactly the same view as to the donor's own cheque, though he held that a cheque paid to him by another man stood on the same footing as a bill of exchange, and was a good subject of *donatio mortis causâ*. There have been two cases, and two only, in which a deposit receipt has been held to make a good *donatio mortis causâ*, and, as they were both decided by courts of first instance, this court can review them, if necessary. The two cases are *Amis* v. *Witt*, 33 Beav. 619, and *Moore* v. *Moore*, 22 W. R. 729, L. R. 18 Eq. 474, in which, at p. 485, Hall, V.C., referred to *Amis* v. *Witt* as deciding the question for him. The form of the deposit note is not given in either of those cases, and in the former no reasons are given for the decision. In *Witt* v. *Amis*, 9 W. R. 691, 1 B. & S. 109, a policy of life assurance was held a good *donatio mortis causâ*; as standing on the same footing as a bond. In *In re Mead, Austin* v. *Mead*, 28 W. R. 891, 15 Ch. D. 651, there was a deposit note with a form of cheque on the back which had to be filled up and signed, just as in the present case. In *Moore* v. *Darton*, 4 De G. & Sm. 517, the donor had done all she could to complete the gift—the debt was not assignable at law, it was not payable on demand, but required six months' notice. [COTTON, L.J.—Does not *In re Mead* depend on the fact that there was no intention there to give the deposit note? LINDLEY, L.J., referred to *Veal* v. *Veal*, 8 W. R. 2, 27 Beav. 303.] That case was treated by Fry, J., in *Mead's case* as governing the case of bills of exchange, but not that of a deposit note like the one here. This deposit note is of no use without the cheque. [LINDLEY, L.J.—What would have been the effect if the cheque had been on a separate paper? *Bramwell Davis* referred to *In re Taylor, Taylor* v. *Taylor*, 56 L. J. Ch. 597, 35 W. R. Dig. 92; *In re Farman, Farman* v. *Smith*, 57 L. J. Ch. 637, 36 W. R. Dig. 81; and *Cassidy* v. *Belfast Banking Co.*, 22 L. R. Ir. 68, 36 W. R. Dig. 88.] [COTTON, L.J.—Is there any case which shows that the authority of the bank to cash the cheque is revoked by the death of the donor where the donee is his executor?] The cheque was to be given back to him if he recovered, so could not have been meant to be cashed in his lifetime. *In re Mead* is not sufficiently distinguished from this case by the mere fact that the cheque was only for part of the deposit. A gift of a fourth share in a horse has been held good.

They also contended that, on the evidence, there was no sufficient proof that there was a gift intended.

Warmington, Q.C., and *Bramwell Davis*, for the respondent.—A good gift can be made by indorsement of a deposit note, because it is not then distinguishable from a promissory note, which makes a good *donatio mortis causâ*. It is the same with a cheque payable to the deceased, which is merely an order to a banker to hold certain moneys to the credit of the deceased. If a promissory note is a good subject of *donatio mortis causâ*, why is not this? Though there is no case binding on this court, yet there is a current of decisions in favour of deposit notes being good as gifts of this sort: *Witt* v. *Amis*. [COTTON, L.J.—That is not satisfactory, because no reasons are given.] *Cassidy* v. *Belfast Banking Co.* is not distinguishable from the present case. [COTTON, L.J., referred to *Duffield* v. *Elwes*, 1 Sim. & St. 239, 1 Bli. N. R. 497.] In *Rankin* v. *Weguelin*, 27 Beav. 309, bills of exchange were, again, held good as a *donatio mortis causâ*. [LINDLEY, L.J.—It does not appear there when the bills were indorsed—whether by Colonel Weguelin, or by his executors.] In *Veal* v. *Veal* it is clear there was no indorsement. This deposit note is clearly a receipt for money, and also a promise to pay, because it is payable on demand. There would be a good *donatio mortis causâ* if the deposit note were given, quite apart from the cheque on the back. *Duffield* v. *Elwes* shows that executors are bound to indorse the note or do whatever is necessary to enable the donee to get the money. The provision as to signing the cheque is merely to protect the bank, as it gives them a receipt. In order to decide against us a considerable body of authority would have to be overruled: *Amis* v. *Witt*; *Moore* v. *Moore*. *In re Mead* is really in our favour. There the money was only withdrawable after seven days' notice. If it had been payable on demand, Fry, J., would have held it a good *donatio mortis causâ*, but he held there was there only a cheque drawn upon the total amount deposited, which, according to the authorities, would not be a good *donatio mortis causâ*. In *In re Taylor* Stirling, J., held that a deposit note was good as a *donatio mortis causâ*. In *In re Farman* North, J., held that such a gift was good, even without corroboration of the donee's evidence. *Amis* v. *Witt* has got into the text-books, and, having been accepted by the profession generally, the law as laid down in it should not now be disturbed. In the Irish case the judges thought the words "not transferable" immaterial, and that they were void at law if the intention was to make the money inalienable. In *In re Hughes*, 36 W. R. 821, Cotton, L.J., treated a deposit note as forming a good *donatio mortis causâ*. In this case the document was a deposit note, and not a cheque. The cases where the cheque was payable to the donor are in our favour: *Clement* v. *Cheesman*. This is a deposit note with something more, which is a mere form.

They also referred to and Byles on Bills, 14th ed., p. 201.

Methold replied.

COTTON, L.J.—I will deal first with the point raised as to the evidence brought forward to substantiate the case of the lady who claims to be entitled to this deposit note by *donatio mortis causâ*. There is, on that point, the evidence of the lady herself, and if that is correct there can be no doubt the deceased did hand over to her what I will call the deposit note. Kekewich, J., relied on the accuracy of her statement. It is said she made a mistake as to the exact time the gift was made. But there is nothing more usual than for a person speaking with general accuracy, and, as to other matters, with complete accuracy, to make a slight mistake as to the time of an occurrence in a matter of this sort. In my opinion it would be wrong, when Kekewich, J., who saw this lady and heard her evidence, believed her story, for us, on the grounds put forward, to treat her as an unreliable witness. Then it is said her evidence ought to have been corroborated, but I do not think, as the law now stands, that that is necessary. Besides, in my opinion there is corroboration here, in the sense that the document produced bears the signature of the deceased. For what possible reason should he have signed this just before his death, unless he meant to give it to her? It was contended that she was his executrix, and that it was to enable her in that capacity to get the money more easily, but I think that, having regard to what we know about the facts of the case, that could hardly have been the reason. In my opinion the circumstance strongly corroborates her evidence.

Then, as to the other point, could this document be a good subject of *donatio mortis causâ*? I will first deal with those matters in which the present case differs from other cases which have been cited in argument. I was surprised that no evidence was brought by either side to show what the usual practice of bankers is with regard to these deposit notes. In my opinion the object of requiring the cheque at the back to be signed before the money is drawn out is simply in order that by retaining it as a receipt, evidence of the money having been paid may be preserved in a convenient form. The intention is not to intimate that they will not pay back the money at all unless the cheque is signed. I think they would have no power to withhold the money altogether in case their requirements were not complied with, but they rightly require some reasonable explanation to be given to justify them in paying the money without the production of the document filled up in the prescribed manner. Still, I do not think this provision has the effect of making this money stand in the same position as a balance on an ordinary drawing account. If, therefore, the means exist of making a good *donatio mortis causâ* of the money deposited, I do not think this memorandum is sufficient to prevent it.

It is said this is the first time this question has come before the Court of Appeal. Now, I do not rely so much on the cases, because we are asked, and have power, to review them—one and all; although there are a large number. There is, moreover, one case which was decided by the Court of Appeal in Ireland which agrees with the cases which say that a deposit note can be made the subject of a *donatio mortis causâ*. But, to deal with the question on principle, why should not this document be a good subject for a *donatio mortis causâ*? It is true that, the cheque not having been presented before the death of the donor, it would not confer on the donee a good title at law to the money. But why is there not a good *donatio mortis causâ* putting aside the cheque altogether? The case of *Duffield* v. *Elwes* assists us as to that. It shows that the executors of the deceased donor would be considered as trustees for the donee, so as to be bound to do what was necessary to enable her to obtain the money. Then the judgment of Knight-Bruce, V.C., in *Moore* v. *Darton* shows what kind of instruments may be the subjects of *donatio mortis causâ*, and in that case the delivery of a receipt was held, under the circumstances in which it was handed over, to confer on the donee a good title by *donatio mortis causâ* to the debt evidenced by it. Applying the reasoning of that decision, and the indorsed cheque in the present case being, in my opinion, merely a means of enabling the donee to draw out the money, I think there was here a complete and effectual gift or transfer of the debt of which this deposit receipt formed the documentary evidence.

What took place here was, therefore, in my opinion, sufficient to make a good *donatio mortis causâ* of the deposit note and the money payable on it. But it is said this instrument is not negotiable apart from the cheque, and that was not cashed in time. Well, then, as regards any difficulty occasioned by the negotiable character of the instrument, what, as bearing on that, does *Duffield* v. *Elwes* say? In that case Lord Eldon laid down that the executors of a donor become trustees for the donee, and that they are bound to do everything which may be necessary in order to enable the donee to get the money. No doubt that is anomalous, as it would not be so with respect to a *donatio inter vivos*—that is, a gift made in the donor's lifetime. The court does not give any assistance to mere volunteers in such cases, so that it is an anomaly peculiar to the case of a *donatio mortis causâ*. It is true that here the assistance of the court might not be necessary, the donee herself being one of the executors, but I do not rely on that. The same view was taken in the Irish case by the Court of Appeal in Ireland, though in that case the executor, and not Cassidy, would have been the proper plaintiff. That, in my opinion, gets over any difficulty arising from the non-negotiable character of the instrument. I think, therefore, that the appeal fails, and should be dismissed.

LINDLEY, L.J.—I am also of opinion that the decision of Kekewich, J., was correct on both the points raised in this appeal before us. We were asked to overrule the judge's decision upon the evidence. That would be a very difficult thing to do when he has seen and heard the witnesses, and we have not. I am bound to say for myself that, having attended to the evidence which has been read, I fully belive the lady's story.

Then it is said that, even assuming the deceased intended to make a *donatio mortis causâ*, this deposit note cannot be made the subject of such a gift. One would like to know why not. I can see the difficulty—the note is not a negotiable instrument, and cannot, therefore, be sued on in the donee's own name. But that point was set at rest ages ago. Sir J. Leach decided in *Duffield* v. *Elwes* that the court would not assist a donee under such circumstances to obtain payment of the gift, but that decision was reversed on appeal and the reasoning of the judge condemned, and Lord Eldon said that the principle that a court of equity will not assist a volunteer does not apply to these gifts *mortis causâ*. Then why cannot this deposit note be made the subject of a good *donatio mortis causâ*? It is said there cannot be a *donatio mortis causâ* of a cheque payable to bearer. I will assume that that proposition is correct, though I think it may some day require consideration. But that does not affect the present question, because, although there is a form of cheque payable to bearer on the back of the deposit note, that is a mere means of getting payment of the money deposited, and I am perfectly convinced that a perfectly valid *donatio mortis causâ* can be made of this deposit note. The authorities are all in favour of that view, but we were asked to review these cases. That, however, would be a very strong thing to do at this time of day, and I cannot see that it would yield any advantage whatever, to

counterbalance the disadvantage of upsetting what has now been regarded as settled for so long a period. I agree that this appeal fails.

LOPES, L.J.—The first point here is whether this *donatio mortis causâ* was proved. In my opinion the judge was quite right in holding that the story told by this lady was the correct one. It is true that there was a certain slight discrepancy in what she said, but I think the learned judge was quite right in holding that the gift was established.

Then there is the further question to be considered whether this deposit note is a good subject of *donatio mortis causâ*. The law (though I am not so familiar with it as my learned brethren) seems to be well established. It seems clear that a promissory note is a good subject of *donatio mortis causâ*. It is also clear that an ordinary deposit note is a good subject. But exception is taken to the deposit note in this case on the ground of the cheque upon the back of it. In my opinion that does not in any way alter the case. I think it is merely intended to afford the bank a convenient means of preserving evidence that the money has been paid. With respect to the intention of the donor, it is clear to me that he intended to give the donee the means of getting the money. In my opinion the decision of the learned judge was quite correct, and this appeal ought to be dismissed.

COTTON, L.J.—I meant to mention, with regard to the case of *In re Mead*, that I became quite convinced in the course of the argument that there was no intention in that case to give the donee the whole of the money secured by the deposit note, but merely to give her a cheque, drawn upon the money deposited, for a portion only of that money. That distinguishes it from the present case.

Appeal dismissed.

Solicitors for the appellant, *Gedge, Kirby, & Millett.*

Solicitors for the respondent, *H. F. & E. Chester.*

From Q. B. Div. Feb. 13.

BARLOW *v.* ROSS. (*a.*)

Right to light—User for ten years—Extinguishment—Prescription Act—Artizans' Dwellings Act, 1875 (38 & 39 *Vict. c.* 36), *s.* 20.

The plaintiff built a house in 1867. *In* 1877 *the land adjoining it was acquired by a local authority under the provisions of the Artizans' Dwellings Act,* 1875. *In* 1888 *their lessee (the defendant) erected on the land buildings which obstructed the access of light to the plaintiff's house. Upon an action brought to recover damages for the obstruction,*

Held, that the defendant was protected by section 20 *of the Artizans' Dwellings Act,* 1875, *since the plaintiff had in* 1877 *an inchoate right over the land acquired by the local authority, which was extinguished by the section, and in respect of which compensation was payable.*

Appeal from the decision of Hawkins, J.

In 1867 the plaintiff erected a building at Birmingham. In 1877 the land adjoining this building was acquired by the Corporation of Birmingham under the Artizans' Dwellings Act, 1875 (38 & 39 Vict. c. 36) for the purpose of carrying out a scheme of improvement.

In 1886 they let the land immediately opposite the plaintiff's building to the defendant, and in 1888 he pulled down the old buildings which were standing and erected a new building, which materially obstructed the access of light to the plaintiff's building. The present action was then brought to recover damages for the obstruction, and was tried before Hawkins, J., and a jury. The jury gave a verdict for the plaintiff for £100, but Hawkins, J., entered judgment for the defendant, on the ground that he was protected by section 20 of the Artizans' Dwellings Act, 1875.

The plaintiff appealed.

William Graham, for the appellant.—At the time the land was purchased by the corporation the plaintiff had acquired no right to the light and was not entitled to any compensation. The right could only be acquired by twenty years' user under the Prescription Act. There was, therefore, at that time no right which could be extinguished by the operation of section 20.

He cited *Ladyman* v. *Grave,* 19 W. R. 863, L. R. 6 Ch. App. 763; *Scott* v. *Pape,* 34 W. R. 465, 31 Ch. D. 554; *Plasterers' Co.* v. *Parish Clerks' Co.,* L. R. 6 Ex. 630; *Mitchell* v. *Cantrill,* 36 W. R. 229, 37 Ch. D. 56.

Henn Collins, Q.C., and *Methold,* for the respondent.—The corporation were compelled by law to carry the scheme into execution, and to allow the plaintiff's contention would prevent them from doing so. The right of the plaintiff in 1877 was an inchoate right and was extinguished by the section: *Duke of Bedford* v. *Dawson,* L. R. 20 Eq. 353, 24 W. R. Dig. 236; *Clark* v. *London School Board,* 22 W. R. 354, L. R. 9 Ch. App. 120.

Graham replied.

By section 20 of the Artizans' Dwellings Act, 1875, "Upon the purchase by the local authority of any lands required for the purpose of carrying into effect any scheme authorized by a confirming act, all rights of way . . . and all other rights and easements in or relating to such lands or any part thereof shall be extinguished, and all the soil of such ways . . . shall vest in the local authority, subject to this provision, that compensation shall be paid by the local authority to any persons or bodies of persons proved to have sustained loss by this section."

Lord COLERIDGE, C.J.—This case raises what is in some respects a very important point. The Artizans' Dwellings Act, 1875, was passed for the improvement of towns in respect of artizans' dwellings and general sanitary regulations. It invests the local authorities of towns—in this case the Corporation of Birmingham—with very large powers, but it carefully respects the rights of individuals with the exercise of which those powers might interfere. A scheme of improvement under the Act must be referred to a Government department, and opportunity is given for any objections to it being made, either before that department, or before a committee of Parliament. The confirming authority, the Local Government Board, have then to consider the scheme and to embody it in a provisional order, which is to be laid before both Houses of Parliament, and nothing can be done in pursuance of the scheme until all those steps have been taken. Thus every opportunity is given to persons prejudicially affected by the scheme to make their opposition known. But after the scheme becomes law it becomes incumbent on the local authority to see that it is carried into effect. They are not to carry it out themselves, but they are to see that it is properly done. *Inter alia,* power is given to them to say what sort of houses are to be erected within the area of the scheme, and it is their duty in effectuating the scheme to see that any interests with which the carrying out of the scheme interferes are properly compensated. In the present case it is said that the powers of the local authority are controlled by the rights of the plaintiff. Although a large area of land was bought under the Act, and although all rights in or

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

relating to that land were, by operation of section 20, extinguished, yet it is said that this only included rights which were in existence at the date of the purchase, and that the plaintiff's right to light, which was not then in existence, was not affected by the section. That is to say, that if at the time of the purchase there were several persons like the plaintiff who were in process of acquiring similar rights, but had not yet acquired them, and the corporation were unable to block their light until a period of twenty years had elapsed, then, as regards the carrying into effect of that part of the scheme, their powers are entirely at an end, and they can only go to Parliament for further powers. That would, I think, be a startling conclusion. No doubt the *primâ facie* meaning of the word "rights" is existing rights, and it does not in its ordinary meaning include such an interest as that possessed by the plaintiff when the land was taken, an interest which did not become a right until the time limited by the Prescription Act had elapsed. That is conceded, and if we had to deal with a different Act of Parliament, and could see that to give the word its ordinary meaning would not interfere with the scope and object of the Act, we should so interpret it. But here it is plain from the object of the Act that if this interpretation were given, in many cases that object would be entirely defeated, and the whole scheme of improvement might be made inoperative. An obstinate man who objected to be compensated might, if he chose, stand on his rights and force the local authority to seek fresh compulsory powers from Parliament before they could proceed with the scheme. Unless it were absolutely necessary so to construe the section, I should shrink from a construction which would have such results. I think, therefore, that "rights in or relating to the land" in the section, must include not only existing rights, but nascent, growing, or inchoate rights which are capable of being measured by a money compensation. The Act provides for compensation being made for any loss sustained by reason of the section, and I think that if we are to give that wide construction to the word rights we must place a similarly wide interpretation on the word loss, and hold that it includes anything, which is measurable in money, by which the full exercise of the powers of an owner are limited by anything which the local authority have power to do under the Act. This is, I think, a fair case for compensation, because the plaintiff has been prevented by the Act of Parliament from obtaining a valuable right which but for the operation of the Act he would have obtained. It is therefore a subject for compensation, but not for an action for damages. It follows I think that the judgment of Hawkins, J., was right, and that the appeal must be dismissed.

Lord ESHER, M.R.—In this case the plaintiff brought an action for interference with light to which he had acquired a legal title by an unobstructed user for twenty years. In answer to his claim it is said that the application of the Prescription Act has been defeated by the enactments in the Artizans' Dwelling Act, 1875, and that, the defendant being not only entitled, but bound, to do what he has done, the plaintiff cannot maintain an action for damages, although he is entitled to compensation. The plaintiff contends that he is not entitled to compensation because, at the time when this adjoining land was taken he had no right over it in respect of which he could be compensated. On the other hand, it is said that, even if he is not entitled to compensation, nevertheless, he cannot sue the defendant for damages. The case, therefore, turns on the meaning which we are to give to the word "rights" in section 20. According to the ordinary meaning of language, no doubt the plaintiff's interest at the time the land was taken was not an existing right. But in this case we have to apply the well-known rule that, although we are bound to give the language of an Act of Parliament its ordinary meaning, yet, if there are circumstances in the Act which show that the words were used in a sense larger than their ordinary meaning, we are bound to give them that extended construction. It therefore becomes necessary to examine this Act of Parliament to see whether the plaintiff can or cannot maintain his action. On carefully looking at the Act, and at the recitals to the Act, it appears to me that it became the duty of the authority to carry out the scheme as soon as it had been properly authorized. In order to carry out a scheme of improvement it is almost a necessity that there should be higher and larger buildings. The local authority had the right to prescribe the elevation of the buildings, and the defendant was only allowed to take the land in question on condition of his putting up buildings in conformity with the scheme. This, to my mind, affords strong ground for saying that, even if the plaintiff could not get any compensation, nevertheless he cannot sue for damages. But I should not like so to decide. The courts have always set their faces against any interference with a man's interest without due compensation. It is plain that if the plaintiff is to have the right which he claims, he could prevent the local authority from carrying out the scheme, but, if he is to lose the right, one would expect that he should have compensation. It cannot have been intended that where, as in the present case, the plaintiff had, at the time the land was taken, an inchoate right, and the local authority were unable to bar that inchoate right before it became, by virtue of the lapse of time and of the Prescription Act, an existing right, the owner of that right should be able to obtain an injunction to prevent the local authority from doing the very thing which they were bound by Act of Parliament to do.

I think, therefore, that the effect of section 20 is that the land purchased is a clean piece of land free from any rights of any kind whether existing or inchoate. I think that if a person has at the time of the purchase property in such a state that if things remained unaltered he would in process of time acquire a right, he has an inchoate right which is extinguished under the section, and for which he is entitled to receive compensation. I have considerable doubts whether, if no house had been built on the land for instance, the owner would still have an inchoate right to light, but if nothing had to be done to acquire the right but allow the years to elapse, then I think there is an inchoate right. I think that the plaintiff is still entitled to compensation, but he is not entitled to damages, and the appeal must be dismissed.

FRY, L.J.—In 1867 the plaintiff completed the erection of his house. In 1877 the Corporation of Birmingham purchased the land opposite to it for the purposes of their scheme of improvement. In 1886 they let it to the defendant under terms which required him to erect upon it certain buildings which were erected by him in 1888, and which interfered with the access of light to the plaintiff's house. The present action is then brought, and the defendant sets up that the right acquired by the plaintiff was extinguished in 1877 by the operation of section 20. The plaintiff replies that in 1877 he had acquired no right, having only had ten years' user of the light, and that his right did not come into existence till 1887. The question, therefore, turns on the words of the section. *Primâ facie* it appears only to refer to existent rights. But when the object of the Act of Parliament is considered, it is plain that the word rights was not intended to be limited to its ordinary meaning. The local authority intrusted with the duty of seeing the scheme carried out are a public body and not a private profit seeking association. They are bound to do certain things for the public interest. The elevation of buildings must be within their power, and therefore the Corporation of Birmingham had a public duty

to prescribe the elevation of buildings erected under the scheme. To do so they must be independent of any rights as to the lights of adjoining property, whether those rights had accrued or were accruing, and therefore inchoate at the time of the purchase of the land. Otherwise they would be fettered in a manner highly inconvenient and practically inconsistent with the objects of the Act. A large interpretation must therefore be put upon the section, and it must be held to include the right to count the years of user which already had run when the purchase was made. The liability to compensate must be read as co-extensive with the rights extinguished. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Field, Roscoe & Co.*, for *Smith & Pinsent*, Birmingham.

Solicitors for the respondent, *Burton & Co.*, for *Edge*, Birmingham.

From Prob. Div. and Adm. Div. Feb. 26, 27.

O'SHEA *v.* O'SHEA AND PARNELL.
In re TUOHY. (*a.*)

Practice—Appeal—Criminal cause or matter—Contempt of court—Publication of comments calculated to prejudice fair trial of a civil proceeding—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.

An application made by a party to a civil action then pending, against a stranger to the action, for attachment for contempt of court committed by the publication in a newspaper of comments calculated to prejudice the fair trial of the civil action, is a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873, *and no appeal lies to the Court of Appeal from a judgment imposing punishment for such contempt, made on such application, by a judge of the High Court.*

Reg. *v.* Barnardo, Tye's case, 37 *W. R.* 789, 23 *Q. B. D.* 305, *distinguished.*

Appeal from Butt, J.

The point raised and decided in this appeal was that an application for attachment for a contempt of court, consisting in the publication by a newspaper of comments calculated to prejudice the fair trial of a civil action then pending, is a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873,* and, therefore, that no appeal lies from a judgment inflicting punishment for such contempt, made on such application, by a judge of the High Court.

After the institution of a divorce action by a husband against his wife, but before the trial, an article containing comments calculated to prejudice the fair trial of the action was published in a newspaper.

An application for attachment for contempt of court was made by the petitioner in the divorce action, against a Mr. Tuohy, who was not a party to the divorce action, but who was alleged to be a person responsible for the publication of the newspaper. The application was intituled with the title of the divorce action, and was also intituled "*In re Tuohy.*"

Butt, J., on the hearing of the application, made an order imposing a fine of £100 on Mr. Tuohy for contempt of court, committed by the publication of the newspaper containing the above-mentioned article, for which publication Butt, J., held Mr. Tuohy to be a person responsible.

From this order Tuohy appealed.

Sir Charles Russell, Q.C., Asquith, Q.C., and *Beskill*, for the appellant.—The other side intend to take a preliminary objection as to the appeal being heard, on the ground that the order appealed from was an order "in a criminal cause or matter," and, therefore, that no appeal lies, having regard to section 47 of the Judicature Act, 1873. But that section does not mean that no appeal shall lie, when the act which originates the proceeding in which the order is made is a crime, but it means that no appeal shall lie when the cause or matter, in which the order is made, is in the nature of a criminal proceeding: *Per* Cotton, L.J., in *Reg.* v. *Barnardo*, 37 W. R. 789, 23 Q. B. D. 305. In the case of *Ex parte Alice Woodhall*, 36 W. R. 655, 20 Q. B. D. 832, it was held that no appeal lay from a refusal by the Queen's Bench Division of an application for a writ of *habeas corpus* made on behalf of a person arrested as a fugitive criminal accused of an extradition crime; and that was on the ground that the order appealed from, was an order made determining a question raised in or with regard to proceedings, the subject-matter of which was criminal—viz., the extradition proceedings before the magistrate. In *Hunt* v. *Clarke*, 37 W. R. 724, and *Reg.* v. *Jordan*, 36 W. R. 797, appeals were heard from orders made on applications with reference to contempts of court very like the present, but no objection to the appeals being heard was taken by counsel, though in *Reg.* v. *Jordan* the court, after judgment had been delivered, expressed a doubt as to whether an appeal lay. The order appealed from in the present case is an order made in the divorce action, and is so intituled.

Sir E. Clarke, S.G., Inderwick, Q.C., and *Lewis Coward*, for the respondent.—There are different kinds of orders for attachment for contempt of court, and different kinds of contempt. A contempt consisting of an attempt to interfere with the due course of justice is, in its nature, criminal, and an attachment for such contempt is a criminal process. The distinction between contempts and attachments of this nature, and contempts and attachments of a civil nature, is pointed out in *In re Preston*, 31 W. R. 804, 11 Q. B. D. 545. Some contempts of court are clearly capable of being regarded as criminal offences, and can be punished as such: *In re Pollard*, L. R. 2 P. C. 106, 17 W. R. P. C. Dig. 4. A contempt of court consisting of an endeavour to stifle the truth and prevent the execution of justice is a common law misdemeanour, 1 Hawkins' Pleas of the Crown, ch. 6, ss. 1, 15, and is indictable as such, 2 Hawkins, ch. 25, s. 4; Russell on Crimes, 5th ed., vol. 1, p. 188; *Earl Thanet and Fergusson's case*, 27 State Trials, 822. Attachment is a process for dealing with a criminal offence awarded by the discretion of the justice upon a bare suggestion and without any indictment; it is properly grantable in cases of contempts against which all courts of record may proceed in a summary manner according to their discretion: 2 Hawkins, ch. 22, p. 206. The chief reason for giving the courts power to deal with contempts in a summary manner, is to secure prompt redress. The present appellant is not a party to the divorce proceedings, and the order against him is not an order directing him to do anything in the action, but it is solely to punish him for a gross interference with the administration of justice in the divorce action then pending before the court. The proceeding against the appellant is outside the divorce action altogether. The question as to what is a criminal cause or matter under section 47 was argued before the House of Lords on the appeal from the judgment of the

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* The material part of section 47 is as follows:—"No appeal shall lie from any judgment of the High Court of Justice in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of" the Court of Crown Cases Reserved.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Court of Appeal in *Ex parte Bell-Cox*, 36 W. R. 209, 20 Q. B. D. 1, but the judgment of the House of Lords has not yet been given.

They also referred to the Crown Office Rules, 1886, rr. 261, 271, 272.

Asquith, Q.C., in reply.—Though contempt of court is, in a sense, an offence, and though attachment is a punitive proceeding, and to that extent of a criminal nature, yet that does not constitute the proceeding in which the order now appealed from was made, "a criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873. Section 100 of that Act defines the meaning of the word "cause" in that Act, as including "any action, suit, or other original proceeding between a plaintiff and a defendant and any criminal proceeding by the Crown"; and the word "matter" is defined as including "every proceeding in the court not in a cause." The application for attachment in the present case, is a proceeding in the civil action in the Divorce Division. The application is, in fact, made by the petitioner in the divorce action, and is intituled in that action, and the complaint is with reference to that action. The attachment proceedings were not independent proceedings instituted by the court itself, or by the Crown. No court or judge other than the judge who was trying the divorce action could have entertained the application for attachment. [COTTON, L.J.—Suppose a judge engaged in trying a cause is insulted or abused, could not an application to commit for contempt be made to and dealt with by some other judge?] I submit not. There is no instance of a proceeding by way of indictment for contempt of court, and the passages cited from Hawkins' Pleas of the Crown, are merely *dicta*. The case of *In re Freston* is really in my favour. [*Sir E. Clarke* mentioned *Skipworth's case*, L. R. 9 Q. B. 230.]

COTTON, L.J.—The question raised in this case has never yet been the subject of decision, and as the question is an important one, and has been fully argued before us, I think we ought not to delay giving our judgment upon it.

The appeal is from an order of Butt, J., which inflicted a fine of £100 on the present appellant, and in default of payment attachment.

A preliminary objection has been taken to the appeal being heard, on the ground that by section 47 of the Judicature Act, 1873, no appeal lies. [The Lord Justice read the section, and continued:—] Now is this a judgment in a criminal cause or matter. In my opinion it is.

It is quite true that motions very like that in the present case have at times been made, but the point now raised has never yet been dealt with, though in one case (*Reg.* v. *Jordan*) the other branch of the Court of Appeal did suggest a doubt (after the appeal had been heard) whether any appeal lay.

The present proceeding is for a contempt of court.

Of course, there are many contempts of court that have nothing criminal about them, as, for instance, where a man does not obey an order of the court, made in some civil proceeding, to do or to abstain from doing something—as in the case of an injunction against a defendant—and then a motion to commit him for contempt is made, and an order made thereon; that is really only to get something done in the course of the suit, and is not a criminal proceeding.

In the present case, however, though the notice of motion is intituled in the matter of the divorce suit (for the purpose of convenience), yet it is also intituled in the matter of an original application against Mr. Tuohy, and the essential part of the motion is the application to commit Mr. Tuohy for contempt.

It was argued that the application was made in the divorce suit, and was a proceeding in that suit, but the application was to commit, for a contempt consisting of an attempt to pervert the proper course of justice, by preventing this divorce suit being properly tried. That is contempt of a criminal nature, and is a criminal act. Authorities have been cited which showed that anything done to prejudice the judge or the jury in the trial of an action, was a criminal act, and the instances which are given, all refer to the same thing—viz., an attempt to pervert the due course of justice.

In the present case it is true the application for committal was made—not by the Attorney-General—but by the petitioner in the divorce suit, but it is conceded that the act done was a wrongful act, for there could otherwise have been no fine imposed, and therefore, in my opinion, though the application was made by the petitioner in the divorce action, yet it is in no way a proceeding in that action, but it is an independent application to prevent the course of justice being perverted.

It is quite true that in some cases (*Reg.* v. *Barnardo* was one), where a motion to commit very like the present was made, the court held that the proceeding did not come within section 47. Much stress was naturally laid on my own judgment in that case. I said: "Section 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding." Well, what was the proceeding there? It was to obtain something being done in the civil proceeding before the Queen's Bench Division. That is what I referred to in my judgment in that case.

But in the present case the whole proceeding was to punish the wrong done by the present appellant, and not to obtain anything being done in the civil action before the Divorce Division. It was a proceeding, therefore, outside the divorce action, and its object was only to obtain that fair trial which every suitor has a right to, and not to obtain the performance of any order made in the divorce action. In my opinion, therefore, section 47 of the Judicature Act, 1873, does prevent us hearing this appeal.

LINDLEY, L.J.—In my opinion we have no jurisdiction to hear this appeal. The question turns on the true construction of two sections of the Judicature Act, 1873—viz., section 19 and section 47. [The Lord Justice read these sections, and continued:—] Does the present case come within section 19 or within section 47? In my opinion it comes within section 47.

This is really an appeal by Mr. Tuohy from a summary conviction for a criminal offence. His offence is clearly a criminal offence. I do not say it is an indictable offence, but, whether indictable or not, it is an instance, and the only instance I know of, of an offence punishable at common law by summary process.

As regards the cases, no case has been cited which conflicts with the view we take in our judgment in this case. In the case of *Reg.* v. *Jordan* counsel did not take (they purposely abstained from taking) the point now raised. After the appeal in that case had been heard and judgment given, the point occurred to me, and I said I was not satisfied that we had any jurisdiction to hear the appeal. I am now satisfied that we had no jurisdiction to hear it. The case of *Reg.* v. *Barnardo* is quite distinguishable from the present case.

There are obviously contempts and contempts; and attachment may sometimes be regarded merely as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days, I can well remember the time when there was no mode of enforcing such an order except by attachment. One must not, therefore, be misled by the words "contempt"

or "attachment," but the substance of the thing must be looked at.

In the present case it is a summary conviction for a criminal offence, and, therefore, no appeal lies.

LOPES, L.J.—The preliminary objection raises an important question—viz., whether the order for attachment made in this case is an order made in a criminal cause or matter within the meaning of section 47.

There are different kinds of attachments for contempt. One kind of attachment is to enforce obedience to an order, made in some civil suit or proceeding, against one of the parties to such suit, to do, or to abstain from doing, something, the not doing or the doing of which, is not criminal. That would not be within section 47; and the case of *Reg.* v. *Barnardo* is an example of that kind.

Another kind of attachment is in respect of an independent application against a person not a party to the suit, in respect of an act done outside the suit, and which act is criminal. That, I think, is within section 47. The application on which the present order was made is an application by Mr. O'Shea, a litigant in the divorce action, with reference to an attempt made by a stranger to interfere with and pervert the due process of justice in the action, but it is made outside the action. The object of the application was to obtain the punishment of Mr. Tuohy. The proceeding, in which this attachment was made, commenced with the motion against Mr. Tuohy, and ended with the order for his punishment. I am clearly of opinion that that is a criminal cause or matter. As to whether the offence committed by Mr. Tuohy is an indictable offence or not, I desire at present to express no opinion.

Appeal dismissed.

Solicitors for the appellant, *Lewis & Lewis.*

Solicitors for the respondent, *Wontner & Sons.*

High Court of Justice.

Chan. Div. } Chitty, J. } Jan. 22, 23.

In re WEST RIDING OF YORKSHIRE PERMANENT BUILDING SOCIETY. (*a.*)

Building society — Advanced members — Borrowing members—Winding up—Liability to contribute to losses—Term of redemption.

Under one of the rules of a building society, deficiencies of income, by which the society might be prevented from meeting its anticipated expenditure and liabilities, were to be apportioned between the investing and borrowing members.

Held, that "liabilities" included the sums due to the investing members in respect of their shares, and that the borrowing members were liable to contribute rateably to any losses thereon incurred by the investing members.

Under another rule of the same society, the property mortgaged to the society to secure advanced shares was to be so secured until the amount of such shares should be repaid to the society, with all fines and other payments incurred in respect thereof.

Held, that, under the last-named rule, a borrowing member was not entitled to redeem his mortgage, except on payment of what might be due from him in respect of his above-mentioned liability.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Adjourned summons.

A building society, established under the Act of 6 & 7 Will. 4, c. 32, which was not registered under the Act of 1874, had advanced and unadvanced members, and had for its object the making of advances to members of the amount or value of their shares for the purposes of erecting or purchasing houses. It was provided that each share should be £120, and that the value of a member's share on his joining the society should be £60, and after that date its value should be determined according to the society's tables. Advances were to be made on the security of property to the satisfaction of the directors. It was provided by rule 18 that, "whenever the value of a share or shares shall be advanced to any member out of the funds of the society pursuant to these rules, the property shall be secured to the society by way of mortgage until the amount of such share or shares shall be repaid to the society with all fines and other payments incurred in respect thereof, and every such mortgage deed shall be made in such form and contain all such covenants, clauses, and provisoes, including a power of sale, as are usually inserted in deeds of the like nature, and as the solicitors of the society shall think proper." The rule with respect to the members' right of redemption was to the same effect, and in the mortgages which were taken by the society from its members as security for advances on their shares the proviso for redemption was framed in accordance with these provisions.

Rule 39, headed "Surplus Profits," provided "that the present and future surplus arising from the transactions of the society, after providing for all liabilities, shall, from time to time, be appropriated equitably and equally between the investing and borrowing members by way of bonus in proportion to the number of shares held by each member and the period subscribed for to the society."

Rule 40, headed "Deficiency of Income," provided that "the directors shall, every three years at least, take into consideration the general affairs and the gross receipts and expenditure of the society at special meetings of their body to be called for that purpose by the manager, and if they shall determine at such special meeting that there is a deficiency of income by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and shall be paid by them severally and respectively forthwith, or by such monthly or quarterly instalments as the directors shall determine, and, if the same shall not be paid accordingly, every member who makes default shall pay the same fines as for an equal amount of subscriptions or repayments in arrear, as the case may be."

Losses having occurred through the fraud of a secretary, a resolution was passed for winding up, and a winding-up order under supervision was made on the 26th of November, 1889. The assets were sufficient to satisfy the outside creditors in full, but not to satisfy the claims of the non-advanced members. The liquidator claimed to make the advanced members contribute a rateable proportion of the loss which might be sustained by the other members, and the present was an application adjourned into court to obtain the decision of the court as to the liquidator's right to do so. No special meeting had ever been held under rule 40, except the meeting at which the resolution to wind up was passed, but his lordship held that to ascertain the deficiency of income was merely a question of machinery, and that the court could not determine the matter. It appeared that certain advanced members had applied to the liquidator in the winding up to accept payment of the subscriptions and other payments due on their shares and for a reconveyance, but he re-

fused, on the ground that, even after the outside creditors were satisfied, the securities covered any sums payable by the advanced members in respect of their proportion of the losses.

Romer, Q.C., and *Baker*, for the liquidator.—*Primâ facie* the advanced members are not liable; *Brownlie* v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28; *Tosh* v. *The North British Building Society*, 35 W. R. 413, 11 App. Cas. 489; those cases, however, were decided on their special circumstances, but here, on the rules, advanced members are liable.

Byrne, Q.C., *Wurtzburg*, and *T. B. Napier*, for the advanced members and for a member who sought to redeem.—Advanced members are only liable to the claims of outside creditors. *In re The Doncaster Permanent Building Society*, 15 W. R. 102, L. R. 3 Eq. 158, not to claims by other members. In this case the claim is not within rule 40.

Romer, Q.C., replied.

CHITTY, J.—It is admitted that the assets of this society, after the outside creditors have been satisfied, may not be sufficient to repay the investing members the full amount of their shares, and the question now raised is whether this loss is to be borne by them exclusively, or whether the advanced members are liable to contribute rateably thereto so as to make the loss fall on both classes of members. To put a simple case by way of illustration, I will assume there to be only a single member of each class, and the assets after all liabilities have been discharged to amount to £100, and that the investing member is entitled to demand payment of a full share of £120, the question then being whether the other advanced member is liable to bear with the investing member this loss of £20. Now it is well established that in these societies advanced members are not liable to contribute to a loss such as this is, unless there be a contract between the members to that effect, and in the present case it is on the terms of rules 39 and 40 that this question must be determined. [His lordship then referred to the constitution and objects of the society, and continued:—] Now under rule 39 it is clear that profits are to be credited in a due proportion, both to the investing and to the advanced members. The effect of so doing in the case of the investing members is this, that supposing there to be no subsequent losses they will in a lesser time and with diminished payments have made up the amount of their shares. And, similarly, the advanced members who are paying their subscriptions on the footing of their mortgage deed will be relieved *pro tanto* from these payments.

Now the rule is headed "Surplus Profits," and it is in these terms. [His lordship read the rule and continued:—] The term "liabilities" here clearly includes the amounts due to the investing members. The balance-sheets of the society all state this as being so, and correctly; the first item of liability being always the value of shares not advanced upon. Of course there is nothing put down in respect of the advanced members' shares inasmuch as those have been paid. And in each of the balance-sheets down to 1886 there is inserted among the liabilities "profits due to members" not attributing this item to them rateably, but taking it as a gross sum due to them in a body. I have, therefore, no hesitation in holding under this rule that in estimating profits the sums payable to investing members must be treated as a liability.

But if the rule stood alone it is plain that the advanced members would still not be liable to contribute to this loss, for the agreement to divide profits is not sufficient to make them liable for losses. But then comes rule 40, which must be read in connection with rule 39. The rules in many societies are not expressed as carefully as is desirable, and they are often difficult to construe, and this rule is itself open to some such observation upon it. [His lordship read the rule, and continued:—] This language has been criticized in argument, especially the term "deficiency of income," which was apparently argued to be something distinct from "capital." But there is no such contrast in the rule, where "income" means merely all that comes into the society. This is clear from its very nature, for the subscriptions consist partly of principal and partly of interest, and there is in these societies no such distinction between capital and income as exists in companies which have a fixed capital—no distinction, that is, between the tree and its fruits. Under this rule the directors are to consider every three years whether the income will be sufficient to meet the expenditure and liabilities anticipated within that period, and to make provision accordingly. In my opinion any loss owing to which assets might be insufficient to meet the claims of investing members, would have to be included among such liabilities, and by the rule this is to be borne, not by the borrowing members alone, but by both classes equitably apportioned between them. I come to the conclusion, therefore, that the liquidator's contention on this point is correct, and that the advanced members are liable to contribute to any losses sustained by the investing members in respect of their shares.

The other question is this. The advanced members are prepared to pay off all the society's claims under their security. But the liquidator contends that their securities include the just proportion of the loss of the society to which the advanced members is bound to contribute. This is contested by the advanced members. But this question is really disposed of by rule 18, in conformity with which the mortgage deed was framed. For it throws on the security, not merely the instalments and fines, but "other payments incurred," which is equivalent to saying "liabilities for payments." This is a liability accrued at the date when the advanced member seeks to redeem; it is, therefore, included in the security which cannot be redeemed until the payment is made. The exact amount due is not yet ascertained, but *certum est quod certum reddi potest*. I hold, therefore, that the advanced members cannot redeem their mortgages, except on payment of what may be due from them towards the losses sustained by the investing members, but I see no objection to the liquidator allowing them to redeem forthwith on their paying into court a sum provisionally assessed in respect of this liability.

Solicitors, *Burn & Berridge*, for *J. R. Farrar*, Halifax; *Ford & Ford*, for *E. T. Rhodes*, Halifax; *Emmet, Son, & Stubbs*, for *Wavell, Son, & Marshall*, Halifax.

Chan. Div. North, J. } Aug. 8.

HENDON LOCAL BOARD *v.* POUNCE. (*a.*)

Local government—Urban sanitary authority—Bye-laws—Entrance to new street—Width—"Construction" of new street—Validity of bye-laws—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

One of the bye-laws of a local board, which had been allowed by the Local Government Board, provided as follows:—"Every person who shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street and open from the ground upwards."

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Held, that, upon the right construction of this bye-law, it prevented a landowner from constructing a new street and building upon his own land until he had provided an entrance to the new street of the requisite width; that the bye-law was not ultrà vires, *and that it applied not merely to the making of the roadway, with sewers and footpaths, but also to the construction of the houses on each side and the gardens attached to them; and consequently, that, if the landowner could not provide the requisite entrance, either over his own land or by arrangement with some other landowner, then he could not utilize his land by constructing a new street and building houses upon it.*

Baker *v.* Mayor of Portsmouth, 25 *W. R.* 677, 3 *Ex. D.* 4, *followed.*

Motion.

The action was brought by the Hendon Local Board, acting as the urban sanitary authority, against J. H. Pounce, an owner of land within the plaintiffs' district, and H. Cooper, a builder, and the relief claimed by the writ was an injunction to restrain the defendants from constructing a new street, called Ravenshurst-avenue, within the plaintiffs' district, until an entrance to such new street, of a width equal to the width thereof, was provided, and to restrain the defendant H. Cooper from building upon the land abutting upon the new street until such an entrance had been provided.

The plaintiffs' bye-laws, which had been allowed by the Local Government Board, provided as follows:—

1. "In the construction of the bye-laws relating to new streets and buildings the following words and expressions shall have the meanings hereinafter respectively assigned to them, unless such meanings be repugnant to, or inconsistent with, the context or subject-matter in which such words or expressions occur; that is to say (*inter alia*):—

"'Width,' applied to a new street," means the whole extent of space intended to be used, or laid out so as to admit of being used, as a public way, exclusive of any steps or projections therein, and measured at right angles to the course or direction, or intended course or direction, of such street." . . .

4. "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be forty feet at the least." . . .

6. "Every person who shall construct a new street shall provide at one end, at least, of such street an entrance of a width equal to the width of such street, and open from the ground upwards."

In December, 1886, J. H. Pounce—who was the owner of a field bounded on the north by a row of houses called Market-place abutting on an old road called Church-lane, running east and west and communicating with Church-lane by a passage about 17 feet wide running from north to south between two of the houses, on the south by a footway called Chapel-walk about 10 feet wide running from east to west, and on the east by houses built on land belonging to J. B. Mathews, which was bounded on the north by Church-lane and on the south by Chapel-walk—applied to the plaintiffs for permission to lay out a new street, forty feet in width, to be called Ravenshurst-avenue, to extend from the passage running from Church-lane into his field across his field in a southerly direction to Chapel-walk, in accordance with a plan deposited with his application. There was to be no access into Chapel-walk, and the only entrance to the proposed new street was by the passage leading into Church-lane, which passage was only 17 feet wide or thereabouts.

His plan was not approved by the plaintiffs on the ground that the proposed new street would violate their bye-laws.

J. H. Pounce then amended his plan by making, at the southern end of the proposed new street, an extension, forty feet in width, at right angles to the proposed new street from west to east, up to a piece of vacant ground belonging to J. B. Mathews which communicated with a street called John-street running parallel with the proposed new street across land belonging to J. B. Mathews, and terminating with Chapel-lane. The extension would not, however, join John-street unless it was carried over the intervening piece of vacant ground, which could not be done without the consent of J. B. Mathews.

On the application by J. B. Mathews to the plaintiffs in October, 1881, for permission to construct John-street, it had been made a condition by them that the piece of vacant ground forty feet in width should be left so as to form an entrance of that width to Pounce's land in case that land should at any time thereafter be built upon.

The report of the committee of the plaintiff board upon the amended application by J. H. Pounce was as follows: "Your committee, having fully considered the application and the minutes of the board of the 22nd of October, 1881, with reference to John-street, whereby it was stipulated that the two plots in John-street nearest Chapel-walk should be left vacant, in order to provide for any future new road down Chapel-walk of a width of forty feet required by the bye-laws, and, as Mr. Pounce's application proposes to construct a portion of such new street over the before-mentioned vacant plots into his proposed new street (Ravenshurst-avenue), your committee consider that if the proposed new street is laid out and constructed, as shown on the plans deposited by Mr. Pounce for the whole length between Church-lane and John-street, and of a width of forty feet from the old road at Church-lane end to John-street, and before any houses are allowed to be built in such street your committee would recommend the board to assent to Mr. Pounce's application."

In January, 1887, the plaintiffs resolved "that Mr. Pounce's plan be passed, subject to the conditions mentioned in the report."

J. H. Pounce accordingly commenced the construction of Ravenshurst-avenue, and made sewers and drains along it, and kerbed and paved the footpaths, and metalled the roadway of the part adjoining the passage leading into Church-lane. He also entered into an agreement with H. Cooper to let the land abutting on the new street for building.

H. Cooper then applied to the plaintiffs for permission to build houses abutting on Ravenshurst-avenue; but the plaintiffs rejected his application, on the ground that the new street had not been constructed in accordance with the resolution of the plaintiffs or with their bye-laws, as it had not been carried over the vacant piece of land belonging to J. B. Mathews so as to be connected with John-street.

H. Cooper, however, with the assent of J. H. Pounce, commenced building houses on the land abutting Ravenshurst-avenue, and continued to do so notwithstanding a notice from the plaintiffs directing him to stop building. The plaintiffs accordingly commenced the present action.

This was a motion by the plaintiffs for an *interim* injunction in the terms of the claim by their writ.

Cozens-Hardy, Q.C., Yate Lee, and *R. Cunningham Glen,* for the motion.—The building of houses abutting on the street is an infringement of the 6th bye-law, which applies to buildings on each side of a new street: *Baker* v. *The Mayor, &c., of Portsmouth,* 25 W. R. 677, 3 Ex. D. 4. The defendants must provide an entrance of the same width as the street before building houses abutting upon it.

Everitt, Q.C., and *Vernon R. Smith,* for the defendants.—The right construction of the 6th bye-law is, that a person constructing a new street must provide an entrance of a width equal to the width of the street as

far as his land extends. It does not apply to the case where his land is approached by an entrance narrower than the new street, which entrance is over another person's land. It does not compel him to provide an entrance of a width equal to the width of the new street when the entrance is through the land of another person, over whom he has no control. This construction would make the bye-law *ultrà vires* and void as being unauthorized by section 157 (2) of the Public Health Act, 1875. The defendants have provided an entrance, as far as their land is concerned, of a width equal to the width of the new street, and are, therefore, entitled to construct the new street. The case of *Baker* v. *The Mayor, &c., of Portsmouth* is not in point, but refers to the power of a local board to provide for the pulling down of buildings erected in violation of their bye-laws.

NORTH, J., stated the facts, and proceeded :—If the defendants had done what the local board assented to, when they approved conditionally of the new plan, there would have been an entrance forty feet wide at the end of Ravenshurst-avenue, adjoining John-street, which would have been acceptable to the local board, and their approval would have been given. But the defendants cannot take advantage of that, because that has not yet been done, and therefore the time has not come at which the defendants can rely on the conditional approval so given by the board. At present the defendants have merely commenced making the new road called Ravenshurst-avenue at the northern end, and the rest of it is not made at all. It is, as I understand, marked out, and some sods may have been taken off, but nothing like constructing a road has taken place, except at the northern end. The road has only been constructed at the northern end, and, according to the plans which have been handed to me, some houses, about ten in number, have been, or are going to be, built, on one side at least, if not on both sides of the road. That cannot be justified by what it is proposed to do at the south end of the new road, inasmuch as it has not yet been done. The only question is, whether it can be justified by what has been done at the north end of Ravenshurst-avenue. [His lordship referred to section 157 of the Public Health Act, 1875, and the bye-laws 4 and 6, and continued :—] The 4th bye-law applies to Ravenshurst-avenue, and makes it essential that it shall be at least forty feet wide from one end to the other.

Then the 6th bye-law provides for something else. It does not refer to the new street, because the whole width of the new street from beginning to end has been fixed by the 4th bye-law at forty feet. The 6th bye-law provides that there is to be "an entrance" forty feet wide. That does not mean that a part of the new street is to be forty feet wide, because the whole street is to be of that width, but it means that the mode of access to the new street so made is to be of a width equal to the width of the new street. The object of that is plain. It would be of no use to have a new street forty feet wide throughout if at the end of that street the access is only by a narrow space fifteen or twenty feet wide. Therefore, it is required that a person who proposes to construct a new street shall, before he is allowed to make it, provide an entrance to it of equal width with the street. It appears to me, therefore, that, so long as the access from Ravenshurst-avenue to John-street is not made, the defendants are not entitled to make any part of their new street until they have provided an entrance to it at the north end forty feet wide. In my opinion, therefore, they are wrong in attempting to proceed with the erection of houses abutting upon the proposed new street until an entrance to it forty feet wide has been provided. One way of doing this is by making the street throughout to John-street, and if the defendants had done that there would have been provided at one end an entrance forty feet wide, and they could go on with the construction of the new street ; but, if they do not choose to do that, then they must provide an adequate entrance at the other end, by enlarging the narrow part to the proper width.

It is said that it would be unreasonable to suppose that the bye-law compels them to do this on someone else's land. It does not do anything of the sort. As I construe it, all that the bye-law does is this—it prevents the landowner from building upon his own land until he has provided an entrance to it of the specified width. He may be able to provide the entrance over another man's land by arrangement with him, but if he cannot provide the requisite entrance, either over his own land or by arrangement with some other landowner, then the only result is that he cannot utilize his own land by constructing a new street and building houses upon it. The bye-law does not require him to do anything upon another man's land ; it only says, you cannot construct a new street on your own land unless you provide an adequate entrance to it. That disposes of the first point raised—viz., that the defendants have complied with the bye-laws, because this new street is forty feet wide. They have complied with the 4th bye-law, but they have not complied with the 6th, because they have not provided an entrance to the new street of the same width as the street itself.

Then it is said that this bye-law is invalid, as being *ultrà vires*. Of course, if it were, it would not be enforced. But, in my opinion, it is not *ultrà vires*, and I think that is decided by the case of *Baker* v. *Mayor of Portsmouth*. The question there arose upon a similar bye-law made by a local board under section 34 of the Local Government Act of 1858, and it was decided that the power given by that Act to make bye-laws with respect to the level, width, and construction of new streets included not merely the making of the street proper, that is, the roadway, with the sewers and footpaths, but also the making of the houses on each side, and the gardens between them and the road itself. It is clear, therefore, that this bye-law is not *ultrà vires*.

Then it is said that the bye-law is unreasonable, and therefore invalid. It is difficult to see how it can be unreasonable if it is *intrà vires*. But, in my opinion, there is nothing unreasonable in it. It would be absurd to say that the board were right in insisting on the road being forty feet wide if they are not to gain the advantages which a road of that width would give. The object is, for sanitary reasons, to admit light and air, and to allow the wind to sweep freely along the road. A road of that width is much more healthy than a narrower one, and, of course, the benefit of a road of that width will be only partially secured if it is closed in at each end, or, at any rate, one end, by an entrance so narrow that a free draught of air through it is prevented. I can see nothing unreasonable in saying that the person who constructs a new road shall provide an entrance as wide as the road itself, and it is quite clear that in the present case the board are not acting unreasonably, because they are willing to allow the road to be made with access to John-street. In my opinion, the plaintiffs are in the right, and I think the bye-law applies to the buildings on each side of the new street as well as to the street or roadway itself. The injunction, therefore, must go against the builder, as well as against the owner of the land, until the trial of the action or until further order.

Solicitors, *S. Tilley ; H. H. Wells.*

Chan. Div. }
Stirling, J. } Feb. 5, 6.

In re T. SMITH.
KEELING *v.* SMITH. (*a.*)

Will—Construction—Condition—Marriage with consent of trustees.

Where a testator attaches, as a condition to the enjoyment of property given by his will, that the beneficiary shall, if he marry, do so with the consent of his trustees, but prescribes no particular form of consent, the court will treat such consent as a matter of substance rather than of form, and will hold that the condition has been satisfied if the consent has been substantially given.

Daley *v.* Desbouverie, 2 *Atk.* 261, *followed.*

Adjourned summons.

Theophilus Smith, who died on the 22nd of September, 1882, by his will, dated the 11th of December, 1882, devised and bequeathed the residue of his real and personal estate to three trustees upon trust for sale and conversion and for investment, and directed them to hold such investments upon trust as to one moiety thereof to pay the income arising therefrom to his son, H. W. Smith, during his life or until marriage, and, after the marriage of his said son, "with the consent of at least two of the trustees for the time being thereof, then I declare that my trustees or trustee shall stand possessed of the said moiety or equal part in trust for my said son absolutely." The testator provided that if his said son should die without having been married, then his trustees should stand possessed of such income and the investments for the time being representing the same upon the same trusts as were thereafter declared concerning the other moiety. And the testator directed that the other moiety should be held upon trust for his two grandchildren, Eliza E. Walters and H. A. Walters, as therein mentioned.

H. W. Smith married, and the question was whether he had done so with the consent of two of his father's trustees so as to become entitled to a moiety of the residuary estate.

The circumstances under which the marriage took place were the following:—

One of the trustees was unable from ill health to give evidence, but an affidavit by the other two contained the following paragraph:—"None of us gave any consent to the said marriage of the defendant, H. W. Smith, unless a consent thereto is to be inferred from the circumstances hereinafter stated, but we have never refused to give our consent to the marriage. We have not any objection to the marriage, and at the time when the defendant, H. W. Smith, applied to us as hereinafter stated we had no objection to the lady. We were, however, of opinion that it was not at that time desirable that the said defendant should marry, or should be put in possession of the capital of his share under the testator's will."

This evidence was supplemented by the evidence of H. W. Smith himself, who said that the above paragraph of the trustees' affidavit did not fully give an account of what occurred at the interview therein mentioned, and that one of the trustees on that occasion said to him after he had asked the trustees' consent to his marriage, "We see no objection, but we should like you to make your application in writing," leading him thereby to suppose that the writing was merely a matter of form.

A formal letter was written on the 5th of January, 1885, to which an answer was sent on the 13th of January, the meaning of which his lordship held was that the trustees understood that, as the lady did not intend to marry him, it was not necessary for them to give any consent.

The marriage took place on the 2nd of March, 1885.

Gregson, for the trustees.

Hastings, Q.C., and *Eastwick*, for H. W. Smith.—There is sufficient evidence here of consent by the trustees. The will does not require that the consent shall be in writing. The trustees never refused their consent, and their statements, which appear from their affidavit, must be regarded as equivalent to consent. Where no particular mode of consent is prescribed by the instrument it may be inferred from conduct: *Berkley* v. *Ryder*, 2 Ves. sen. 533; *Campbell* v. *Lord Netterville*, cited *Ibid.* 534; *Mesgrett* v. *Mesgrett*, 2 Vern. 580; *Daley* v. *Desbouverie*, 2 Atk. 261; *Clarke* v. *Parker*, 19 Ves. 1; *Reynish* v. *Martin*, 3 Atk. 330; *Harvey* v. *Aston*, 1 Atk. 361. The court leans strongly against stripping a child of its provision: *Burleton* v. *Humfrey*, Amb. 256.

Buckley, Q.C., and *Colt*, for H. A. Walters and the trustees of Mrs. Mason's (formerly E. E. Walters) marriage settlement.—There was no tacit consent by the trustees to the marriage. The evidence shows that the trustees, so far from consenting to the marriage, opposed it, and for the reasons stated in the affidavit. Previous consent must be shown, and no regard must be had to subsequent approbation. *Campbell* v. *Lord Netterville* merely shows how far such consent may be implied. *Daley* v. *Desbouverie* was not really a case of implied consent, for there there was a letter signed by the trustees containing the statement "We shall be obliged to consent," which was held equivalent to consent. *Mesgrett* v. *Mesgrett* was a case of fraud. In *Burleton* v. *Humfrey* the words were "consent and approbation," and it was held that the word "and" was to be construed to mean "or." The case is not, therefore, an authority upon the present question. The cases were reviewed in *Clarke* v. *Parker*, and the result deduced therefrom was that, although the court may wish to struggle to prevent a child being deprived of its portion, yet it must see that the condition is fulfilled. The consent must be given before the marriage, subsequent approbation will not suffice.

Hastings, Q.C., was not called upon in reply.

STIRLING, J., stated the will, and continued:—The son has married, and the question I have now to decide is whether he has married "with the consent of at least two of the trustees for the time being."

In the first place it is to be observed upon the terms of the will that the testator has not prescribed that the consent of the trustees is to be given in any particular form or manner, and it is enough that there should be the consent of two of the trustees for the time being. It is also to be observed that in dealing with cases of this kind the court has from an early period treated the consent to be given to the marriage as a matter of substance rather than of form, and that when the court finds that substantially the consent has been given it has not looked very minutely into the form which the consent has taken.

This is, perhaps, shown by no case more strongly than by that of *Daley* v. *Desbouverie*, decided by Lord Hardwicke as far back as 1738. In that case there was a gift over in case Lady Ann Burke should marry without the consent of her trustees, and there was then the peculiar feature that at first there was an absolute refusal of such consent, but there was afterwards a letter written by the trustees, which contained this passage:—"If Mr. Daley's father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and, therefore, we shall be obliged to consent to it." That

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

was not in form a letter expressing any present consent at all, but, rather, an expression of a future consent to be given on terms. Mr. Daley's father was willing to make a settlement, though not in precisely the terms proposed by the trustees, and after some negotiations, which did not come to anything, the plaintiffs, Lady Ann and Mr. Daley, were married, according to the evidence, at the Fleet "by John Gagnam, the famous Fleet parson, on the 6th of June, 1785," so that it was a secret marriage, and the question whether that was a marriage with consent came before Lord Hardwicke for decision; and his lordship, in deciding that the marriage was substantially with the consent of the trustees, towards the end of his judgment expressed himself as follows:—"It is manifest, both from the letter and disposition of Mr. Manley, one of the trustees, that he agreed to the proposal, and gave his consent that it should be a match; and the letter is likewise evidence that the trustees in general approved of the person, behaviour, and quality of Mr. Daley; and it is also evidence of their consent to the marriage, provided Mr. Daley, the father, will make the settlement he proposed. The words in the letter, 'We shall be obliged to consent,' mean from the necessity of the thing, and for the happiness of the lady, and ought to be construed a present consent, that, if the father would make the settlement, they would not break the match. . . . The trustees have signified their consent that a settlement should be made according to the prayer of the plaintiff's bill. And, therefore, I will decree accordingly." So that Lord Hardwicke held that the marriage was substantially with the consent of the trustees.

I cannot find that this case has ever been overruled. On the contrary, in *Clarke* v. *Parker* Lord Eldon was not at all prepared to depart from it, for in the very last paragraph of his judgment he says:—"There are so many cases in which the court has thought itself at liberty to conceive consent to have been given substantially, though not in terms, that I do not think it right to decide this case without directing inquiries, with a view to bring fully before the court matter which is in some degree before it." That was in relation to the question whether a substantial consent could be inferred from the acts of one of the trustees who had not given a formal consent. That was the principle upon which the present case ought to be dealt with, and the evidence here stands thus: [His lordship then stated the evidence of the trustees as above set forth, and continued:—] So to the marriage itself they had no objection, although they were of opinion that at present it had better not take place. That is to say, they stood in very much the same position as the trustees in *Daley* v. *Desbouverie*, and their evidence amounts to this, "We consent, provided the marriage takes place at the proper time." That evidence should be supplemented by the evidence of Mr. H. W. Smith himself. [His lordship then referred to the evidence of H. W. Smith and to the letters above stated.] Upon that evidence it was said that the trustees never considered the matter, and never really gave their consent.

In my opinion I ought not so to regard it. I think that they did consider the substance of the matter—*i.e.*, whether or not it was a proper marriage; and that they came to the conclusion that it was, though they attached the proviso that it should take place at a proper time. That brings the case within *Daley* v. *Desbouverie*, and I accordingly come to the conclusion that consent to the marriage had substantially been given, and that the son is now entitled to a moiety of the residuary estate.

Solicitors, *Wynne-Baxter & Keeble*, for *J. S. Streeter*, Croydon; *Prior, Church, & Adams*, for *Drummonds*, Croydon; *H. Tyrrell & Son*, for *J. M. Head*, Reigate.

Q. B. Div. (Lord Coleridge, C.J., and A. L. Smith, J.) Feb. 24.

TOWNEND *v.* SHERIFF OF YORKSHIRE. (*a.*)

Sheriff—Execution—Sheriff's costs and charges—Taxation by district registrar—Appeal—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20, *sub-section* (2)—*General Order of August* 31, 1888, *schedule.*

The schedule to the General Order made on the 31*st of August*, 1888, *in pursuance of section* 20, *sub-section* (2), *of the Sheriffs Act*, 1887, *provides for the taxation by a master or a district registrar of the sheriff's costs and charges of an execution, "in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof." The power of the taxing officer under this provision is limited to the ascertainment of the amount of the costs and charges according to the scale in the schedule; he is to assume them to have been properly incurred, and cannot deal with the question of liability. There is, therefore, no appeal from his decision.*

This was an appeal from the decision of Day, J., in chambers that he had no jurisdiction to hear an appeal from a taxation by the Manchester District Registrar under the following circumstances:—

The plaintiff had recovered judgment in an action of *Townend* v. *Dunn*, and a writ of *fi. fa.* was placed in the hands of the sheriff for execution, the name of Dunn's residence being indorsed on the writ. The sheriff's officer, on seizing some goods at the place named, was informed that all the property there, belonged to Dunn's wife. He afterwards discovered two other places where Dunn carried on business, and he seized goods at each of them. In each case a bill of sale was set up. The sheriff took interpleader proceedings, and his claims were dismissed, these two seizures thus proving ineffectual. The sheriff and the plaintiff differing as to the amount of the sheriff's costs and charges, they were taxed by the district registrar. He allowed one guinea in respect of each of the three seizures according to the table of fees in the schedule to the General Order made on the 31st of August, 1888, under the Sheriffs Act, 1887. That table provides—

2. For seizure by the sheriff's officer:—

For each building or place separately rated at which a seizure is made ... £1 1 0

The plaintiff disputed the right of the sheriff to receive any payment for the abortive seizures at the two houses other than the one named in the writ, and this contention formed the ground of his appeal; but, as will be seen from this report, this question was not decided.

C. A. Russell, for the plaintiff.—The sheriff has seized goods of a third person to satisfy our claim against Dunn, and he has no right to be paid for this. The district registrar, by allowing his ordinary fee, has decided that he has that right, and there is an appeal from his decision. This is an ordinary taxation in the High Court and is subject to review. Ord. 65, r. 27 (39—41) apply. This order as to taxation of sheriff's costs is *ultra vires*; the Act is a consolidating Act, and is not intended to alter the law.

J. V. Austin, for the sheriff, was not called on.

Lord COLERIDGE, C.J.—I am of opinion that the order of Day, J., following a similar order of Field, J., was right. This is an attempt to review the taxation, under the General Order of the 31st of August, 1888, by the district registrar of the fees recoverable by the sheriff from the execution creditor. No. 2 in the table of fees issued as a schedule to that order is "for seizure by the sheriff's officer—for each building or place separately

a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

rated at which a seizure is made, £1 1s.," and at the end of this scale it is provided that "the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be) in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof." It has been argued that the word "tax" being used in this rule, the serious consequence follows, that in every taxation of a sheriff's costs by the taxing master or district registrar there is an appeal (through the intermediate courts) to the House of Lords. It is said that the word "tax" always carries with it certain incidents. Without denying that the general principle is that taxation is subject to review, one must construe enactments with reference to their subject-matter, and it would be foolish to extend the principle to matters to which it was never intended to apply. It was certainly not in the minds of the framers of the rules that an appeal should lie to the House of Lords about every sum of 5s. or 7s. 6d. sheriff's costs. The question, no doubt, is not what was in the minds of the framers of the rules, but whether the words bear the meaning suggested, and I think they do not. All the rule says is, that the district registrar is to tax in case the parties differ as to the amount. Mr. Russell contended that it was not the amount that was called in question here, but the right of the sheriff to take anything in respect of the seizures at these two houses, and that the registrar had to deal with that question. I think not; any more than in a taxation of an attorney's bill of costs questions of retainer or of the attorney's negligence are gone into; the retainer is assumed, and the taxing master only decides whether the proper amount is charged in the bill upon that assumption. This rule seems to me to contemplate the possibility of some seizures being inoperative, and still the taxing master has to tax. It is true that in almost every question as to the amount of a charge the right to charge anything at all, is involved, but where the amount alone is the subject mentioned in the rule, I think that that alone is to be dealt with by the taxing master. The judgment creditor is not without remedy, for if it be true that an amount has been given to the sheriff without his having a right to any amount at all, that question can be raised by an action with all the appeals incident to an action. I think, therefore, that there is no appeal from the decision of the district registrar, which is simply as to the amount. A very serious question was raised as to the validity of these rules, but that cannot be gone into on this occasion, and I express no opinion upon it.

A. L. SMITH, J.—I agree. The district registrar has taxed the amount to be paid to the sheriff, and Day, J., held that there was no appeal from his taxation. The sole question which we have to decide is whether or not the district registrar or the taxing master (as the case may be) is made the sole judge. [His lordship then read section 20, sub-section 2, and referred to the table of fees.] When one looks at the scale of fees one sees that there are many matters to be gone into which are matters of arithmetical calculation and nothing else. It is argued that the ordinary principles of taxation should be applied in this case. But that is not so; the object of the taxation is to ascertain an amount; the ascertainment of that amount fixes no liability on the parties and no order to pay is made. The objection here is that the sheriff did not do his duty when he made seizures in two of the three houses, and that may be a matter for much argument, but it was not a matter which the district registrar could go into.

Appeal dismissed.

Solicitor for the plaintiff, *Arthur Harris*, for *Joseph Sims*, Manchester.

Solicitors for the sheriff, *Bell, Brodrick, & Gray.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 20.

DUKE OF NORFOLK v. LAMARQUE (SURVEYOR OF TAXES). (a.)

Inland Revenue—Income tax—Manorial dues—Profits—Cost of collection—Deductions—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *schedule* (*A*), *rr. II.*, 4; *s.* 159.

In estimating the value of manorial dues under schedule (A) of the Income Tax Act, 1842, *the lord of the manor is not entitled to deduct the costs of collection, such costs not being specified in the Act as an authorized deduction.*

Case stated for the opinion of the court under section 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

The Duke of Norfolk, lord of the manor of Dorking, was assessed to income tax for the year ending the 5th of April, 1889, in the sum of £178 9s., being the amount admitted to have been received or to be receivable by him on an average of the seven preceding years in respect of the amount of the profits of the manor for that year. This assessment was made under the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, schedule (A). The 4th of the rules for estimating the lands under schedule (A), No. II., provides for the computation of the annual value "of manors and other royalties, including all dues and other services or other casual profits (not being rents or other annual payments reserved or charged) on an average of the seven preceding years to be charged on the lord of such manor, or royalty, or person renting the same." By section 159 no other deductions than such as are expressly enumerated in the Act are to be made. The Duke claimed to deduct from the amount of the assessment a sum of £38, being the costs incurred by him in the collection of the manorial rights and dues. He appealed to the Commissioners for the General Purposes of the Income Tax Acts for the Wotton Division of the county of Surrey against the refusal by the surveyor of taxes to allow this deduction. The commissioners dismissed the appeal, and at the request of the appellant stated this case for the opinion of the court.

Lyon, for the appellant.—I admit that the cost of collection is not included in the deductions authorized by the Act—schedule (A), V., and section 159—but this expense is necessarily incurred, for these dues could not be collected by the lord of the manor personally. Therefore the profits are not to be computed until the cost of collection has been defrayed, and it is the profits only which are taxed. The words are, "including all dues and other services or other casual profits": *Stevens* v. *Bishop*, 36 W. R. 421, 20 Q. B. D. 442.

Sir R. E. Webster, A.G. (*A. V. Dicey* and *E. Griffin*, with him), argued that no deductions were to be made except those specified in the Act, and referred to section 159 and schedule (A), V., and cited *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315.

Lyon replied.

POLLOCK, B.—In my judgment this appeal fails. Mr. Lyon very properly admitted that this amount sought to to be deducted was not one of the deductions named in the Act of Parliament, and that admission, to my mind, goes a little further than at first sight appears; because, if you turn to the deductions which are admitted and provided for by the Act (they are to be found at page 59 of Mr. Dowell's book) you will find that they are not items which are essential to be deducted before you can

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

arrive at any fixed sum—as in the case of manufacturers an outlay for rent, for materials, salaries of workmen, and so forth—but they are items which would come after the profit derived from the particular subject-matter which is taxed is obtained. It is therefore clear that this is in no sense a deduction of that kind.

Neither is it a deduction to be made before you can arrive at the amount which is to be returned by the person who is taxed. The Act requires the lord of a manor to return the amount of all dues and other services or other casual profits of the manor on an average of seven years.

It is when we look at rules I. and II. of schedule (A) that the greatest difficulty arises. It is plain that no analogy whatever can be drawn from profits earned in manufactures or mercantile concerns, for those profits are the result of outlay made for the purpose of earning them: but the money paid for collecting rent is not spent for the purpose of earning the rent. The use of the word "profits" in No. II. is certainly not very happy. The annual value of certain properties is to be "understood to be the full amount for one year or the average amount for one year of the profits received therefrom." "Profits" here means, to my mind, the average amount for one year of the interest or property that the man has in those rights which are taxed. The words relating to manors and royalties (sub-rule 4 of No. II.), are "on an average of the seven preceding years to be charged on the lord of such manor, or royalty, or person renting the same." These profits are treated as rent issuing out of property which belongs to the lord in fee simple.

The only other doubt which I have felt has been occasioned by the case of *Stevens* v. *Bishop;* but there is certainly a distinction between the cases; in my opinion the real ground of the decision there is that it was admitted by the Crown that the sum claimed to be deducted was expended necessarily and properly; that is not so here. In this case I think the full amount is subject to duty and the appeal fails.

HAWKINS, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Few & Co.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Nov. 26, 27; Dec. 18.

KNILL v. TOWSE. (a.)

Election law—County council—Registration—Right of voting in more than one division of a county—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 2, *sub-sections* (1), (2) (e), (4); *s.* 75—*County Electors Act,* 1888 (51 *Vict. c.* 10), *s.* 7, *sub-sections* (1), (2), (4), (5) —*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 44, *sub-section* (1); *s.* 45, *sub-section* (6); *s.* 51, *sub-section* (2).

Under the Local Government Act, 1888, *an elector is not entitled to vote in more than one electoral division of an administrative county, although qualified and duly registered under the County Electors Act,* 1888, *in more than one division.*

Appeal from the City of London Court.

The plaintiff had a residence in the Greenwich electoral division of the administrative county of London and a place of business in the City of London division of the same county, and was duly registered as an elector in the registers of both divisions. At an election of county councillors in January, 1889, the plaintiff voted in the Greenwich division and subsequently presented himself at a polling station in the City of London division where the defendant was acting as presiding officer, and demanded a ballot paper to enable him to vote. The defendant refused to receive the vote or to supply a ballot paper, on the ground that each elector could only vote in one division.

An action having been brought in the City of London Court to recover damages for such refusal, the judge gave judgment for the defendant, and the plaintiff appealed.

Finlay, Q.C., and *Russell Griffiths,* for the plaintiff.

Vaughan Williams, Q.C., and *J. V. Austin,* for the defendant.

The arguments are sufficiently set out in the judgment.

Dec. 18.—The following written judgment of the COURT was delivered by

MATHEW, J.—This was an action brought to try the question whether the plaintiff was entitled to vote at the same election in two electoral divisions of the administrative county of London.

The plaintiff's vote had been refused by the defendant, as presiding officer for the City division, on the ground that the plaintiff had already voted in the Greenwich electoral division, and the plaintiff sued the defendant in the City of London Court to recover damages for rejecting the plaintiff's vote.

The case raised the question whether in elections for county councils an elector having a qualification in more than one division can vote in each of such divisions, or can vote only once.

It was admitted that the plaintiff was a duly registered elector for the City and for the Greenwich electoral division, that he had voted in the latter division before he demanded a voting paper and proposed to vote in the City, and that his vote had been on that ground rejected by the defendant in the City electoral division.

The case came on for trial before the judge of the City of London Court, who gave judgment for the defendant, and against this judgment the plaintiff appealed.

The argument for the plaintiff may be stated thus. The Local Government Act, 1888, s. 2, sub-section (4), provides that, as respects the election of county councillors, the persons entitled to vote (elsewhere than in a borough) shall be the persons registered as county electors under the County Electors Act, 1888.

The plaintiff was admitted to be entitled to be placed on the roll of electors for both divisions under section 7, sub-section (1), of that Act. By sub-section (4), of section 7, nothing in that section is to prevent a county elector from being registered in more than one division register. And by sub-section (5), which is intended to secure that a parliamentary voter shall not vote at an election more than once in respect of different qualifications in the same parliamentary division, it is provided that the voter shall have the same right of voting at an election of a county authority as if the section did not apply. The case was therefore said to be perfectly clear when the Local Government Act and the County Electors Act were read together, and the argument that under section 75 of the Local Government Act, 1888, statutes were incorporated which might lead to a different conclusion, was met by reference to the express terms of that section, that no enactment is to be incorporated inconsistent with the provisions of the Local Government Act.

On the other hand, the defendant's counsel contended that the County Electors Act, when carefully examined, disclosed no intention that the elector for the county council was to be entitled to vote in each electoral division, as he clearly would have been if he were duly

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

qualified as a voter in different parliamentary divisions. Section 7, sub-section (5), it was said, applied to parliamentary electors only, and the clause at the end of the section which preserved any right of voting at an election of a county authority did not define or specify what that right was. The object of sub-section (5), it was urged, was not to confer a double franchise on county council electors, but was to prevent the loss of a vote at an election for the county authority, as would be the result if, instead of an asterisk, there was an erasure of the voter's name in accordance with the Registration Act, 1885, s. 4, sub-section (9) (*a*). It was pointed out that by section 7 of the County Electors Act, 1888, sub-section (2), the Registration of Electors Acts and sections 45, 48, and 71 of the Municipal Corporations Act, 1882, are to apply for the purposes of the section, with the substitution of "county register" and "division register" for "burgess roll" and "ward roll" respectively, and of "electoral division" for "ward." Then, by section 75 of the Local Government Act, 1888, portions of the Municipal Corporations Act are incorporated, and among them is the 51st section, which provides that no person shall vote in more than one ward; and by the Local Government Act, 1888, s. 2, it is provided that the council of a county and the members thereof shall be constituted and elected in like manner and in like position in all respects as the council of a borough divided into wards, but subject to the provision (sub-section (2) (*e*)) that the divisions shall be called "electoral divisions," and not "wards." This provision, it was said, was the key to the true construction of the statute, and showed a clear intention that, under section 75 of the Local Government Act, 1888, section 51, sub-section (2), and section 59 of the Municipal Corporations Act, 1882, should be incorporated with the Local Government Act.

If any provision of the County Electors Act was inconsistent it was pointed out that it was repealed by section 126.

It followed that the right of voting in divisions in administrative counties was to be dealt with as in wards in municipal elections, for which only one vote is allowed.

We are of opinion that the argument for the defendant must prevail, and that the judgment for the defendant must be affirmed. We cannot adopt the view that the clauses of the Municipal Corporations Act are inconsistent with the provisions of the principal Act with which they are incorporated. Those sections seem to us in harmony with section 2 of the statute.

We were much pressed with the argument for the plaintiff that the right to vote must follow the express provision of the County Electors Act, that the plaintiff was entitled to have his name placed on the list of voters for each electoral division.

It was insisted that the only object of being registered is to secure a right to vote; and that, if the right was once conferred, it was unreasonable to suppose that the Legislature would forthwith enact that the right should be taken away.

It was said to be almost disrespectful to the Legislature to suppose that in Acts of Parliament passed in the same session, and apparently intended to be read together, there could be found one set of provisions that gave and another that took away the right of the elector to vote in different divisions. But the argument rests upon what appears to us to be the erroneous view, that the County Electors Act and the Local Government Act are to be treated as if they were one statute. The County Electors Act came into operation some months before the Local Government Act, and at a time when the exact form which the later Act was to take had not been decided on. We consider that the intention of the Legislature must be sought from the later Act, and that it is impossible to give effect to its various provisions on this subject without holding that for the purpose of voting the electoral division of the administrative county is to be regarded as if it were a ward in a borough. It follows that the voter has only one vote at an election for an administrative county council. The judgment of the court below must therefore be affirmed, with costs.

We have arrived at this conclusion with some difficulty, though without doubt. The difficulty has arisen, not from anything inherent in the subject itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters.

Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses, are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour, generally speaking, wholly unnecessary. It has, indeed, been suggested that to legislate in this fashion, keeping Parliament, in truth, in ignorance of what it is about, is the only way in which at the present day legislation is possible. We do not know whether the suggestion is correct; what we do know is that this procedure makes the interpretation of modern Acts of Parliament a very difficult, and sometimes doubtful, matter. We, the judges, have perhaps the least cause to complain. We sit here for the purpose, among other things, of interpreting Acts of Parliament, and we bring, or ought to bring, to our task trained and experienced intellects.

But in practical matters of everyday concern, such as the possession and exercise of the franchise, it is of the last importance that the law conferring it, and the rules which govern its exercise, should be easily comprehensible by the mass of the ordinary voters. We are well aware that protest as to past legislation is unavailing, but for the future to draw attention to a plain evil may perhaps be the first step towards its remedy.

Appeal dismissed.

Solicitor for the plaintiff, *The City Solicitor.*

Solicitors for the defendant, *Lowless & Co.*

Prob. Div. & Adm. Div. Probate. } Oct. 29; Nov. 19.

In the Goods of JOHN SMITH. (*a*.)

Probate — Practice — Will — Attestation—Signature of third person under attestation clause — Omission of name in probate.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who was a legatee under the will, appeared at the foot of the will immediately below their signatures, the court will receive evidence to explain why such signature was written, and, if satisfied that it was not written with the intention to attest the signature of the will, it will, on motion after notice to all parties interested, and on their non-appearance, order the name so written at the foot of the will to be omitted in the probate.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

In re Sharman, 17 *W. R.* 687, *L. R.* 1 *P. & D.* 661, *followed.*

Motion for a grant of probate of the will of John Smith, deceased, omitting the name of Emma Smith as signed by her after the attesting witnesses.

John Smith, late of Farnworth, in the county of Lancaster, duly made and executed his last will and testament, bearing date the 24th of July, 1884, whereby he gave a life interest in all his property to his wife, Emma Smith, and directed that after her death or remarriage it should be divided equally between his seven children. The will, which was on a printed form, was duly attested by John Catteral and John Hough, who signed on the two lines linked together in the form for the witnesses' signatures, and after the execution Emma Smith had signed her name immediately below the attesting witnesses. It appeared upon affidavit that she signed, not as attesting witness, but for the purpose of verifying the contents of the will at the request of her husband, who was of opinion that this was necessary for the validity of the will.

Oct. 29.—*Pritchard*, in support of the motion, cited *In the Goods of Sharman*, 17 W. R. 687, L. R. 1 P. & D. 661. The only distinction between that case and this is that in that case the residuary legatee was *sui juris*; here some of the children are infants.

BUTT, J.—To bring myself strictly within that decision I shall direct notice to be served on all the children—on those who are minors through a guardian or person or persons to be nominated by the registrar for that purpose—and the motion will stand over for that purpose.

Nov. 19.—*Pritchard* stated that affidavits had been filed showing that the notices had been given as directed by the court, and no appearance had been entered.

BUTT, J., made the grant in terms of the motion.

Motion allowed.

Solicitors, *Field, Roscoe, & Co.*

Court of Appeal.

From Chan. Div. [and Kay, J.] } Nov. 27, 1889; Feb. 15, 17.

In re RHODES.

RHODES *v.* RHODES. (*a.*)

Lunatic—Maintenance—Implied obligation—Necessaries—Debt—Right to recover against estate of deceased lunatic not so found by inquisition payments made towards her maintenance.

Where sums of money have been expended for necessaries supplied to a lunatic not so found by inquisition, by a person who intends to be repaid for so doing, an obligation will be implied on the part of the lunatic to repay out of his estate the sums so expended.

Whether the sums so expended were for necessaries or not, must be determined according to the circumstances in each particular case.

A lunatic, not so found by inquisition, lived for many years in an asylum partly at her own cost and partly at the cost of other persons. After her death her estate was administered in court, and these persons applied for repayment to them out of her estate of the amount paid by them in maintaining her beyond her own income.

(*a.*) Reported by W. IVIMEY COOK and H. C. ROPER, Esqs., Barristers-at-Law.

Held (*by the* Court of Appeal *and* Kay, J.), *that an obligation could be implied to indemnify them for money spent in supplying her with necessaries; but, on the evidence, that, in this case, repayment had not been expected, and could not therefore be allowed.*

In re Weaver, 31 *W. R.* 224, 21 *Ch. D.* 615, *discussed.*

Appeal from Kay, J.

This was a claim for money spent in the maintenance of a lunatic not so found by inquisition, and the question was whether these sums ought, after her death, to be repaid out of her estate.

Eliza Charlotte Rhodes was confined in a private lunatic asylum from the 6th of November, 1855, till the 7th of July, 1881, the date of her death, at an annual cost of £140. Her own income was not sufficient to defray the whole of this expenditure, and the deficiency was made up by her brother C. H. Rhodes during his life, and afterwards by his son A. C. Rhodes and other persons.

The lunatic's estate was being administered in court, and the chief clerk had made a certificate disallowing all these sums which had been spent in maintaining her, beyond her own income.

The summons was taken out by A. C. Rhodes on his own behalf, and as his father's executor, to vary the certificate by declaring that the money so spent ought to be repaid out of her estate.

Renshaw, Q.C., and *Phillpotts*, for the summons.—The extra payments were for necessaries supplied to the lunatic, and the court will imply a contract on her part to repay them, although she had not been found a lunatic by inquisition. It is not disputed that what was done was for her benefit: *Howard* v. *Digby*, 2 Cl. & F. 634, 663; *In re Gibson*, 20 W. R. 107, L. R. 7 Ch. 52; *In re Marman's Trusts*, 26 W. R. 621, 8 Ch. D. 256; *In re Weaver*, 31 W. R. 224, 21 Ch. D. 615; *In re Webster, Derby Guardians* v. *Sharratt*, 27 Ch. D. 710, 33 W. R. Dig. 151; Pope on Lunacy, p. 239; *Wentworth* v. *Tubb*, 1 Y. & C. C. C. 171, 2 *ibid.* 537, 6 Jur. 980; *Baxter* v. *Lord Portsmouth*, 5 B. & Cr. 170; *Nelson* v. *Duncombe*, 9 Beav. 211; *Manby* v. *Scott*, 1 Sid., p. 112; *Williams* v. *Wentworth*, 5 Beav. 325; *Thompson* v. *Cooper*, 1 Coll. 81. [KAY, J., referred to *Chester* v. *Rolfe*, 23 L. J. Ch. 233, 2 W. R. Dig. 47, and *Vane* v. *Vane*, 24 W. R. 602, 2 Ch. D. 124.]

Millar, Q.C., and *Curtis Price*, for the representatives of the lunatic, were not called upon.

KAY, J.—In my opinion, the chief clerk's certificate is perfectly right. There is a question of considerable interest and importance whether any man who supplies necessaries for a lunatic can recover the costs of those necessaries at law, or in equity, as a debt against the lunatic on the ground of there being an implied contract on the part of the lunatic, raised by implication of law, that there should be such repayment. Now I confess for myself that I do not feel the difficulty. The contract is implied on the part of an infant who cannot enter into any binding contract at all; and yet a binding contract is implied on the part of an infant where necessaries are supplied; the contract being by implication of law. It is, therefore, not an answer to say that a lunatic cannot himself contract. An infant cannot contract so as to bind himself, yet the law does bind him by a contract for the supply of necessaries. But the question on that point has been considerably argued and discussed, and there is a considerable body of authority upon it which is of great weight. Take, first of all, the case of *Howard* v. *Digby* in the House of Lords. The lunatic had been so found by inquisition, but the claim made was for necessaries supplied before the lunatic was so found. Lord Brougham in that case said, "Upon what ground are all these allowances

made; not from kindness, not from charity, not for the convenience of the parties, but because they are debts, because in the eye of that court, be it a court of law or of equity, or the chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the court."

The point came before Knight Bruce, V.C., in the case of *Wentworth* v. *Tubb*, where the bill was brought by the administrator and creditor of the lunatic against the heir-at-law of the lunatic, who was also a lunatic, and his committee, praying payment out of a certain real estate which had descended from the deceased to the defendant, the heir-at-law, there being no personal assets. The claim was founded on a report made by the master in the lunacy of the deceased by which he found that the deceased had been maintained and provided with necessaries at the sole expense of the plaintiff, from the issue of the commission in lunacy to the death of the lunatic. Knight Bruce, V.C., said: "The debt, if it is one, became due from the lunatic by operation of law, or, in other words, upon a contract raised by implication of law. If I were satisfied that there could be no such contract, that there could be no liability so raised, it would be my duty to dismiss the bill; but I am not so satisfied." He therefore directed an inquiry; the case came on appeal before Lord Lyndhurst, C., and is reported in 6th Jur. 980. The Lord Chancellor said during the argument: "If a party applies money for the benefit of a lunatic with his consent and without fraud, it is a debt which can be enforced against the lunatic, and the law constitutes it a debt for the benefit of the lunatic, and if he dies it is payable out of his estate. The rule applies only to necessaries, and there are several decisions to that effect which have always been acquiesced in." Now I comment on these words. The words "with his consent" can hardly have been used by the Lord Chancellor, because the consent of a lunatic would have been a nullity. He is also reported to have said: "Where necessaries are furnished to a lunatic, and no fraud or imposition is practised upon him by the party furnishing them, the lunatic is bound to pay for them as being a debt due from him to such party, and, if a debt, upon his decease his estate is chargeable with it." He then read the words of Lord Brougham which I have read, and says: "Lord Brougham therefore considers them as debts due from the lunatic, and, if debts, they are a charge upon the estate." And he dismissed the appeal. In the case of *Williams* v. *Wentworth* the matter came before Lord Langdale, M.R., who said: "It was argued in this case that, however beneficial to the lunatic the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted: but I am of opinion that in the case of money expended for protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, and that under the circumstances of this case a debt was constituted, and that payment of it may be obtained out of the real estate if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic may well be subject to question and consideration, but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished in principle from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract which in such cases the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to, that a man shall not be allowed to stultify himself."

Again the point came before Knight Bruce, V.C., in *Wentworth* v. *Tubb*, 2 Y. & C. C. C. 537, where the costs on an unsuccessful traverse of an inquisition of lunacy were allowed out of the lunatic's estate. The affirmance of the decision on the other point by the Lord Chancellor is noted. The Vice-Chancellor says: "I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ (as far as he can be said to exercise volition on the subject) a solicitor, not only to resist the commission, but afterwards for the purpose of traversing it, and that, although the proceedings fail, the lunatic's estate is liable for the costs, subject to this, that if anything fraudulent or unfair, or perhaps I may go as far as to say frivolous or litigious, appears to have taken place on the part of the solicitor, the court may say that no debt arises." Then in a later case of *Nelson* v. *Duncombe*, where Lord Langdale says: "The objection is made to the jurisdiction. It is said that, as no lunacy has been found, there can be no implied contract, and, in the absence of contract, the court has no jurisdiction to adjudicate upon the claim. It is, I think, true that in all cases of implied contract which have been decided there has been a lunacy actually found; but it has not been determined that this court will not take notice of what is done in respect of the property of persons lunatic, though not so found, or that a contract may not be implied for the supplies of necessaries to such persons."

Then there is the case of *In re Gibson*, in which Mellish, L.J., says: "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract." I have read a considerable body of authority in support of that proposition, and among others the authority of Lord Brougham, in the House of Lords, and the well-considered opinion of Lord Lyndhurst, sitting as Lord Chancellor, besides the authority of Knight Bruce, V.C., and Lord Langdale twice repeated. But, in the case of *In re Weaver*, the late Master of the Rolls, sitting in the Court of Appeal, commenting on that statement of Mellish, L.J., says: "That is only an interlocutory observation. It is difficult to see how there can be an implied contract with a lunatic if he is incompetent to make an express contract. It is not always safe to report interlocutory observations of judges; they are very liable to be misunderstood." If I may respectfully say so, the reporter ought to have remembered that, before he reported that interlocutory observation of the late Master of the Rolls. In giving judgment the Master of the Rolls said: "It is not necessary to decide the question whether there could be a legal debt in this case; for myself I reserve my opinion on that point, which appears never yet to have been distinctly decided." Brett, L.J., says: "A question has been flushed, if I may use the word in this case, which it is not necessary to decide—viz., whether, if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied? I give no opinion on that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my own part I should doubt whether, in favour of a person who knows of the lunacy, you can imply a contract to pay for a supply of necessaries to a lunatic."

But in a late case—*Brockwell* v. *Bullock*, 37 W. R. 455, 22 Q. B. D. 567—a medical man brought an action in the county court against a lunatic in respect of services rendered in an inquiry into the state of the defendant's mind, but was nonsuited on the ground that he could not recover such charges without an order under section 11 of the Lunacy Regulation Act, 1862. The plaintiff gave evidence on the inquiry which was in order to prove the sanity of the defendant. The defendant, however, was found a lunatic, and then the medical man, not being a physician, brought an action for his

charges against the lunatic and his committee. The county court judge nonsuited the plaintiff because of section 11 of the Lunacy Act, 1862, holding that the action was not maintainable, and the Queen's Bench Division dismissed an appeal from the county court. Then the case came before the Court of Appeal, and Lord Esher, M.R., said that section 11 did not take away any right of action which would otherwise have existed, and then he says:—"Under these circumstances the only question for us seems to be whether, assuming that the defendant was not a lunatic at the time of the plaintiff's employment, or that such employment of the plaintiff was a necessary, the action might be maintained. It seems to me that before the statute the action might in either of these cases have been maintainable." That is a distinct authority that an action could lie for necessaries supplied to a lunatic against the lunatic and his committee. Then later on he says:—"If it be shown that the defendant Bullock was a lunatic when the plaintiff was employed, then I think that in order to succeed the plaintiff must show that his employment was a necessary, a matter which may give rise to difficult questions." I can only say of these authorities—I do not know whether there are others or not, no others are brought to my attention—the large preponderance is in favour of the principle that anyone who supplies necessaries for a lunatic may maintain an action even at law for these necessaries, and that upon an implied contract with the lunatic, a contract which the law will imply notwithstanding the lunacy. But in this case the real question is, Are these necessaries? What happened is this. This lady was a lunatic, and she had certain property of her own which produced a small income, and her brother placed her in an asylum at £140 a year. She might have been placed in an asylum for very much less than that. But her brother thought it right to pay a larger sum, and after the death of her brother, his son, with other members of the family, continued the maintenance of the lunatic at this large sum. But now a claim is made before me that the extra expense was a necessary for the lunatic. It was very generous of her brother to place her in this asylum, and he might, had he lived, have been very likely to maintain her there. But that the extra expense was a necessary is not proved at all to my satisfaction. Another thing is this. The allowance made by the brother and the other members of the family seems clearly to have been an allowance which they never expected to be repaid. There is no evidence which satisfies me that any of these parties expected any repayment. How far a feeling of kindliness towards their relative may have actuated them, I do not know, but there is nothing to show that they had the smallest expectation of being repaid, or of making this a debt against the estate of the lunatic. This application must be refused with costs.

A. C. Rhodes appealed.

Renshaw, Q.C., and *Phillpotts*, for the appellant.—A. C. Rhodes is the legal personal representative both of the father, C. H. Rhodes, and of the lunatic, and therefore no question as to the Statute of Limitations being a bar arises: *Thompson* v. *Cooper*, 1 Coll. 81; *Stahlschmidt* v. *Lett*, 1 Sm. & G. p. 421. The evidence shows that the lunatic had the social position of a lady; she had property which produced an average annual income of £86, and the annual cost of her maintenance and support in the asylum was £140. This charge, having regard to the social position of the lunatic, was not unreasonable, and ought, therefore, to be regarded as a necessary. If the charge is in itself reasonable, the fact that the lunatic might have been supported for a smaller sum in some other asylum is not material. It would have been unreasonable to put her in a pauper asylum.

They cited the various cases relied on in the court below.

Millar, Q.C., and *Curtis Price*, for the respondents.—The chief clerk by his certificate has found that there were no debts due by the estate of the deceased lunatic; no application has been made to vary his certificate in that respect, and therefore, whatever this claim may be, it cannot be said to be a debt due by the estate of the deceased. Further, the facts of this case show that no debt was intended to be created. The payments were made as bounties. Assuming, however, that a debt was created, the extra payments were not for necessaries. The cases cited on the other side all fall into one of two categories, either these are cases in which the lunatic had been so found, or cases in which the payments had been made by the direct trustee of the lunatic. [COTTON, L.J.—We will not trouble you on the question of law.]

COTTON, L.J.—This is an appeal against a decision of Kay, J., refusing to allow a claim made by the defendant on behalf of himself and his brother and his sisters, and as the legal personal representative of his father, for several sums expended in the support of the lunatic in excess of what was provided by the income of her own property. The case raises several questions, one of which is of considerable importance; and although in the view which we take that question is not necessary to the decision of the case, yet, as it has been fully argued, we think we ought to express our opinion upon it. That question is, whether there can be an implied contract on the part of a lunatic not so found by inquisition to repay out of her property, sums expended for necessaries supplied to her. Now the term "implied contract" is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who, by reason of disability, cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, Can there be an implied contract by a person who cannot contract? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think the expression "implied contract" is erroneous and very unfortunate, and in one case which was before the Court of Appeal (*In re Weaver*) though that court did not decide the question whether there could be what has been called an implied contract by a lunatic, yet one of the judges did express an opinion that there could be no implied contract on the part of a lunatic or any other person who is himself incompetent to make an express contract.

We all agree with the view that I have just now expressed, in order to prevent any doubt from arising in consequence of the Court of Appeal having declined to settle the question in the case to which I have alluded.

But then, though there may be an implied obligation on behalf of the lunatic, the necessaries must be supplied and paid for under circumstances which would justify the law in implying an obligation to repay the money spent upon them. I have no difficulty as to the question of the expenditure being for necessaries, for the law is well established that when the necessaries supplied are suitable to the position in life of the lunatic, an implied obligation to pay for them out of his property will arise. [His lordship then discussed the evidence, and came to the conclusion that the relatives of the lunatic, in making the payments for her maintenance, did not intend to constitute themselves creditors against her estate.]

LINDLEY, L.J.—The question we have to decide is whether a sum of £1,100 is payable as a debt out of the assets of the deceased lady. The claim is made on the ground that the money has been properly expended for necessaries. I think that the facts are all in favour of the money having been reasonably and properly expended for necessaries. Against that it is said that the

lady might have been supported at an expense which her own income would have been sufficient to meet, but as, in the case of a claim made for necessaries against the estate of an infant, the claimant is not always bound to show that he sent the infant to the cheapest school that could be found, so in this case the fact that some cheaper place of residence might possibly have been found for this lady is not necessarily an answer to this claim, assuming it can be made.

The question whether an implied obligation arises in favour of a person who supplies a lunatic with necessaries is a question of law, and in the case of *In re Weaver* a doubt was expressed whether there was an obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression "implied contract" has been used to denote an obligation implied by law which is not a contract at law. Obligations of this class have also been called obligations *quasi ex contractu*. But that a lunatic's estate may be made liable for necessaries has been settled, at any rate as far back as *Manby* v. *Scott*, 1 Sid. 112, 2 Smith's L. C., 9th ed., at pp. 476-7, where the three learned judges, after holding that an infant might be bound for necessaries provided for him, proceeded: "And what has been said of an infant is applicable to an idiot in case of housekeeping." I do not doubt that the cost of necessaries can be recovered against a lunatic's estate in a proper case. [His lordship then dealt with the evidence, and agreed with the conclusion arrived at by Cotton, L.J.]

LOPES, L.J.—If a person finds necessaries for a lunatic and intends to be repaid for so doing and to constitute a debt against the lunatic's estate, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries. It seems to me strange that the law to this effect could be doubted. I have known several cases in the Queen's Bench Division of this kind: Action brought for goods sold and delivered; plea, insanity; replication, necessaries. And I have never heard any doubt expressed that that was a perfectly good replication. [His lordship then discussed the evidence, and came to the same conclusion as the other members of the court.]

Then the question arises whether these payments could be necessaries. I should not myself have felt any difficulty as to that because necessaries have to be determined according to the circumstances of each particular case, and things may well be necessaries in one case which would not be so in another. The question what are necessaries must always be considered with reference to the reasonable requirements of the person under disability, having regard to his means and station in life.

The appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Grover & Humphreys; Spence, Gibson, & Co.*

From Q. B. Div. March 5.

PARSONS *v.* BRAND.
COULSON *v.* DICKSON. (*a.*)

Bill of sale—Attestation—Address and description of attesting witness—Statutory form—Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 8, 9, 10—Schedule annexed to the Act.

A bill of sale, which does not contain both the address and the description of the witness attesting the bill of sale, is not "made in accordance with the form in the schedule" annexed to the Bills of Sale Act, 1882, and is therefore void.

The first case was an appeal from the judgment of a Divisional Court (Fry, L.J., and Mathew, J.) of the Queen's Bench Division affirming the judgment, on an interpleader issue, of his Honour Judge Powell, at the County Court of Kent, holden at Woolwich, and holding a bill of sale void; and the second case was an appeal from the judgment of Mathew, J., on an interpleader issue, holding a bill of sale void.

The question raised and decided in both cases was, that the fact of the omission to state in the bill of sale itself, either the address or the description of the witness attesting the bill of sale, rendered the bill of sale void under section 9 of the Bills of Sale Act, 1882, as being, by reason of such omission, not "made in accordance with the form in the schedule," to the Act.

In the first case neither the address nor the description of the witness who attested the bill of sale was stated in the bill of sale itself; the affidavit, however, filed with the copy of the bill of sale on the occasion of its registration, as required by section 10, sub-section (2), of the Bills of Sale Act, 1878, did contain a statement of the address and description of the witness who had attested the bill of sale.

In the second case the description only, of the attesting witness, was omitted to be stated in the bill of sale itself, but it was stated in affidavit filed with the registrar.

The holder of the bill of sale appealed in each case, and the second case was transferred from the other branch of the Court of Appeal, so that the two appeals came on for hearing together before the same court.

The Bills of Sale Act, 1882, provides by section 8 (*inter alia*) that "every bill of sale shall be duly attested . . . otherwise such bill of sale shall be void in respect of the personal chattels comprised therein." By section 9, "a bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void unless made in accordance with the form in the schedule to this Act annexed." And by section 10, "the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto." The schedule annexed to the Act contains a "form of bill of sale" made between A. B. (grantor) and C. D. (grantee), and at the end of the form are these words, "Signed and sealed by the said A. B. in the presence of me, E. F. [add witness's name, address, and description]."

A. E. Nelson, for the appellant in the first case.—The affidavit filed with the registrar states the address and description of the attesting witness to the bill of sale, and therefore the respondent was seised with that knowledge. The address and description of the attesting witness is not part of the form of the bill of sale. The Divisional Court in the present case felt bound to follow the previous decision of a Divisional Court in *Blankenstein* v. *Robertson*, 6 Times L. R. 178, but that case is not binding on the Court of Appeal.

He also referred to *Blount* v. *Harris*, 27 W. R. 202, 4 Q. B. D. 603; *Routh* v. *Roubiot*, 28 L. J. Q. B. 240, 7 W. R. C. L. Dig. 13; *Luckin* v. *Hamlyn*, 18 W. R. 43; and *Jones* v. *Harris*, 20 W. R. 43, L. R. 7 Q. B. 157, which were all cases governed by the Bills of Sale Act, 1854.

H. A. Forman, for the respondent.—The directions contained in the form of bill of sale given in the schedule annexed to the Act of 1882 must be regarded as having the same force as a statutory enactment. "Duly attested" in section 8 means attested according to the directions contained in the statutory form. Though in the case of an ordinary deed the omission of

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the date of the deed, or of the description of the attesting witness, would not invalidate the deed, yet in the case of a bill of sale these matters are essential characteristics of the statutory form of a bill of sale, and therefore their omission will render the bill of sale void. The rule of construction laid down by Bowen, L.J., in *Ex parte Stanford, In re Barber*, 34 W. R. 507, 17 Q. B. D. 259, was not accepted by the House of Lords in *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506, as a test rule applicable to all cases. It is the object of the Act that the address and description of the attesting witness should appear on the face of the bill of sale itself, without the necessity of looking at the affidavit to discover them.

Channell, Q.C., and *A. J. Allen*, for the appellant in the second case.—Though on the authority of *Blankenstein* v. *Robertson* Mathew, J., held this bill of sale void, yet his own opinion was contrary to that. [LOPES, L.J.—*Thomas* v. *Kelly* was not cited to him]. In the present case the address of the attesting witness is stated in the bill of sale, and it is only his description that is omitted. The affidavit contains the description. The words in section 9, "in accordance with the form in the schedule," mean that the terms of the contract must be the same as those in the "form"—*i.e.*, the contract between the borrower and the lender must have the same legal effect as that which is set out in the "form": *Ex parte Stanford*. The address and description of the attesting witness is really outside the "form," and the note about adding the address and description is a mere direction. The words "duly attested" in section 8 are satisfied if the document is attested by some witness whose name and address appear on the face of the document; that is sufficient to identify the witness.

R. O. B. Lane, Q.C., for the respondent.—Sections 8 and 9 and the form in the schedule must be read together, "duly attested" therefore means attested according to the provisions prescribed by the Act; and the form in the schedule expressly directs that the address and description of the attesting witness be stated. Some of the directions given in the form cannot be treated as mere directions, when, as is admitted, other directions in the form go to the substance of the bill of sale. To be "in accordance with the form" something more is required than the following the form in respect of the terms of the contract between borrower and lender. The statement of the address and description of the attesting witness is material, in order to afford sufficient information to persons interested; it is an imperative part of the object to be attained by the machinery of registration.

Channell, Q.C., in reply.—The result of non-compliance with section 8 is different from that of non-compliance with section 9, the latter section deals only with the form of the contract between borrower and lender.

COTTON, L.J. [His lordship stated the facts in each of the two cases, and continued:—].—The question is whether section 9 of the Bills of Sale Act, 1882, makes these bills of sale void. We have nothing to do with the policy of the Act; we have only to carry out what is expressed in the Act of Parliament. There is no direct provision in the Act itself, that the name, address, and description of the attesting witness shall be shown on the face of the bill of sale. The question is whether either of these bills of sale complied with the requirement of section 9—that they should be made in accordance with the form in the schedule to the Act. Is there anything in the form given in the schedule which requires that the address and description of the attesting witness should be added? It has been argued that there is nothing in the statutory form to require this, because, as it is said, the form only refers to that which is the contract between the parties, and that the mere direction as to stating the address and description of the attesting witness is not part of the "form" of the bill of sale, but only a direction added to the "form." In my opinion, the meaning of the word "form" cannot be cut down in that way. It is true that in most of the cases hitherto brought before the court, the deviation from the statutory form was in something relating to the legal effect of the transaction as embodied in the contract between the parties. That was the case in *Ex parte Stanford*. But in my opinion this provision cannot be considered as a mere direction. It is a direction as to matters which are required to be stated at the time the bill of sale is given. There are a number of blanks in the form which cannot be filled up till the form comes to be used—for example, the rate of interest payable; no one can doubt but that that must be stated. So also with regard to time and place. These matters could not be put in in the form given in the schedule, but that form contains directions which show that they should be stated, and, in my opinion, any bill of sale which has not in it that which would be in the form when it was filled up, is not made in accordance with the form. When the person who is the attesting witness in the particular case is known, the "form," to be properly filled up, must contain his name, address, and description. I do not say that any omission in that respect would alter the legal effect of the bill of sale. When Bowen, L.J., in *Ex parte Stanford* said that a divergence from the statutory form was only material when it was calculated to give the bill of sale a legal effect differing from that of the statutory form, he was dealing only with a variation which would alter the legal effect; and the judgments of the Lords in *Thomas* v. *Kelly* show that that statement is not to be taken as laying down a universal test for all cases. If this matter is a part of the statutory form, as I think it is, we must give effect to the provisions of the Act, however stringent they may be. I do not think that this is a merely immaterial matter in the present state of the law. The Act of 1878 required that the execution of every bill of sale should be attested by a solicitor. That provision is now repealed by the Act of 1882. The position of a solicitor gave some sort of assurance that he would see that everything that was required was properly done, and when the Legislature took away that safeguard it may well have thought it material that it should be shown, by means of the address and description of the attesting witness, what sort of a man he was. In my opinion, therefore, it is essential that on the face of the bill of sale itself, the name, address, and description of the attesting witness should appear. In the second appeal this provision presses more hardly than in the first, but I do not see how even in that case one can depart from the directions contained in the schedule. Both the appeals, therefore, must fail.

LINDLEY, L.J.—I am sorry I cannot see my way to arrive at any other conclusion. It is always a painful thing to be compelled to hold that a *bonâ fide* transaction is void because some t's are not crossed and some i's are not dotted. We must, however, give effect to the Act of Parliament, and, in my opinion, the statutory form requires that the name, address, and description of the attesting witness should be filled up.

LOPES, L.J.—The Act of 1882 imposes most stringent fetters on contracts of this kind, by dealing not only with matters of substance, but also with matters of form. It has been said that the Act is imperious and tyrannical. I am not sure that it was not intended to be so. I am not prepared to say that it is too imperious or too tyrannical. But the court has nothing to do with this. I think the words "duly attested" in section 8, mean

duly attested in accordance with the provisions of the Act and the form. At any rate, section 9 is clear that the bill of sale must be in accordance with the form in the schedule, and the name, address, and description of the attesting witness is part of the form. It is perfectly plain that the form in the schedule could not contain the name, address, or description of the particular attesting witness, but in any bill of sale these directions in the schedule are to be complied with, and those things which are added become part of the statutory form of the bill of sale. If they are not complied with, it is impossible to say that a bill of sale is made in accordance with the statutory form when it is not executed and attested in the mode prescribed. I quite agree with Cotton, L.J., that this is not altogether a technical matter, but may well be regarded as a matter of substance. The second case is certainly a harder one, but the same reasoning covers both cases.

Appeals dismissed.

Solicitors for the appellant in the first appeal, *Morse, Hewitt, & Forman.*

Solicitor for the respondent in the first appeal, *Geo. Whale.*

Solicitors for the appellant in the second appeal, *Allen & Sons.*

Solicitors for the respondent in the second appeal, *Hervey, Smith, & Co.*

From Prob. Div. and Adm. Div. Jan. 17.

BUTLER *v.* BUTLER.

BUTLER *v.* BUTLER AND BURNHAM (THE QUEEN'S PROCTOR *intervening*). (*a.*)

Divorce—Cross-petitions — Collusion — Suppression of material facts—Discharge of decree nisi—*Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 30, 31—*Matrimonial Causes Act,* 1860 (23 *&* 24 *Vict. c.* 144), *s.* 7.

An agreement between the parties to a divorce suit to withhold from the court knowledge of material facts tending to support a counter-charge of adultery amounts to collusion within the meaning of section 30 *of the Matrimonial Causes Act,* 1857, *and section* 7 *of the Matrimonial Causes Act,* 1860, *even though the facts suppressed prove insufficient in the event to establish the counter-charge. Consequently, a party petitioning for dissolution of marriage is, by virtue of those sections, deprived of the right to a decree, where such an agreement has been entered into by such party and has been acted upon, though the suppressed facts in the event come to the knowledge of the court and prove insufficient to establish a matrimonial offence against such petitioning party.*

A wife presented a petition for dissolution of marriage against her husband for cruelty, and adultery with four named persons, and the husband presented a counter-petition against the wife for adultery with a named person. After the trial had begun, it was agreed between them that the charge against the wife, and the charges of adultery against the husband with three of the four persons named, should be dropped, but that his adultery with the fourth should be proved, together with the charge of cruelty, so as to allow the wife to get a decree. The husband acted on the agreement, and, though the wife's counsel refused to do so, the jury found the wife not guilty of the adultery charged against her, and the husband not guilty of adultery with the three named persons, but guilty with the fourth, and guilty of cruelty. The judge granted a decree nisi, *but referred the case to the Queen's Proctor, who accordingly intervened. At the second trial the jury found that there had been collusion, and that material facts had been withheld from the knowledge of the court, but, on the question whether the wife had committed adultery, they disagreed and brought in no finding. Upon those findings* Butt, J., *discharged the decree* nisi.

Held by the Court of Appeal, *that the decree nisi was rightly discharged, notwithstanding that the facts withheld had, when disclosed, proved insufficient to establish the wife's adultery.*

Hunt *v.* Hunt, 47 *L. J. P. D. & A.* 22, 26 *W. R. Dig.* 79, *approved.*

Alexandre *v.* Alexandre, 18 *W. R.* 1087, *L. R.* 2 *P. & D.* 164, *doubted.*

Appeal from Butt, J.

The question in this case turned upon the construction of sections 30 and 31 of the Matrimonial Causes Act, 1857, and section 7 of the Act of 1860.

Section 30 of the Act of 1857, provides that "in case the court on the evidence in relation to any . . . petition" for dissolution of marriage, shall find "that the petition is presented or prosecuted in collusion with either of the respondents, then . . . the court shall dismiss the said petition."

Section 31 provides that "in case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find . . . that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved . . . " &c.

Section 7 of the Matrimonial Causes Act, 1860, enacts as follows:—"Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall . . . direct; and during that period any person shall be at liberty . . . to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and, on cause being so shown, the court shall deal with the cause by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the case or before the decree is made absolute, any person may give information to her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and, if . . . the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may . . . intervene in the suit, alleging such case of collusion . . . " &c.

It appeared that Mrs. Emma Butler, the wife of Robert Butler, had, on the 26th of November, 1887, presented a petition for dissolution of the marriage on the ground of her husband's adultery and cruelty. In the petition she stated that there had been "issue of the marriage one child, to wit, Vernon Butler, now deceased."

On the 23rd of February, 1888, the husband, with his answer denying the charges against him, filed a cross-petition for dissolution of the marriage on the ground of his wife's adultery with Walter James Burnham at Nottingham on the 9th of May, 1884, resulting in the birth, on the 7th of January, 1885, of a female child.

The wife by her answer denied the adultery, and alleged that her husband was the father of the child, and she made further charges of adultery against

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

him, so that at the trial he stood charged with adultery with four women. The two petitions, having been consolidated, came on for hearing before Butt, J., and a jury, on the 23rd of June, 1889. It appeared from Mrs. Butler's evidence that she and her husband had separated under a deed of separation on the 24th of November, 1882, but that her husband had visited her subsequently, and she asserted that he was the father of the child born in January, 1885. She gave as a reason for suppressing the birth of a second child of the marriage her fear that her husband would take the child away from her, and she admitted having, from the same motive, registered it in the names of Walter James Burnham and Emma Burnham as father and mother. She said she did this without Burnham's knowledge or consent at the time, his name having occurred to her while waiting at the registry office, and that she chose it because she wished the surname as registered to begin with a B. The child's Christian name was Mabel Winifred.

The trial commenced on a Saturday, and the first day's hearing ended before the conclusion of Mrs. Butler's examination. On the Sunday the solicitors of the parties met, and in the result the following agreement was signed:—"*Butler* v. *Butler*, *Butler* v. *Butler and Burnham*.—Petitioner to give evidence of cruelty to satisfaction of court, and of respondent's adultery with Miss W., and if court satisfied on that evidence, decree for dissolution to go. Petitioner accepts her husband's denial as to adultery with Mrs. J., and withdraws such charge, and, being satisfied that the witnesses who depose to adultery with Smith and Simpson are mistaken as to identity, withdraws such charges. The husband's petition to be withdrawn. As to alimony, no application for same to be made, but the husband, in lieu thereof, to pay a lump sum of £150 to his wife. The deed of separation to be cancelled. The wife to maintain the child Mabel Winifred. The husband to pay the costs of the suit."

When this arrangement was communicated to the wife's counsel, he, considering the agreement an improper one, declined to act upon it, and proceeded as if it had not been made, but the husband's counsel, acting on the instructions of their client, refrained from cross-examining Mrs. Butler, and confined themselves to defending their client from the charge of adultery with Mrs. J. The jury found the husband guilty of cruelty, and of adultery with Miss W., and not guilty of adultery with the three other co-respondents, and found Mrs. Butler not guilty of adultery with Burnham.

Butt, J., granted a decree *nisi*, but referred the papers to the Queen's Proctor, who, after making inquiries, intervened, on the ground that, at the trial, material facts had been withheld from the knowledge of the court, and that the decree had been obtained by collusion between the husband and wife, and he pleaded that on divers occasions the petitioner, Emma Butler, had herself committed adultery. He accordingly prayed that the decree *nisi* might be rescinded and the wife's petition dismissed. Both husband and wife having filed answers to the Queen's Proctor's plea, the case was retried before Butt, J., and a jury. The judge left three issues to the jury:—(1) Were material facts withheld from the knowledge of the court? (2) Was there collusion? (3) Did Mrs. Butler commit adultery with Burnham? The jury answered the first and second questions in the affirmative, but said they were unable to agree as to the third.

Upon those findings Butt, J., discharged the decree *nisi*.

Mrs. Butler appealed.

Buszard, Q.C., and *Priestley* (*Bargrave Deane* with them), for the appellant.—In order to deprive the wife of her right to a decree absolute she must have been found guilty of a matrimonial offence. [*Jacques* referred to *Hunt* v. *Hunt*, 47 L. J. P. D. & A. 22, 26 W. R. Dig. 79.] Persons knowing their own innocence, but aware that there have been circumstances of suspicion against them at some previous period of their lives, are surely not bound to bring those circumstances before the court. When the suppressed facts, on being disclosed, do not establish a matrimonial offence, the 7th section of the Matrimonial Causes Amendment Act, 1860, does not empower the court to withhold a decree of dissolution of marriage on the ground of suppression of material facts by the petitioner: *Alexandre* v. *Alexandre*, 18 W. R. 1087, L. R. 2 P. & D. 164. "Collusion" is defined in *Crewe* v. *Crewe*, 3 Hagg. Eccl. Rep. 123, at p. 130. "Collusion, as applied to this subject, is an agreement between the parties for one to commit or appear to commit a fact of adultery in order that the other may obtain a remedy at law as for a real injury." The findings are inconsistent with each other, as the only fact that could be material would be the adultery of the wife. Moreover, even if the agreement was collusive, it was not acted on—the facts all came out at the trial. [COTTON, L.J., referred to *Barnes* v. *Barnes*, 16 W. R. 281, L. R. 1 P. & D. 505.]

Lockwood, Q.C., and *Jacques*, for the Queen's Proctor, were not called upon.

COTTON, L.J.—This is an appeal from a judgment of Butt, J., who, upon the Queen's Proctor intervening, and upon the findings at which the jury arrived, refused to make a decree absolute, and discharged the decree *nisi*. I will not enter into the question what Butt, J., ought to have done when this agreement was brought before him, though I have some doubt as to whether he ought to have gone on with the case or ought to have made any decree *nisi* after that fact was discovered. He proceeded, however, to communicate with, and send the papers to, the Queen's Proctor, who intervened, and then there was a trial before a jury, who came to a conclusion to which I will refer presently. The ground of the Queen's Proctor's intervention was a strong suspicion in the circumstances brought before him that the decree was obtained by collusion and suppression of material facts. The petition of the wife charged her husband with cruelty and adultery with four named persons; then there was a counter-petition by the husband charging the wife with adultery with a particular person. After the case had gone on for one day, Saturday, and had been adjourned, on the Sunday, the solicitors acting for the wife and husband met together, and they came to an agreement, which has been read to us. The agreement was this—that the charge of adultery against the husband with the particular named persons should not be proceeded with, that the wife shall bring forward such evidence as would satisfy the court of his adultery with another named person, and then the husband shall not press the charge he made against his wife. It is very true that Mr. Buszard, when it was brought before him on the Monday, saw the vice of the agreement, and refused to act upon it, and conducted the case as if no such agreement had been come to. But the husband did, in fact, act upon it, and did not support the charge he had made against his wife, and did not in any way cross-examine her. The jury have found this—and it is not a finding which is altogether satisfactory—that there was collusion between the husband and wife:—that, "as between Emma Butler, the petitioner, and Robert Butler, the respondent, in the first-named suit, they were guilty of collusion together to withhold from the court material facts." Then the jury do not say that the wife had not been guilty of adultery, but do not come to a conclusion whether she had been or not, and

as to that issue there was no verdict at all. Then the question is, was that finding at which they arrived sufficient to justify the conclusion at which the learned judge has arrived, and upon which he acted? I think it was. Under section 7 the decree was first of all to be a decree *nisi*; then there was to be a certain time before it could be made absolute, and during that period the Queen's Proctor, and, in certain cases, other persons, could apply to prevent the decree *nisi* being made absolute.

What is said in the section is this:—"During that period any person"—that is, any person intervening—"shall be at liberty to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court." I need not read what follows, but that was to be done by any person, and the section goes on to provide that power should be given to the Queen's Proctor to bring the matter before the court; and then certain directions are given as to what shall be done by the court for the purpose of ascertaining whether those charges, brought to prevent the decree *nisi* being made absolute, can be supported or not. It is argued that the court has no right to withhold an absolute decree from the petitioner unless she has been found guilty of a matrimonial offence. But I do not at all understand that. It cannot be said that she can obtain a decree *nisi*, followed by a decree absolute if, under the original Act, of which this is a mere amendment in certain details, she could not obtain a decree *nisi* in the original suit. Sections 30 and 31, to my mind, conclude the question, in the sense that she is liable to be deprived of the decree, not simply and solely if she is guilty of a matrimonial offence, but that, by virtue of those sections, the court is prevented from making a decree in her favour if it has been found that the petition is presented or prosecuted in collusion with either of the respondents—the words are, "then, and in any of the said cases, the court shall dismiss the said petition." That is, independently of whether the court arrives at the conclusion that the petitioner has been guilty of a matrimonial offence or not, the Act of Parliament is to prevent the court from making a decree.

In my opinion it is very important that any case brought before the court shall be conducted in a proper manner, that judgment shall be obtained fairly, and that the court shall not give judgment where it finds, not merely that the facts suppressed might lead to the conclusion that a matrimonial offence has been committed, but that the parties, by an agreement between them, have so conducted the case as that all material facts are not brought before the court. And that is what is meant by collusion. I do not suppose it would be argued that if there was collusion it was not "prosecuted" as collusion. It is not necessary that it shall be "prosecuted" as collusion, but the words are "presented or prosecuted." It is said there is no collusion here. Why? Because the facts ultimately brought before the court did not lead to the conclusion that the wife had committed a matrimonial offence. Perhaps not—the state of things being such as it was, the jury differed. But to my mind, in such a state of things the question is not whether it appears that the wife is guilty of a matrimonial offence, but whether the parties have agreed together not to put before the court material facts relevant to the issue tried (not facts material in this sense, that they prove anything conclusively one way or the other upon the issue which has to be tried, but material in the sense that all facts are material if they are substantial facts which will tend to assist the court in arriving at a conclusion whether the charge made was right or wrong).

Here the husband agreed with his wife that he would not support his charge against her, that he would not cross-examine her, and that he would withdraw his counter-charge. In my opinion, that was a suppression of material facts and collusion. It is said that *Alexandre* v. *Alexandre* is inconsistent with that view. We are not bound by *Alexandre* v. *Alexandre*, and if it does really make any such rule as that contended for, I must express my opinion, with every respect for the judge who decided that case, that it is wrong, because I think there is collusion (independently of the question as to whether it is proved ultimately that one of the parties has in fact been guilty of the act complained of), where the parties have agreed together not to bring before the court facts which are relevant to the case, and which, if brought before the court, will enable it to decide one way or the other. And in this case one can see that these facts were never submitted to the first jury, or put before them in such a way as they ought to have been, by the husband prosecuting his charge. They were before them in a certain way, and as a result they came to the conclusion they did. But I think it would be wrong to assume, after what had taken place, that they would even have doubted as the second jury did. We cannot possibly surmise what the jury in the first case would have done, because in our opinion the proper facts were not brought before them, and, therefore, whether the petitioner ought or ought not to have been found guilty of the charge against her, there was collusion between the husband and wife as to the prosecution of the petition. In my opinion, the judgment of Butt, J., was right, and the appeal fails.

LINDLEY, L.J.—If we were to accede to this appeal, it appears to me we should be doing that which would be a perfect scandal. The facts are very short. Mr. and Mrs. Butler were married some time before 1882; in 1882 they separated. In 1885 she had a child, alleged to be illegitimate, and registered under the name of its supposed father, not her husband. Afterwards, in 1887, she sought in the Divorce Division for a dissolution of her marriage, on the grounds of her husband's cruelty and adultery. He presented a cross-petition against her, alleging adultery with the person to whom I have alluded. In the course of the trial, during an adjournment, the solicitors for both sides meet; they sign an agreement to the effect that she shall prove just enough to get a divorce, and that he shall not object. When this letter is handed to the counsel for the wife, he sees the difficulty, and he takes the bold course of going on just as if that had not been written. The husband, however, does nothing of the kind, he acts upon the letter, and he does not oppose the divorce in any serious way. He does not adduce any witness in support of his counter allegation, which he still believes to be true. It is not that he withdraws the opposition on the ground that he has made a mistake—no such thing—but in pursuance of this arrangement he ceases to oppose his wife's petition, and under those circumstances a decree *nisi* is obtained. There is withholding of material facts beyond all doubt or question. It is perfectly idle and absurd to suppose that the facts which we have to deal with, and which were withheld by the husband from the jury, were not material for the consideration of the jury who had to try the case. What view they would have taken of them I do not know. But the materiality does not depend upon that; it depends upon whether they might have taken a hostile view upon those materials; and if they might have done so, then these facts were material.

Under those circumstances the decree *nisi* is got. In consideration of this letter the learned judge sends the case to the Queen's Proctor, who intervenes and alleges that the decree *nisi* has been obtained by collusion. That is the issue for the jury, who find this: (1) That divers material facts were withheld from the consideration of the court when the decree *nisi* was obtained;

(2) That the wife and husband on that occasion had been guilty of collusion together to withhold from the court material facts; but (3) they cannot agree whether the wife was guilty of adultery or not. What their difficulty was, I do not know—and now it is said that as they could not agree as to that, their finding of what took place on the earlier occasion—that there was collusion and a suppression of material facts—cannot be used to prevent the wife from having her decree made absolute.

I say that in my opinion it would be a perfect scandal if we were to allow that contention to succeed. A more scandalous case of attempted imposition upon the part of the parties—I do not say by counsel, because they threw them over—I cannot conceive. The appeal must be dismissed with costs.

Lopes, L.J.—The facts have been gone into on the matter of collusion. In my opinion the agreement of the parties to a divorce suit to withhold from the court pertinent and material facts, which might have been adduced on the trial in evidence in support of a counter-charge by the respondent or co-respondents, amounts to collusion, even though the suppressed facts might not have been sufficient to establish the counter-charge. I believe that to be the correct definition of collusion as applicable to the circumstances of a case like this, and I believe also that that definition is strictly in accordance with the decision in *Hunt* v. *Hunt*. Whether it is entirely in accord with that in *Alexandre* v. *Alexandre* I do not express an opinion. But in point of fact I agree with what was said by my learned brother with regard to *Alexandre* v. *Alexandre*. If it is intended to mean that which is suggested, I doubt very much if it is correct. Applying the definition which I have just given to the present case, let us see how it stands. In this case there was a counter-charge of adultery made against the petitioner by the husband, the respondent, and issue was joined thereon. The husband and wife during the pendency of the trial (the trial, I believe, beginning on a Saturday, and this agreement taking place on the Sunday) agreed to do—what? They agreed to withdraw from the jury the consideration of this issue of whether or not the wife had committed adultery. If the wife had committed adultery it must be remembered that she (the petitioner) would have been disentitled to the relief for which she prayed. To my mind it is impossible to say that those circumstances do not bring this case within the definition that I have given. And this should also be observed—not only was that agreement come to (and I think that would have been sufficient), but that agreement was acted upon, because at the trial Mrs. Butler, the petitioner, was not cross-examined with regard to this alleged adultery having been committed by her, nor did the husband (no doubt in accordance with his agreement) give any substantive evidence, or any evidence in chief, or of any kind, to that effect.

Now what is the object of this special provision with regard to collusion? I think that its object is certainly to compel the parties to come into the court of divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the court; to prevent their blinding the eyes of the court in any respect; to do that which will enable the court to be in a position to do justice between the parties. At the trial, when the Queen's Proctor intervened, the learned judge left several questions to the jury—there were two questions, I think, relating to the collusion, and the jury found both those questions in favour of the Queen's Proctor. But the learned judge left another question to the jury, and that was whether the petitioner, Emma Butler, had on divers occasions committed adultery. With all respect to the learned judge, I think that was an immaterial fact, and I think that he was wrong in leaving that question to them. The question of collusion was an independent issue, and it was an issue which, found one way or the other, was sufficient to enable the judge either to rescind the decree *nisi* or make it absolute. I think, therefore, that this appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors, *Clinton & Buckby; The Queen's Proctor.*

High Court of Justice.

Chan. Div. } Kay, J. } Feb. 19; March 5.

Bristol, Cardiff, and Swansea Aerated Bread Co. (Limited) v. Maggs. (a.)

Vendor and purchaser—Specific performance—Contract—Letters—Offer and acceptance—Subsequent correspondence—Withdrawal of offer—Statute of Frauds—Goodwill.

The defendant wrote a letter to the plaintiff offering to sell him a lease and goodwill at a certain price, the offer to remain open for ten days; and the plaintiff, in reply, accepted the offer. The solicitors of the parties prepared a memorandum of agreement, containing additional formal terms, and the plaintiff wished also to insert a clause restraining the defendant from carrying on business within five miles. After further negotiations about this clause, the defendant, before the expiration of the ten days, declined to proceed further in the sale. The plaintiff claimed specific performance of the contract contained in the two letters, without regard to the subsequent communications.

Held, that the clause in question was a substantial, not a formal, addition; that the question whether the two letters were evidence of a complete contract was independent of the Statute of Frauds; that the whole of the correspondence must be considered, and that that showed that the plaintiff himself thought that the contract was not concluded; that the circumstances that the withdrawal of the offer was within the ten days, and that the negotiations were partly by the principals and partly by the solicitors, made no difference; and that specific performance must be refused.

Hussey *v.* Horne-Payne, 27 *W. R.* 585, 4 *App. Cas.* 311, *followed.*

Observations upon Bolton Partners *v.* Lambert, 37 *W. R.* 434, 41 *Ch. D.* 295.

Trial of action.

This was an action for specific performance, and the question was whether two letters between the parties ought to be taken as evidence of a completed contract or whether subsequent communications ought to be taken into consideration as showing that no contract was actually concluded.

The facts were stated by Kay, J., as follows:—

This action seeks specific performance of a contract alleged to be constituted by the following letters:—

"Cardiff, May 29, 1889. Dear Sir,—I beg to submit to you the following conditions for disposal of my business, carried on at 15, Duke-street, Cardiff. Lease and goodwill, £450 (lease from 29th of September, 1888, for 14 years). All fixtures, fittings, utensils, &c., stock-in-trade connected with the premises to be taken at valuation. Yours truly, R. Maggs. This offer to hold good for ten days." "Cardiff, June 1, 1889. Dear Sir,—On behalf of the Bristol, Cardiff, and Swansea Aerated

(a.) Reported by H. C. Rofer, Esq., Barrister-at-Law.

Bread Co. (Limited), I accept your offer for shop and lease, &c., 15, Duke-street, Cardiff. Yours truly, JOHN GUTHRIE (for B., C., and S. Aerated Bread Co.). Mr. R. Maggs, 15, Duke-street, Cardiff."

Colonel Guthrie, the writer of the last letter, was a director of the plaintiff company, and wrote with the authority of the board. On the 2nd of June, 1889, the defendant's solicitor sent to him a formal memorandum of agreement for approval, with an accompanying letter. This memorandum was altered by the plaintiffs' solicitors, mainly by the insertion of a clause preventing the vendor for five years from carrying on a like business within the borough of Cardiff or within a distance of five miles from the town-hall. The memorandum so altered was returned on the 4th of June, with a letter of the plaintiffs' solicitors. On the 5th of June the defendant's solicitor wrote sending the draft again to the plaintiffs' solicitors, with a modification of the proposed additional clause. On the 6th of June the plaintiff's solicitors wrote that they could not themselves agree to the proposed modification, but that they had asked Colonel Guthrie to call about it.

On the 7th the defendant's solicitor wrote that he regretted the plaintiffs' solicitors had not agreed to the terms of the draft contract, and continued:—"Colonel Guthrie has not been near me, and by my client's instructions I beg to inform you that he declines to proceed further in the matter." On the 8th Colonel Guthrie saw the defendant's solicitor and said he had come to settle the agreement which had been returned to him. The answer was that he was too late; the defendant had made other arrangements. He replied he was prepared to sign the agreement leaving out the disputed clause. The solicitor declined, and Colonel Guthrie went immediately to the defendant, who, he said, told him that he wished to have the agreement cancelled, because his son was very much against his parting with the shop. The defendant, he says, did not suggest that there was no agreement, but asked him to use his influence with his co-directors to get the sale cancelled.

The memorandum of agreement contained several terms not expressed in the letters; for example, it provided for the book debts and books of account being reserved to the vendor and for the payment of a deposit of £45; it fixed the 24th of June as the day for completion of the purchase and delivery of possession; it provided for delivery of abstract of title and the date from which it was to commence, and other matters, all which might possibly be treated as more or less formal

Levett, for the plaintiffs.—We ask for specific performance of the contract contained in the two letters without the additional terms. The solicitors had no authority to alter that contract, and they only inserted formal provisions. If they added a new substantial term that does not make the original contract void. We were prepared to make a fresh contract, but that did not upset the first one. After the two letters the only question was as to the form of the deed, and the court will enforce the first contract without regard to subsequent communications: *Bonnewell* v. *Jenkins*, 26 W. R. 294, 8 Ch. D. 70. [KAY, J.—I must look at the whole of the correspondence: *Hussey* v. *Horne-Payne*, 27 W. R. 585, 4 App. Cas. 311. The question is whether the parties themselves understood that there was a final contract.] That case has been explained in *Bolton Partners* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295. It was decided on the ground that the letters themselves showed that there was a doubt whether the contract was completed. The defendant ought to have given us time to withdraw the new terms.

Warrington, for the defendant.—The subsequent correspondence must be considered, and it shows that there was no concluded contract. *Hussey* v. *Horne-Payne* was decided on general grounds: *May* v. *Thomson*, 20 Ch. D. 705, 31 W. R. Dig. 187. [KAY, J., referred to *Preston* v. *Luck*, 33 W. R. 317, 27 Ch. D. 497.] We do not say that we misunderstood the contract, but that there was none, and the solicitors were settling questions of substance.

Levett replied.

March 5.—KAY, J., stated the facts as above, and continued.—The contested stipulation as to restricting the vendor from carrying on a like business to that which he had sold was not by any means a matter of form. After some conflict of opinion it has been decided by the Court of Appeal in *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, that a man who sells the goodwill of a business may not only set up a similar business next door and say that he is the person who carried on the old business, but that he may also solicit the customers of the old business to continue to deal with him, although by these proceedings he might not only destroy all benefit to the purchaser of the thing which he had bought, but might recover to himself the actual possession of it. Such a fraudulent proceeding, according to the decision, cannot be prevented by any court of law or equity. It follows that the stipulation which the company's solicitors introduced into the draft was one which they were not entitled to insert if the two letters which I have read were a complete contract. In other words, they were trying to obtain an additional and most important concession from the vendor.

Now, put aside for a moment the Statute of Frauds and decided cases, and suppose this to pass in conversation:—A. offers to B. his business, lease, and goodwill for £450. B. says: "I accept." A day or two afterwards B. asks A. to engage not to carry on a similar business within a distance of five miles. A. answers: "I cannot agree to that, but I will if you say three miles." B. takes time to consider, saying he will send an agent next day to settle the terms. The agent does not go the next day, and A. accordingly says to B.: "I put an end to the matter." No one could doubt that would be a continuous negotiation, and that B. could not say: "I will disregard all that followed the acceptance of the prior offer and insist on there being a complete contract by that acceptance." Well, then, still leaving out of sight the statute and authorities, suppose all this to take place by letters between A. and B. instead of conversation, it is obvious the result must be the same. Some of the letters being by the principals and some by the solicitors could not make any difference. Now what effect has the Statute of Frauds upon such a transaction? Certainly it was not intended to turn a negotiation into an agreement. There was danger of fraud and perjury if parol agreements as to land could be enforced. To obviate this it was enacted: "No action shall be brought whereby to charge . . . any person . . . upon any contract or sale of lands . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Lord Mansfield, in 1764, pointed out that it had often been said of this statute "that it should never be so turned, construed, or used as to protect or be a means of fraud" (*Carter* v. *Boehm*, 3 Burr. 1905). This has been repeated again and again since his time, and, very recently, in *Jervis* v. *Berridge*, 21 W. R. 395, L. R. 8 Ch. App. p. 360, and, in *Hussey* v. *Horne-Payne*, Lord Selborne said, in effect, that the Statute of Frauds was a weapon of defence, not offence. The real truth is that the statute was not meant to affect contracts in any way, but only the evidence of them. It does not provide that a memorandum duly signed shall be a contract, but only that no contract concerning land shall be proved by any lower evidence than such a written memorandum. The question whether the two letters

relied on in this case were a complete contract or were only steps in a negotiation is altogether independent of the Statute of Frauds.

Then I must consider the authorities on the subject. Is there anything in them which prevents my deciding this case according to what seems to me the common-sense view of the transaction? In *Hussey* v. *Horne-Payne* Lord Cairns, dealing with a case in which it was proposed to satisfy the requirement of the Statute of Frauds through the medium of letters which had passed between the parties, said this:—"It is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum, of the terms of the contract, in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say we will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond. In order, fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them." Lord Cairns then considered the two letters which in that case it was contended constituted the agreement, putting aside the words "subject to the title being approved by our solicitors" which occurred in the latter of them. He found that in the previous negotiation there had been a verbal suggestion by one of the parties, which was acquiesced in by the other, that the purchase-money should be paid by instalments. What those instalments were to be was to be thereafter settled. There was a subsequent negotiation about this, but before it was ended one of the parties died. The conclusion drawn by Lord Cairns from what the appellant himself told him was "that the two original letters, which, if you took them alone, without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement; that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms." And he finds the result to be "that there was in point of fact no completed agreement between the parties." His lordship then considers the words which he had put aside, and treats them as meaning only that the title must be investigated and approved in the usual way. Lord Selborne concurs both in the reasons and the conclusion of Lord Cairns, and adds that he cannot agree, "that because two letters were written by which the conditions required by the Statute of Frauds would have been satisfied if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a court of equity ought specifically to perform without regard to what preceded or what followed. The observation," he says, "has often been made that a contract established by letters may sometimes bind parties, who, when they wrote these letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract beyond and besides those expressed in the letters which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere," his lordship continues, "to what I said when sitting in the Court of Chancery in the case of *Jervis* v. *Berridge*, that the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties, and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement which were of great practical importance and were so regarded on both sides then remained unsettled, and were still the subject of negotiation between them."

I have examined that case carefully because it has been suggested that the judgment of Lord Cairns proceeds upon the circumstance that the two original letters contained terms which raised a doubt whether there was a concluded contract, and an observation to that effect of one of the judges of the Court of Appeal in *Bolton Partners* v. *Lambert* is relied on. I have read Lord Cairns' judgment more than once, and with deference I do not think that to be a just criticism. Both he and Lord Selborne seem to me to lay down broadly that where it is sought to make out a binding contract from correspondence the whole of it as well as the verbal communications at interviews should be regarded, and it is not right to stop at one letter of the correspondence which, with what preceded, might constitute a sufficient agreement within the Statute of Frauds, whereas, if the whole of the correspondence were considered, and particularly as Lord Selborne says, "the sequel" of the communications, it may clearly appear that those letters were in truth only part of an uncompleted negotiation.

As was said in *May* v. *Thomson* "the case of *Hussey* v. *Horne-Payne* shows that we must look at the whole correspondence from beginning to end. Of course, if we find a few letters which are perfectly plain in themselves which show an agreement, and the parties do not follow them up by further correspondence, we have a comparatively easy case. But where each letter is followed immediately by another which suggests something else as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter."

With that view of the decision of *Hussey* v. *Horne-Payne* I entirely agree, and, so understood, it is a valuable and important authority, pointing out and obviating the great danger which arose from the course of modern decisions upon contracts by correspondence—viz., that the Statute of Frauds, which was passed merely to alter the law as to evidence of a contract, might be used as a trap to catch unwary vendors and purchasers and bind them by a contract when the real intention was negotiation only.

The only difference between that case and the present, is that in that case there had been before the letters in question were written an understanding, not expressed in them, that the purchase-money was to be paid by instalments, the amount of which remained to be settled.

In this case there was no anterior understanding as to the restriction of the vendor's right to carry on a similar business to that sold. The negotiation as to that arose after the two letters relied on had passed. But it was begun by the solicitors of the plaintiffs, who are now seeking to rely on the two letters only. Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter by negotiating for another most important advantage; and having thus treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them to say, "Although we thus treated the matter as incomplete and a negotiation only, yet the defendant had no right to do so, but was bound by a completed contract." In my opinion the decision of *Hussey* v. *Horne-Payne* completely covers this case. I understand it to mean that if two letters standing alone

would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to show that the contract was not complete, and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule. Cases have been referred to in which a subsequent discussion as to the preparation of a formal contract, even where the letters mention that such a contract is contemplated, has been held not to prevent the letters from being themselves a binding contract. There are many such decisions, and the distinctions between some of them are remarkably fine—see *Crossley* v. *Maycock*, 22 W. R. 387, L. R. 18 Eq. 180. But they are all subject to the observation that the formal document contemplated is one which is to put into more correct form, a complete agreement, not to alter that agreement by adding a substantial term to it. I have already pointed out that the subsequent negotiation in this case was in no sense concerning a matter of form, but was a negotiation for an additional term, to which the plaintiffs had no right, according to existing decisions, at law or in equity. It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But this can make no difference. The offer was not a contract, and the term that it should remain open for ten days was therefore not binding. It has often been held that such an offer may, notwithstanding, be withdrawn within the ten days—*Routledge* v. *Grant*, 4 Bing. 653; *Cooke* v. *Oxley*, 3 T. R. 653; *Dickinson* v. *Dodds*, 24 W. R. 594, 2 Ch. D. 463. I decide this case against the plaintiffs upon the ground that although the two letters relied on would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the plaintiffs have themselves shown that the agreement was not complete by stipulating afterwards for an important additional term, which kept the whole matter of purchase and sale in a state of negotiation only, and that the defendant was therefore at liberty to put an end to the negotiations, as he did, by withdrawing his offer. The action must be dismissed, with costs.

Solicitors, *Prior, Church, & Adams*, for *Meade, King, & Bigg*, Bristol; *Field, Roscoe, & Co.*, for *G. F. Hill*, Cardiff.

Chan. Div. Kay, J. } Nov. 30; Dec. 2.

In re Bristol Athenæum. (*a*.)

Company — Literary society — Trading company — "Business"—Winding up — Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 199—*Literary and Scientific Institutions Act*, 1854 (17 *&* 18 *Vict. c.* 112), *ss.* 30, 33.

An unregistered association, not established for the purpose of gain, but for the promotion of literary and scientific purposes, cannot be wound up under section 199 *of the Companies Act*, 1862, *which is only applicable to trading associations.*

Such a literary or scientific association, though consisting of members who are shareholders, is not a joint-stock company within the proviso in section 30 *of the Literary and Scientific Institutions Act*, 1854, *and on its dissolution its property must be given to some kindred institution, to be determined in manner prescribed under section* 30 *of the Literary and Scientific Institutions Act*, 1854, *even although the rules of the association contain a provision that the property of the society on its dissolution is to be divided among its shareholders. Such a provision is contrary to the Act.*

Petition.

The Bristol Athenæum was a society established in 1844 for the purpose of promoting "moral and intellectual improvement and social recreation by means of libraries for circulation and reference, newspapers, and periodical publications, lectures, discussion, and classes for instruction and improvement in literature and the arts and sciences. The lectures to include theological and political science, but not party or local politics or controversial theology."

The society consisted of donors to the funds of £20 and upwards (who were to be life members), of shareholders, and of annual subscribers of various sums. The property of the society was to be vested in five trustees with power to sell or exchange such property for the benefit of the society at the request of the board of directors. The society was never incorporated or registered under any Act of Parliament, and no trust deed was ever executed.

Certain leasehold premises in Bristol were acquired by the society and were vested in trustees.

In 1884 the trustees mortgaged these leasehold premises by way of sub-demise to secure the payment of £1,750.

In March, 1888, certain new rules were adopted by the society, which were as follow:—

"The society shall not be dissolved unless a resolution be carried by a majority of at least two-thirds of the life members and shareholders present at a meeting especially convened for that purpose, and confirmed by at least as great a majority at a second special meeting held at an interval of not less than a month from the first. The property remaining after paying off all liabilities shall be divided among the shareholders *pro ratâ*" (rule 15).

"This society shall not make any dividend, gift, division, or bonus in money unto or between any of its members" (rule 18).

In August, 1888, the mortgagee sold the premises, and after satisfaction of the mortgage there remained a balance of £800 which was paid to the solicitors of the surviving trustees in whom the premises subject to the mortgage were vested.

On the 22nd of August, 1888, a general meeting of the life members and shareholders was held, at which it was resolved that the society should be dissolved, and at another meeting held on the 1st of October this resolution was confirmed.

In November, 1888, the library books, furniture, fittings, and other effects of the society were sold, and the proceeds, amounting to £150, were paid to the treasurer of the society. The said sums of £800 and £150 represented the whole available assets, and the directors had paid thereout all the ascertainable debts and liabilities of the society. Advertisements for creditors and claimants had been issued, and the time limited by such advertisements had long since expired.

This petition for winding up the society was now presented under the Companies Acts, 1862 and 1867, by shareholders and a life member, who stated in the petition that it was not known who the present shareholders were, by reason of many of them having died or gone to reside away from Bristol, or having transferred their shares to persons who had not registered the transfers; that there remained a considerable surplus for distribution, but that, having regard to the difficulty in determining whether the shareholders of the society were entitled to the surplus, and, if so, how it ought to be distributed, it was just and equitable that the society should be wound up by the court.

Edward Ford, for the petition.—This society may be wound up under the 199th section of the Companies

(*a*.) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

Act, 1862, which applies to unregistered companies. The society is not a trading association, but an extended meaning may be given to the term "place of business" in that section. *Re Dutton*, 27 W. R. 398, 4 Ex. D. 54, is distinguishable. The society is not within the Literary and Scientific Institutions Act, 1854, because of the proviso in section 30, "this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company."

A. G. Ford, for the society.

Kay, J.—I think that this is not a society which comes within the description "an institution in the nature of a joint-stock company." It is not a trading association at all. Section 199 of the Companies Act, 1862, provides that any partnership, association, or company, except railway companies, consisting of more than seven members, and not registered under the Act, and thereinafter included under the term "unregistered," may be wound up. Now of course this society is not registered. But if it comes within any section it is not section 199, because the first sub-section of that section provides that an unregistered company shall, for the purpose "of determining the court having jurisdiction in the matter of winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate," therefore, the "partnership, association, or company," which may be wound up under section 199 must be one of those thereinafter included under the term "unregistered company," and an unregistered company under the section must be wound up at its place of business, and "business" must ordinarily be trading under the Act. But in the first place this does not seem to me to be a joint-stock company, because it is constituted by rules which do not permit of any dividend, division, or bonus among its members. The funds which are provided by the rules are to be subscribed by life members, subscribers, and shareholders. The objects of the society are entirely within the 33rd section of the Literary and Scientific Institutions Act, 1854, to which I have been referred. Therefore, undoubtedly it is an institution within that Act of Parliament. Now that Act provides that when such an institution—speaking generally, a literary institution, to call it by that name for this purpose—is dissolved, which this has been by both classes of members, its property shall be given to some other institution, to be determined either by the members or by the county court—some other like institution.

No doubt these rules contain a provision that when the society is dissolved its property shall be divided, not among those who contributed, but among the shareholders only. That is distinctly contrary to the Act. No rules can obviate or get rid of the effect of a public Act of Parliament. It seems to me that this Act applies, and that this institution does not come within the exception in section 30 which excepts joint-stock companies. This institution, for the reason I have given, seems to me not to be a joint-stock company, and, therefore, I think that the proper view to take is that the shareholders cannot divide the property of the company, as to which, indeed, there seems to be a difficulty, because it has not been ascertained who they are and where they all are. The institution to which the property must be given must be determined by the court. This, however, cannot be done until all the liabilities are discharged. It is suggested that there may be a liability under covenants in the leases to which the institution is subject. The court will, of course, see that proper provision is made to indemnify the members. I am glad to come to this conclusion, because if I were to make a winding-up order a great part of the funds would be dissipated in costs, whereas now, by a simple application, the fund may be saved for the benefit of some other useful institution of the same class and character. I am of opinion that the institution comes within the first part of the 30th section of the Literary and Scientific Institutions Act, 1854, and is not affected by the proviso in that section. I therefore make no order, except that the costs of the petitioners and of the association are to be paid out of the assets of the institution.

Solicitors, *J. J. Harlow*, for *J. B. King*, Bristol; *Robinson, Preston, & Stow*, for *Jacques, Pease, & Jacques*, Bristol.

Chan. Div. Kekewich, J. } Nov. 21—23.

In re Metcalfe.

Metcalfe *v.* Metcalfe. (*a.*)

Will—Construction—Forfeiture—Alienation—Repugnancy—Annulment of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35 (2).

A testator by his will gave his personalty absolutely to, amongst others, his children. He devised his real and leasehold estate and his residuary estate, as to one-third to his wife for life, and as to two-thirds to his children for life equally, with remainder, after the death of his wife, to his children equally.

The will contained a forfeiture clause, whereby if, by any act or operation of law, the share given to his wife or any child should be aliened, charged, or disposed of, the share or shares so aliened, charged, or disposed of should vest in the other beneficiaries. At the date of the testator's death one of his daughters, who, under the will, had been given an absolute interest, an immediate life interest, and a contingent life interest, was a bankrupt. The bankruptcy was annulled some years afterwards, sufficient funds having come to the trustee's hands to pay all the creditors in full. The contingent gift still remained contingent at the date of the annulment.

Held, that, as to the absolute gifts, whether in possession or remainder, at the testator's death, the forfeiture clause was repugnant and void; that, as to the contingent life interest, the forfeiture clause did not operate, since the moment for determining whether the clause applied was when payment and receipt became possible; but

Held, also, that, as to the immediate life interest, the clause of forfeiture did operate, notwithstanding the provisions as to the consequences of annulment contained in section 81 *of the Bankruptcy Act,* 1869 (*the Act applicable to this particular case*), *the language of which, for the present purpose, is the same as section* 35, *sub-section* (2), *of the Bankruptcy Act,* 1883.

Trial of action.

This was an action brought by Georgina Metcalfe, one of the daughters of a testator, Thomas Metcalfe, against the widow, who was an executrix, and the other children of the testator for administration of the testator's estate, and payment to her of a share of the testator's property.

The question raised was as to the operation of a forfeiture clause in the testator's will, dated the 10th of May, 1864, by which he bequeathed certain personalty to his wife, and directed his executrix and executor to convert all debts, shares, and securities for money, and all moneys at his dwelling-house, or at his bank, or in the funds, and bequeathed one-third part thereof to his wife, and the remaining two-thirds equally between his children living at his decease, and attaining twenty-one or marrying, as tenants in common. The tes-

(*a.*) Reported by J. W. Greig, Esq., Barrister-at-Law.

tator also demised and bequeathed to his executrix and executor certain real and leasehold estates, and also all his residuary estate upon trust, to permit his wife to receive one-third of the rents and profits thereof for her life or during widowhood, to pay the remaining two-thirds to his children living at his decease for their respective lives and the lives and life of the survivors or survivor, such payments to commence at twenty-one or marriage. The testator also declared that on the death or second marriage of his wife the said children should share equally the clear rents and profits during their lives and the lives of the survivors or survivor, and on the death of any of the children the share of such child was to go over to the shares of the survivors or survivor. Towards the end of the will there was a proviso as follows:—"Provided also that if by any act or default or by operation of law the part or share, parts or shares, or the whole of the said rents and profits, or any other sums of money or interests limited or bequeathed by this my will in trust for my said wife and children or child, grandchildren or grandchild, or either of them, shall be aliened, charged, or disposed of, either in part or as to the whole of the said several and respective shares and interests, whereby the same respectively would, but for this provision, vest in or become payable to some other person or persons, otherwise than my said wife, children or child, grandchildren or grandchild, or either of them, then my said trustees or trustee shall, upon such act or default, or upon such operation of law as aforesaid, pay or apply the share or shares, interest, or interests so aliened, charged, or disposed of, or attempted so to be dealt with as and in manner aforesaid, to and among the others or other of the person or the persons who would have been entitled to the same by survivorship in remainder or otherwise under the aforesaid trusts as in the case of the death or deaths of the person or persons so alienating, charging, or disposing of his, her, or their respective shares and interests, or attempting the same as and in manner aforesaid."

The testator died on the 7th of February, 1884, leaving five children who had attained the age of twenty-one. The plaintiff, Georgina Metcalfe, had been adjudicated a bankrupt on the 16th of March, 1882. On the 17th of January, 1885, the plaintiff became entitled, upon the death of her brother, to a share under another will, and in February, 1887, this interest was sold by her trustee in bankrupty for £425. The creditors were all paid in full, and there was a small balance. On the 10th of June, 1887, the plaintiff's bankruptcy was annulled; but the bankruptcy having occurred before the passing of the Bankruptcy Act, 1883, the effect of the annulment was governed by section 81 of the Bankruptcy Act, 1869, which section, however, for the present purpose, is the same as section 35, subsection (2), of the Act of 1883. The question argued was as to the effect of the forfeiture clause upon the absolute gifts in the will, both in possession and remainder, and also upon the life interests, both present and contingent. No part of the testator's residuary estate had fallen into possession since the annulment of the plaintiff's bankruptcy.

Warmington, Q.C., and *G. R. Napier*, for the plaintiff.—This forfeiture clause is certainly bad as to everything beyond an immediate life interest. First, as regards absolute interests, when once you find them given, anything that cuts them down or defeats them is void for repugnancy: Coke upon Lyttleton, 223 A.; *Bradley* v. *Peixoto*, 3 Ves. jun. 324; *Holmes* v. *Godson*, 4 W. R. 415, 8 De. G. M. & G. 152; *In re Rosher*, *Rosher* v. *Rosher*, 32 W. R. 821, 26 Ch. D. 801; *In re Dugdale*, *Dugdale* v. *Dugdale*, 36 W. R. 462, 38 Ch. D. 176. The question is one of the construction of the will, as to what was the interest given. The effect of the annulment of the bankruptcy of the plaintiff was to restore the plaintiff to her former position, and operated as a sort of statutory reverter. There is no devolution of title from the trustee to the bankrupt: Bankruptcy Act, 1869, s. 81; *Bailey* v. *Johnson*, L. R. 7 Ex. 263. The bankruptcy was unduly prolonged by the trustee, as, within a year of the testator's death, the plaintiff's estate was really solvent, owing to the fact of assets having come in from another source. The gift over is only to take effect if the primary object of the testator is likely to be defeated; but the bankruptcy is now annulled, so that this forfeiture clause has no application to either absolute or life interests: *White* v. *Chitty*, 14 W. R. 366, L. R. 1 Eq. 372; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722, 15 W. R. Ch. Dig. 42; *Ancona* v. *Waddell*, 27 W. R. 186, 10 Ch. D. 157; *Robertson* v. *Richardson*, 33 W. R. 897, 30 Ch. D. 623. These were cases of life interests, but the question as to the effect of the annulment of the bankruptcy is the same whether it is a fee simple or a life interest. Secondly, as to the contingent life interests, they have not become vested, and, therefore, in no case does the clause apply. The annulment of the bankruptcy took place before any right to receive anything under these bequests occurred: *In re Parnham's Trust*, 46 L. J. (Ch.) 80, 25 W. L. Dig. 326; *Samuel* v. *Samuel*, 12 Ch. D. 152, 28 W. R. Dig. 250.

Neville, Q.C., and *Gaselee*, for the defendants.—The forfeiture clause operated upon all the various interests. Upon the first main point as to the clause being repugnant it is the same for this purpose whether a life interest or an interest in fee is given. In no way can you give either an absolute interest or a life interest, and couple it with a condition which is inconsistent with the legal rights which pass by such a gift, but you can, by means of a forfeiture clause limit the enjoyment of a life estate: *Brandon* v. *Robinson*, 18 Ves. 429. The only case of an absolute interest in substance being given is *Samuel* v. *Samuel*, and in the present case it is the same. [KEKEWICH, J.—I do not read it as an absolute gift in *Samuel* v. *Samuel*. Is there any case of an absolute gift in form being given and then being cut down by a condition?] No, I cannot find one, but there is a material statement on this point in the case of *In re Stringer's Estate*, 25 W. R. 815, 6 Ch. D. 1, where James, L.J., says, that when once property was vested *de facto* in a man it could not be taken from him by an expression of wish of the testator, but that "did not apply to a case where the original gift never did take effect at all, because then there is no repugnance." This absolute interest was never vested *de facto* in the plaintiff, if it had been the forfeiture clause would be void. The time at which to consider whether the forfeiture clause applies is the time for distribution. If the legatee is in a position to receive his legacy he must have it, if it is to be received by somebody else then he is excluded from it. No violence is done to the testator's language by such a construction. As to the annulment of the bankruptcy. The time before which the annulment should have taken place, in order to exclude the operation of the forfeiture clause, is the date of the death of the testator. Between February, 1884, and February, 1887, the interest of the plaintiff was payable to the trustee in bankrupty if the forfeiture clause did not apply. The time when the operation of the clause is to take place is to be determined once for all: the forfeiture clause is not to be read distributively, but applies to every interest taken under the will: *Dorsett* v. *Dorsett*, 10 W. R. 98, 30 Beav. 256. The forfeiture having taken place, the gift over comes in, and no subsequent event can alter it.

They also cited *Markwick* v. *Hardingham*, 29 W. R. 361, 15 Ch. D. 339.

Warmington, Q.C., in reply.—The forfeiture clause cannot be read as limited to the period of distribution, it must be read distributively and applied to the particular interests according as circumstances require.

KEKEWICH, J.—The object of the clause in question is to secure personal enjoyment of the fund by the legatee, or, rather, to provide against the benefits given to him by the will being enjoyed otherwise than by him personally. The difficulty in construing the clause arises from the state of the facts rather than anything else. The words "shall be," in my opinion, clearly cover, not only a bankruptcy occurring in the testator's lifetime, but before the date of the will: *Trappes* v. *Meredith*, 20 W. R. 130, L. R. 7 Ch. 248; *Gibbons* v. *Gibbons*, 6 App. Cas. 471, 29 W. R. Dig. 249.

As regards the other points: The forfeiture clause must be read distributively—that is, as repeated before each gift in favour of the plaintiff; hence the gift in question takes a conditional form, and determinable on the happening of any one of the events specified.

It is contended that the proviso cannot operate on the two different sets of gifts, because, as regards one, such operation is legally impossible, and, as regards the other, no specified event has occurred.

There are unquestionably gifts to the plaintiff of an absolute character—gifts, that is, which, if concerned with land, would create an estate in fee; and the plaintiff says that to put the forfeiture clause in operation as regards these would be to defeat the original gift by a condition repugnant to it, and therefore void. An estate cannot be limited to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the principle is equally applicable to gifts of personalty. In favour of the will, which must be read and construed as a whole, you can allow such a proviso to defeat any particular estate, not as operating to take away that which has already been given, but as restricting the quantity of the original gift; but an estate in fee, or its equivalent, an absolute gift of personalty, does not admit of such treatment.

As regards, then, the gifts which, according to the terms of the will, independently of the forfeiture clause, vested absolutely, whether in possession or in remainder, on the testator's death, I think, following *Holmes* v. *Godson*, that they are unaffected by the forfeiture clause, not because the language of the clause is inapplicable to them, but because the defeasance is repugnant to the original gifts, and therefore void. Though that is the rule governing gifts of absolute interests, whether in possession or remainder, there is a distinction, in the case of gifts of particular interests, between interests in possession and interests in remainder. It has been held in many cases that if a bankruptcy which, if continuing, would have brought a forfeiture clause into operation, has been annulled before any money becomes payable to the legatee the clause does not come into operation, because the personal enjoyment does not, in the events which have happened, require to be secured, and this rule is directly applicable to reversionary interests, whether taking effect as remainders or as executory gifts.

This coincides with what the late Master of the Rolls says down in *In re Parnham's Trusts*, and followed in *Samuel* v. *Samuel*. It is not denied that the bankruptcy subsisted at the testator's death, and thus whatever had been given to the bankrupt by the will of the testator was immediately transferred to the trustee in bankruptcy, and might have been realized for the creditors, and it is said that therefore personal enjoyment was interfered with so as to bring the forfeiture clause into operation. But personal enjoyment points not to vesting in law, but to enjoyment in fact; that enjoyment which if not interfered with would have resulted in payment and receipt; but a gift which, according to the terms of the will, cannot be thus enjoyed remains for the time in suspense. The moment for determining whether the forfeiture clause is applicable to it or not, is the moment when receipt or payment becomes possible in fact. I have no doubt that the period of distribution—that is, the time when payment to the legatee becomes due in law—is the time when the inquiry, whether a legatee is in a position to receive, that is, himself give a receipt for his legacy, or whether it is payable to his trustee in bankruptcy, must be made and answered. The cases of *Samuel* v. *Samuel*, *Robertson* v. *Richardson*, and also that of *Ancona* v. *Waddell*, all tend in this direction. The postponement of payment by some accident, as the difficulty of proving some devolution of title, or the lunacy, or death, or absence from this country of a trustee, or any other like cause, ought not to affect the result. In this instance the testator died on February 7, 1884, and such gifts as took effect in possession at the testator's death became payable then, or, at least, at the expiration of one year from that date. The bankruptcy, as a matter of fact, subsisted for more than two years after the death. It is said that there was enough in the bankrupt's estate to pay all creditors, and that the bankruptcy was unduly prolonged. If that were substantially true I should be quite prepared to hold that the annulment of bankruptcy need not have been formally made in order to prevent the operation of the forfeiture clause, and that the merely nominal interposition of a trustee in bankruptcy, whose duty it would be, under the circumstances, to hold the fund for the benefit of the alleged bankrupt, could not be held to defeat personal enjoyment. This is the meaning of the decision in *Ancona* v. *Waddell*. But I cannot give the plaintiff the benefit of any such ruling here. The bankruptcy was not annulled until June 10, 1887, and the assets sufficient to procure that result did not fall in until January, 1885, and were not realized until February, 1887. I hold, therefore, that any life interests to which the plaintiff was entitled under the will at the testator's death were not excluded from the operation of the forfeiture clause by the annulment of the bankruptcy.

As to the effect of the 81st section of the Bankruptcy Act, 1869, which is substantially the same as section 35, sub-section (2), of the Bankruptcy Act, 1883, I think it was only intended to operate as between the debtor on one hand and the trustee or other persons claiming title under the bankruptcy on the other, and to confer on the debtor, as from the date of annulment, a good title to his property, so that he may convey or give a good discharge for the same without the concurrence of the trustee in bankruptcy, but it was not intended to affect the title of other persons claiming independently, under such a forfeiture clause as this one.

Solicitors for the plaintiff, *Harper & Battcock*.

Solicitors for the defendants, *Thompson & Groom*.

Q. B. Div. (Fry, L.J., and Mathew, J.) Jan. 30.

SHOOLBRED *v.* JUSTICES OF ST. PANCRAS. (*a.*)

Licensing Acts—Game licence—Disqualified person—Person "licensed to sell beer by retail"—Game Act, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 18—*Holder of licence to sell beer in bottles to be drunk off the premises—Inland Revenue Act*, 1863 (26 & 27 *Vict. c.* 33), *s.* 1.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The holder of a licence to sell beer in bottles to be drunk off the premises under the Inland Revenue Act, 1863, *is, by virtue of section* 18 *of the Game Act*, 1831, *disqualified from holding a licence to deal in game.*

Case stated by justices under the Summary Jurisdiction Acts, 1879 and 1884.

Messrs. Shoolbred applied to the justices of the St. Pancras Division of the County of London sitting in special sessions for a licence to deal in game under the Game Act, 1831.

Section 18 of the Game Act authorizes justices to grant a licence to deal in game to any person "not being an innkeeper, or victualler, or licensed to sell beer by retail, nor being the owner, guard, or driver of any mail coach or other vehicle employed in the conveyance of the mails of letters, or of any stage coach, stage wagon, van, or other public conveyance, nor being a carrier or higgler."

The applicants were holders of a licence to sell beer in bottles to be drunk off the premises, under section 1 of the Inland Revenue Act, 1863, which enacts that "any person who, in England or Ireland, shall have taken out an excise licence to sell strong beer in casks containing not less than four-and-a-half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises, may take out an additional licence on payment of the excise duty of one pound one shilling, and five per cent. thereon; and the same shall authorize such person to sell beer in any less quantity and in any other manner than as aforesaid, but not to be drunk or consumed on the premises where sold."

The justices were of opinion that the possession of such a licence precluded the holder thereof from obtaining a licence to deal in game, and therefore refused the application, but stated this case in order that the applicants might appeal.

Grain, for the appellants.—Messrs. Shoolbred are not persons "licensed to sell beer by retail" within the meaning of section 18 of the Game Act, 1831. Those words must be held to apply to persons holding a licence under the Beerhouse Act, 1830 (1 Will 4, c. 64). That Act was the first Act which created beerhouse licences, and by the amending Act of 1840 (3 & 4 Vict. c. 61) it became necessary for the holder of such a licence to be a resident occupier of the premises in respect of which the premises were granted. The licence held by the appellants was first created in 1863, many years after the Game Act, and is altogether a different licence; it does not require residential occupation, and it does not entitle the holder to sell beer to be drunk on the premises. The case of *Jones* v. *Bone*, 18 W. R. 489, L. R. 9 Eq. 674, is an illustration of the difference between the two licences. A consideration of the classes of persons disqualified by section 18 of the Game Act shows that the intention of the Legislature was to prevent poaching and the harbouring of poachers, and the disposal of poached game. There was no intention to aim at persons in the position of the appellants.

Bodkin, for the respondents, was not called upon to argue.

FRY, L.J.—I think the justices were right in their decision. The question turns on the true construction of the Game Act, 1831. That statute gave authority to justices to grant licences to persons to deal in game, such persons not being, among others, persons licensed to sell beer by retail. At that time licences to sell beer by retail were known; there were what are called full licences, and there were what are called beerhouse licences, that is, excise licences granted under the Act of 1830, and subsequently confined to resident occupiers. The Legislature in the Game Act of 1831 does not refer to the Act of 1830, but uses general language. I think that the words "licensed to sell beer by retail" mean persons entitled to sell beer by retail according to the law for the time being in force from time to time. The method of granting licences and the formalities to be complied with have been modified since that time by several statutes. The appellants hold a licence under the Act of 1863, which requires different formalities from the Act of 1830. But they have a licence to sell beer by retail, and therefore come within the language and meaning of the statute. The case which has been cited does not throw any light on the question.

MATHEW, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *G. H. Barber & Son.*

Solicitors for the respondents, *Scadding & Bodkin.*

Q. B. Div. (Huddleston, B., and Stephen, J.) Nov. 5.

EVANS v. NEWPORT URBAN SANITARY AUTHORITY. (a.)

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 4, 150, 257—*Highway—Expenses to new road—Frontagers.*

Where a street has been formed by an old footpath and by strips of land newly added to it, and the old footpath was repairable by the parish, the frontagers are liable to pay the expenses incurred in improving the whole street under section 150 *of the Public Health Act*, 1875.

Special case.

The appellant was summoned before the justices of the borough of Newport for non-payment of expenses incurred by the urban sanitary authority of that borough (the respondents) in improving a road. The justices determined that he was liable under section 150 of the Public Health Act, 1875, and the case having been argued in the High Court on the point whether the road was a "street" within sections 4 and 150 of the above Act, the court decided that it was such a "street," and remitted the entire case to the justices for a rehearing upon the point whether the road was or was not a highway repairable by the parish. The justices found that the road was an ancient footpath or highway, but that it had been altered, widened, and added to. They further found that, houses having been built abutting thereon, it was a street within sections 4 and 150 of the Public Health Act, 1875, and adjudged that the frontagers were liable to pay the expenses incurred on the improvements.

After argument before a divisional court the case was again remitted to the justices to find whether or not the whole of the said road was a public highway, and what were the additions, &c., in the ancient highway or footpath, and where, and when, and by whom the same were made. The further finding of the justices on this point was that the whole of the road was not a public highway, and that the father of the appellant, about 1850, by permission of the adjoining landholders, made a carriage-drive, fenced and metalled the whole road, put in a drain, and made a quickset hedge and bank all the way down. At the western end he planted his quickset hedge within the boundary of the old track, thereby throwing a portion of his land into the road. Land was added by the father of the appellant on the north side to what was the ancient track for a considerable distance in order to get an entrance to his property. Land was also added at both ends and a long way towards the middle on the appellant's side, the north side, of the present road, and land was also taken from the site of

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

the old track and included within the then new boundary of the appellant's property; a small portion of his boundary wall was built upon the boundary of the ancient highway or footway—viz., about 300 feet, or one-fourth of the whole, the total length being about 1,200 feet; and on the south side the road was widened in 1864, and on that side the boundary of the road was a hedge and a high bank, which had been taken away, and a long strip of land, about 160 feet, was thrown into the roadway in order to make the road broader.

The appellant appealed against the order of the justices, on the ground that he was not liable to pay the amount claimed from him under section 150 of the Public Health Act, 1875.

Ram, for the appellant.—The road is an ancient highway. If so, section 150 of the Public Health Act does not apply.

Macnorran, for the respondents.—The frontagers have been charged in respect of the enlarged road. Where an old highway has been widened the frontagers are liable to be charged: *Richards* v. *Kessick*, 57 L. J. M. C. 48. Further, the apportionment of expenses is conclusive, because it has not been disputed within three months, under section 257: *Midland Railway Co.* v. *Watton*, 34 W. R. 524, 17 Q. B. D. 30.

Ram, in reply.—There was no jurisdiction to make the order: *Eccles* v. *Wirral Sanitary Authority*, 34 W. R. 412, 17 Q. B. D. 107.

HUDDLESTON, B.—The question for our determination is whether the justices were substantially right in deciding that the appellant was liable to pay the amount claimed from him. They have adjudged that the frontagers are liable to pay the expenses of this road under the provisions of the Public Health Act, 1875, s. 150, and that, having regard to the circumstances, the appellant has now no right of objection because he did not avail himself of the provisions of section 257 of the same Act. The road was originally an old road, and had been altered from time to time to suit the convenience of adjacent proprietors. In fact, it had ceased to be an old road and had become a street composed partly of the old road and partly of a new road. The justices found that the old road had been repaired by the parish—indeed, one witness said he had repaired it for the highway board—and the minute-books of the highway board showed that the surveyor had repaired the road. We have to say whether, in the case of a road constituted by an old road and by new additions to it, jurisdiction is given to the justices to charge the expenses of the repairs on the frontagers.

By the Public Health Act, 1875, s. 150, "where any street within any urban district (not being a highway repairable by the inhabitants at large) is not sewered, levelled, paved, &c.," the local authority may do the work and take certain proceedings to recover the expenses from the frontagers. As the section relates to a street "not being a highway repairable by the inhabitants at large," there is, so far, no jurisdiction to charge the frontagers, because it is said that this is a street repairable by the inhabitants at large. But the final clause of this section enacts that "the same proceedings may be taken and the same powers may be exercised in respect of any street or road of which a part is, or may be, a public footpath or repairable by the inhabitants at large as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large." Therefore, when part is a highway and repairable by the parish, and part is not, the road may be dealt with just as if it was not repairable by the parish, which is the case in point.

The justices found "that the road in question was an ancient footpath or highway, but that it had been altered, widened, and added to, and houses having been built abutting thereon, it is a new street within sections 4 and 150 of the Public Health Act, 1875." I am clearly of opinion that the justices were right in making the order. There must be judgment for the respondents, but it is not necessary to decide the other question raised in the case.

STEPHEN, J., concurred.

Judgment for the respondents.

Solicitors for the appellant, *Gibbs, White, & Crooker.*

Solicitors for the respondents, *Cole & Jackson.*

House of Lords.

From C. A. (England). } July 23, 25; Aug. 9, 1889.

BIRCH v. CROPPER.

In re BRIDGWATER NAVIGATION CO. (*a.*)

Company—Winding up—Surplus assets—Partly paid-up shares—Distribution—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-sections* 1, 10.

In the liquidation of a company limited by shares, the surplus assets, after providing for debts and liabilities and for the adjustment of the rights of the contributories, ought to be distributed amongst all shareholders (ordinary and preference) in proportion to their shares; and this is the case though some of the shares are only partly paid up.

A company incorporated under the Companies Act, 1862, was voluntarily wound up, and, after paying all expenses and returning the capital advanced by each shareholder, there was a large surplus. The shares consisted of preference shares fully paid up and ordinary shares partly paid up. There were no provisions in the articles regulating the distribution of assets in case of a winding up.

Held (reversing the decision of the Court of Appeal, 36 *W. R.* 769, 39 *Ch. D.* 1), *that the surplus must be divided amongst the holders of all the shares in proportion to the shares held by them respectively.*

This was an appeal from a decision of the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.), reported as *In re Bridgwater Navigation Co.*, 36 W. R. 769, 39 Ch. D. 1; and the question was upon what principle the surplus assets of the company should be distributed as between the ordinary and preference shares.

The facts are given in the judgments of Lords Herschell and Macnaghten.

Sir Horace Davey, Q.C., and *Cozens-Hardy, Q.C.* (*O. L. Clare* with them), for the appellant, who represented the holders of ordinary shares.

Rigby, Q.C., and *Buckley, Q.C.* (*Swinfen Eady* with them), for the respondent Schofield, who represented the holders of preference shares.

S. A. Sampson, for the liquidator.

Robinson v. *Ashton*, 23 W. R. 674, L. R. 20 Eq. 25, 28; *Watney* v. *Wells*, 15 W. R. 627, L. R. 2 Ch. 250; *Binney* v. *Mutrie*, 36 W. R. 129, 12 App. Cas. 160; Lindley on Partnership, 5th ed., 402; *Griffith* v. *Paget*, 25 W. R. 821, 6 Ch. D. 511, 515; *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 65, 31 W. R. Dig. 37; *Ex parte*

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Maude, 19 W. R. 113, L. R. 6 Ch. 51; *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.*, 36 W. R. 1; *Soame* v. *Currie*, 1 K. & J. 605, 3 W. R. Ch. Dig. 76; *In re Exchange Drapery Co.*, 36 W. R. 444, 38 Ch. D. 171, were referred to.

The House took time for consideration.

Aug. 9.—Lord Herschell.—The only question for determination in this case is upon what principle the balance of the proceeds of the realization of the assets of the Bridgwater Navigation Co. remaining after satisfying all the liabilities of the company and returning to the shareholders the paid-up capital, is to be distributed as between the holders of the ordinary and preference shares of the company. The company was formed in 1872 for the purpose of acquiring the Bridgwater and other canals, with a capital of £500,000, divided into 500 shares of £1,000 each. By resolution duly passed in September of that year it was provided that the capital, instead of being divided into shares of £1,000, should be divided into 50,000 shares of £10 each, and should be increased to £1,300,000, consisting of 130,000 shares of that amount.

Prior to April, 1880, £100,000 out of the capital of £1,300,000 had been issued as ordinary shares, upon which £2 10s. per share had then been paid; and on the 27th of that month it was resolved at an extraordinary meeting that the balance of the uncreated capital—viz., £300,000—should be created, and that the 30,000 new shares should be issued as preference shares entitling the holder to a preferential dividend of five per cent. In pursuance of this resolution the shares were issued accordingly, and the additional capital of £300,000 was paid up. At the same time a call of £1 was made on the ordinary shares, raising the amount paid up on them to £3 10s. per share.

In 1887 the Manchester Ship Canal Co. purchased the undertaking and assets of the Bridgwater Canal Navigation Co. for the sum of £1,710,000, and it was thereupon resolved that the latter company should be wound up voluntarily. In the September following the liquidators repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. After making this return to the shareholders, and after discharging all the debts and liabilities of the company, there remained in the hands of the liquidators a surplus of about £550,000. The question is how this surplus ought to be distributed amongst the ordinary and preference shareholders respectively.

The court below has determined that the distribution ought to be made in proportion to the amounts respectively paid upon their shares, and your lordships have to determine whether this is the correct principle to apply. It is contended on behalf of the appellant, who represents the ordinary shareholders, that they are entitled to the whole of the surplus; but, failing this contention, it is insisted that the division ought to be made according to the capital subscribed, and not to the amount paid up on the shares.

The Companies Act affords very little assistance in terms towards a decision of the question. It provides that, in the case of a voluntary winding up, the property of the company shall be applied in satisfaction of its liabilities, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. But this leaves undetermined what those rights and interests are.

The learned counsel for the appellant argue that, except in so far as the provisions of the Companies Acts necessarily create a distinction between the rights of its members and those of partners, the principles of the law of partnership are applicable, and ought to be applied; and they urge that, in the case of a partnership, unless the terms upon which it is entered into provide otherwise, surplus assets are distributable amongst the partners in the proportions in which they are entitled to share the profits. Even assuming that the doctrine laid down with regard to the division of surplus assets in the case of a partnership be correct (upon which I pronounce no opinion), I am unable to see how it establishes the appellant's claim, that the ordinary shareholders should receive the whole of the assets. The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case. What they are to receive is, indeed, limited in its amount, but it is none the less a share in the profits. To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think, therefore, that the first contention of the appellant wholly fails.

The other point raised by the appeal is, to my mind, one of considerable difficulty. There is no decision bearing directly upon the point, and it must, therefore, be determined upon general principles of equity. Some stress was laid in the court below upon the decision in the case of *Sheppard* v. *The Scinde, Punjaub, and Delhi Railway Co.*; but I do not think that case can be relied on as an authority, except where the circumstances are precisely similar. All the noble and learned lords who took part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle.

The view taken by the court below has presented to my mind from the outset some formidable difficulties. I cannot but feel that it would in some cases be most inequitable to take into consideration in distributing the surplus assets only the amount of capital paid up by the several classes of shareholders, and to make the distribution accordingly. In the Court of Appeal Cotton and Fry, L.JJ., were guided to their conclusion by the provisions contained in the articles of association of this particular company. With all deference, I do not think that they really afford the assistance that was supposed. The 85th article of association prescribes that the net profits of each year shall be divided *pro ratâ* upon the whole paid-up capital of the company, and that the directors may declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon. But this article is clearly inapplicable to the preference shareholders, who do not share *pro ratâ* in the profits of the year. Their rights are determined by the resolution creating the new capital, which provided that the new shares were to entitle the holders thereof to a dividend of five per cent. per annum "upon the amount for the time being called up thereon," and taking precedence over all dividends on the ordinary shares. This clearly by implication excludes in the case of these shares the operation of article 85. Cotton, L.J., after pointing out, I think correctly, that, under the articles, both as regards the ordinary shareholders and the preference shareholders respectively *inter se*, the right to the dividend was to be on the footing of its being in proportion to the sum paid up on the shares, proceeds to say:—"That is the footing upon which to decide it. All question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end. We must deal with them all as shareholders having equal rights without reference to profits; and, in my opinion, when

that is so, and when there is the indication in the articles of association, which form the contract of partnership, that profit is to be divided when it is a going concern and arising from the working of the business in accordance with the sums paid upon each share, then, in this particular case, and having regard to that provision, the true equitable mode of dividing this sum is to divide it among all the shareholders in accordance with, and in proportion to, the amount paid up by them on their shares." I have a difficulty in seeing how the provisions of the articles alluded to show that the equitable mode of distribution is that suggested. It is conceded that they cease to be applicable when the company comes to be wound up; but, if they are to be regarded at all, I think that their full effect must be borne in mind. It is not the case that when the company was a going concern the profits earned were to be divided in accordance with the sums paid on each share. The share of the profits to which the preference shareholders were entitled was limited in amount. It did not depend upon the proportion which the profits bore to the total paid-up capital. And the ordinary shareholders were, in fact, receiving a proportion of the profits exceeding that which they would have been entitled to had such profits been divided to each shareholder in proportion to the capital paid up. I do not say that this indicates the mode in which the surplus assets should be distributed; but it does appear to me to show that it does not follow from the method in which profits were divided that the equitable mode of dividing surplus is to let all the members share alike in proportion to the amount paid up on their shares. In the present case, too, it cannot be doubted that in estimating the price to be paid by the canal company the future prospects of the Bridgwater Co., the probable development of its property and the increase in its value was taken into account. In these future prospects the preference shareholders had no concern save in so far as they improved the security for the payment of their interest. If that security was already ample, the benefit arising from the increased value of the company's undertaking would, down to the time of its being wound up, enure entirely to the ordinary shareholders. And yet, in so far as the price represented this increased future value, the result of the decision is to give to the preference shareholders approximately one-half of it. Now I do not mean to say that any principle can be laid down which will insure perfect equality in this respect, but that which has been adopted appears to me to tend to raise the inequality to a maximum. The articles of association do not appear to me to afford the means of deciding this case upon any special grounds peculiar to this company. Their provisions are such as are commonly to be found regulating the distribution of profits in the case of joint-stock companies. I think the determination of the question at issue must be arrived at upon principles wider and of more general application. In my opinion one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of £3 10s. per share was not the only contribution made by the ordinary shareholders to the assets of the company. They had each come under liability to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable, and tend just as effectually to the prosperity of the company, as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property. In the case of *Sheppard* v. *The Scinde Railway Co.*, Bowen, L.J., said, "Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was not in any way an element in the production of this purchase-money." I am not by any means prepared to say the same of this company. On the contrary, I think it most probable, looking to the large sums of money raised on loan at a moderate rate of interest, that the liability of the shareholders did add very materially to the ease with which these loans were obtained, and to the consequent development and prosperity of the undertaking. In the same case Fry, L.J., said: "It seems to me that in this case distribution must be proportionate to contribution. But it is said, suppose the property to have been produced, not by unequal contributions, but by unequal liabilities to pay, the proceeds must be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of the liabilities. I conclude that in this case the assumption of liability by the shareholders has not in any way produced the property, and that it cannot be said that the capital has been in the least increased by the liability." In the present case that learned judge appears to have discarded altogether these considerations, apparently because he thought the matter settled by the terms of the articles of association; but, for the reasons I have given, I cannot concur in this view. I am fortified by the observations of the two learned judges I have quoted in the view that a scheme of distribution which overlooks an important part of the contribution can scarcely be regarded as equitable. It would be impossible, to my mind, to enter upon an inquiry in each individual case how much the liability incurred and the money provided had respectively contributed to the prosperity of the company or the value of its property. Some general rule must be laid down. I quite admit that it may be urged with force that if the distribution is to follow not the paid-up, but the subscribed capital, the liability would always be treated as of as much value as actual money. But if there must be a general rule, and I have to choose between so regarding it or treating it as valueless, I believe the former would, on the whole, be the more equitable course. I, of course, exclude such a case as that of the Scinde Railway, where the constitution of the company determined the amount of purchase-money to be given for the undertaking, and, by the mode in which it was to be ascertained, indicated what was the equitable mode of distributing it. In making these observations with reference to the unpaid liability upon shares, I do not desire to be understood as indicating that they are decisive of the question how surplus assets are to be divided, but only as explaining why I cannot feel satisfied that the principle which has been adopted in the court below is the correct one. Let me put an illustration which occurred to me whilst the appeal was under argument. Take the case of a company whose entire paid-up capital was obtained by the issue of preference shares bearing a limited rate of interest, nothing being paid upon the ordinary shares. The prosperity of such a company might be very largely due to the liability of the ordinary shareholders, which might be just as valuable to the company as if they had paid a large sum on their shares, yet in such a case, if the undertaking were sold, the whole of the surplus, after discharging the liabilities of the company and returning their capital to the preference shareholders, would, on the principle adopted by the court below, have been the property of such shareholders, and it must have been declared that the ordinary shareholders had no title to it, or to share in its distribution; that, though members, they had no "rights or interests" in the company. I admit that the case I have put is an extreme, though it is not an impossible, one; but I think it may well be put to test the equity of the principle laid down. It may be said that in the case I have put the profits could not be payable according to the amount paid up on the shares, and that in that case some other principle must

be applied and the amount subscribed, or some other test must be taken. But if this be so the principle on which assets were to be distributed would be altered—it may be in a manner most detrimental to the ordinary shareholders—as soon as any call, however small, was made on the shares.

I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided amongst the shareholders according to the shares which they hold in the company.

The present company has been prosperous, and the result of the winding up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to inquire how the different classes of shareholders would have been dealt with if the reverse had been the case, and a loss had resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case, where there is no provision to the contrary in the articles of the company, the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In the case of the *Anglesey Colliery Co.*, 14 W. R. 708, L. R. 2 Eq. 379, it was held by Lord Hatherley when Vice-Chancellor, and his judgment was affirmed on appeal—14 W. R. 1004, L. R. 1 Ch. 555—that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in the case of *Ex parte Maude*, where some of the shareholders had paid £20 and others £25 a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets £5 to each shareholder who had paid £25, before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares "and the amount paid up thereon respectively," and this was relied on as showing that the loss ought to be proportioned to the amount paid up. Mellish, L.J., however, said:—"In my opinion we cannot draw any inference from article 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that, in the case of the company being wound up, the losses should be divided in proportion to the amount paid up, and not to the amount subscribed." And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either it would seem only natural and equitable that loss should be borne and benefits shared in the same proportion. And in my opinion this is the true principle to apply. In the course of the argument I put the case of a company being wound up, having a large asset of doubtful value, and not capable of immediate realization. In such a case it might be necessary or prudent to call up the unpaid capital in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up the surplus would be distributed rateably amongst all the shareholders; whereas, supposing the judgment under appeal to be correct, if the asset had been first realized the distribution amongst the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would thus be made to depend on the urgency of the creditors or the timidity of the liquidators, a result neither satisfactory nor equitable. I observe that the same consideration occurred to Mellish, L.J., in the case I have just referred to. He said:—"If any other construction were adopted it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately valued, or whether it was necessary to make a call to pay the debts. If the £5 per share had been called up to pay pressing debts it could not be denied that the assets when got in would be divided *pro ratâ*—that is to say, the losses would be borne by shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realized, or that the creditors did not press for payment, so that a call was not necessary before the assets were divided; but that accident ought not to alter the way in which the assets are to be divided." Surely all this applies with equal force to the profit resulting on the winding up of the undertaking. The truth is, that each member who has subscribed for a £10 share owns the same share in the company whether it be or be not paid up; and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company; and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle which I recommend your lordships to adopt will not secure absolutely equal or equitable treatment in all cases; but I think that it will in general attain that end more nearly than any other which has been proposed.

I am, therefore, of opinion that the judgment appealed from should be reversed, and that it should be declared that the balance of the proceeds of sale ought to be divided amongst the holders of all the shares in the Bridgwater Navigation Co. (Limited) in proportion to the shares held by them respectively.

I understood at the close of the argument that it had been agreed that the costs of the appellant and the respondents, taxed as between solicitor and client on the higher scale, should be paid out of the assets of the Bridgwater Navigation Co.

I accordingly move your lordships that the judgment appealed from be reversed, and that the declaration I have just read be made; and that it be further declared that the costs of the liquidators and of the appellant and the respondents, both in the court below and in your lordships' House, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the assets of the Bridgwater Navigation Co.

Lord Fitzgerald.—My noble and learned friend who has just spoken has, in his exhaustive judgment, not only carefully given all the facts and criticized and disposed of the various contentions, but he has also examined the case in all its bearings, and fully and clearly indicated his reasons for not adopting the decision of the Court of Appeal. I concur in the conclusion at which he has arrived, though I do not find it necessary to say that I accept all his reasons. I am to be followed by a second elaborate speech from Lord Macnaghten, the notes of which I have read, and as he arrives at the same result I need not express my concurrence a second time. Coming between such weighty authorities, I confidently anticipate your lordships' sanction to my being concise.

The Bridgwater Canal Co. (Limited), formed in 1872, had become the proprietors of an extensive and valuable undertaking, which appears, as far as we can judge, to have been worked ably and profitably with an increasing business down to 1880, when the company deemed it expedient to raise £600,000 for the purpose of paying off a mortgage of the like amount, and their financial

plan appeared to be as follows:—The company had already called up £250,000 of their subscribed capital; they made a further call of £1 a share, amounting to £100,000, and, in the exercise of the powers which they undoubtedly had, they passed a resolution calling into existence their uncreated capital by the creation of 30,000 further shares of £10 each, to be paid up in full within the two years succeeding. The terms and conditions on which the new shares were to be issued and the new shareholders to be received in respect of those shares as members of the company are fully stated in the letters of allotment:—"Allotment Letter, dated 27th April, 1880.—The Bridgwater Navigation Co. (Limited) 5 per Cent. Preference Shares.—Sir,—I beg to inform you that, at an extraordinary general meeting of the members of the Bridgwater Navigation Co. (Limited), held on the 27th April, 1880, the following resolution was passed:—That the balance of the uncreated capital of the company—namely, £300,000—be now created, and that there be issued 30,000 new shares of £10 each on the following terms and conditions—namely:—(1) The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company. (2) The calls upon the new shares to be payable as follows:—£1 per share on the 30th of June, 1880. £1 10s. per share on the 31st of December, 1880. £2 10s. per share on the 30th of June, 1881. £2 10s. per share on the 31st of December, 1881. £2 10s. per share on the 30th of June, 1882. (3) Interest at the rate of 5 per cent. per annum to commence from the date when each call becomes due. (4) Any moneys paid and received with the consent of the directors in advance of calls to bear interest at the rate of 4 per cent. per annum. That, in the first instance, the new shares shall be allotted to the holders of ordinary shares registered in the books of the company at this date as near as may be in the proportion of three new shares for every ten ordinary shares. That any new shares not accepted by the members to whom they are allotted remain at the disposal of the directors, to be issued at such times on such terms and in such manner as they may think fit for the benefit of the company. An allotment of your proportion of the new shares is annexed hereto."

The subsequent practice of the company seems to have been to pay out of profits to the preference shareholders the preference dividend of £5 per cent. and the nett residue of the annual profits, after deducting all outgoings and providing for a reserve, was distributed equally amongst the holders of the original £10 shares on which £3 10s. only had been paid up.

The next step was the statute sale of the whole undertaking to the Manchester Ship Canal Co.

It seems to have been a successful stroke of business for the Bridgwater Co., and probably was not a losing one to the Manchester Co., as they got a property necessary for the purposes of their great undertaking, and got it as a going and profitable concern, with fair prospects of increasing annual profits. The Bridgewater Co. as a working company having thus come to an end, a voluntary winding up was resorted to. The liquidators paid off every liability, and they further paid to the preference shareholders their whole capital with interest at 5 per cent. and to the ordinary shareholders their capital with their share of profits. The Bridgwater Co. thus became clear of every liability, and the liquidators found that there remained the clear surplus of £550,000 to be distributed amongst those who had been the shareholders, whether ordinary or preference. The question is on what principle is that surplus to be divided?

The case came first before North, J., and the Court of Appeal adopted his decision North, J., says:—"I find, therefore, that the parties have not entered into any contract as to the mode of division of this surplus, and that it is to be divided on equitable principles. There is little direct authority to assist me in the matter." I quite concur so far with the learned judge. He adds: "But the question I have to decide is not what is a reasonable mode, but what is the equitable mode, of distributing the increment in question. In my opinion the recent case before the Court of Appeal of *Sheppard* v. *The Scinde, Punjaub, and Delhi Railway Co.* is so like the present as not only to assist me, but to furnish an authority I ought to follow." That case as an authority on the present appeal has been already disposed of by my noble and learned friend. North, J., then quotes a passage from the judgment of Cotton, L.J., in the *Scinde case*. "I think the general law is, that after providing for the capital at the credit of each partner the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners." There is the principle on which North, J., acted as the equitable mode of distributing the surplus. The Court of Appeal adopted it.

I have felt myself unable to act on this supposed rule as applicable to such an undertaking as the Bridgwater Canal Co. (Limited), and there is no authority for doing so. It may fit an ordinary common law partnership, but, when applied to an association such as is now before us, it works out inequality and injustice, and not equity. The error seems to me in supposing that there is an exact analogy between an ordinary commercial partnership and a statutable undertaking called into existence under the Joint-Stock Companies Acts and regulated by the statute and its own memorandum of association and articles. There may be likeness in some particulars, but there is no real analogy.

Then, what rule is to guide this distribution? There is, in my opinion, no contract to guide us in the circumstances which have arisen, and there is nothing to be found in the memorandum of association, or in the articles, or in the statutes, to give us any real help. The resolutions calling into existence the preference shares are equally a blank on the subject, but I have no doubt that the able men who then directed the affairs of the company, if they had foreseen the probability of a surplus or winding up, would have been the last to agree to give up the lion's share to the preference shareholders.

Then on what rule or principle are we to proceed? I concur in what my noble and learned friend has adopted as the equitable principle to be acted on. There is a clear stage to act on. The shareholders have been all reduced to one common level. Each shareholder of a share represents a former share in the company, and we have some authority that between the several classes of shareholders each represents £10 in the subscribed capital of the company, and that for the present purpose and in this particular case it matters not whether the £10 had been actually paid up in full or subscribed for and partially paid.

We have some authority for this in the *Oakbank Co.* v. *Crum*, which, though not an authority in point, at least imports that the proper interpretation of "share" is the shareholder's proportion in the subscribed capital of the company which appears in his name on the register of shareholders.

I am clearly of opinion that the only equitable principle to be acted on in this case is that of equality. That is an equitable principle, and in giving effect to that rule each and every shareholder should receive in respect of his share an equal proportion of this surplus.

Lord Macnaghten.—The question involved in this appeal appears to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of Stirling, J., *In re London and Brighton*

Stock Exchange (Limited), 12th of August, 1887, which is only to be found in the *Times* reports (4 Times L. R. 2). The case of *The Scinde Railway Co.*, which was treated as an authority in the courts below, has since been reviewed in this House, and in affirming the decision of the Court of Appeal every one of the noble and learned Lords who addressed the House relied simply and solely on the special circumstances of the case.

The question before your lordships is this:—In the liquidation of a company limited by shares, what is the proper mode of distributing assets not required for payment of debts and liabilities, or for the costs of the winding up, or for the adjustment of the rights of the contributories amongst themselves, so far, at any rate, as such rights have hitherto been understood and recognized? As incidental to that question your lordships have to consider whether the mode of distribution can be in any way affected by one or more of the following circumstances: (1) That the shares of the company were paid up unequally, some being fully paid up, others being paid up only in part. (2) That the fully paid-up shares were issued separately as preference shares, carrying a preferential dividend of five per cent. without any further right to participate in the profits of the business. (3) That by the regulations of the company dividends on the company's shares were payable in proportion to the amounts paid up thereon.

The answer, as it seems to me, must depend on the principles applicable to companies limited by shares, and on the provisions contained in the Companies Act, 1862. It is, perhaps, rather beside the mark to discuss the general doctrines of partnership, and to examine particular cases of partnership contracts. The scheme of the Act and the directions to be found there are, I think, a safer guide than any analogies can be.

Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all.

When the company is wound up, new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding up, and such sums as may be required for the adjustment of the rights of the contributories amongst themselves.

In the case of compulsory winding up the Act says, in section 109, that "the court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that remains amongst the parties entitled thereto."

In the case of voluntary winding up the language is not quite the same, and the directions are rather more explicit; not that there can be any difference as to the proper mode of distributing assets in the two cases; no one has suggested that. A sufficient reason for the difference of language is, I think, to be found in the circumstance that while the privilege of voluntary liquidation is confined to companies under the Act, any partnership or association consisting of more than seven members may be wound up compulsorily. To meet every case of compulsory liquidation it was necessary to use the most general language. Besides, it is obvious that specific directions useful and proper for the guidance of voluntary liquidation are not so requisite when the liquidation is under the court. As Lord Cairns points out in *Webb* v. *Whiffen*, L. R. 5 H. L. 711, "it was naturally thought important in the case of voluntary windings up to make specific provisions and to give specific directions as to matters which were supposed to be so plain and so necessarily consequential upon the general scheme of the Act that in a winding up under an order of the court it was not thought necessary to give express directions upon these matters of detail." I cannot, therefore, agree with Cotton, L.J., that sections 109 and 133 are to be read together, with the result that the more general language of section 109 is to neutralize or obscure the *primâ facie* meaning of the more specific directions given in the case of a voluntary winding up.

The consequences that are to ensue upon the voluntary winding up of the company are to be found in section 133. It is there provided:—"The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then the section goes into details as to the powers of the liquidators, and ends by saying that "the liquidators shall pay the debts of the company and adjust the rights of the contributories amongst themselves."

Now, in the case of members of a company limited by shares, what are "their rights and interests in the company" in the absence of any special regulation, and what are the rights of the contributories amongst themselves which have to be adjusted in the winding up?

Amongst the rights to be adjusted the most important are those which arise when there is a difference between shareholders in the amount of calls paid in respect of their shares. Before winding up no such rights exist; whatever has been paid by the shareholders of one issue in excess of the contributions of their fellow shareholders of a different issue must have been paid in pursuance of calls duly made, or in accordance with the conditions under which the shares were held. While the company is a going concern no capital can be returned to the shareholders, except under the statutory provisions in that behalf. There is therefore, during that period no ground for complaint, no room for equities arising out of unequal contributions. In the case of winding up everything is changed The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalized, what equity founded on inequality of contribution can possibly remain? The rights and interests of the contributories in the company must, then, be simply in proportion to their shares. This was the view of Stirling, J., in the case I have referred to. Your lordships, however, were reminded more than once that "the Act does not say so." You were told that if that had been the meaning of the Legislature nothing would have been more easy than to have said so in so many words. It is easy, no doubt, to make a slip. But I should have been rather surprised if the framers of this Act, which is a model of careful and accurate drafting, had forgotten that the provisions for voluntary liquidation apply to some companies which have not a capital divided into shares.

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital,

with five per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of five per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company.

Then the preference shareholders say to the ordinary shareholders:—"We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of a company results from its paid-up capital; distribution must be in proportion to contribution. The surplus assets must be divided in proportion to the amounts paid up on the shares." That seems to me to be ignoring altogether the elementary principles applicable to joint-stock companies of this description. I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets," as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company; part and parcel of the joint-stock or common fund which at the date of the winding up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding up must have taken that share and must have held it on the terms of paying up all calls duly made upon him in respect thereof. In paying up his share in full he has done no more than he contracted to do; why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding up took his share and held it on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter rights which were the subject of express contract?

Observe how unreasonable this contention on the part of the preference shareholders is. They do not propose to unravel the accounts of the company or to inquire how long the company had the benefit of the contributions from each of the two classes of shareholders, or what was the position of the company when those contributions were made. It may be that the founders of the company made a lucky hit at the outset. Good management may have had something to do with the success of the company. And, after all, something may perhaps be put down to the fact that the Ship Canal Co. was forced to buy a property which lay directly in the track of its undertaking. The preference shareholders discard all these considerations. They take the date of the winding up as the date which governs the rights of the shareholders in the distribution of what they call surplus assets. They say:—"Our payments, then, were in excess of the payments of the ordinary shareholders." But that is a mere accident. There was a time, not very long ago, when the contributions of the ordinary shareholders were in advance of those of the preference shareholders. If the company had gone on they might soon have been on a level again. The prosperity of the company was not due to the contributions of the preference shareholders. They did not come on the scene till just before the last act. It so happens that the very same directors' report which records their final payment calls attention to the Ship Canal as a practical project. When the preference shareholders were invited to come in the prosperity of the company was assured. The business was flourishing; the shareholders were receiving dividends of eight per cent., with occasional bonuses; and the directors were in a position to borrow at four per cent. Instead of borrowing the company resolved to issue these preference shares, on the condition that they should be fully paid up within a limited time. As the company chose to admit Mr. Rigby's clients as shareholders they must have the rights of shareholders; but I cannot see why they should claim more.

Then it was said on behalf of the preference shareholders that the provision for payment of dividends in proportion to the amounts paid up on the shares leads to an inference that the distribution of surplus assets was to be made in the same proportion. I do not think that it leads to any inference of the kind. It is a very common provision nowadays, though it is not what you find in table A. And it is a very reasonable provision, because, during the continuance of the company, and while it is a going concern, it prevents any sense of dissatisfaction on the part of those who have paid more on their shares than their fellow shareholders of a different issue. But when it has come to an end I cannot see how it can be used to regulate or disturb rights with which it had nothing to do even while it was in force.

I am therefore of opinion that the judgment of the Court of Appeal must be varied, and that it should be declared that, subject to the payment of the costs, charges, and expenses of the winding up, including the costs of all parties in this application here and in the courts below, the assets of the company remaining undistributed, other than the reserve fund, which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares.

Order appealed from reversed, and order of North, J., varied by declaring that "the balance of the proceeds of sale of the said undertakings to the Manchester Ship Canal Co. remaining after satisfaction of all the debts and liabilities of the Bridgwater Navigation Co. (Limited), and after adjusting the rights of the shareholders inter se *(other than their rights in respect of the purchase-money) and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares ought to be divided amongst the holders of all the shares of the Bridgwater Navigation Co. (Limited), in proportion to the shares held by them respectively"; subject to this variation the order of North, J., affirmed; ordered that the costs of the liquidators and of the appellant and respondent Schofield in this House and in the court below, as between solicitor and client upon the higher scale, may properly be retained and paid by the liquidators out of the Bridgwater Navigation Co. (Limited); cause remitted to the Chancery Division.*

Solicitors for the appellant, *Cunliffe & Davenport*, for *T. E. Sampson*, Liverpool.

Solicitors for Schofield, respondent, *Burgess & Cozens*, for *Arthur Buckley*, Manchester.

Solicitors for the liquidators, respondents, *Cunliffe & Davenport*, for *Lingards*, Manchester.

Court of Appeal.

From Q. B. Div. Feb. 1, 3.

REG. v. COWPER. (a.)

County court—Costs—Particulars to be signed by solicitor — Lithographed form — County Court Rules, 1889, *ord.* 6, *r.* 10, *Appendix.*

Under ord. 6, *r.* 10, *of the County Court Rules,* 1889, *read with the Appendix, in order to entitle a plaintiff to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and it is not sufficient for him to enter them on a form which bears his lithographed name.*

So held by Fry, L.J. (Lord Esher, M.R., *dissenting*), *affirming the decision of the* Divisional Court (ante, *p.* 207, 24 *Q. B. D.* 60).

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Mathew, J.), reported *ante*, p. 207, 24 Q. B. D. 60.

Upon the issue of a summons in the Croydon County Court in an action of *Rees* v. *Tassell* a lithographed form of copy of particulars was indorsed, "Claim, £2 16s. 5d.; court fees, 4s; solicitor's costs, 4s."; and the name and address of the firm of solicitors acting for the plaintiff were lithographed below the indorsement. The defendant paid the sum of £3 0s. 5d. into court. At the hearing the registrar ruled that the plaintiff's solicitors were not entitled to an order for payment of the 4s. claimed as solicitor's costs, on the ground that they had not complied with the rules by signing the particulars. The deputy-judge having upheld this decision, a rule was obtained against him by the plaintiff to show cause why he should not hear and determine the matter. The Divisional Court discharged the rule.

The plaintiff appealed.

By the County Court Rules, 1889, ord. 6, r. 10, "the solicitor of a plaintiff suing by a solicitor shall indorse on the particulars his name or firm and place of business, and shall state thereon where he will accept service of proceedings in the action or matter on behalf of the plaintiff, otherwise the costs of entering the plaint by the solicitor shall not be allowed."

In the appendix to the rules there is the following provision as to costs on the lower scale; No. 1, "Where the particulars and copies are signed by a solicitor, and the amount claimed exceeds £2 and does not exceed £5, there may be entered upon an ordinary summons and upon a default summons, 4s."

And in the note to the appendix:—"No other costs are to be allowed than the above where the amount claimed does not exceed £10 unless the judge certifies otherwise."

Crump, Q.C., and *E. Lewis Thomas*, for the plaintiff.

Jelf, Q.C., and *Muir Mackenzie*, for the deputy-judge.

The arguments used and cases cited were the same as in the court below.

Lord ESHER, M.R.—In this case it is proper to consider what the intention and reason of the rule in question were, and what circumstances it was passed to meet. Does the rule insist on actual handwriting for the "signature," or will a lithographed signature suffice? The object of the rule no doubt was to have the name of a solicitor, or firm of solicitors, appended to the particulars in order that if any wrong was done the court might have an officer of the court over whom it had a peculiar jurisdiction whom it could hold responsible. That seems to me to be the only object of the rule. That being so, does this lithographed form carry out or interfere with that object? It has been urged that the lithographed form may be misused by a clerk of the solicitor's stealing it and filling it up for his own purposes. I cannot think such an occurrence probable, but if he did do so he would be liable to be punished for robbery and forgery. Then it is suggested that some bill collector who was not an attorney at all might get hold of the form and use it for the purposes of extortion. But even supposing that he did get hold of such a form, he could not get the money without coming to the court, and it is most improbable that the registrar would not detect that he was an unauthorized person. In my opinion, if a solicitor authorizes the filling up of such a lithographed form as this, and allows it to issue, he cannot deny his responsibility for what it contains, and the object of the rule is satisfied. The solicitor intended the lithographed name to represent his signature, and he has issued it as a signed statement of particulars. I cannot see why we should require anything more. Except the signing of a will, there is no case where the actual handwriting is necessary, and where such a lithographed signature as this would not be sufficient. It would certainly be sufficient under the Statute of Frauds, and it would be a good signature to a bill of exchange. Then it is argued that it is not a signature, because it was on the form before it was filled up. If that argument is good, it would be equally forcible where the form had been actually signed before it was filled up. I know of no rule that would go that length. For these reasons I am unable to see why we should put anything more than the ordinary business meaning on the word "signed." To do so would, in my opinion, be pressing the language of the rule unduly. I therefore think that this form of particulars satisfies the requirements of the rules.

FRY, L.J.—I have the misfortune to differ from the Master of the Rolls. I think that the decision of the Divisional Court was correct. We have to deal with matters of form, which are regulated by ord. 6, r. 10, of the County Court Rules, 1889, and by the appendix to those rules. The rule provides that the solicitor shall indorse on the particulars his name and address, and the appendix provides that where the particulars are signed by a solicitor he shall be entitled to certain fees. In the present case there is a lithographed form, which contains at the end the lithographed name of the solicitors and their place of address. It is impossible, to my mind, not to see that this was intended to comply with the rule requiring indorsement, and was not intended as a signature at all. We have no information as to the person who filled up the form, and we are asked to say that the lithographed name at the end is a signature within the requirements of the appendix. In my judgment it is not. I think that it was intended that there should be an actual signature of the particulars by the solicitor. The object of the rules was to make the solicitor pledge himself to the accuracy of the particulars. The court has a right, I think, to require its officers to intervene to that extent. It is obvious that in many cases, as in the present, the particulars will be acted upon on an undefended summons when there is no evidence before the court. The registrar will then have to rely on the signature of the solicitor as a guarantee of the accuracy of the particulars. A mere lithographed name, which is part of the form, does not furnish any such guarantee. There is nothing to show that the particulars have come under the personal cognizance of the solicitor, or of anyone directly authorized by him to act on his behalf. In my opinion it would be defeating the object of the rule to hold otherwise, especially since, as I have said before, in my opinion, it was not intended to be a signature at all. The name is there *alio intuitu*—to satisfy

(a.) Reported by A. P. PERCIVAL KERR, Esq., Barrister-at-Law.

the rule as to indorsement. No doubt the objection is a formal one, but the rules were passed to regulate matters of form, and I do not think that it would be right to neglect them. I agree, therefore, with the decision of the Divisional Court, and in my opinion this appeal fails.

Solicitors for the plaintiff, *Aird & Hood.*

Solicitors for the deputy-judge, *Carter & Simpson.*

High Court of Justice.

Chan. Div. Kay, J. } Dec. 19.

In re DALE AND PLANT (LIMITED). (a.)

Company—Winding up—Proof—Salary of managing director—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-section* 7—*Debt due to member of company in his character of a member.*

A company was formed for the purpose of buying and carrying on a business formerly carried on by the vendor, and it was agreed that the vendor should, for a period of ten years, act as the managing director of the company. The articles of association provided that the vendor should receive a fixed annual salary as the managing director, and that every director should be the holder of a certain number of shares. The company having gone into liquidation before the ten years expired, the vendor claimed in the winding up as a creditor for a sum due to him for arrears of salary as managing director, and for a sum assessed as damages for breach of the contract to employ him as such for ten years.

Held, that these sums were not due to the claimant "in his character of a member, by way of dividends, profits, or otherwise," within the meaning of section 38, *sub-section* 7, *of the Companies Act,* 1862, *and therefore that he was entitled to prove for them in the winding up, in competition with the other creditors.*

Adjourned summons.

This company was formed for the purpose of taking over and carrying on the business of dryesalters, &c., formerly carried on by James Dales and Samuel Allen Plant, and it was agreed that Dales and Plant were, for the term of ten years from the 31st of March, 1886, to remain as managing directors of the company.

The articles of association provided that Dales and Plant were to be the first managing directors upon the terms contained in the agreement; that the qualification of every director was to be the holding in his own right of not less than ten shares; that the directors were to be paid for their services out of the funds of the company the remuneration following—viz., Dales and Plant each £300 per annum, and each of the other directors such sum as the company in general meeting should from time to time determine; that every director was to vacate his office if he ceased to be a holder of at least ten shares; that Dales and Plant were to be styled managing directors and to remain on the board so long as they continued in the employment of the company under the agreement or any extension thereof, and the determination of the agreement, or any extension thereof, was not to invalidate their appointment as directors.

Before the expiration of the ten years, an order was made for the winding up of the company, and in the winding up, Plant claimed to rank as a creditor for (*inter alia*) a sum of £118 13s. 4d. arrears of salary as managing director; and for damages for breach of the agreement to employ him as managing director for ten years at a salary of £300 a year, and which damages the chief clerk had found to be £1,500.

By section 38, sub-section 7, of the Companies Act, 1862, "No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company."

Chadwyck Healey, in support of the summons.—Section 38, sub-section 7, of the Companies Act, 1862, does not apply here. It was held in *In re Leicester Club and County Racecourse Co., Ex parte Cannon*, 34 W. R. 14, 30 Ch. D. 629, that a director's unpaid fees were debts due to him in his character of member, and to be postponed to outside creditors, but that case was based on *Dunston* v. *Imperial Gas Light and Coke Co.*, 3 B. & Ad. 125, which was a very peculiar case, and a ground of the decision was that the payments were in the nature of gratuities. Section 38, sub-section 7, could not have been intended to prevent a person who entered into an ordinary contract to do work for, or supply goods to, a company, from proving in competition with other creditors merely because he happened to have taken shares in the company. In this case the salary was remuneration for skilled work done for the company by the present claimant. The words of the sub-section "dividends, profits, or otherwise" evidently point to a claim by a shareholder for sums due in respect of his shares by way of dividend, bonus, or the like. It is true that in this case the managing director must necessarily be a shareholder, but he might have remuneration as a director, which would fall within the sub-section, and at the same time under a special contract be entitled to special remuneration for extraordinary work, as to which he would be in the position of an ordinary creditor of the company.

Renshaw, Q.C., and *Levett*, for the liquidator.—This claim clearly falls within the principle of the decision in the *Leicester Club case*. The claimant was entitled to this remuneration only in his character of a member. The articles require that the managing director shall be a director and shareholder, and he is liable to vacate his office if he ceases to be a shareholder. The case falls within the words "or otherwise." Those words do not qualify the word "member," but the words "sum due." If it is of the essence of the contract that there should be membership on the part of the person contracting with the company, money due to him under the contract is due to him in his character of member.

KAY, J.—I do not agree with the argument which has been addressed to me on behalf of the liquidator. This is a very simple point, and, to my mind, a very clear one. Here is a man appointed managing director. He was so appointed, as appears clearly enough, because he had special knowledge of the business which this company was going to carry on; and by the articles of association he was to receive certain remuneration for the management of the business of the company. Now it is quite true that a director was the only person who could be so appointed, and it is true also, or I assume it to be the fact, that no one could be a director who was not a shareholder. It is said that all remuneration agreed to be paid to the claimant for his special skill and attention in managing the business of the company is payable to him in his character of member. I do not agree. Suppose this case was that of a solicitor, a man specially trained in a

(a.) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

peculiar business which is of great importance to the community, and that such solicitor happened to be a member of a company, and sent in his bill of costs for business done for the company. In the winding up of the company could it be said that the solicitor should not prove in competition with the other creditors because he was a shareholder? Obviously that proposition could not be maintained for a moment. It was so admitted in the argument. But it is said that if the articles of association provided that no one should be a solicitor to the company unless he was also a shareholder, then the payment made to him would be a payment to him in his character of member. I do not follow that. The payment to him in respect of his bill of costs cannot be payment to him in his character of member, whether the articles of association do or do not contain such a provision. The payment in either case is to him in his character of solicitor, and not in his character of member. Take another case. Suppose a company bought a million bricks from a brickmaker. If he happened to be a shareholder, no one could doubt that that circumstance would not prevent him from proving in competition with the other creditors. But suppose that the articles of association contained provisions that no bricks should be bought of any person who was not a shareholder in the company. Is, then, the money paid as the price of the bricks, money due to the vendor in his character of member? Certainly not. It is money due to him in his character of brickmaker or brick seller, and the fact that one of the articles provided that the company should not buy of anyone not a member would not make the price of the bricks money due to him in his character of member any more than it would be if there were no such article.

Then, it is said, and this, to my mind, is the strongest part of the argument, that section 38, sub-section 7, of the Companies Act, 1862, is introduced into the Act of Parliament by analogy to the partnership law. A debt due to a partner could not be proved in competition with outside creditors where the partnership was dissolved. That is true. But the answer is that a shareholder is not a partner, and this section does not introduce all the partnership law with respect to every shareholder. It only introduces—I daresay it may be by analogy to the law of partnership—the particular provision which has now to be construed. That provision is this—(his lordship read the material part): What does "character of member" mean? The words that follow seem to me to show that clearly. The words are "by way of dividends"—that is, on his shares—"profits"—that, again, is in respect of his shares—"or otherwise"—the words "or otherwise" must mean something analogous to dividends or profits on his shares. That shows the meaning. Dividends are due to him in his character of member; profits are due to him in his character of member; there may be something else equally due to him in his character of member which this clause was intended to include. To my mind it is clear that the clause does not include money due for goods which a member has supplied to the company, otherwise it would be so expressed. Nor can it include payment for particular work which he has special skill in doing, and which he has done for the company. I am of opinion that this money, which ought to have been paid to this claimant solely as managing director, is money for which he may prove in competition with other creditors. The only case cited is that of *In re Leicester Club and County Racecourse Co.*, where a director claimed for fees, and the articles of association provided that "the remuneration of the directors for their services shall be such sum as the company in general meeting may from time to time determine, which shall be divided amongst the directors in such manner as they shall from time to time think fit." It was held in that case that the remuneration came within the words "money due to him in his character of member." I say nothing about that case except that it is not the case now before me, and it seems to me very plain that this is not money due to the claimant in his character of a member of this company, and that he is entitled to prove for it in the winding up in competition with the other creditors.

Solicitors, *Belfrage & Co.*, for *Reece, Harris, & Harris*, Birmingham; *Ellis, Munday, & Co.*

Chan. Div. (Kekewich, J., for Kay, J.) March 14.

FARRAR v. COOPER. (a.)

Practice—Arbitration—Injunction to restrain proceeding with arbitration—Particulars of differences—Futile result—Jurisdiction—Judicature Act, 1873, *s.* 25, *sub-section* 8—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

Partnership articles provided that, in case any dispute should arise between the three partners relating to the partnership, they should forthwith each nominate a referee, and that the referees should determine all matters in dispute, or, in default of agreement, appoint an umpire. Questions arose, and two of the partners appointed referees to "settle and determine all questions, disputes, differences, and matters that may be in dispute or difference" between the partners. The third partner objected that there was no point in dispute within the clause. He asked for information as to the alleged differences, and was told that particulars would be furnished at the proper time. He now moved to restrain his partners from proceeding with the arbitration finally, or until they had specified what disputes they wished to refer, or that he might be at liberty to revoke the submission to arbitration.

Held, that the court had jurisdiction to grant the injunction, but that an arbitration without particulars and without the consent of the plaintiff would be merely futile; and that that was no ground for restraining the proceedings.

Motion.

This was an application by a partner to restrain the other members of the firm from proceeding with an arbitration, on the ground that they had not told the plaintiff what points they wished to refer, and that he would be seriously prejudiced by the proceedings.

The partnership articles were dated the 30th of June, 1880, and made between William Cooper, of the first part, Benjamin Farrar, of the second part, and Henry Cooper, of the third part. The 26th clause was as follows:—"That in all cases of dispute on the method of business adopted by the said partners, or one of them, or as to any question in relation to the said partnership, the decision and instructions of the majority or two members of the said partnership shall be final and effective, and be binding on the partner not assenting to or concurring in the said decision and instructions." The 27th provided:—"That in case any dispute shall arise between the said partners, their executors or administrators, either during the continuance of the said partnership or after the determination thereof, either on the construction of these presents or the settlement of the books and accounts thereof, or the settling, dividing, or applying the profits and losses of the said partnership, or any other matter, cause, or thing relating to the same, then and in such case the

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

said partners, their executors or administrators, shall forthwith nominate three disinterested persons, one of whom to be chosen by each of the said partners, which said three persons shall determine all such matters aforesaid by their award in writing under their hands, and in case such referees cannot agree upon an award within thirty days next after such reference, then the same shall be referred to and be determined by such one other disinterested person as the said referees shall for that purpose appoint as umpire between them, who shall determine the same by writing under his hand within ten days after he shall be so appointed umpire, and the said partners, their executors, administrators, or assigns, shall and will abide by and perform the award which shall be made by the said referees or their said umpire without further suit or trouble whatsoever." By the 28th clause it was further agreed:—"That this submission to reference shall be made a rule of the Chancery Division of Her Majesty's High Court of Justice upon the application of either of the said parties hereto, and every award thereunder shall also be made such rule, and be prosecuted as a judgment of the said court," and that no action should be commenced by one partner against another until he should have neglected or refused to appoint a referee, or the time limited for making an award should have expired.

Questions arose between the parties which the Coopers desired to refer to arbitration. Farrar, on the other hand, insisted that all disputes could be settled under the 26th clause.

On the 20th of February, 1890, W. Cooper and H. Cooper, by separate instruments in similar form, appointed two arbitrators "to settle and determine all questions, disputes, differences, and matters that may be in dispute or difference between myself and my copartners, or either of them, and falling within the provisions of the said in part recited" articles of partnership.

Notice of the appointment was given to the other partners, stating the appointment "for the purpose of awarding, ordering, and determining all disputes, differences, doubts, or questions which have arisen between me and you . . . or either of you, concerning the construction of the said indenture of the 30th day of June, 1887, or the settlement of the books and accounts of the said partnership, or the settling, dividing, or applying the profits and losses of the partnership, or any other matter, cause, or thing relating to the same, and for all other purposes, if any, for which I am entitled to nominate an arbitrator in connection with the said partnership." The notice further called upon the other partners to appoint their arbitrators. Farrar's solicitors asked what were the points it was wished to arbitrate upon, and were told that when the proper time arrived particulars would be furnished. He thereupon issued a writ, and now moved "that the defendants may be restrained . . . from proceeding with the arbitration of which they have given notice to the plaintiff finally, or until they have specified to the plaintiff what disputes and differences have arisen which they desire to have settled by arbitration, or that the plaintiff may be at liberty to revoke the submission to arbitration contained in the deed of partnership."

Marten, Q.C., and *Jason Smith*, for the motion.

Renshaw, Q.C., and *R. M. Bray*, for the defendants.—The court will not assume that the arbitrators will act improperly, nor stay proceedings, unless it sees that injustice will be done. There is no jurisdiction to interfere: *North London Railway Co.* v. *Great Northern Railway Co.*, 31 W. R. 490, 11 Q. B. D. 30.

Marten, Q.C., in reply.—That case applies only to proceedings under the Lands Clauses Consolidation Act: *London and Blackwall Railway Co.* v. *Cross*, 34 W. R. 201, 31 Ch. D. 354. The court has jurisdiction to stay proceedings in the arbitration: *Maunsell* v. *Midland, Great Western, &c., Co.*, 11 W. R. 768, 1 H. & M. 130; *Piercy* v. *Young*, 28 W. R. 845, 14 Ch. D. 200; *Mylne* v. *Dickenson*, Geo. Cooper, 195; *Beddow* v. *Beddow*, 26 W. R. 570, 9 Ch. D. 89; *Hedley* v. *Bates*, 28 W. R. 365, 13 Ch. D. 498; Arbitration Act, 1889, s. 12; Russell on Arbitrations, 5th ed., p. 459.

Kekewich, J.—There is no desire on my part to interfere with the domestic tribunal of arbitration in partnership cases. Many judges have expressed their entire approval of that course, and business men often prefer to refer disputes to arbitration, and especially cases which cannot be conveniently decided in court. Therefore, nothing that I say must be considered as a wish on my part to interfere with arbitrations, but it seems to me that the first principle of arbitration is that, having secured a competent man intending to do his duty honestly, you must lay before him the points to be decided, and unless these points are laid before him by all the parties it is impossible for him to give a decision. In the present state of affairs I am reluctant to indicate any opinion upon the construction of the articles, but clauses 26 and 27 are wholly different in language and in intention. Whether there are any disputes within the 26th clause is not now in question, although the affidavits show that some of the parties think there are. The words of clause 27 are not quite in common form, and may require close consideration, but that will be for determination hereafter. The defendants have not condescended to tell the plaintiff what they require to refer to arbitration. In a curt letter of the 25th of February they say: "You appoint an arbitrator and then we will tell you what we are going to refer." The plaintiff says he wants to know what is to be referred before making the appointment. His selection of a referee will depend on the subject-matter to be referred. If it is a question of construction he may desire to appoint a lawyer, if it is a question of book-keeping and accounts he may prefer an accountant. The conduct of the defendants puts him in an extremely unfair position. The only result of an arbitration without settling the particulars beforehand will be to get an award which cannot be enforced or have any practical effect. The question how the costs are to be borne may give rise to difficulties. Therefore, no arbitration without the consent of the plaintiff can be binding on him or be of any legal, practical value. But does it follow that I must restrain these proceedings of the defendants?

I entirely adopt what was said by Lindley, L.J., in *London and Blackwall Railway Co.* v. *Cross*, referring to *North London Railway Co.* v. *Great Northern Railway Co.* He says:—"The case does not decide that in no case is it right to restain persons from proceeding to arbitration; there are cases in which it is quite right to do so." Mr. Marten has cited other cases to the same effect. Lindley, L.J., does not say, and I do not say, in what cases it is right to restrain them. I do not think there would be anything to prevent my restraining the defendants in a case where I saw that injustice would result from the arbitration; but where I do not see that, but only, as in this case, that futile proceedings are likely to result, I do not think it necessary to grant an injunction. I remember a case before the late Master of the Rolls in which I was for the plaintiff. An application was made to restrain directors from passing certain resolutions with reference to preference shares, and it was stated that the resolutions, if passed, would be useless. The Master of the Rolls asked why he should interfere; they could pass any resolutions they thought fit. Those resolutions, if the plaintiff was right, would not bind him; they would be mere waste paper. He

had no right to interfere, and he refused the injunction on that ground.

In my opinion I ought to refuse to interfere in this case on the same ground. I do not think that these proceedings would have any binding authority or could be enforced against the plaintiff, they would be futile, and, that being so, I simply make no order on the motion. The plaintiff has been provoked into coming here, and the costs will be costs in the action.

Solicitors, *Wolferstan & Avery; Herbert Nield.*

Chan. Div. Kekewich, J. } Jan. 11.

In re MAINWARING.

CRAWFORD *v.* ROYAL INFIRMARY. (*a.*)

Executor—Renunciation of probate by one executor—Power of selection of beneficiaries.

A testator by his will appointed three persons his executors, and gave the residue of his estate to certain charitable institutions named in his will, or such others "as my executors herein named" might appoint. One of the executors renounced probate.

Held, that the renunciation of the office of executor did not operate to prevent him claiming the right of joining with the continuing executors in selecting the charitable institutions to share in the residue.

Keates *v.* Burton, 14 *Ves.* 434, *not followed.*

Further consideration.

J. K. Mainwaring, by his will, dated October 12, 1877, after bequeathing certain legacies, gave "to my executors herein named the sum of fifty pounds each, for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them." The will then proceeded:—"I hereby appoint J. D. Crawford, J. Forshaw, and William Jones executors of this my will," and after giving various charitable legacies, the will contained the following gift:—"The residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of."

One of the executors, J. Forshaw, named in the will renounced probate, but claimed, notwithstanding, to take part in the selection of the charitable institutions to share in the testator's residuary estate, and the case was now brought on to decide whether he had a right to do so.

Neville, Q.C., and *Crawford*, for the plaintiffs, the continuing executors.—The question in whether this is a right of division given to the persons who may happen to be executors, or a right personal to the particular executors named in the will and not attached to the office. This power of distribution is part of the administration of the testator's property, and once the character of executor is put off this power goes with it. The will, in fact, imposes the condition of the existence of a specific character, before the power can be exercised. *Keates* v. *Burton*, 14 Ves. 434, is a case in point. There a power of control over a certain interest was given to executors, who renounced, and it was held the interest became accordingly absolute. As one executor has renounced he cannot exercise the power, [KEKEWICH, J.—It is a recognized practice that a person made trustee and executor can renounce the latter office, and yet retain the former character.] But here he would be at once executor and not executor.

Warmington, Q.C., and *P. O. Lawrence*, for Forshaw.—It has been held in this case that Forshaw is entitled to his legacy, even though he has renounced the executorship; he was named in the will, not merely as an executor, but for other purposes, and he may, if he likes, decline either part of the duties named. *Keates* v. *Burton* is not really reported on the point of the executor's renunciation, but on the construction of the will.

Neville, Q.C., in reply.—The claimant in *Keates* v. *Burton* was the assignee of Christie, and it had there to be decided whether the power of limiting the interest could be exercised, and it was decided it could not. In this will this power is given to them as executors, and if any one of them divests himself of that character he cannot join in the selection.

KEKEWICH, J.—If I thought *Keates* v. *Burton* really decided the question I should follow it, but it does not appear to me to do so. No doubt, in deciding other points, the judge in that case states that the power there given to the executors could not be exercised. But that was merely stated as one of the circumstances which had taken place, and not for the purpose of making it a *ratio decidendi*. This case must be decided on the words of the will, and the question is, was this power given to the executors as part of their office. The duties of an executor are not easy to define, but directly you have a residue or fund clear of debts and legacies, that immediately becomes a trust fund, and then the executor becomes at once a trustee. It seems to me there is a clear distinction between executor and trustee, and that the exercise of this power cannot be one of the duties of the executor. There is certainly in this will a gift of a legacy to each executor, but I do not think the motive actuating that gift controls the latter clause whereby a power is given of selecting certain beneficiaries. The last direction in the will is in these terms:—[His lordship read the clause.] It is suggested that the correct way to read this will is to read in the names of the executors, and then the mere renunciation of that character by one of them would not affect the right to exercise this power, and that, I think, is the correct view. Mr. Forshaw was one of the executors "herein named," and I think, therefore, he can still exercise this power.

Solicitors for the plaintiffs, *Miller & Williamson.*

Solicitor for the defendant, *G. A. Forshaw*, Liverpool.

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Lord Esher, M.R.) } Feb. 26.

MORGAN *v.* HUTCHINS. (*a.*)

Master and servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* (1)—*Defect in condition of machinery—Dangerous machine.*

The fact of a machine being dangerous to the workman whose duty it is to use it, although it is perfectly effective for the purpose for which it is used, is "a defect in the condition of the machinery" within section 1, *sub-section* (1), *of the Employers' Liability Act*, 1880, *which, when combined with negligence on the part of the employer, entitles the workman to recover damages in an action brought under that sub-section.*

Walsh *v.* Whiteley, 36 *W. R.* 876, 21 *Q. B. D.* 371, *explained.*

Appeal from the Bristol County Court.

The material facts were as follows:—

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The plaintiff was a boy in the employment of the defendants at their factory. It was his duty to feed a pressing machine with sheets of leather by placing them between rollers which were to press them. Close beside the rollers was an arrangement of cog wheels by which the machine was worked. There was no fencing between these cog wheels and the place where the boy worked. In attempting to straighten a piece of leather which was about to be pressed by the rollers his hand slipped and was caught in the cog wheels, with the result that two of his fingers were taken off. No want of care on the part of the plaintiff was alleged.

The action was brought under section 1, sub-section (1), of the Employers' Liability Act, 1880, for personal injuries caused by reason of a defect in the condition of the machinery.

At the trial the Government Inspector of Factories stated that the machine would be very dangerous even to an adult workman owing to the cog wheels not being fenced off; that this could easily have been done; and that, in the year 1885, he had pointed this out to the defendants.

The jury found that the machinery was defective, and awarded damages to the plaintiff.

The defendants appealed.

Radcliffe, for the appellants.—There was no evidence of a defect in the machinery. A defect in machinery is something which prevents it from doing its work: *M'Giffin* v. *Palmer's Shipbuilding Co.*, 31 W. R. 118, 10 Q. B. D. 5. [Lord COLERIDGE, C.J., referred to *Heske* v. *Samuelson*, 32 W. R. 595, 12 Q. B. D. 30.] Mere danger, however great, does not constitute a defect: *Walsh* v. *Whiteley*.

Upjohn, for the respondent.—*Walsh* v. *Whiteley* is in my favour. [He was stopped by the court.]

Lord COLERIDGE, C.J.—I am of opinion that the county court judge left the right questions to the jury, and that there was abundant evidence for them to come to the conclusion to which they came. It is always a difficult thing where general words like these are used to express in words a definition of what cases come within them and what do not. To define the word "defect" so as to include all possible cases is a thing which I would not attempt. Still, by the lights of common sense and authority, one may decide whether a particular case comes within the words. Personal injury to a workman is actionable if it be caused "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," and to that statement of the law must be added, according to the judgment of the Court of Appeal in *Walsh* v. *Whiteley*, that there must be negligence on the part of the employer.

Now in this case the personal injury was caused by the condition of the machinery used in the employer's business—the word "condition," according to the dictionaries, including the surrounding circumstances; that is, the way in which the machinery is to be used; the defect need not be in the machine itself. One of the surrounding circumstances of this machine is that it is to be used by men and even by boys; it must have human skill brought to bear upon it to make it useful. That it was dangerous one cannot doubt, because accidents had happened with it before, and a perfectly disinterested person, the inspector of factories, said so in the strongest manner possible, and had told the employer so, as long ago as 1885, and had urged upon him the necessity of fencing the cog wheels. If danger is a defect it was unquestionably present here, and that owing to the negligence of the employer, for he was well aware of it, and had been warned of it.

The only question remaining is, Is manifest danger to the workman a defect within the meaning of section 1, sub-section (1)? If the Court of Appeal has decided that it is not, of course I am bound to defer to their decision. But I cannot find any such case. There are cases which look that way, but they do not decide that point.

The principle on which the case of *Heske* v. *Samuelson* was based seems to me to carry with it the point which we are now deciding, for there the machine was perfectly proper and effective in itself, yet, because it was not made safe for other persons, it was held to be defective by the Court of Appeal. This seems to me to show that in certain cases the fact of the machine being dangerous is itself a defect. Then it was said that *Walsh* v. *Whiteley* decided differently, and it is binding upon us. But in that case there is no difference between the Master of the Rolls and the other judges on this point—they all held that danger is a defect, but the majority held that there must also be negligence on the part of the employer. What underlay their decision was that an essential part of the dangerous defect was that it must be traceable to the negligence of the owner. In this case negligence on the part of the owner, which was wanting there, is abundantly present. The governing principle upon which the majority of the court decided that case is different from that on which I am now deciding. I think that here the condition of the machine was defective owing to its dangerous character, of which the defendant was warned over and over again.

Lord ESHER, M.R.—This section does not apply unless personal injury has been caused to the workman: where that is so the Act protects him beyond what the common law did. Under the common law he was considered to run the risk, and he could only recover if the defect were known to his master and not to himself. That rule was intended to be modified by this section. [His lordship then read sub-section (1) of section 1, and continued:—] This is a section intended to protect the workman, and yet the argument for the employer is that, although the machine was defective with regard to the safety of the workman and actually caused him injury, it is not a defect in the condition of the machinery within this section. It was even argued that if a secret defect existed in machinery which caused danger but did not interfere with the working of the machine, that was not a defect. The strange result of such a doctrine might be that this section would protect workmen who were not using the machine and not those who were using it. This machine has to be fed by a workman and is useless unless there is a man to work it. Is not that part of the "condition" of the machine? The workman is a necessary part of the machine while it is doing its work. If it is dangerous to him is that not a defect in the machine, of which he is a necessary part? Surely it is. The Act of Parliament might as well be put in the fire if the argument to the contrary were not held to be fallacious. If the machine is dangerous to the man without whose assistance it cannot be worked, and that without any fault of his own, that is a defect in the condition of the machinery. That was the opinion of all the judges in *Walsh* v. *Whiteley*. If the majority had not thought so, they would not have had to consider the other point—the question of negligence on the part of the employer. In that case they held that although there was a defect there was no evidence of negligence, and therefore no right to recover. I am not going to act against that decision either here or in the Court of Appeal, but the ground of that decision is not applicable to the present case. No one has suggested that there was any want of care on the part of the plaintiff, and the negligence of the employer was proved. This case is outside the case in the Court of Appeal and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Corben & Greener*, for *Gregory, Graham, & Baldwin*, Bristol.

Solicitors for the plaintiff, *Brunskill & Co.*, for *Gore*, Bristol.

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 29.

Hay v. Justices of the Tower Division of the County of Middlesex. (a.)

Licensing—Spirit licence—Person convicted of felony—Disqualification—Free pardon, effect of—Wine and Beerhouse Act (1869) *Amendment Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 14—9 *Geo.* 4, *c.* 32, *s.* 3.

A free pardon under the Queen's sign manual relieves the convict not only of the sentence inflicted on him by the court, but of all penal consequences of the conviction.

Where, therefore, a man has been convicted of felony, and has afterwards received the Queen's pardon, he is not subject to the permanent disability to hold a licence to sell spirits by retail, imposed by section 14 *of* 33 & 34 *Vict. c.* 29 *upon a person convicted of felony.*

Case stated by quarter sessions.

The following were the material facts:—

The respondent Hay was, on the 28th of May, 1883, convicted of having received goods knowing them to have been stolen, and was sentenced to seven years' penal servitude. On the 8th of November, 1883, he was released on licence, and on the 9th of May, 1885, he received a free pardon under her Majesty's sign manual. On the 8th of July, 1889, he applied at the licensing sessions to the justices of the Tower Division for a transfer to him of a licence of a fully-licensed house. The justices refused the application, being of opinion that they were precluded from granting a licence to Hay by the terms of section 14 of the Wine and Beerhouse Act (1869) Amendment Act, 1870 (33 & 34 Vict. c. 29).

This section enacts that "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid."

Hay appealed to quarter sessions, who considered that he was not disqualified from holding a licence, the effect of the free pardon being to remove the disability imposed on convicted persons by section 14. They therefore decided in favour of Hay, but, at the request of the licensing justices, stated this case for the opinion of the court.

Morton Smith, for the appellants (the licensing justices).—The language of section 14 is peremptory. A man who has been once convicted can never afterwards hold a licence. There are similar provisions as to beer and wine licences: 3 & 4 Vict. c. 61, s. 7; 23 Vict. c. 27, s. 22. [Pollock, B.—Are there not old authorities as to the effect of a free pardon?] Yes; a pardon is said to take away "*poenam et culpam*": Hale Pleas of the Crown, vol. 2, p. 278; to give a man "new capacity and credit": Hawkins' Pleas of the Crown, vol. 2, p. 548; but it does not remove a conviction. So to hold would bring about this difficulty—9 Geo. 4, c. 32, s. 3, provides that a man who has served his term of imprisonment shall be in the same position as one who has received a free pardon, so that there would be no one to whom section 14 would be applicable except convicts who were actually serving their time or were out on ticket of leave. The form of the pardon is always the same, so that it never appears whether it was granted on the ground of the man's innocence or because he gave information against other criminals; it therefore does not follow that a man who has received a pardon is a proper person to hold a licence.

He referred to *Leyman* v. *Latimer*, 26 W. R. 305, 3 Ex. D. 15, 352; *Cuddington* v. *Wilkins*, Hobart, 67, 81; *Bullock* v. *Dodds*, 2 B. & Ald. 258; *Reg.* v. *Vine*, 23 W. R. 649, L. R. 10 Q. B. 195; *Sir H. Finch's case*, Godbolt, p. 288. [Pollock, B., mentioned *Sir John Bennet's case*, Cro. Car. 55.]

Sir R. E. Webster, A.G. (*R. S. Wright* with him), for the respondent.—The case is to be decided on principle, and the principle is to be found in the judgment in *Cuddington* v. *Wilkins* (at p. 81). The object of section 14 is to protect the public against persons of bad character, convicted felons, holding licences, and was never intended to apply to persons who had received a free pardon. A free pardon not only clears the offence, but all "dependencies, penalties, and disabilities incident thereto"; it removes the criminal intention, it restores a man's right to sit in Parliament: Erskine May Parliamentary Practice. The difficulty suggested as to the effect of 9 Geo. 4, c. 32, does not really arise, for that Act was passed merely for the object of amending the law of evidence with respect to convict witnesses.

Morton Smith, in reply.—As to sitting in Parliament, that right is given by statute, 33 & 34 Vict. c. 23, s. 2. But here a permanent disqualification is imposed by statute, and no pardon can get rid of it: Bac. Abr., tit. Pardon, H. The Act 9 Geo. 4, c. 32, was not passed merely as to evidence; it was so held in *Leyman* v. *Latimer*.

Pollock, B.—The question involved in this case is one of considerable importance, both personally to the respondent and generally, and it is very clear what is the point in question. The facts are simply these. John Hay, who had been convicted of receiving goods knowing them to have been stolen in May, 1883, and who was released in the following November, and received a free pardon under the Queen's sign manual on the 9th of May, 1885, applied at the licensing sessions for the Tower Division in July, 1889, for a transfer of the licence of the Duke's Arms public-house. The justices thought they had no power to grant the application, which was therefore refused. John Hay appealed to quarter sessions. The quarter sessions held that the free pardon removed the disqualification imposed by the conviction, and allowed the appeal. In my opinion they were right in so doing.

The question arises on section 14 of 33 & 34 Vict. c. 29. [His lordship read the section.] Our attention was very properly called to the fact that this was not a new enactment, a similar provision having been made by earlier Acts as to wine and beer licences. Before we come to consider the authorities as to the effect of a free pardon it is well to notice that this was a pardon under the sign manual, not under the great seal, but it was admitted that such a pardon was by the Act 7 & 8 Geo. 4, c. 28, s. 13, made equivalent to a pardon under the great seal.

The Act 9 Geo. 4, c. 32 was relied on by the appellants, as showing that a convict who has undergone his sentence is to be considered to be in the same position as one who has received a free pardon. But it must be remembered that that Act was passed to enable a convict to give evidence; the section with which we are now dealing was passed to protect the public and to give them some guarantee as to the character of the person who keeps a public-house. What we have to consider is the effect of a free pardon upon the *status* of a man who has been convicted of an offence. Now it seems to me that the pardon goes beyond doing away with the punishment—it that it also purges the offence itself. In 2 Hale P. C., at p. 278, it is said "the king's pardon takes away *poenam et culpam in foro humano*." In 2 Hawkins P. C., ch. 37, section 48, the pardon (it is said) makes the convict "as it were a new man and gives him a new capacity and credit." And, again, Chitty (Criminal Law, p. 775) lays it down that the effect of a pardon is to give a man "a new capacity, credit, and character." These are but text-books, but we have also dicta

(a.) Reported by T. R. Colquhoun Dill, Esq., Barrister-at-Law.

authorities: there is *Cuddington* v. *Wilkins* which was dealt with and approved in *Leyman* v. *Latimer*, where the whole court was of opinion that when the pardon came it took away not only the penalty but the fault as well. It was said that that did not show that there was a purging of everything, of all the consequences of a conviction, but *Sir John Bennett's case* appears to me to be clear on both points. It seems to me therefore that both on the language of the Act, and on principle and authority, that the decision of the justices in quarter sessions was right. In the case of *Reg.* v. *Vine*, which was relied upon by the appellants, it was not shown that the offence was purged, and that case has no bearing on the present. I do not feel called on to deal with the difficulty which is said to arise under the Act 9 Geo. 4, c. 32, s. 2. It was said that that section places a man who has endured the punishment to which he has been condemned in the same position as a man who has received a free pardon. Whether that be so or not I do not decide. The question for us is as to the effect of a free pardon, and on that question we have clear authorities with us and no authority to the contrary.

HAWKINS, J.—I am of the same opinion. With reference to the alleged conflict of statutes and the argument drawn from the case of the man who has served his sentence, I will say a few words. Everyone knows that all sentences do not involve penal servitude or imprisonment for life; sentences are in the discretion of the justices or the judge by whom the case is tried. Even in cases of felony only a day's imprisonment is sometimes inflicted where some exceptional circumstances exist. All this was well known to the Legislature when they passed this Act (33 & 34 Vict. c. 29), and in section 14 the words "for ever" must have some meaning; they would have none if a man who had had only a month's imprisonment could demand a licence. I think that disposes of that argument. The Legislature intended that whatever the length of the sentence might be the disqualification should last all the man's lifetime.

As to the effect of the Queen's pardon, my short ground is this—that it not only removes the actual punishment imposed by the judge who sentences the man, but it also has the effect of dissolving all the penal consequences which attach to the conviction. Any other interpretation would lead to monstrous consequences. To say that when a man had had the grave misfortune to be unjustly convicted, and the Queen's pardon had been granted to him upon that ground, he should still be disqualified from following his vocation, and that the pardon could take away all the effects of the conviction except that one, would be contrary to common sense. It is said that a great thief may receive a free pardon by turning round and denouncing his companions in crime, and that such a person ought not to be in a position to obtain a licence. I do not know how that may be, but the probability is that such a person would not obtain a free pardon; a remission of part of the sentence would be sufficient to meet his case. I have come unhesitatingly to the conclusion that the Queen's pardon takes away, not only the punishment ordered by the judge, but all the penal consequences of the conviction. It follows that the justices in quarter sessions were right, and the appeal fails.

Appeal dismissed; leave to appeal refused.

Solicitors for the appellants, *Beale, Phillips, & Beale.*

Solicitor for the respondent, *The Solicitor to the Treasury.*

Q. B. Div. (Pollock, B., and Wills, J.) Jan. 18.

OLD (*Appellant*) *v.* ROBSON (*Respondent*). (*a.*)

Trade union—Society registered as trade union, but containing some of the objects of friendly society—Right of members to sue society for sick benefit—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Friendly Societies Act,* 1875 (38 & 39 *Vict. c.* 60), *s.* 22.

The Amalgamated Society of Carpenters and Joiners was registered as a trade union under the Trade Union Act, 1871. *The rules contained the usual rules in restraint of trade, providing for the fining, suspending, and expelling of members for violating the rules of the society as to trade matters. They also contained rules similar to those of a friendly society, giving to members allowances in cases of sickness, infirmity, and want of employment, and other benefits.*

Held, that, as the objects of the society were partly in restraint of trade, the society was, at common law, an illegal association, and therefore, by section 4 *of the Trade Union Act,* 1871, *no agreement between members to provide benefits to members could be enforced in any court of law.*

Case stated by the stipendiary magistrate and a justice of the peace for the borough of Middlesborough.

The appellant was secretary of the society called the "Amalgamated Society of Carpenters and Joiners," and the respondent, Robson, who was a joiner, was a member of the society. On the 5th of July, 1889, the respondent preferred a complaint before the magistrates at petty sessions against the appellant as secretary of the society, under section 22 of the Friendly Societies Act, 1875, charging him with having "refused to pay him a certain weekly allowance of twelve shillings for sick benefit or relief to which he was entitled as a member of the society, by reason of his being unable to follow his employment, contrary to the rules of the society."

The Amalgamated Society of Carpenters and Joiners was a society registered as a trade union under the Trade Union Act, 1871, but at the same time it gave members a right to certain allowances in cases of sickness or infirmity. The respondent, as a member of the society, had made the above claim under the rules for sick benefit relief, which the society refused to grant.

Upon the hearing of the complaint it was contended for the society that the society was a "trade union," and not a "friendly society," and that section 4 of the Trade Union Act, 1871, precluded the court from exercising jurisdiction in the matter: *Farrer* v. *Close*, 17 W. R. 1129, L. R. 4 Q. B. 602.

For the respondent it was contended that the claim was for sick benefit, and that the society was a friendly society, and the rules of the society were put in, in support of such contention.

The magistrates, after perusing the rules of the society, found that the object of the society was substantially the same as specified in the Friendly Societies Act, 1887 (50 & 51 Vict. c. 56), and on the authority of *Knowles* v. *Booth*, 32 W. R. 432, they made an order for the payment of the twelve shillings claimed and costs.

The question of law was whether the "Amalgamated Society of Carpenters and Joiners" is a "trade union," or substantially a "friendly society."

The society was registered as a trade union, but, in addition to the rules which dealt with trade matters and which were in restraint of trade, it contained rules providing for the benefit of members, for the support of members in cases of sickness, accident, superannuation; for the burial of members and their wives; for what was called unemployed benefit, or allowance to members out

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

that the administration proceedings might, pursuant to section 125 of the Bankruptcy Act, 1883, be transferred to the Northampton County Court, as the county court having bankruptcy jurisdiction, to administer the testator's estate. There was evidence that the estate was insolvent, that the testator's debts amounted to about £9,000, and that his assets did not exceed £4,000. The banking company alleged both that the greater part of the plaintiff's debt was barred by the Statute of Limitations, but that the executors, being friendly to the plaintiff, would not plead the statute against him, and also that the executors intended to retain a debt due to themselves which was also barred by the statute. For these reasons the banking company contended that a transfer of the administration to the Bankruptcy Court ought to be made.

The plaintiff's summons for administration and the banking company's summons for transfer were heard together on February 3, 1890, by Chitty, J., in chambers, and he made an order for administration on the plaintiff's summons, but refused the application for transfer.

On February 14, 1890, a motion by the banking company to have the order made in chambers discharged, was dismissed by Chitty, J., on the ground that the power given to the court by section 125, sub-section (4), of the Bankruptcy Act, 1883, was discretionary, and that no sufficient reason had been shown for exercising the discretion by ordering a transfer in the present case.

The banking company appealed.

The Bankruptcy Act, 1883, section 125, provides:—"(1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form, praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy; (2) upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss such petition with or without costs; (3) an order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the court that the debtor committed an act of bankruptcy within three months prior to his decease; (4) a petition for administration under this section shall not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may in such case, on the application of any creditor and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon such last mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor; (5) upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act; (6) with the modifications hereinafter mentioned, all the provisions of part 3 of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act; (7) in the administration of the property of a deceased debtor under an order of administration, the official receiver shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the testator's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts."

Everitt, Q.C., and *Edward Ford*, for the appellant.—The plaintiff's claim against the estate is favoured by the executors, and if this insolvent estate is administered in the Chancery Division, the banking company and the other creditors of the testator cannot raise the objection that the plaintiff's debt is barred by the Statute of Limitations, because the plaintiff's debt will then be the foundation of the decree: *Fuller* v. *Redman*, 26 Beav. 614, 8 W. R. Ch. Dig. 38. The application of the banking company is made under section 125, sub-section (4), of the Bankruptcy Act, 1883, which enacts that on such application, and on proof that the estate is insufficient to pay its debts, "the court *may* transfer" the administration proceedings to the proper Bankruptcy Court. "*May*" in this sub-section must be construed as "*must*." In sub-section (1) and (2) of the same section "may" clearly has the effect of "must." Under section 79 of the Companies Act, 1862, which enacts that a company "*may*" be wound up by the court, it has been held that, as between a creditor and the company, it is not a discretionary matter with the court to say whether the company shall be wound up or not: *Bowes* v. *The Hope, &c., Scidy*, 13 W. R. 790, 11 H. L. Cas. 389; Buckley on The Companies Acts, 5th ed., p. 196. Though the natural meaning of the word "may" when used in an Act of Parliament is permissive and enabling only, yet there may be circumstances which may couple the power with a duty to exercise it: *Backwell (Alderman) case*, 1 Vern. 152; *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214; *Knowles* v. *Roberts*, 38 Ch. D. 263, *per* Bowen, L.J., at p. 271, 36 W. R. Dig. 157. In the case of *In re Weaver, Higgs* v. *Weaver*, 33 W. R. 874, 29 Ch. D. 236, Pearson, J., held that the power to transfer given by section 125, sub-section (4), was a discretionary power, but that case is not binding on this court.

Whitehorne, Q.C., and *T. R. Warrington*, for the defendants, the executors.

Bryne, Q.C., and *P. S. Gregory*, for the plaintiff.—Section 125, sub-section (4), does not in any way render it imperative on the court to transfer the administration of the estate to the Bankruptcy Court; the words of the section are purely discretionary. The view of Pearson, J., in *In re Weaver, Higgs* v. *Weaver*, was adopted by Stirling, J., in *In re York, Atkinson* v. *Powell*, 35 W. R. 609, 36 Ch. D. 233, and he expressed an opinion that the existence of the executor's right of retainer was no special ground for making an order for transfer. In the administration in bankruptcy of the estate of an insolvent debtor, the Bankruptcy Court will follow the practice of the Chancery Division: *In re Crowther, Ex parte Ellis*, 36 W. R. 189, 20 Q. B. D. 38.

Everitt, Q.C., in reply.—The whole object and machinery of the Bankruptcy Act is to provide equality for all creditors; the express provision in sub-section 7 of section 25 for payment of funeral and testamentary expenses, as a preferential debt, shows that no other creditors can be preferred. In the case of insolvent estates the object of the Bankruptcy Act will be fettered by not transferring the administration to bank-

ruptcy. The object of section 125 is that the mode of administration in bankruptcy may be applied in the administration of the estate of a deceased insolvent, though not so as to include the property of third persons. *Ex parte Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92.

Cotton, L.J.—The appellant contends, in the first place, that, on the words of the Act, it is imperative on the judge to make the order for transfer. The words are that the court *may*, in such a case, make an order for transfer, and, in my opinion, those words can never do more than empower the judge (not making it imperative on him) to make the order asked for. The real question to be decided in all these cases—where the words only give the judge power to make an order for transfer, which he could not have made were it not for those words in the Act of Parliament—is whether or not there is anything which can be collected from this or any other part of the Act to require, and make it the duty of the judge to exercise the power given to him by those words. That is the principle laid down in the case of *Julius* v. *Bishop of Oxford* by Lord Selborne, and I refer to it because the principle of law is there stated correctly and shortly.

I think great misconception is caused in attempting to argue that "may" means "must." It never can mean "must" so long as the English language retains its meaning; but it gives the power, and it may be a question when (a judge having the power to do that which is given him by "may") it becomes his duty to exercise that power. There is nothing said in the Act as to the duty of the judge to exercise the power given him, but it is argued that the whole object of the Act of Parliament was to secure equality amongst the creditors, and that, therefore, as the leaving of the administration in the Chancery Division may give priority to some creditors—as, for instance, by enabling the executor to retain his own debt, or the plaintiff creditor to get payment of his debt, because the statute is not pleaded against him—this renders it the duty of the judge (when there is an application by a large creditor), to make the order asked for, because the object of the section is to have the equality, provided for by the law of bankruptcy.

Let us first consider that. In my opinion, if Parliament had meant to do away with the rule of retainer, which is a legal rule allowed in the Court of Chancery in administering the estates of deceased persons, it would have done so in express terms. Parliament is quite strong enough to do so, and that is the only power that can do so. But it is wrong to suppose that that rule was an equitable doctrine. So far from that being so, the Court of Chancery only empowers an executor to retain out of legal assets his own debts. He cannot apply that doctrine as regards equitable assets; so that shows that the Court of Chancery does recognize fully the equitable right of equal payment of creditors of equal degree. As regards the executor not pleading the statute, the Court of Chancery does not hold an executor liable for not pleading the statute; but the executor, as the person legally liable for the debt, has, from his position, the alternative, as settled by the Court of Chancery, of pleading or not pleading the Statute of Limitations when a creditor comes forward whose right might possibly be barred (I do not say it is here, but assuming it were) by the Statute of Limitations. A claim might, however, be set up, to which the statute was never intended to apply, and, therefore, although the statute might be pleaded, there may be circumstances that render it wrong to plead the statute, and it is never looked upon with any great favour.

Then it is said that the Bankruptcy Act shows, not directly, but indirectly, that it is intended to do away with this power, as regards the executor, by saying that the receiver in bankruptcy is to have regard to any funeral expenses incurred by the personal representative, and that those are to be paid in priority to other debts. Well, that is one case that is provided for, possibly others were never thought of by Parliament, but in my opinion, the right of retainer being a right which the personal representative would not have in the administration in bankruptcy, the mere existence of that right, recognized by the Chancery Division which has not been recognized in the Court of Bankruptcy, is not a ground for exercising the discretion, or for compelling the judge to exercise the power given him by the section, and that really is the only point.

It may be (I do not express an opinion on it) that Stirling, J., was right in saying (in the case of *In re York*) that the fact of the existence of the right of retainer would not be a ground for not exercising the power of transfer; but there were in that case circumstances which did render it desirable that there should be a transfer. It is still a question to be considered, and one we may have to consider hereafter, whether the transfer of an administration to bankruptcy would prejudice or injure an executor in his right of retainer. But in my opinion neither that, nor the fact that the executor has not thought fit to plead the statute against the plaintiff, can be treated as a ground, if there be no other ground, for making it desirable to make an order for transfer. In my opinion if it were intended in the case of a bankrupt or insolvent estate, that there should be no such right on the part of an executor to retain, or that an executor should be bound to plead the Statute of Limitations against every creditor on the part of whom there might be an application, Parliament ought to have said so, and I think it would have said so.

In my opinion there is a power of discretion given in the word "may," and there is not anything sufficient in point of law to show that it was the duty of the judge to exercise that power in this particular case.

I call attention to this—that we have a great many provisions in the Bankruptcy Acts in order to secure property—not only the property the bankrupt has at the time of the bankruptcy, but what he has parted with and prevented himself from having at the time of his bankruptcy; but what the law considers unfair preference in the case of a bankrupt's creditors, is not really applicable to deceased debtors, even though they are insolvent, for in the latter case it has been held that the sections referring to voluntary settlements executed a certain time before the bankruptcy, have no application to the case of deceased persons, though at the time of their death they were insolvent.* That shows that Parliament did not intend by this section to apply all the procedure of the Bankruptcy Acts in the administration of the estates of insolvent debtors.

In my opinion Chitty, J., was right, and, although I quite hold that this is a discretion which may be appealed, I think that he exercised that discretion rightly in this case.

Lindley, L.J.—There is no ground for transferring this action from the High Court to the Court of Bankruptcy except the broad and very important ground, that if the transfer is made, the assets will be administered in a very different manner. That is true, and it is also true that to many minds the mode of administering assets in bankruptcy is preferable to the mode of administering assets elsewhere. The mode of administering assets in bankruptcy is statutory, and depends on statutory enactments carefully worked out, whereas if they are administered elsewhere, it rests on technical principles not altogether satisfactory.

The right of an executor to retain, is a common law legal right. It depends on the rule that a man cannot sue himself, and out of that rule, developed the right to retain. That right has been thought so ill of by

* *Ex parte Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92.

that the administration proceedings might, pursuant to section 125 of the Bankruptcy Act, 1883, be transferred to the Northampton County Court, as the county court having bankruptcy jurisdiction, to administer the testator's estate. There was evidence that the estate was insolvent, that the testator's debts amounted to about £9,000, and that his assets did not exceed £4,000. The banking company alleged both that the greater part of the plaintiff's debt was barred by the Statute of Limitations, but that the executors, being friendly to the plaintiff, would not plead the statute against him, and also that the executors intended to retain a debt due to themselves which was also barred by the statute. For these reasons the banking company contended that a transfer of the administration to the Bankruptcy Court ought to be made.

The plaintiff's summons for administration and the banking company's summons for transfer were heard together on February 3, 1890, by Chitty, J., in chambers, and he made an order for administration on the plaintiff's summons, but refused the application for transfer.

On February 14, 1890, a motion by the banking company to have the order made in chambers discharged, was dismissed by Chitty, J., on the ground that the power given to the court by section 125, sub-section (4), of the Bankruptcy Act, 1883, was discretionary, and that no sufficient reason had been shown for exercising the discretion by ordering a transfer in the present case.

The banking company appealed.

The Bankruptcy Act, 1883, section 125, provides:—"(1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form, praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy; (2) upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss such petition with or without costs; (3) an order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the court that the debtor committed an act of bankruptcy within three months prior to his decease; (4) a petition for administration under this section shall not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may in such case, on the application of any creditor and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon such last mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor; (5) upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act; (6) with the modifications hereinafter mentioned, all the provisions of part 3 of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act; (7) in the administration of the property of a deceased debtor under an order of administration, the official receiver shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the testator's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts."

Everitt, Q.C., and *Edward Ford*, for the appellant.—The plaintiff's claim against the estate is favoured by the executors, and if this insolvent estate is administered in the Chancery Division, the banking company and the other creditors of the testator cannot raise the objection that the plaintiff's debt is barred by the Statute of Limitations, because the plaintiff's debt will then be the foundation of the decree: *Fuller* v. *Redman*, 26 Beav. 614, 8 W. R. Ch. Dig. 38. The application of the banking company is made under section 125, sub-section (4), of the Bankruptcy Act, 1883, which enacts that on such application, and on proof that the estate is insufficient to pay its debts, "the court *may* transfer" the administration proceedings to the proper Bankruptcy Court. "*May*" in this sub-section must be construed as "*must*." In sub-section (1) and (2) of the same section "may" clearly has the effect of "must." Under section 79 of the Companies Act, 1862, which enacts that a company "*may*" be wound up by the court, it has been held that, as between a creditor and the company, it is not a discretionary matter with the court to say whether the company shall be wound up or not: *Bowes* v. *The Hope, &c., Society*, 13 W. R. 790, 11 H. L. Cas. 389; Buckley on The Companies Acts, 5th ed., p. 196. Though the natural meaning of the word "may" when used in an Act of Parliament is permissive and enabling only, yet there may be circumstances which may couple the power with a duty to exercise it: *Backwell (Alderman) case*, 1 Vern. 153; *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214; *Knowles* v. *Roberts*, 38 Ch. D. 263, *per* Bowen, L.J., at p. 271, 36 W. R. Dig. 157. In the case of *In re Weaver, Higgs* v. *Weaver*, 33 W. R. 874, 29 Ch. D. 236, Pearson, J., held that the power to transfer given by section 125, sub-section (4), was a discretionary power, but that case is not binding on this court.

Whitehorne, Q.C., and *T. R. Warrington*, for the defendants, the executors.

Bryne, Q.C., and *P. S. Gregory*, for the plaintiff.—Section 125, sub-section (4), does not in any way render it imperative on the court to transfer the administration of the estate to the Bankruptcy Court; the words of the section are purely discretionary. The view of Pearson, J., in *In re Weaver, Higgs* v. *Weaver*, was adopted by Stirling, J., in *In re York, Atkinson* v. *Powell*, 35 W. R. 609, 36 Ch. D. 233, and he expressed an opinion that the existence of the executor's right of retainer was no special ground for making an order for transfer. In the administration in bankruptcy of the estate of an insolvent debtor, the Bankruptcy Court will follow the practice of the Chancery Division: *In re Crowther, Ex parte Ellis*, 36 W. R. 189, 20 Q. B. D. 38.

Everitt, Q.C., in reply.—The whole object and machinery of the Bankruptcy Act is to provide equality for all creditors; the express provision in sub-section 7 of section 25 for payment of funeral and testamentary expenses, as a preferential debt, shows that no other creditors can be preferred. In the case of insolvent estates the object of the Bankruptcy Act will be fettered by not transferring the administration to bank-

ruptcy. The object of section 125 is that the mode of administration in bankruptcy may be applied in the administration of the estate of a deceased insolvent, though not so as to include the property of third persons. *Ex parte Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92.

Cotton, L.J.—The appellant contends, in the first place, that, on the words of the Act, it is imperative on the judge to make the order for transfer. The words are that the court *may*, in such a case, make an order for transfer, and, in my opinion, those words can never do more than empower the judge (not making it imperative on him) to make the order asked for. The real question to be decided in all these cases—where the words only give the judge power to make an order for transfer, which he could not have made were it not for those words in the Act of Parliament—is whether or not there is anything which can be collected from this or any other part of the Act to require, and make it the duty of the judge to exercise the power given to him by those words. That is the principle laid down in the case of *Julius* v. *Bishop of Oxford* by Lord Selborne, and I refer to it because the principle of law is there stated correctly and shortly.

I think great misconception is caused in attempting to argue that "may" means "must." It never can mean "must" so long as the English language retains its meaning; but it gives the power, and it may be a question when (a judge having the power to do that which is given him by "may") it becomes his duty to exercise that power. There is nothing said in the Act as to the duty of the judge to exercise the power given him, but it is argued that the whole object of the Act of Parliament was to secure equality amongst the creditors, and that, therefore, as the leaving of the administration in the Chancery Division may give priority to some creditors—as, for instance, by enabling the executor to retain his own debt, or the plaintiff creditor to get payment of his debt, because the statute is not pleaded against him—this renders it the duty of the judge (when there is an application by a large creditor), to make the order asked for, because the object of the section is to have the equality, provided for by the law of bankruptcy.

Let us first consider that. In my opinion, if Parliament had meant to do away with the rule of retainer, which is a legal rule allowed in the Court of Chancery in administering the estates of deceased persons, it would have done so in express terms. Parliament is quite strong enough to do so, and that is the only power that can do so. But it is wrong to suppose that that rule was an equitable doctrine. So far from that being so, the Court of Chancery only empowers an executor to retain out of legal assets his own debts. He cannot apply that doctrine as regards equitable assets; so that shows that the Court of Chancery does recognize fully the equitable right of equal payment of creditors of equal degree. As regards the executor not pleading the statute, the Court of Chancery does not hold an executor liable for not pleading the statute; but the executor, as the person legally liable for the debt, has, from his position, the alternative, as settled by the Court of Chancery, of pleading or not pleading the Statute of Limitations when a creditor comes forward whose right might possibly be barred (I do not say it is here, but assuming it were) by the Statute of Limitations. A claim might, however, be set up, to which the statute was never intended to apply, and, therefore, although the statute might be pleaded, there may be circumstances that render it wrong to plead the statute, and it is never looked upon with any great favour.

Then it is said that the Bankruptcy Act shows, not directly, but indirectly, that it is intended to do away with this power, as regards the executor, by saying that the receiver in bankruptcy is to have regard to any funeral expenses incurred by the personal representative, and that those are to be paid in priority to other debts. Well, that is one case that is provided for, possibly others were never thought of by Parliament, but in my opinion, the right of retainer being a right which the personal representative would not have in the administration in bankruptcy, the mere existence of that right, recognized by the Chancery Division which has not been recognized in the Court of Bankruptcy, is not a ground for exercising the discretion, or for compelling the judge to exercise the power given him by the section, and that really is the only point.

It may be (I do not express an opinion on it) that Stirling, J., was right in saying (in the case of *In re York*) that the fact of the existence of the right of retainer would not be a ground for not exercising the power of transfer; but there were in that case circumstances which did render it desirable that there should be a transfer. It is still a question to be considered, and one we may have to consider hereafter, whether the transfer of an administration to bankruptcy would prejudice or injure an executor in his right of retainer. But in my opinion neither that, nor the fact that the executor has not thought fit to plead the statute against the plaintiff, can be treated as a ground, if there be no other ground, for making it desirable to make an order for transfer. In my opinion if it were intended in the case of a bankrupt or insolvent estate, that there should be no such right on the part of an executor to retain, or that an executor should be bound to plead the Statute of Limitations against every creditor on the part of whom there might be an application, Parliament ought to have said so, and I think it would have said so.

In my opinion there is a power of discretion given in the word "may," and there is not anything sufficient in point of law to show that it was the duty of the judge to exercise that power in this particular case.

I call attention to this—that we have a great many provisions in the Bankruptcy Acts in order to secure property—not only the property the bankrupt has at the time of the bankruptcy, but what he has parted with and prevented himself from having at the time of his bankruptcy; but what the law considers unfair preference in the case of a bankrupt's creditors, is not really applicable to deceased debtors, even though they are insolvent, for in the latter case it has been held that the sections referring to voluntary settlements executed a certain time before the bankruptcy, have no application to the case of deceased persons, though at the time of their death they were insolvent.* That shows that Parliament did not intend by this section to apply all the procedure of the Bankruptcy Acts in the administration of the estates of insolvent debtors.

In my opinion Chitty, J., was right, and, although I quite hold that this is a discretion which may be appealed, I think that he exercised that discretion rightly in this case.

Lindley, L.J.—There is no ground for transferring this action from the High Court to the Court of Bankruptcy except the broad and very important ground, that if the transfer is made, the assets will be administered in a very different manner. That is true, and it is also true that to many minds the mode of administering assets in bankruptcy is preferable to the mode of administering assets elsewhere. The mode of administering assets in bankruptcy is statutory, and depends on statutory enactments carefully worked out, whereas if they are administered elsewhere, it rests on technical principles not altogether satisfactory.

The right of an executor to retain, is a common law legal right. It depends on the rule that a man cannot sue himself, and out of that rule, developed the right to retain. That right has been thought so ill of by

* *Ex parte Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92.

Chancellors and those who have had the development of chancery jurisdiction that they have declined to follow the law where they have had equitable assets to deal with. That right is, nevertheless, perfectly well known to every lawyer, and Parliament has never yet faced the difficulty and abolished that right, and we all know that any legislation on the subject is so worded as not to prejudice it. So here Parliament has said nothing to the effect that the right to retain shall be abolished. Again, there is, in administration in the Chancery Division, the right of the creditor who has obtained judgment to priority in the administration over other creditors. That is unknown in administrations in bankruptcy, so far as I know. Now, is it right to say that, in consequence of these two systems of administration being co-existent, whenever there is an insolvent estate being administered in Chancery, it must be transferred to the Bankruptcy Court? It really comes to that. I cannot spell that out of the section. If Parliament meant that, it should have used very different language, and should not have said "may" so often, and contrasted it with "shall." As a matter of construction I am convinced, having regard to the principle laid down in *Julius* v. *The Bishop of Oxford*, that this is a discretionary power, and I cannot say that Chitty, J., has exercised his discretion wrongly. It is an important question whether it would be just to other people to exercise his discretion the other way; I do not know how that may be; but I am not prepared to differ from him in what he has done.

LOPES, L.J.—Sub-section (4) of section 125 of the Bankruptcy Act, 1883, authorizes a transfer from the High Court to the court exercising jurisdiction in bankruptcy (that is, in this case, the county court) in the case provided for by that sub-section, and the first question which is raised is this, Whether that power of transfer is discretionary or imperative? It is contended by Mr. Everitt that there is no discretion in the judge, but that he is bound to transfer.

Now the word used in sub-section (4) is "may," and the word "may" is beyond all question potential—it implies a power, but if it is coupled with a duty imposed on the court, or on the person to whom it is given, to use that power in a certain particular way, it then, no doubt, becomes imperative, and there is plenty of authority for that proposition.

Now in this case I can see no such duty, and, in my opinion, the power conferred by the word "may" is discretionary.

But then it is said that, even if there is a discretion in the judge, in this particular case he has wrongly exercised such discretion, and the ground upon which it is said he has wrongly exercised his discretion is, because the effect of his exercising his discretion in the way he has, is this—that it preserves to the legal personal representative, and to the plaintiff creditor, an advantage which they would possess if the administration takes place in the Court of Chancery. These rights of the legal personal representative, and the plaintiff creditor are rights which they possess, and I cannot say that the recognition of these rights is any ground for holding the discretion to be wrongly exercised. It is perhaps an anomaly that there should be two co-existing systems, and that the distribution of assets should proceed in a different way, depending very much on whether the proceedings are taken first in the Court of Chancery or in the Court of Bankruptcy; but that is a matter for Parliament, and is a matter with which we have nothing to do.

I think, therefore, this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Penley & Grubbe*, for *Hunnybun & Son*, Huntingdon.

Solicitors for the plaintiff, *Kinsey, Ade, & Hocking.*

Solicitor for the defendants, *Thornton Toogood.*

From Q. B. Div. Jan. 22.

DUKE OF DEVONSHIRE AND OTHERS v. O'CONNOR. (a.)

Inclosure Act—Reservation to lord of manor—Right of shooting over lands allotted—Rule of construction of Act.

Where, under an Inclosure Act, lands in a manor have been inclosed and allotted as freehold, and, by a reservation clause, certain rights over the lands so allotted are reserved to the lord, the reservation clause, being in derogation of the right of freehold given by the Act, will be construed most strictly against the lord, and nothing short of a positive reservation to the lord, either expressly or by necessary implication, of rights (as, for example, the right of shooting) will suffice to entail upon the lands allotted as freehold a burden inconsistent with the ownership in fee.

Sowerby v. Smith, 23 *W. R.* 79, *L. R.* 9 *C. P.* 524, *followed.*

Lord Leconfield v. Dixon, 16 *W. R.* 157, *L. R.* 3 *Ex.* 30, *discussed.*

Appeal from the judgment of Grantham, J., at the trial of the action. The action was brought for an injunction to restrain the defendant from shooting over certain land which had been allotted under an Inclosure Act (referred to below) to the defendant's predecessor in title.

The plaintiffs were the trustees of the Earl of Carlisle, who was lord of the manors of Upper Denton and Nether Denton, in the Barony of Gilsland, in Cumberland.

The defendant was the rector of Nether Denton, and as such was the present owner of an allotment under an Inclosure Act and award made in 1798.

The Inclosure Act (38 Geo. 3, c. 18, private Act) was entitled "an Act for dividing and inclosing the moors, commons, and waste grounds in the manors of Upper Denton and Nether Denton, within and parcel of the Barony of Gilsland, in the county of Cumberland."

On page 19 of the Act it was provided that "all and every the allotments and appropriations hereinbefore directed to be made shall and are hereby declared to be freehold to all intents and purposes whatsoever."

On page 26 it was provided that "nothing in this Act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Frederick, Earl of Carlisle, lord of the said Barony of Gilsland, and of the said manors of Upper Denton and Nether Denton, his heirs or assigns, or of the lord or lords, lady or ladies, of the said barony and manors for the time being, of, in, and to the coal, lead, tin, copper, stone, or slate, minerals, or metals, within or under the said moors, commons, and waste grounds intended to be inclosed as aforesaid (save and except the stones in the public stone quarries to be set out as aforesaid), or of, in, or to the seigniories and royalties, franchises, and liberties, incident and belonging to the said manors; but that the said Frederick, Earl of Carlisle, and all and every person and persons claiming by, from, or under, or in trust for him as lord of the said barony and manors, and all succeeding lord and lords, lady and ladies, and owners thereof, for the time being, shall and may at all times for ever hereafter have, hold, take, and enjoy all rents, services, courts, perquisites, and profits of courts and mills (except for the grinding and grist of malt), piscaries, fishing, hunting, hawking, and fowling, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances what-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

soever, to the said barony and manors, or to the lord or lords, lady or ladies thereof, for the time being, incident, appertaining, or belonging, or which have been anciently used, exercised, and enjoyed by the lord or lords, lady or ladies, of the same barony and manors (other than and except such right of common, pasturage, and free warren in respect of conies, which is intended to be extinguished) as could or might be claimed by him, her, or them, as owner or owners of the soil of the said moors, commons, and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he, she, or they could or might have held and enjoyed the same in case this Act had not been made."

Grantham, J., held that the right of shooting over the allotments was reserved by the Act to the lord, and gave judgment for the plaintiffs. The defendant appealed.

Gully, Q.C., and *Mattinson*, for the defendant.

Bigham, Q.C., and *Edward Pollock*, for the plaintiffs.

The following cases were referred to: *Greathead* v. *Morley*, 3 Man. & G. 139; *Ewart* v. *Graham*, 7 W. R. 621, 7 H. L. Cas. 331; *Bruce* v. *Helliwell*, 5 H. & N. 609, 8 W. R. C. L. Dig. 33; *Lord Leconfield* v. *Dixon*, 16 W. R. 157, L. R. 3 Ex. 30; and *Sowerby* v. *Smith*, 23 W. R. 79, L. R. 9 C. P. 524.

Lord ESHER, M.R.—The plaintiffs claim a declaration that they, as trustees for the Earl of Carlisle, are entitled to the exclusive right of shooting over that part of the original waste land which has been allotted to the defendant's predecessor in title. The defendant claims to be entitled to the right of shooting by virtue of his ownership of the freehold of the allotment. The question turns solely upon the construction of this particular Inclosure Act. It is said that it is an Act which in one sense is to be considered as an agreement between the various parties. It may be that the Act must be considered as drafted upon an agreement between the parties, but still it is an Act of Parliament and must be construed according to the rules, if any, which have been laid down for the construction of such Acts as these. The first inquiry, then, is, whether any rules of construction have been laid down for construing such Acts. It seems to me that *Sowerby* v. *Smith* in the Exchequer Chamber is the leading case in which a rule is laid down. That was a decision of a court of co-ordinate jurisdiction with this court, and the principles laid down in that case are binding upon us, unless there is something which takes that case out of the ordinary rule. It was suggested that the case is not binding upon us because, it was said, it was in conflict with another case also in the Exchequer Chamber, and that when two cases in the same court as this are in conflict, this court is free to say which it will follow. The court, however, ought not to come to the conclusion that two cases in the same court are in conflict unless it is clearly convinced that they are. I agree that if the two cases are in conflict this court must say with which of the two it agrees. If, therefore, the case of *Lord Leconfield* v. *Dixon* were in conflict with *Sowerby* v. *Smith* we should have to say which we should follow. For my part I should prefer to follow *Sowerby* v. *Smith*. I shall consider presently whether or not they are in conflict. The judgment delivered by Cockburn, C.J., in *Sowerby* v. *Smith* was a carefully considered judgment, and the effect of it is that in such an Act as this, where in one part one finds that a portion of the waste is allotted as freehold, the fact of the freehold being allotted gives the allottee the right of shooting in as full a manner as is possessed by any other freeholder in this country, unless from another part of the Act it appears that, notwithstanding the grant of the freehold, the allottee is not to have the right of shooting, but that that right is reserved to the lord. *Primâ facie*, the allottee has the right of shooting, and it lies upon the lord to show that, notwithstanding the grant of the freehold, the right of shooting has been reserved to him either in express terms or by necessary implication. Cockburn, C.J., says (23 W. R., at p. 80, L. R. 9 C. P., at p. 531):—"The land having been allotted as freehold, the ownership must carry with it all the incidents which ordinarily attach to a freehold interest, unless by the special provisions of the Act some right has been reserved to the lord which would derogate from the ordinary rights of ownership in the soil; and the question turns, therefore, entirely on the effect of the reservation clause." Further on (23 W. R., at p. 81, L. R. 9 C. P., at p. 532) he gives an additional rule of construction:—"It appears to me that the effect of the clause"—he is speaking of the particular clause there in question, but the rule is applicable generally—"which being in derogation of the right of freehold given by the Act to the allottees of the lands inclosed, must, I think, be construed most strictly against the party claiming under it, is simply to preserve to the owner of the manor such rights as were of a manorial character." I take that rule to be that as the claim of the lord depends upon the reservation clause, which is in derogation of the right of freehold granted to the allottees, that clause must be construed most strictly against the person claiming under it. That rule is expanded by him (23 W. R., at p. 82, L. R. 9 C. P., at p. 537):—"Independently, however, of authority, I arrive at the conclusion that nothing short of a positive reservation to the lord of the right of sporting over the enclosed lands, if not in express terms, at all events in language necessarily leading to such a conclusion, will suffice to entail on land allotted as freehold a burden of a feudal and onerous character inconsistent with the ownership in fee." Nothing can be clearer than that. The lord's alleged right depends upon the reservation clause. That clause must be construed strictly, and cannot be held to reserve a right over another man's land unless it does so in express terms or in language necessarily leading to that conclusion. In my opinion it must be taken that Lord Bramwell, though he delivered a separate judgment, concurred in that judgment.

It is said that *Lord Leconfield* v. *Dixon* is in conflict with that case. If it is, we are left free to follow which we think right, and when I look at the closely reasoned judgment of Cockburn, C.J., in *Sowerby* v. *Smith* I can gather a clear and distinct principle and rule laid down in it, whereas, though I look with affectionate respect at the judgment of Bovill, C.J., in *Lord Leconfield* v. *Dixon*, I must confess I can gather no rule or principle laid down there. I venture to say that, if the case of *Lord Leconfield* v. *Dixon* had come up for decision after *Sowerby* v. *Smith*, and the court had to apply the rule laid down in the latter case to it, I should greatly doubt whether I could say that the reservation clause was so clear as to reserve the right of sporting to the lord. There are, however, words in the reservation clause in that case which are not to be found in the reservation clause in *Sowerby* v. *Smith*—"hawking, fowling, and all beasts and birds considered as game, . . . and all other royalties, liberties, privileges, and appurtenances, except such as are expressly taken away by this Act." Those words were relied upon by Bovill, C.J., as showing the implied reservation. It is not, therefore, necessary now to say that those words are not sufficient to raise the necessary implication. It is clear from the argument in *Lord Leconfield* v. *Dixon* in the Court of Exchequer, as reported in 36 L. J. Ex. 102, that the court had to consider those words, and the Court of Exchequer Chamber overruled the decision because, in their opinion, sufficient weight had not been given to them. The right of sporting was, therefore, held to be reserved to the lord, not in express terms, but

by necessary implication. That case, therefore, in that view of it, comes within the rule laid down in *Sowerby* v. *Smith*.

Then, as to the case of *Ewart* v. *Graham*, there can be no doubt that the right there claimed was, though not expressly, still by necessary implication reserved. That was the decision of the Exchequer Chamber, and it was upheld in the House of Lords. That case clearly comes within the rule. There is more, however, to be gathered from *Ewart* v. *Graham*. The case of *Greathead* v. *Morley* was overruled by the Exchequer Chamber in *Ewart* v. *Graham*. The House of Lords, however, refused to say that *Greathead* v. *Morley* was to be taken as overruled. Accordingly that case, as it is not overruled, must be considered also. It seems to me that it also lays down the same rule, though not in such distinct terms as *Sowerby* v. *Smith*.

The result, therefore, is that we see the rule laid down in the earliest of the above cases, and in more distinct terms in the latest case, and of the two cases which came between them, one comes clearly within the rule, and the other cannot be said not to be within it. None of the cases, therefore, in my opinion, conflict.

(His lordship then said that the language of the reservation clause in the present case was ambiguous, and did not clearly, either expressly or by necessary implication, reserve the right of shooting to the lord. Construing the reservation clause, according to the rule above laid down, strictly against the lord, he could not hold that the right of shooting had been reserved.)

BOWEN, L.J., concurred.

FRY, L.J.—I am of the same opinion. I shall not refer to the authorities further than to say that I adopt the conclusions of the Exchequer Chamber in *Sowerby* v. *Smith* as laying down the law which we should follow. If there is any difference between that case and the earlier one of *Lord Leconfield* v. *Dixon*, I do not hesitate to say that I prefer the rule laid down in the later case. It lays down an intelligible rule for the construction of such Acts as these. There is one case which was not referred to by the Master of the Rolls—namely, *Bruce* v. *Helliwell*—and that case seems to me to be quite consistent with the rule laid down in *Sowerby* v. *Smith* (The Lord Justice then held that the reservation clause was obscure, and did not make it clear that the right of shooting was reserved to the lord.)

Appeal allowed.

Solicitors for the plaintiffs, *Wing & Du Cane*.

Solicitor for the defendant, *E. Richardson*, for *Donald & Ostell*, Carlisle.

High Court of Justice.

Chan. Div. }
Chitty, J. } Feb. 28; March 7.

In re TAYLOR.
TURPIN *v.* PAIN. (*a.*)

Practice—Official referee—Form of report—Method of taking accounts—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 56.

An official referee is not bound to take accounts referred to him under section 56 *of the Judicature Act*, 1873, *in the strict way used in the Chancery Division before a chief clerk in chambers, though he may adopt that method so far as the circumstances of the case seem to him to admit. He is not compelled, in cases of complicated accounts, to proceed upon any particular accounts and to refer to each item in the report, but may strike a balance upon the result of the inquiry generally. The parties may use the notes of the inquiry and of the evidence for the purpose of tracing any item allowed or disallowed which they may desire to question.*

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

Motion.

Mary Ann Taylor, widow, died on the 27th of August, 1872, having by her will appointed the defendants, Philip Pain and William Pain, executors and trustees thereof, and thereby directed them to carry on her business of a farmer upon her farm called Goosehcys, in the parish of Romford, in the county of Essex, and to employ the capital embarked therein, with any other part of her personal estate required for that purpose, during the remainder of the term for which she held the said farm; and she directed the defendants to stand possessed of the profits arising therefrom upon the trusts thereinafter declared concerning her residuary estate, and after the expiration of the said term she gave her implements of husbandry, household furniture, and effects unto her son, Philip Thomas Taylor, and gave her residuary personal estate, including the profits of her said business, upon trust to provide for the maintenance of her children during their minorities, and when the youngest child should attain the age of twenty-one years in trust to divide the same amongst her children, Philip Thomas Taylor and the four plaintiffs, Mary Ann Turpin, Emma Giblin, Fanny Taylor (since deceased), and Amy Taylor.

The defendants proved the will on the 21st of October, 1872, and carried on the farming business from the date of the death of the testatrix until the 29th of September, 1877. During this period they allowed Philip Thomas Taylor to act as bailiff, and with his sisters, the plaintiffs, to occupy the farmhouse, and made him payments for the expenses of the farm and of the household. On the 29th of September, 1877, the term for which the farm was held expired; Philip Thomas Taylor then became tenant, the plaintiffs continuing to live with him in the house until 1880, when he became insolvent, and the assets to which he had become entitled under the will of the testatrix were realized, and the farm given up. The defendants then took a house elsewhere for the plaintiffs, and continued to make payments for their support and education. The plaintiff, Amy Taylor, the youngest of the beneficiaries under the will, attained the age of twenty-one years on the 14th of October, 1885.

The defendant Philip Pain was a farmer, and the defendant William Pain a cattle dealer. They had kept the ordinary cheque and pass books, and had the usual accounts kept in these respective businesses relating to purchases and sales of live and dead stock belonging to the Goosehcys Farm; beyond these they had kept no proper accounts, and the executorship accounts were consequently in a very complicated condition.

On the 24th of August, 1886, the plaintiffs commenced this action, claiming administration of the testatrix's personal estate.

On the 4th of February, 1887, an order for administration was made, and an order for a receiver, with the usual accounts to be taken, and an inquiry what parts, if any, of the testatrix's personal estate were then outstanding or undisposed of. On the 14th of May, 1887, an order was made discharging so much of the order of the 4th of February as directed the taking and making of the accounts and inquiries therein mentioned. On the 14th of May, 1887, on the action coming on for trial before Kekewich, J., an order was made directing various accounts and inquiries, and, amongst others,

(1) an account of the dealings of the defendants in the business at Gooseheys Farm from the date of the death of the testatrix up to the 29th of September, 1877; (2) an account of receipts and profits of the defendants in respect of the estate of the testatrix other than those comprised in account No. (1).

By an order of the 15th of December, 1887, it was by consent ordered that on the chief clerk's certificate under the judgment of the 14th of May, 1887, it should be certified that the accounts brought in by the defendants respectively under the said judgment should include both the estate of the testatrix and of her husband, Philip Taylor, deceased, such accounts not distinguishing the items relating to these respective estates. By an order of the 11th of November, 1889, it was ordered that it should be referred to Mr. Hemming, Q.C., one of the official referees, under section 56 of the Judicature Act, 1873, to take, among other accounts, the accounts numbered (1) and (2) directed by the judgment of the 14th of May, 1887, and to report thereon, regard being had to the order of the 15th of December, 1887. Separate accounts were filed by the defendants, who had severed their defences, and were represented by separate counsel and solicitors.

The official referee refused to go into the accounts as between the two defendants, and for the purpose of his inquiry ordered the separate accounts to be amalgamated. He examined witnesses and the books and vouchers, the inquiry lasting nine days, and made his report on the 24th of December, 1889. By this he stated, having set out the facts at considerable length, that it was generally impossible to distinguish between payments made by the defendants to Philip Thomas Taylor for the purpose of carrying on the farm, to be expended in wages and other outgoings, and those made to Philip Thomas Taylor for the purpose of household expenses for the maintenance of himself and of the plaintiffs, most of such payments never having been specifically appropriated; and that he had allowed such sums in the accounts, notwithstanding any such irregularity, as payments made by the defendants for maintenance and education, the defendants having acted for the benefit of the estate. He further reported that as to account (1) the defendants had, from the death of the testatrix up to the 29th of September, 1877, in the course of their dealings with the farming business, received £9,758, and had paid £9,823, leaving a balance of £65 in their favour; and that as to account (2), the defendants had, in respect of other receipts and profits, received £5,061, and expended £5,080, leaving a balance of £19 in their favour.

The plaintiffs now moved that the report of the 24th of December, 1889, might be remitted to the same official referee, or in the alternative to another official referee or to a special referee, that directions might be given to such referee that the accounts be taken in the way usual in the Chancery Division, before a chief clerk, and vouched in the ordinary way, that the referee should take the accounts rendered by the defendants and filed before the date of the order of reference, and that directions be given to such referee to state in his report which of the items in the accounts rendered by the defendants had been allowed and disallowed by him respectively, and show what, if any, sums not mentioned in such accounts he had charged against the defendants.

On the 28th of February, 1890, after the motion had been opened, it was adjourned for a week at the suggestion of the judge, in order that he might make some further inquiries of the official referee, and that counsel for the defendants might show from the referee's notes the way in which the sums allowed by him had been arrived at.

On the 6th of March the referee made a further report to the judge to this effect:—The accounts brought in by the defendants were, after the lapse of time which had occurred, insufficient to enable them to produce an approximate account. The defendants had severed in their defence. One of them had given such materials as he had or could discover from the plaintiffs to an accountant to do what he could with them, and the other had intrusted his solicitor with a like duty. Accounts had then been produced which were not in harmony with one another, and were too defective in form to supply the basis of investigation in the usual way. The defendants could not verify these on oath, and the accountant could only say that his account was as good as it could be made from the existing materials. Under these circumstances the following course had been adopted. The official referee had collated such documents as could be found with the *vivâ voce* evidence of everyone who knew anything about the matters in question, including that of Philip Thomas Taylor, who had a book in which he had informally made entries of the sales and purchases effected by the defendants in carrying on the farm, as well as notes of the money expended by himself for wages, maintenance of his four infant sisters, the plaintiffs, at the farmhouse, and other petty outgoings. With these materials the aggregate expenditure and receipts of the trustees were arrived at, and a further account obtained, though not one which the official referee could have taken as the basis of investigation on the method pursued in chambers in the Chancery Division. The notes of this inquiry would afford as great facilities as an ordinary chief clerk's certificate for rearguing before the court all points taken before the official referee, and less difficulty would occur in tracing any specific matter than would result from a search through the affidavits, though the report would not afford materials for opening up new questions on items not made the subject of inquiry before the referee.

Maclean, Q.C., and *J. H. Redman*, for the motion.—The report may be adopted wholly or partially only; it merely presents the general conclusions of the official referee. There is nothing specific to enable the plaintiffs to examine and dispute, if necessary, separate items: *Burrard* v. *Calisher*, 30 W. R. 540, 19 Ch. D. 644. The report ought to be remitted, and directions given for the accounts to be vouched in the ordinary way.

Romer, Q.C., and *G. Curtis Price*, for the defendant Philip Pain.

Byrne, Q.C., *Haldane, Q.C.*, and *W. R. Sheldon*, for the defendant William Pain.—No further inquiry is necessary or should be ordered: *Walker* v. *Bunkell*, 31 W. R. 661, 22 Ch. D. 722. The official referee has wide powers as to the way in which he is to hold his judicial inquiry under section 56 of the Judicature Act, 1873, and to take evidence: *Baroness Wenlock* v. *River Dee Co.*, 35 W. R. 822, 19 Q. B. D. 155. He is not compelled to take accounts in the way usual in the Chancery Division; these involved accounts have been taken in the best way possible.

Maclean, Q.C., replied.

Chitty, J.—An order was made in this action directing various accounts and inquiries, including (1) an account of the dealings and transactions of the defendants in carrying on the business of the testatrix at Gooseheys Farm from the time of her death until the 29th of September, 1877, and (2) an account of the receipts and payments expended in respect of the estate of the testatrix other than those comprised in number (1). Against the trustees there is no charge of dishonesty, but there is difficulty in making out their accounts, which clearly have not been properly kept. The order was taken in chambers, and an attempt was made to work through the accounts in the usual way—that is, the accounts being brought in by the accounting parties, verified by affidavit, and then, if necessary, the

accounting parties being cross-examined as to matters in contest. The vouching then takes place, before a junior clerk as a rule, and then the chief clerk's certificate is prepared in a form which enables the parties to single out the items allowed and disallowed by reference to the account filed, and bring any objection before the court by way of a summons to vary.

This method, it was found, broke down in the present case. Two years were spent in chambers, and two separate accounts were brought in, each defendant accounting as well as he could for certain parts of the estate. The result was that the matter was so entangled that this ordinary system, which is well adapted to accounts properly kept, would possibly have ended had things gone on, in a similar result to *McIntosh* v. *The Great Western Railway Co.*, 3 W. R. 472, 4 Giff. 683—namely, that the parties would have been obliged probably to settle the matter, or the beneficiaries would have been kept out of their money for an indefinite period. The delay which can and does take place in taking some very intricate accounts almost amounts to a denial of justice. Trustees ought, of course, to keep accounts, and I am not in a position to draw distinctions between accounts to be kept or those not to be kept, for I should have to weigh the capacity of each man in golden scales, and say who should or who should not keep accounts, perfect or imperfect. Such varying distinctions have never been made. Putting wilful default out of the question, the object of taking the accounts is to arrive at a just conclusion for what sum the accounting parties must account, and the proper remedy with regard to the non-keeping of accounts in a proper case is to disallow the costs of taking the account, or to direct the trustees to pay it. With that I have nothing to do in this case.

A failure having practically taken place in the ordinary method, an order was made referring the matter to one of the official referees under section 56 of the Judicature Act, 1873, that is to report only; to take the accounts, including those numbered (1) and (2), and to report thereon to the court. The official referee has made a report first stating of what the estate of the testatrix consisted at her death, including her deceased husband's estate, and also of what the estate now consists, to both of which there is no objection. He then states the circumstances of the case, and what the trustees did, from which it appears that they did not act strictly, but did the best they could, as trustees for the family, according to their judgment. The referee then reports that dealing with these two accounts the trustees have, as to number (1), received £9,758, and have paid £9,823, leaving a balance of £65 in their favour; and as to number (2), received £5,061, and have paid £5,080, leaving a balance of £19 in their favour. That is the report.

This motion now asks me to remit the report to the referee (or to some other referee, which part was not pressed), and to give a direction to the referee that the accounts be vouched in the ordinary way. The official referee is not bound to take the accounts in the same way as the chief clerk. If it were so, provision would be made by the General Orders to that effect. There is an advantage in some accounts in taking them before the referee according to the existing practice. He does not proceed by affidavits and then by cross-examination on the affidavits, but by having the witnesses, accounts, and books before him, and by sitting continuously and taking *vivâ voce* evidence. The referee has made full notes of the inquiry, which are before me, and contain all the materials upon which he proceeded. This method is similar to that adopted by the masters in the Queen's Bench Division. I am of opinion that the referee may adopt the method employed by the chief clerk in taking accounts so far as he may find it convenient and likely to advance the ends of justice. Special items in the account may be specially referred to as allowed or disallowed, but in such a case as this, where the farming and household accounts are mixed up with the advances, I say the referee could not properly have taken the accounts in that way, by having accounts regularly taken before him in the usual manner. Therefore the applicants fail upon this point. Then I am asked to give directions to the referee to take the accounts rendered by the defendants before the date of the order of reference, and to give directions to the referee to state in his report which of the items therein had been allowed and disallowed by him, and what sums, if any, not mentioned in such accounts he has charged against the defendants. These two points resolve themselves into this. The plaintiffs say that the report is practically final, and that they cannot attack it. The referee is not directed to conclude the matter—that is, to try it as if it were the trial of the action and enter judgment—he is directed under section 56 to inquire only. He has, it is said, made a report in such a manner that the parties cannot select an item and bring it before the court as a matter with regard to which they contend the referee has erred. It is obvious that the referee has not stated on what accounts he has proceeded, and he has not proceeded upon any account with specific numbers to every item, but has found the total receipts and payments and has found a balance. According to arrangement I have seen the referee, and have had a detailed statement upon these points which have been urged. He tells me in substance that he cannot go through his materials again and indicate by reference the items allowed or disallowed. Further, it should be observed that the notes of the referee are in court, and can be read by anyone desirous of so doing, and the second report says that less difficulty would probably occur in tracing therein any particular item than would result from hunting it down through a vast mass of affidavits.

Now this is a peculiar case. Did I think the report could not in any way be attacked, I might accede to this proposition so far as this, to direct the referee, on the face of his report, to point out generally or specifically, as the case permitted, the items allowed or disallowed, by reference to some document. But I am satisfied by the second report that there are the materials at present with which to attack the report as a matter of substance, if there are special grounds for doing so. No doubt this would involve much labour, but the parties who were before the referee will be able, if necessary, by reference to his notes, to pick out the material points and bring them before the court. I have referred to the *Dunkirk Hall Colliery Co.'s case*, 26 W. R. 841, 9 Ch. D. 20. There it was a question of ascertaining damages, but it was a complicated case and the notes very voluminous. In that case those who objected to the report had to go through the notes in a similar way, but the fact that much time and labour are necessary for such a task is no reason why I should, in such a special case as this, insist on form to such an extent as to substantially inflict injustice on some of the parties to the action. I am not asked to adopt or reject the report, but simply to send it back; so the result is that I do not remit the report to the official referee. The trustees' costs will be their costs in any event, without prejudicing the question of two sets of costs to them. Liberty to apply upon further consideration.

Motion refused.

Solicitors for the plaintiffs, *Child & Norton.*

Solicitors for the defendant Philip Pain, *A. H. Hunt & Co.*

Solicitors for the defendant William Pain, *Haynes & Clifton.*

Chan. Div. North, J. — Feb. 8.

In re WORMALD. FRANK *v.* MUZEEN. (*a.*)

Married woman — Gift to married woman of life interest for her separate use without power of anticipation—Gift over on death or on her anticipating the income—Mortgage of her life interest—Forfeiture.

A married woman entitled to a life interest in a fund for her separate use without power of anticipation, with a gift over "on her anticipating the income," assigned her life interest by way of mortgage.

Held, that, as the assignment was wholly inoperative, she had not in fact anticipated her income, and therefore her life interest had not determined.

Originating summons.

This was a summons taken out by the sole surviving trustee of the will of J. Wormald to determine the question whether, in the events which had happened, a gift made by the testator of the income of his residuary estate to his sister, Mary Elizabeth Muzeen, had or had not determined.

The testator died on the 24th of March, 1874, having, by his will, dated three days before his death, devised and bequeathed his residuary real and personal estate to trustees on trust to pay an annuity of £300 a year to his wife for life, and subject thereto to pay the income of his residuary estate to his sister Mary Elizabeth Muzeen "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease or on her anticipating" the income or any part thereof the residuary estate was to be held on trust for all her children equally as tenants in common. The widow died in July, 1881, and Mary Elizabeth Muzeen was at the testator's death and is at the present time the wife of Muzeen. There was only one child of the marriage. Mary Elizabeth Muzeen, by deed dated the 3rd of June, 1889, purported to assign her life interest by way of mortgage.

H. J. Wood, for the surviving trustee, the plaintiff, submitted to the court the question whether the life estate had determined.

Arnold White, for Mrs. Muzeen.—The alleged mortgage is merely an attempt to anticipate, it is not an anticipation, and there is, therefore, no forfeiture.

Dunham, for the child of the marriage.—The execution of the mortgage is a forfeiture of the life interest. Mrs. Muzeen, being a married woman, could not anticipate the income, the words "on her anticipating" must therefore mean on her attempting to anticipate, or they are wholly inoperative. By mortgaging her life interest she had attempted to anticipate the income, and her life interest had accordingly determined.

NORTH, J.—I cannot in this case adopt the view that the expression "on her anticipating," means "on her attempting to anticipate." The trust is to pay the income of this estate to Mrs. Muzeen "for her separate use, free from the debts and control of any husband, without power of anticipation, and for and during the term of her natural life, and from and after her decease or on her anticipating the income or any part thereof," there is a gift over. Now has she anticipated? No. She could not do so, because she was a married woman both at the time of the testator's death and at the time of the execution of the mortgage deed. It is said that to attempt to anticipate and to anticipate are the same thing. I am of opinion that this is not so. The testator's intention clearly was that his sister should have the income for her life, and if she should anticipate the fund should go to her child. She has, however, not done so, as the assignment was wholly inoperative and does not affect her life interest.

Solicitors, *Collyer, Bristow, & Co.; Morse & Simpson.*

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Q. B. Div. (Denman and Wills, JJ.) — Feb. 4.

GRIFFITH *v.* YSTRADYFODWG SCHOOL BOARD. (*a.*)

Practice—Costs—Payment into court—Plea of tender—Plea not stating that tender was before action—Taking out sum in satisfaction—Plaintiff's right to costs—Ord. 22, r. 7.

In answer to a claim for money lent, the defendants pleaded that the only sum due was £38, which they had tendered to the plaintiff and now brought into court in satisfaction of the whole claim—the plea of tender not stating the tender to have been made before action; and the plaintiff took out the sum in satisfaction of his claim.

Held, that the plaintiff was not entitled to have his costs taxed, as there was a plea of tender on the record, which was not disposed of, and that it was not essential that the plea of tender should have stated that the tender was before action brought, if that fact could be inferred.

Appeal from an order of Field, J., at chambers.

The plaintiff brought an action against the defendants to recover a sum of £87 for money lent and for money received by the defendants on behalf of the plaintiff.

The defendants pleaded that the only sum due was a sum of £38 15s., which sum they had tendered to the plaintiff, who refused to accept it, and they now brought that sum into court in satisfaction of the whole claim. The plaintiff took out that sum, under ord. 22, r. 7, in satisfaction of his whole claim, and he gave the defendants notice accordingly.

The plaintiff then applied to a master to tax his costs in the action, but the master refused to tax the costs, on the ground that he had no authority to tax the costs, and that there was a plea of tender on the record which had not been disposed of.

On appeal Field, J., affirmed the order of the master.

The plaintiff appealed.

H. Lynn, for the plaintiff.—The action was at an end, and the plaintiff was therefore entitled to have his costs taxed and paid by the defendants. The plea of tender did not state that the tender was made before action, and cannot have the same effect as a plea of tender before action brought. There was an alternative plea of a payment into court in satisfaction: *Wheeler v. United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 597.

W. Evans, for the defendants.—The plaintiff ought to have given notice of discontinuance instead of taking the money out in satisfaction. It is not essential that the plea of tender should state that the tender was made before action; that fact may be inferred.

DENMAN, J.—There is a distinction between cases relating to a payment into court with a mere denial of liability, and cases in which there is a plea of tender with a payment in satisfaction. In the former case the plaintiff might take out the money and proceed to tax; in the latter case, not so. If the defendants were right in their plea of tender the action should never have been brought, and no costs would have been incurred, so that, unless the plaintiff can disprove the plea of tender, it is

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

only right he should have to pay the costs. It has always been held that in pleading a plea of tender it is not essential that the words "before action" should be inserted in the defence if that may be otherwise inferred.

Wills, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Baker & Nairn.*

Solicitors for the defendants, *Purkis & Co.*, for *Linton & Kenshole*, Aberdare.

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 4.

Ward *v.* Folkestone Waterworks Co. (*a.*)

Local government — Waterworks — Constant supply— Prevention of waste—Obligation of consumer to put down special apparatus—Breaking up of roads—Right of company to cut off supply—Folkestone Waterworks Acts, 1858 (21 & 22 *Vict. c. x.*), *ss.* 13, 14, *and* 1888 (51 & 52 *Vict. c. xxv.*), *ss.* 5 (2), 6—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 43, 48, 51, 52.

By a local Waterworks Act passed in 1858, *it was provided that "All persons supplied with water by the company shall provide proper ball or stop-cocks, or other necessary apparatus of approved construction, for regulating such supply," under the penalty of having their pipes cut off or the water cut off from their premises. By an Act passed in* 1888, *the company was compelled to afford a constant supply of water, and took power to attach to the water-pipe outside of each house a stop-valve of the screw-down kind, in order to prevent waste, subject to the provisions of the Waterworks Clauses Act*, 1847, *with respect to breaking up of the streets for the laying of pipes. The company called upon an occupier to put down such stop-valve, and, on his making default, cut off his water supply.*

Held, that the company was liable to be convicted for "refusing to furnish a supply of water to an occupier" under the provisions of section 43 *of the Waterworks Clauses Act*, 1847, *and that a stop-valve to prevent waste outside of a house was not a "necessary apparatus for regulating the supply of water."*

Case stated by justices under 20 & 21 Vict. c. 33.

The appellant was the occupier of a dwelling-house in the borough of Folkestone, and on the 13th of September, 1889, he was served by the respondents with a notice requiring him to provide and insert in his communication pipe under the pavement of the street a stop-valve of the screw-down kind within seven days after the receipt of the notice. The appellant was willing to comply with the notice, but was unable to obtain the consent of the corporation to his breaking up of the pavement.

On the 25th of September the respondents gave the appellant notice that if he did not at once comply with their demand his supply of water would be cut off, and on the same day the appellant tendered to the respondents the water rate then due, which the respondents refused to accept.

On the 26th of September, as the appellant had not complied with the demand, the respondents cut off the water supply from his house. The appellant thereupon summoned the respondents under section 43 of the Waterworks Clauses Act, 1847, for unlawfully refusing to furnish him with a supply of water.

The respondents were bound by the Folkestone Waterworks Act, 1888, to furnish a constant supply of water, and the justices found as a fact that it was necessary, for the prevention of waste, that screw-down valves should be inserted in the communication pipes.

It was contended by the appellant that by section 43 of the Waterworks Clauses Act, 1847, he was compelled to obtain the consent of the corporation before attempting to comply with the notice, and he had been unable to obtain their consent, but that in any case the respondents had no power to insist upon his inserting a stop-valve in his communication pipe as a condition precedent to his obtaining a supply of water.

It was contended by the respondents that they had such power under the provisions contained in sections 13 and 14 of the Folkestone Waterworks Act, 1858 (21 & 22 Vict. c. x.), which are as follows:—

Section 13.—"It shall be lawful for the company from time to time, for the purpose of preventing the waste or misuse of water, to prescribe the size, nature, and strength of the pipes, cocks, cisterns, and other apparatus to be hereafter altered or fixed, and to interdict any arrangements and the use of any pipes, cocks, cisterns, or other apparatus which may tend to such waste or misuse as aforesaid."

Section 14.—"All persons supplied with water by the company shall provide proper ball or stop-cocks or other necessary apparatus of approved construction for regulating such supply, and shall keep the same in good repair, so that the water may be properly drawn off and effectually prevented from running to waste, and in case any such person shall, after being required by the company, neglect to provide such ball or stop-cock or other necessary apparatus, or to keep the same in good repair, the company may cut off the pipes or turn off the water from the premises of such persons respectively, until such ball or stop-cocks or other necessary apparatus shall be provided or repaired as the case may require."

By the Folkestone Waterworks Act, 1888 (51 & 52 Vict. c. xxv.), s. 5, sub-section (2), the company was compelled to "afford for the domestic use of the inhabitants a sufficient supply of pure water constantly laid on"; and by section 6 of the same Act "The company may, outside of and at or near the point at which the communication-pipe for the conveyance into any premises of the water supplied by the company enters those premises, attach to that pipe a sound and suitable stop-valve of the screw-down kind . . . and every such valve shall be protected by a proper cover and guard-box, and the provisions of the Waterworks Clauses Act, 1847, with respect to the breaking up of the streets for the laying of pipes, shall extend and apply to, and for the purpose of inserting, the said valve, cover, and guard-boxes."

The justices were of opinion that the respondents had power under their Act of 1858 to require the appellant to provide a stop-valve and guard-box, and to fix it in the street or pavement to prevent the waste of water, and that, upon his default, they had power, under section 14 of that Act, to cut off his supply of water, and that, upon the true construction of the provisions of the Waterworks Clauses Act, 1847, the appellant had legally power to open the pavement for the purpose of fixing a stop-valve in spite of the corporation refusing its consent.

They accordingly dismissed the summons, and the question for the court was whether or not they were right in so doing.

Duke, for the appellant.—Sections 13 and 14 of 21 & 22 Vict. c. x., which empower the respondents to require all persons supplied with water to provide "proper ball or stop-cocks or other necessary apparatus for regulating such supply," do not apply to the case of a stop-valve of the screw-down kind, "the other apparatus" must be

(*a.*) Reported by Cecil Chapman, Esq., Barrister-at-Law.

something *ejusdem generis* with ball or stop-cocks—that is to say, some apparatus to be used inside a house in connection with the cistern. The object of a screw-down valve in the street is to prevent the flow of water when the supply is not required, but that cannot be called an apparatus for "regulating the supply." Further, there is no statutory power in any occupier of a house to break up the pavement for the purpose of doing anything to the communication pipe which brings water into his house. It is clear, therefore, that whatever powers the company possessed they could not be exercised in the absence of consent by the corporation to the breaking up of the street.

G. Denman (*Murphy, Q.C.*, with him), for the respondents.—The only limitation imposed upon the company in regard to "other apparatus" is that it should regulate the supply. It is found as a fact in this case that stop-valves are necessary for the prevention of waste, and they serve precisely the same purpose in the way of regulating supply, as ball and stop-cocks do, to the cistern. In *East London Waterworks Co.* v. *Vestry of St. Matthew, Bethnal Green*, 35 W. R. 37, 17 Q. B. D. 475, it was held that "covers or guard-boxes to protect stop-valves placed for the purpose of regulating the supply of water in the communication pipes" were works necessary to the undertaking within section 28 of the Waterworks Clauses Act, 1847. In regard to the power of the appellant to break up the pavement, that is provided for by section 52, which says that "any such owner or occupier may open or break up so much of any street as shall be between the pipe of the undertakers and his premises . . . for any such purpose," and such purpose must include the repairs and alterations necessary to a communication pipe which the occupier is expressly allowed to lay down by section 48.

Cave, J.—In this case the waterworks company claim the right to compel the consumer of water to put down a screw-down valve in the street in the pipe which connects his premises with the company's main, and it lies upon them to show, upon very clear and unmistakable language, that they have that right. It is said that that right is given to them by the Act of 1858. Now so far as section 13 of that Act is concerned I do not think it touches this case, for it does not give the company power to compel the consumer to put down any apparatus at all, it merely empowers them, in the event of his choosing to put down certain apparatus, to prescribe what the kind shall be and to prohibit him from putting down anything which is not of an approved description. Section 14 is more to the point, for it does give the company power to compel the consumer to adopt certain precautions to prevent waste. It says "All persons supplied with water by the company shall provide proper ball or stop-cocks." We all know what a ball or stop-cock is—it is an apparatus used in a cistern for the purpose of admitting water into the cistern when it is not full, and excluding the water when it is full. Then the section goes on "or other necessary apparatus of approved construction for regulating such supply . . . so that the water may be properly drawn off and effectually prevented from running to waste." The apparatus there spoken of must be something akin to a ball-cock, something, that is to say, which will prevent the water from running to waste consistently with its admission into the cistern as occasion may require. But the object of the screw-down valve which it is sought here to compel the consumer to put down, is not to regulate the supply in the same manner in which the ball-cock regulates it, but to shut it off altogether. It seems to me therefore clear that the company had not, under that section either, the right which they seek to establish.

But, further, at the time when the Act of 1858 was passed the company were compellable only to give an intermittent supply. They were not required to give a constant supply till 1888. And from the finding in the case that screw-down valves are necessary where there is a constant supply, we must assume that they were not necessary when the supply was only intermittent. When by the Act of 1888 the company came to be compelled to furnish a constant supply, it became necessary to consider what new protection they would require against waste, and what new powers might be necessary to enable them to give the constant supply with the least possible inconvenience and damage to themselves. They accordingly, by section 6, took power to themselves to insert these stop-valves in the communication pipes, without which power any interference by them with the communication pipes, which are the property of the consumers, would be a trespass. But nowhere in the Act is any express provision to be found enabling them to require the consumer to put down these stop-valves, or to pay for the expense of putting them down, and if it had been intended that they should have that power one would have expected an express provision to that effect. Moreover, the consumer has no statutory power to break open the street for any such purpose. It is to the company, and to the company alone, that power to do so is given under section 6.

I am of opinion, therefore, that the justices came to a wrong conclusion, and that they ought to have convicted the respondents. The case must be remitted back to them.

A. L. Smith, J.—I must protest against an attempt to construe an Act of Parliament by the light of legislation passed thirty years after its date. Under the Folkestone Waterworks Act, 1858, the only thing which the company could compel the consumer to do, in order to prevent their water from running to waste, was to provide a sufficient ball or stop-cock, or some other apparatus of the same kind, in connection with the cistern. Such a thing as a stop-down valve in the communication pipe was at that time wholly unnecessary, and its use was never contemplated by anyone. Then came the Act of 1888, by which the company were for the first time placed under the obligation of maintaining a constant supply. And the company then, wanting more protection for themselves than was afforded by the ball-cock, procured the insertion of section 6 in the Act. That section enables them to provide the additional security against waste afforded by the screw-down valve, but only to provide it at their own expense. The mere fact that the valve is to be inserted in the consumer's pipe does not show that the consumer is to pay for it. I can see nothing in that section compelling the consumer to put down or pay for these stop valves, and the provisions of the earlier Act cannot be enlarged to meet the altered condition of things brought about by the later Act. It seems to me, therefore, that the justices in this case have erred, and that the company, having unlawfully cut off the water, are liable to a penalty.

Case remitted to justices.

Solicitors for the appellant, *Low & Worssam.*

Solicitors for the respondents, *A. R. & H. Steele.*

Q. B. Div. (Grantham and Charles, JJ.) Jan. 28.

PAIN v. BOUGHTWOOD. (a.)

Adulteration of food — Alteration of article—Milk—Abstraction of fat from—Selling milk so altered—Scienter—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 9.

In a prosecution under the 9th section of the Sale of Food and Drugs Act, 1875, *for selling an article of food which has been so altered by abstraction of any part of it as to affect injuriously its quality, substance, or nature, it is not necessary to prove that the seller had knowledge of the alteration; but he may be convicted of an offence under the section, even though he had no knowledge of such alteration.*

Case stated by a metropolitan police magistrate.

The appellant, an inspector of nuisances, summoned the respondent for having sold an "article of food, to wit, milk, in its altered state, without notice or making disclosure of the alteration, from which 28 per cent. of its original fat had been abstracted, so as to affect injuriously its quality, substance, or nature, contrary to the provisions of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and the Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30)."

At the hearing of the summons, it was proved that the appellant bought a pint of milk at the shop of the respondent, which was duly divided into three parts, one of which was sent for analysis to the public analyst. The certificate of the analyst stated that 28 per cent. of the fat had been abstracted, and as a result only 1·47 of fat remained. Except this certificate, no evidence was given that the milk was altered, and the defendant gave evidence that he had no knowledge of any such alteration, and his daughter, who sold the milk and managed the shop, also denied all knowledge of the alteration.

The magistrate held that, as the 9th section contemplated disclosure by the seller of any alteration in the article, it was necessary to prove knowledge of the alteration, and, there being no such proof, he dismissed the summons. The question for the opinion of the court was whether this decision was right in point of law.

Section 9 of the Act enacts that "no person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

J. V. Austin, for the appellant.—The magistrate ought to have convicted the respondent of an offence under the 9th section, although the respondent did not know of the alteration in the milk. With regard to the 9th section of the Act, this point has never been settled. The only point is whether *mens rea* is necessary or not, for a conviction under the 9th section. The learned magistrate held that it was necessary, but I submit it is not necessary. Under sections 3 and 4 no person could be convicted without proof of knowledge. The learned magistrate thought that as the word "intent" was used in the one part of the section it applied to the whole section, and he thought it would be hard if the seller of an adulterated article were convicted, although he did not know of the adulteration; but section 25 protects the seller in such a case, as, by that section, he can protect himself by getting a written warranty from the person from whom he bought. The case of *Betts* v. *Armistead*, 36 W. R. 720, 20 Q. B. D. 771, a case under the 6th section of the Act, is conclusive in the present case. There it was held that an offence could be committed under that section though the seller did not know of the adulteration. There are some cases which are perfectly analogous to the present, as for example the case of *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207, where a licensed person was convicted of an offence, under the 13th section of the Licensing Act, 1872, of supplying drink to an intoxicated person, although he did not know of the condition of the person supplied. The case of *Lane* v. *Collins*, 33 W. R. 365, 14 Q. B. D. 193, though at first sight it appears to be against me, is really in my favour. The earlier Act, 23 & 24 Vict. c. 84, s. 1, contained the words "to the knowledge of such person"; these words are omitted in the later Act, and that shows, that knowledge of the alteration is not necessary to constitute the offence. The learned magistrate was wrong in holding that *mens rea* was necessary to constitute the offence.

The respondent did not appear.

GRANTHAM, J.—I have no doubt what our judgment ought to be; our judgment ought to be for the appellant.

In 1875 the Legislature passed an Act of Parliament, repealing all the former Acts, and incorporating their provisions in one Act. Now the Legislature dealt first of all with the question of the adulteration of food and drugs, by mixing with them injurious ingredients; these provisions are contained in sections 3 and 4; then there is a special proviso in section 5 which shows that a person shall not be convicted under sections 3 and 4, if he shows that he did not know that the article was adulterated, and that he could not with reasonable diligence have obtained that knowledge. Then came section 6, which prohibited the sale of articles of food and drugs not of the nature, substance, or quality demanded by the purchaser, and a person cannot be convicted under that section if he comes within the exemptions there specified. That being so, the Legislature went on to enact section 9 without any such exemptions. Now that section is evidently aimed against two classes of persons, against the person who abstracts something from an article of food so as to affect injuriously its quality, and against the person who ultimately sells the article so altered. If it had not been so, the provision of the section would have been entirely useless, so that the section not only provided that the person should be liable who injuriously affected the quality of an article by abstracting something from it, but it also provided that no person should sell the article so altered. A protection is given by section 25, which gives a defendant a power of exonerating himself by showing that he bought the article in the same state in which it was sold, and by getting a warranty to that effect from the person from whom he bought, and if he does not do this, the Legislature thinks he has made himself a party to the fraud. There is thus every provision in the Act to enable an honest dealer to protect himself, as, if he gets this warranty, he can use it as a defence, and if he does not get it, he must be made personally liable.

I think, therefore, this appeal must be allowed.

CHARLES, J.—In my view this case is concluded by the case of *Betts* v. *Armistead*. It seems to me that the case of *Core* v. *James*, 20 W. R. 201, L. R. 7 Q. B. 135, points in the direction of *mens rea* being necessary in cases of this kind, but I do not feel myself at liberty to follow the case of *Core* v. *James*, as that case was cited to the court in *Betts* v. *Armistead*, and was not followed. That being so, *Betts* v. *Armistead*, is an authority for saying that in a case of this kind *mens rea* is not necessary. I feel bound to follow that decision, and I think

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

therefore, that this appeal should be allowed, and that the case should be remitted to the magistrate.

Appeal allowed; case remitted to the magistrate.

Solicitor for the appellant, *W. Lewis.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 12; March 21.

Ex parte Jones.
In re Jones. (*a.*)

Bankruptcy — Discharge — "Conduct and affairs" of bankrupt—Conditional order—Consent to judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28—*Practice.*

In 1885 *judgment for* £500 *was recovered against the bankrupt in an action for breach of promise of marriage. In* 1886 *the bankrupt's father died, leaving considerable property to all his children except the bankrupt. An offer of* £250 *in satisfaction of the judgment having been refused by the plaintiff in the action, the bankrupt, in April,* 1889, *filed his own petition, on which a receiving order was made, the only creditor being the plaintiff in the breach of promise action, who proved for* £596. *The discharge of the bankrupt was granted by the county court judge, subject to the condition that he should consent to judgment being entered against him for* £250.

Held, that the county court judge was justified in taking into consideration the affairs of the bankrupt, and that, looking at the offer made previous to the presentation of the petition, and at the circumstances and position of the bankrupt, the order requiring him to consent to judgment was a right order.

The "conduct" of the bankrupt which the court is required, by section 28 *of the Bankruptcy Act,* 1883, *to take into consideration on the hearing of an application for discharge is not confined to the instances of misconduct specified in sub-section* (3) *of that section, or in section* 24. (Ex parte The Board of Trade, In re Betts and Block, 35 *W. R.* 530, 19 *Q. B. D.* 39, *and* The Board of Trade *v.* Block, 37 *W. R.* 259, 13 *App. Cas.* 570, *distinguished.*) *But the conduct referred to must be conduct in some way connected with or arising out of the bankruptcy.*

Appeal from an order of his Honour Judge Lloyd in the county court at Wrexham, granting the bankrupt his discharge only on condition that he should consent to judgment being entered against him under section 28, sub-section (6), of the Bankruptcy Act, 1883, for the sum of £250.

The case raised a question with reference to the species of conduct which the court is entitled to take into consideration on application by a bankrupt for his discharge.

In July, 1885, the bankrupt was defendant in an action for breach of promise of marriage, in which the plaintiff recovered judgment for £500. In January, 1886, the bankrupt's father died, leaving personalty valued for probate duty at £2,315, and also real property worth £1,300 or £1,400. By his will, made five days before his death, all his children took substantial benefits except the bankrupt, to whom a legacy of £10 only, payable on his mother's death, was left. On April 11, 1889, a receiving order was made against the bankrupt on his own petition. The assets were practically *nil*, and the only creditor was the plaintiff in the breach of promise action, who proved for £596, made up of damages, costs, and interest on the judgment debt. Shortly before the petition in bankruptcy was filed, the bankrupt's family offered the plaintiff £250 in satisfaction of her judgment, which, however, was refused.

Upon these facts the county court judge gave the bankrupt an order of discharge subject to his consenting to a judgment for £250 being entered up against him, such judgment to be deemed to be satisfied if the bankrupt paid the official receiver £200 within a month.

The bankrupt appealed.

E. Cooper Willis, Q.C., and *F. C. Willis*, for the bankrupt.—The county court judge had no power to impose any condition whatever. The bankrupt had committed no offence under either section 28 or section 24, of the Bankruptcy Act, 1883, and by the decision in *In re Betts and Block, Ex parte the Board of Trade* (35 W. R. 530, 19 Q. B. D. 39) in the Court of Appeal, and *The Board of Trade* v. *Block* (37 W. R. 259, 13 App. Cas. 570) in the House of Lords; the bankrupt was entitled to an absolute order of discharge. Section 28 of the Bankruptcy Act, 1883, is a *quasi*-penal section, and must be read strictly. A bankrupt is entitled to an unconditional discharge if he has not committed any offence under section 28, or section 24. Even if the county court judge had power to make this order he ought not to have done so. Such a condition ought not to be imposed unless there is some likelihood of the bankrupt acquiring property afterwards, and that is not the case here.

They also referred to *Ex parte Shackleton, In re Shackleton, ante*, p. 288; *Ex parte Arnaud, In re Bullen*, 36 W. R. 836; *In re Brockelbank, Ex parte Dunn*, 37 W. R. 537.

Muir Mackenzie, for the official receiver.—The House of Lords in *Board of Trade* v. *Block* did not lay down the narrow rule on which the appellant relies. The argument in that case was limited to the fact whether a refusal to submit to medical examination was conduct under section 24 which could be taken into account on an application for discharge. In *In re Cook, Ex parte Cook*, 6 Morrell's Bankruptcy Cases, 224, this court took into consideration the general conduct of the debtor. On the other point, the family of the bankrupt was a well-to-do family, and, assuming that the court had power to make it, the order was a lenient one.

He also referred to *In re Clarkson, Ex parte Allestree*, 2 Morrell's Bankruptcy Cases, 219.

Lankester, for the creditor, did not address the court.

Cur. adv. vult.

March 21.—Lawrance, J., read the judgment of Cave, J., with which A. L. Smith, J., concurred, which, after stating the facts as above set out, proceeded as follows:—

For the appellant it is contended that the learned judge had no power to take the above facts and circumstances into consideration, and ought to have granted an unconditional order of discharge. Section 28, sub-section (2), of the Act of 1883 provides that "On the hearing of the application (for a discharge) the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after-acquired property; provided that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act or Part II.

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order or suspend the operation of the order for a specified time or grant an order of discharge subject to such conditions as aforesaid." By sub-section (6) "the court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts." Now, looking at this section according to its natural grammatical meaning, it seems clear that the court is to take into consideration the bankrupt's conduct and affairs, and after such consideration may, in the exercise of a judicial discretion, grant, refuse, or suspend the order of discharge or grant it subject to conditions. Then comes a proviso which in certain cases takes away this discretion and compels the judge to refuse or to modify the order.

According to its natural and grammatical construction, the proviso does not cover the whole of the ground taken up by the first part of the section, and still leaves room in cases not covered by the proviso for the exercise of the discretion of the judge. What, then, is to be understood by the words "conduct and affairs"? We were invited by the appellant to hold that the conduct which can be considered by the judge is limited to the species of conduct referred to in sub-section (3), and that no conduct outside that sub-section and section 24, can be looked at. In support of this contention reliance was placed on *Block's case*. In that case the debtor, after his bankruptcy, had refused to comply with the request of the trustee that he should be medically examined, in order that an insurance might be effected on his life with the view of selling a reversionary interest he possessed to the best advantage. It is obvious that, unless a duty to comply with such a request is somewhere imposed on the bankrupt, a refusal to submit to medical examination is not misconduct, and, therefore, that it was necessary to find something in the Bankruptcy Act from which it could be inferred that it was the duty of the bankrupt to submit to such an examination. That case turns entirely on the question whether there is or is not such a duty to be inferred, and it was held, both in the Court of Appeal and in the House of Lords, that no such duty is imposed on the debtor, and, that being so, such refusal was not misconduct within the meaning of section 28, and consequently not conduct which the judge would consider on the application for a discharge.

Our attention was, however, particularly called to certain *dicta* in that case which deserve our respectful consideration. In the Court of Appeal, Lord Esher, M.R., remarked that the conduct which is to be taken into account under section 28 in determining whether the bankrupt should be discharged, if it be not one of the matters specified in that section, must be something described in section 24. The observations of Lopes, L.J., in the same case were also urged upon us. His lordship says:—"In my opinion the word conduct in section 28 does not include what I will call general misconduct. For instance, it could not, I imagine, he said, to include immoral conduct, however culpable or however unreasonable; nor, again, in my opinion, would it include a breach of an obligation not connected with the bankruptcy, such, for instance, as a breach of promise of marriage, however dishonourable and however unreasonable the conduct of the bankrupt in that respect might be." In the House of Lords Lord Macnaghten is reported to have said: "The question is, Was such a refusal conduct which ought to have been taken into consideration when the bankrupt applied for his order of discharge? That depends on sections 24 and 28 of the Act. The case does not fall within any of the cases specified in section 28. The appellants are, therefore, driven to rely on section 24." The argument founded on these *dicta* was, that they established the position, that the only conduct of the bankrupt which could be taken into consideration was that specifically described in sub-section (3) of section 28. Now, in the first place, this argument gives no meaning to the word "affairs" in section 28, sub-section (2). It has been pointed out by Lindley, L.J., in *Ex parte Arnaud, In re Bullen*, that the condition which may be imposed under sub-section (6) is not to be imposed as a general punishment for misconduct. His lordship there says:—"There is no evidence that the man (the bankrupt) will ever have any after-acquired property, and, under these circumstances, I think *primâ facie* one ought not to tie a man up with such a judgment (under sub-section (6)). A man ought not to be placed in such a position unless something is likely to be gained by it." In these observations, if I may respectfully say so, I entirely concur, and in the case of *Ex parte Shackleton, In re Shackleton*, I endeavoured to express the same idea.

But the conclusion I draw from the use of the word "affairs" in section 28, and from this particular condition in sub-section (6), is, that it was not the intention of the Legislature that a man who was not able to pay his debts at a given time, but who had reasonable expectations of acquiring property afterwards, should take advantage of the Act to get rid of his debts on payment of a small dividend, or perhaps none at all, and, by getting an unconditional discharge, put himself into a position to enjoy without molestation from his creditors that property which he had every reason to believe would shortly devolve upon him. Let me take the very common case of a man who has reason for thinking that he will take large pecuniary benefits under the will of his father, or an uncle, or some other wealthy relative. Such expectations are very naturally shared by those who are acquainted with his position, and tradesmen and others are ready to give such a man credit in the expectation of being paid when these expectations are realized. If the contention of the appellant is correct, such a man might, after he had enjoyed the benefit of this credit, and when all his creditors were content to wait until these expectations were realized, file his petition in the Bankruptcy Court, and, in the absence of fraud, demand his discharge without paying his creditors any dividend, thus leaving himself free to enjoy the benefits of his relative's generosity without spending a sixpence with those who had trusted him in the expectation of being paid out of this fund. That such a state of things could be brought about without any actual fraud on the part of the expectant heir is obvious to anyone with the least knowledge of the world and of the way in which credit is given to persons of that class. Take, again, a case such as that of *In re Clarkson, Ex parte Allestree*, where, on a consideration of the bankrupt's affairs, this court modified the order of discharge in the manner pointed out by sub-section (6). It was, indeed, suggested there that the bankrupt had brought himself within sub-section (3) because he had pleaded a defence to an action for breach of promise of marriage, which defence he had afterwards withdrawn; but, assuming that the plaintiff in an action of breach of promise of marriage is a creditor within sub-section 3 (*e*), the expense the plaintiff was put to by the pleading a defence which was afterwards withdrawn could be but small, and, substantially, the result would have been the same if the defendant had let judgment go against him by default.

In my judgment, therefore, the learned judge was justified in taking into consideration the affairs of the

bankrupt, and if on such consideration he came to the conclusion that the bankrupt would probably come into possession of property in the future, and had presented his petition in order that he might get rid of this creditor first, and enjoy his subsequently acquired property without having to pay any portion of this debt, it was within his power to make the order which he has done. In my opinion, looking at the offer to pay £250 which was made shortly before the petition was presented, and to the circumstances and position of the bankrupt, the judge was justified in coming to that conclusion, and I have very little doubt that the £250 will ultimately be paid.

These considerations are sufficient to dispose of this appeal, but I should like to add a few words with reference to the *dicta* in *Block's case*, above cited, because in some quarters they have been taken as amounting to a decision that the "conduct" referred to in section 28 must be confined to the instances of misconduct specified in sub-section (3) or in section 24. Now the subject of complaint in *Block's case* was that the bankrupt refused to submit to a medical examination which the trustee desired him to submit to in order that the trustee might insure the bankrupt's life. This was conduct of a negative character, and in order to establish that such a refusal is misconduct, it is necessary to show that the bankrupt is by law required to do the thing which he has refused to do. The only sections which were referred to for this purpose were sections 24 and 28. Section 28, sub-section (2), refers to particular kinds of misconduct enumerated in sub-section (3). Sub-section (7) prescribes the conduct of the bankrupt after his discharge. Section 24 imposes certain duties on the bankrupt with reference to giving information to the trustee and creditors, and aiding in the realization of his property, and the distribution of the proceeds among the creditors. According to the view of the majority of the Court of Appeal and of the House of Lords respectively, neither of these sections required the bankrupt to submit to a medical examination, and therefore he was not guilty of any misconduct within section 28. This view of the subject amply explains all that was said by Lord Macnaghten, and leaves only the *dicta* of the Master of the Rolls and Lopes, L.J., to be dealt with. The Legislature has nowhere expressly defined what is the "conduct" which is to be considered under section 28, sub-section (2). To my mind, it is quite impossible to hold that the proviso in that sub-section is co-extensive with the first part of the sub-section, for if that were so, and if no conduct could be considered except such as is specified in sub-section (3), it would necessarily follow that misconduct coming within section 24 could not be considered, nor yet conduct coming within section 29, which, however, by the express language of the Act is to be considered. There is, therefore, necessarily conduct to be considered other than that specified in sub-section (3), and it is conduct which the Legislature has considered may be dealt with by a lighter punishment than the conduct specified in sub-section (3), for the Legislature has invested the judge with more discretion with regard to it. Of course, the word "conduct" must have some limitation. It cannot apply to the man's behaviour from the time he became responsible for his actions down to the day of the hearing. As was held in the case of *In re Brockelbank, Ex parte Dunn*, the conduct referred to must be conduct connected with, or arising out of, the bankruptcy. So far as I can judge, that is all Lopes, L.J., meant to say in that part of his judgment in *Block's case* which has been cited above. Of what nature is the conduct specifically referred to in sub-section (3). It is conduct of various kinds connected with the bankruptcy, as, for instance, in the case of a trader neglecting to keep proper books, or continuing to trade after he knew himself to be insolvent, or in the case of any bankrupt contracting a debt without reasonable prospect of payment, bringing on the bankruptcy by blamable speculation or extravagance, putting a creditor to expense by a frivolous or vexatious defence to an action, undue preference, former bankruptcy, fraud, or fraudulent breach of trust.

It is difficult to reduce these kinds of conduct to any general head. They are all connected with the bankruptcy under investigation except (*g*), which refers to a previous bankruptcy or arrangement with creditors. They are all acts of commission except (*a*), the omission to keep proper books of account. Let us suppose the bankrupt has been guilty of conduct analogous to that referred to in sub-section (3), and injurious to his creditors in the same kind of way, is he, nevertheless, to be entitled as a matter of right to an absolute order of discharge? Suppose it were proved that the bankrupt had caused his clerks to keep the books required by clause (*a*), but had neglected to look at them, and therefore had continued to trade after he was insolvent without knowing himself to be so; or suppose that he had not brought on, but had contributed to, the bankruptcy by rash and hazardous speculation or unjustifiable extravagance in living; or had brought on his bankruptcy by gambling or by culpable neglect of his business; or that he had put any one of his creditors to unnecessary expense by a frivolous or vexatious action or counter-claim against him; or that he had dissipated his assets by making payments which were undue preferences within section 48 but not within sub-section (3) (*f*), which substitutes a different starting point for the three months to run from, or which would be undue preferences if the petition had been presented three days earlier; or, to take a case not so cognate to the cases in section 28 as those already given, suppose that the bankrupt's assets were insufficient to pay any dividend, or that there had been a very large loss or disappearance of assets shortly before the bankruptcy which the bankrupt had failed to account for satisfactorily; surely it cannot be in all these cases the bankrupt is entitled to insist upon an unconditional and immediate discharge as soon as his public examination is concluded.

None of these considerations were before the Court of Appeal in *Block's case*. The court was not dealing with blameworthy acts of commission which had brought on the bankruptcy, or had caused any creditor to trust the bankrupt, or which had squandered the assets before they were handed over to the trustee. It was dealing with a refusal to do an act after all the assets had been handed over to the trustee, and which, in the opinion of the majority of the court, was a refusal to do something which had no relation to his property or to the distribution of it. And therefore it was necessary to find, either in section 28 or section 24, an express or implied prohibition of such conduct, or, at all events, of conduct of an analogous nature, and, as the Court of Appeal and the House of Lords held, no such express or implied prohibition is to be found. I need hardly say that I accept unhesitatingly the decision of the House of Lords in *Block's case*, which, indeed, affirms, in effect, a decision of my own, but I do not understand the *dicta* referred to, to have the wide import which has been attributed to them, because I believe that the Master of the Rolls and Lopes, L.J., had before them very different considerations from those I have been discussing above.

The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Rooke & Sons*, for *Wynne Evans*, Wrexham.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Solicitors for the creditor, *Morgan, Son, & Upjohn*, for *Williams & Millard*, Dolgelly.

Q. B. Div. (Cave, J.) Nov. 4.

Ex parte The Trustee.
In re Ridgways. (a.)

Bankruptcy—Compromise by trustee of claim against bankrupt's estate—Approval of committee of inspection—Rejection by general body of creditors—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 57, 89.

A compromise agreed upon by the trustee in respect of a claim made against the bankrupt's estate was approved by the committee of inspection, but, at a subsequent general meeting of the creditors, a resolution was passed refusing to accept the compromise. The trustee applied to the court for leave to carry out the compromise, notwithstanding this resolution.

Held, that, the resolution of the creditors having been passed by them bonâ fide, *and with a view to their own interests, the compromise ought to be abandoned.*

Application by the trustee in the bankruptcy for leave to carry out a compromise.

In February, 1885, a receiving order was made against the debtors, A. and T. G. Ridgway, the statement of affairs showing secured creditors to the extent of £40,000, holding mortgages over freehold and leasehold properties, which it was then estimated would realize something like £33,000 in excess of the sum advanced upon them, and an arrangement was entered into between Mr. Price, who was at first appointed trustee of the bankrupt's estate, and Messrs. Robinson & Fisher, a firm of auctioneers, whereby the latter agreed to advance a sum of £42,000 in order to pay off the secured creditors with interest, taking, as they alleged, as security a charge upon the whole property.

Mr. Price subsequently died, the present applicant, Mr. Hurlbatt, being appointed trustee in his place, and, the mortgaged properties not proving to be so valuable as was anticipated, a dispute arose as to the nature of the security held by Messrs. Robinson & Fisher, in consequence of which notice of motion was, in January, 1889, served by them upon the trustee.

After due consideration of the matter, which was a very complicated one, the trustee came to the conclusion that the claim was one with regard to which it would be expedient to effect a compromise in order to avoid litigation, and, terms having been arranged, they were submitted to the committee of inspection, who approved them by a majority of three to two. At a subsequent general meeting of the creditors, however, a resolution rejecting the compromise was passed.

Application was now made to the court by the trustee for leave to carry out the compromise notwithstanding this resolution of the creditors.

Herbert Reed, for the trustee.—The trustee is clearly of opinion that the terms of compromise which have been agreed upon are the best thing for the creditors and the estate, and those terms were approved by the committee of inspection notwithstanding strong opposition raised by General Kaye and Mr. Smyth, two members of the committee. The subsequent resolution of the creditors rejecting the compromise was obtained by means of proxies, which were sent to General Kaye at his request. The court has full power to overrule that resolution if it thinks fit, by the decision in *Ex parte Cocks, In re Poole*, 31 W. R. 105, 21 Ch. D. 397. The trustee has no personal interest in the matter, his only wish being to do what is best for the estate. The notice of motion by Messrs. Robinson & Fisher asks, among other things, for an injunction to prevent a dividend being paid, and so the whole proceedings are tied up. The broad question in dispute is whether Messrs. Robinson & Fisher only stand in the room of the original mortgagees, or whether they have, as they allege, a right of consolidation and a covering charge on the assets in case of any deficiency. The question is very complicated, and the trustee is of opinion that litigation ought to be avoided.

Whinney, for Messrs. Robinson & Fisher, did not address the court.

Sidney Woolf, for the objecting creditors.—General Kaye and Mr. Smyth were not committeemen wishing to cause a disturbance. They refused to agree to the proposed compromise because they are of opinion that by it Messrs. Robinson & Fisher get more than they are entitled to, and are also released from all liability in respect of any negligence in dealing with the estate. General Kaye alleges that there was negligence in the sale of certain farms, and he objects to any release from liability being given. Section 89 of the Bankruptcy Act, 1883, provides that the trustee shall, in the administration of a bankrupt's property, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection. The case of *Ex parte Cocks, In re Poole*, is distinguishable. The creditors there were not acting *bonâ fide* and for the best. It must be made out, before the court will interfere, that the creditors have in some manner failed in the duties imposed upon them.

Cave, J.—I am of opinion that the leave applied for by the trustee should not be granted. According to the provisions of the statute, the trustee has power, with the permission of the committee of inspection, to make a compromise, but section 89 provides that the trustee shall, in his administration of the property of the bankrupt, have regard to any directions that may be given by resolution of the creditors, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection. Then by subsection (3) of section 89 the trustee may apply to the court for directions in relation to any particular matter arising under the bankruptcy.

Now in this case the compromise which the trustee proposes to enter into has received the sanction of the committee of inspection, but on the matter being submitted to a general meeting of the creditors the majority of those were opposed to this compromise, and under these circumstances the trustee comes and asks me, notwithstanding the resolution of the creditors, to let him enter into this compromise.

No doubt the court has power to entertain this question, but by what considerations it should be guided in dealing with such an application is not so plain. In the case referred to, the court did disregard the resolution of the general meeting of creditors, and it disregarded that resolution on the ground that it was passed to favour the debtors, and not in the interest of the creditors themselves. In this case it is admitted that no improper motive can be imputed to these creditors who have refused the compromise, but it is said that I ought to overrule their decision on the ground that the compromise is so manifestly beneficial to the estate that the wishes of the majority ought to give way to the wishes of the minority. Now, if I should come to that conclusion, I should really come to the conclusion that the creditors had not acted *bonâ fide* when it is in fact admitted that they did act so. They are men of business, and understand the business with which they are dealing, and it is a strong thing to ask me to overrule their decision as to the mode in which their business shall be carried on when it is admitted that that decision has been arrived at in a *bonâ fide* manner. I do not say

(a.) Reported by C. F. Morrell, Esq., Barrister-at-Law.

that where it could be shown that the decision was clearly wrong—and it is almost impossible to see how such a decision could be arrived at if everything were *bonâ fide*—the court would not interfere. But the resolution here is clearly not that. There is perhaps something to be said on both sides. I give the trustee the credit of believing that the compromise he wishes to carry out is the best thing for the creditors. On the other hand, I must give the credit to the creditors of believing that their opinion is the right one. That being so, and having no ground for believing that the creditors had not honestly and *bonâ fide* striven to understand the matter, and had their own interests in view, I should be doing wrong if I were to overrule their own decision on their own matter, on the ground that the result which they anticipate is not likely to be realized, and may not prove so beneficial as they think it will. I am of opinion, therefore, that the compromise ought to be abandoned.

Application refused.

Solicitors for the trustee, *Girdlestone & Co.*

Solicitors for Messrs. Robinson & Fisher, *Lyne & Holman.*

Solicitor for the opposing creditors, *G. E. Carpenter.*

Court of Appeal.

From Lancaster Palatine Ct. of Chan. } March 7, 8, 10.

CLEGG v. HANDS. (a.)

Landlord and tenant—Lease of public-house by brewer—Restrictive covenant—Covenant not to sell beer other than beer purchased from lessor—Lessor defined to include assigns—Sale of brewery by lessor—Conveyance by lessor of reversion in the demised premises to purchaser of brewery, with the benefit of the restrictive covenant—Covenant running with land—Construction of covenant in connection with clause defining "lessor"—Benefit and burden of covenant.

By a lease made between C. & W. (thereinafter called "the lessors," "including in such term each of them, their, each, and every of their heirs, executors, administrators, and assigns") of the one part, and H. of the other part, a public-house was demised to H. for a term of years, and he covenanted with the lessors not to take, sell, or deal in upon the demised premises any beer other than beer purchased from the lessors or from either of them, either alone or jointly with any other person or persons who might thereafter become a partner or partners with them or either of them, provided they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at the fair current market price thereof. At the date of the lease C. & W. carried on business as brewers at the A. Brewery, and they were also vendors of beers generally, but they subsequently sold the A. Brewery, with their plant, business, and goodwill, to N. They also conveyed their reversion in the lease of the public-house to him, with the benefit of the covenants in the lease, and expressly assigned to him the benefit of the aforesaid covenant; and, about the same time, or soon afterwards, ceased to carry on business and dissolved partnership. N. did not use the A. Brewery as a brewery, but carried on his brewing business at his adjacent M. Brewery. H. having declined to take his beer from N., the latter brought an action in his own name and those of C. & W. for an injunction in the terms of the covenant to restrain H. from taking or selling beer other than such as should have been purchased from N., either directly or through C. & W.

Held, (1) *that, upon the true construction of the covenant taken in connection with the clause in the lease defining "lessors," it was a covenant which included C. and W.'s assigns of the reversion in the demised premises, and was, moreover, not confined to such of their assigns as should continue to carry on the business of brewers at the A. Brewery, and that it was, therefore, not a mere personal covenant, or incapable of being assigned;* (2) *that the covenant was one which did, in fact, touch or concern the demised premises, and that the benefit of it would accordingly run at law with the reversion; but* (3) *that, even if the covenant were one the benefit of which would not at law run with the reversion of the demised premises, the fact of the assignment to N. of the brewery business (which must have included the goodwill), and the fact of the benefit of the covenant having been also expressly assigned to N. with the reversion of the demised premises, entitled him in equity to sue upon the covenant; and* (4) *that, that being so, and H. having presumably got the premises at a lower rent in consideration of his entering into the covenant, and it being in effect restrictive, and not affirmative, the principle of* Tulk *v.* Moxhay, 2 *Ph.* 774, *applied, and an injunction ought to be granted.*

Decision of Bristowe, V.C., *of the* Palatine Court *affirmed.*

Doe d. Calvert *v.* Reid, 10 *B. & C.* 849, *and* Renals *v.* Cowlishaw, 26 *W. R.* 754, 28 *W. R.* 9, 9 *Ch. D.* 125, 11 *Ch. D.* 866, *distinguished.*

Appeal from Bristowe, V.C., Lancaster Palatine Court.

The plaintiffs, Messrs. Clegg & Wright, were brewers and vendors of ale and stout, carrying on business at the Alton Brewery, Liverpool.

By a lease dated the 19th of November, 1886, and expressed to be made between James Clegg and Peter Wright (thereinafter called "the lessors," "including in such term each of them, their, each, and every of their heirs, executors, administrators, and assigns"), of the one part, and Benjamin Hands, the defendant (thereinafter called "the lessee," "including in such term his executors, administrators, and permitted assigns"), of the other part), Messrs. Clegg & Wright demised to Hands a public-house for a term of nine years and a half. Among other covenants by the lessee the lease contained the following:—"The said lessee will not at any time during the continuance of this demise buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises, or any part thereof, any ales or stout (other than best stout) other than such as shall have been *bonâ fide* purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them, or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the said lessee of good quality and at the fair current market price thereof."

In July, 1889, Clegg & Wright agreed to sell their brewery, plant, business, and goodwill to the plaintiff Cain, who carried on business as a brewer at an adjacent brewery, known as the "Mersey Brewery," and was also a vendor of beer not of his own brewing. The purchase having been completed on the 2nd of October, 1889, Clegg & Wright dissolved partnership, and ceased to carry on business. They then conveyed their reversion in the lease of the public-house to Cain, with the benefit of the rent and covenants reserved

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

and contained in the said lease to Hands, and the benefit of the aforesaid restrictive covenant was expressly assigned to Cain. The latter did not use the Alton Brewery premises for the purposes of a brewery, but they were used for other purposes. Hands having declined, under the above circumstances, to take beer from the plaintiff Cain, the latter brought this action in the Lancaster Palatine Court in his own name and the names of Clegg & Wright (with their concurrence) for an injunction to restrain Hands from selling beer other than such as should have been *bonâ fide* purchased of the plaintiff Cain, either directly or through Clegg & Wright.

Bristowe, V.C., granted the injunction.

The defendant appealed.

Henn Collins, Q.C., Mattinson, and *McConkey*, for the appellant.—The benefit of this covenant does not run with the reversion in favour of the assignee. The Alton Brewery has been shut up, and the appellant considers that his business would be injured by taking Mr. Cain's ales. The true construction of the covenant is that the lessee was to take his ales from the lessors personally as long as they or either of them continued to brew, either alone or jointly with any partner or partners, not from anybody who might become an assignee of the brewery and public-house, and who, perhaps, might not even be a brewer. The case is governed by *Doe d. Calvert* v. *Reid*, 10 B. & C. 849, the facts of which case were on all fours with those here, though we have really a stronger case. On any other construction the covenant will not run. In *Vyvyan* v. *Arthur*, 1 B. & C. 410, it was held that a covenant to grind at the lessor's mill all corn grown on the demised premises would only run as long as the ownership of the mill and the demised premises remained in the same person. [COTTON, L.J.—Is not this a reservation in the nature of rent? You hold under this lease? LINDLEY, L.J.—The rent of a "tied" house is usually lower than that of a free house.] No doubt, in one sense, it is a reservation. [COTTON, L.J.—Then do these questions as to covenants running arise?] An assignee cannot sue upon every covenant. This covenant would not run at all on a mere assignment of the reversion without the brewery. In *Spencer's case*, 1 Sm. L. C., 9th ed., at p. 72, the question whether a covenant runs with the land is put on exactly the same footing as whether it runs with the reversion. A mere right to receive money from a public-house cannot run with land. To uphold this decision would be going far beyond any previous case, and would be going against what are at least *dicta* of judges specially conversant with this branch of law. The definition of "lessors" at the commencement of the lease is cut down by the covenant, which limits it, for the purpose of the covenant, to future partners of Clegg & Wright, or either of them. A particular statement controls a general statement. If neither Clegg & Wright nor Cain can sue separately, they cannot do so any more by joining together. Even assuming the benefit of the covenant would run, on the assignment of the reversion, *with* the brewery—that is, as part of the business—it cannot run where the brewery is divorced from the reversion, and where the covenant is, therefore, merely collateral, and does not touch or concern the land: *Spencer's case*. In *Lybbe* v. *Hart*, 29 Ch. D. 8, at p. 19, 33 W. R. Dig. 26, Baggallay, L.J., expressed an opinion that a covenant to "*feed*" the hay on the farm did not run with the land. Section 10 of the Conveyancing Act, 1881, has not done away with the whole doctrine as to covenants running with the land contained in *Spencer's case*. The judge below seems to have confused the equitable doctrine of notice to an assign of the lessee with the question of covenants running with the reversion, as here, and to have misapplied the doctrine of the benefit going with the burden.

They also referred to *Mayor of Congleton* v. *Pattison*, 10 East, 130; *Keppell* v. *Bailey*, 2 Myl. & K. 517; *Anon*, Godbolt, 120; *Purfrey's case*, Moore, 243; *Sampson* v. *Easterby*, 9 B. & C. 595; *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826; *Thomas* v. *Hayward*, L. R. 4 Ex. 311, 17 W. R. C. L. Dig. 73; *Hartley* v. *Pehall*, Peake, 178; Davidson's Conveyancing, 3rd ed., vol. 5, part 1, p. 136.

Cozens-Hardy, Q.C., and *J. Rutherford*, for the respondents.—This case really turns on the construction of the lease. The covenant is not merely to take beer brewed by Clegg & Wright. The definition of "lessors" is absolute, and includes assigns wherever it occurs. The provision as to partners in the covenant itself was intended to meet a case not met by the definition clause. There is no reference to beer brewed at any particular brewery. We are assignees of the goodwill of the brewing business, the business itself, the brewery premises, and the reversion of the lease of the public-house, and we are entitled to the benefit of this covenant, which was expressly assigned to us. In *Doe* v. *Reid* the brewery of the plaintiffs was two miles from that of the original covenantees, and the covenant was to take beer of the covenantees or their "successors in their said trade." [As to the question of covenants running, they referred to *Vyvyan* v. *Arthur* and *Hooper* v. *Clark*, 15 W. R. 347, L. R. 2 Q. B. 200.] Section 10 of the Conveyancing Act does away with the doctrine in *Spencer's case*. But we have not here to consider whether the covenant runs with the land, because we have the covenantees themselves, as well as their assignee, as plaintiffs. In *Renals* v. *Cowlishaw*, 26 W. R. 754, 28 W. R. 9, 9 Ch. D. 125, 11 Ch. D. 866, Hall, V.C., decided on the ground that the plaintiffs bought without notice of the covenant, and, therefore, had no right to the benefit of it. In *Spicer* v. *Martin*, 37 W. R. 689, 14 App. Cas. 12, Lord Macnaghten adopted the judgment of Hall, V.C. The appellant is in possession of the property under the deed containing the restrictive covenant, and is, therefore, bound by it: *Tulk* v. *Moxhay*, 2 Ph. 774; *Luker* v. *Dennis*, 26 W. R. 167, 7 Ch. D. 227. The right must either have passed to Cain or be remaining in the covenantees, who are co-plaintiffs, so that in either case we are entitled to succeed.

Henn Collins, Q.C., in reply.—It is to be implied from the context and subject-matter that the assigns were to be brewers. This is like a covenant to take wine from a particular wine merchant. *Calvert* v. *Reid* cannot be distinguished from this case. *Tulk* v. *Moxhay* does not apply, this being really an affirmative covenant to take beer, and not a negative one: *Haywood* v. *Brunswick, &c., Building Society*, 30 W. R. 299, 8 Q. B. D. 403; *Austerberry* v. *Corporation of Oldham*, 33 W. R. 807, 29 Ch. D. 750. [COTTON, L.J.—In that case the covenant was not one to which *Tulk* v. *Moxhay* would apply.] *Tulk* v. *Moxhay* was a case of burden running, not benefit, as here. The judge below held that Cain could not enlarge his rights by joining Clegg & Wright as co-plaintiffs.

He also referred to *Keates* v. *Lyon*, 17 W. R. 238, L. R. 4 Ch. App. 218; *Tatem* v. *Chaplin*, 2 H. Blacks. 133; *Hooper* v. *Clark*; and *Robson* v. *Drummond*, 2 B. & Ald. 303.

COTTON, L.J.—This is a question involving several points, but on the whole it has been very fully and ably argued, and we think we had better at once give the judgment at which we have arrived.

The first question arises in this way. An injunction has been granted to restrain the defendant from buying beer contrary to the covenant in his lease, and the question raised is, therefore, what is the true construction of the covenant. I will take that first, as, in

my opinion, the covenant, in the events that have happened, will prevent the defendant from buying his beer except upon the terms of that covenant, if there is nothing else to prevent its being enforced against him. There was a lease entered into between Clegg & Wright and the defendant. Clegg & Wright are described as "hereinafter called the lessors (including in such term each of them and their and each and every of their heirs, executors, administrators, and assigns)." I read that because a good deal of the argument for the appeal was founded on it. Then the defendant is described as the lessee. Then we come to this, that there is a covenant entered into by the lessee in terms with "the lessors"—that is, with each of them, and their, each and every of their heirs, executors, administrators, and assigns. There is no doubt about that. Then we come to the particular covenant in question. That is this—that "the said lessee will not at any time during the continuance of this demise, buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly" — there is no difficulty about construction there — "in, upon, out of, or about the said demised premises, or any part thereof, any ales, stout (other than best stout), other than such"—this is what the argument has been upon—"as shall have been *bonâ fide* purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." It is said that that is not a covenant which includes the assigns, because part of the definition is repeated here in terms which exclude the full application of that definition, that is to say, the description of the persons who are described as "the lessors." But I cannot think that that is so. The covenant, as I pointed out, is entered into with the lessors—that is, the persons named—each or any of them, or the heirs, executors, administrators, or assigns of each or any of them. Very probably it was not necessary to add what is here put in, but I cannot think that that prevents the covenant being a covenant with the assigns of those who were the grantors of this lease to the defendant.

But then it is said, as I understand the argument, that it was only intended to include such assigns as should carry on the business of brewers at this particular brewery, which was assigned to one of the plaintiffs, and where the business of brewing is no longer carried on. A case to which reference was made (*Doe d. Calvert* v. *Reid*) was much relied upon for the purpose of that construction, but it was a case where the language was different, and, in my opinion, it is clear that that was not the intention in the present case.

Then there is this:—"Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at the fair current market price."

Well, I pointed out, or Lindley, L.J., pointed out, in the course of the argument, that there is some protection afforded to the publican by this provision that the beer shall be of good quality, and that it shall be supplied at the fair current market price.

Then, in my opinion, it is shown clearly here that it was not intended to restrict this covenant to the benefit of the persons who carried on this brewery at this particular place, by not in any way referring to the beer, which has to be provided, being made by the landlords or their assigns. The words are "provided they or he shall at such time deal in or vend such liquors." It shows that it was not made or intended to be made a stipulation that the persons entitled to the benefit of the covenant were to be persons who made beer at all. It was not provided that they should still make the beer they were selling, but it was provided that it should be of good quality, and be supplied at the fair current market price. Considerable light was, to my mind, thrown upon the true intention of the parties by what was put before us by Mr. Collins in his reply—that at this time these landlords did not only make beer, but buy beer, and supply those who were not bound by any restrictive covenants to take beer from them alone. That, I think, does show what they were intending to provide for—not that they should supply beer which they themselves made, but that they should go on doing what they were then doing—buying beer—and that they should be willing and able to supply it of good quality and at the fair market price.

Then there was a case referred to. Cases, so far as they give us a rule of construction, are very useful, but it is very seldom, to my mind, that a case on the construction of a particular document tells us much when we come to construe another document, unless it lays down some principle to guide us. In the case referred to (*Doe d. Calvert* v. *Reid*) there was an action by brewers against a purchaser of beer for a public-house. The brewers had shut up the brewery, and though they themselves carried on the business of brewers, they did not carry it on at the place where the lessors had carried on their business at the time the lease was granted. The words to which reference was made are these, and I think the case turns upon this almost entirely:—The purchaser shall "take of and from the said John Phillips and Samuel Miall, their executors, administrators, or assigns, *or their successors in their late or present trade as brewers*, all the porter, ale," &c. It is true there was a covenant there that the covenantors and their assigns should take from the covenantees, their executors, administrators, or assigns, or their successors in business, in those terms. Then what followed? The words "their successors in their late or present trade as brewers," though not in terms limiting the assigns to those in that position, did afford a clue to the construction. The defendant said they were no longer carrying on that trade, because, though they were carrying on the trade of brewers, they were not carrying on the trade of the lessors who were plaintiffs in the suit, and the court held that what was meant was carrying on the same trade—not merely carrying on the trade of brewers, but carrying on the trade which was carried on at that particular brewery.

The construction which I put upon the covenant in the present case is governed by this particular clause which occurs here, and which does not occur in the case of *Calvert* v. *Reid*, and which throws a different construction and effect upon the covenant in the present case from that which was given to the covenant by the different words in *Calvert* v. *Reid*.

In my opinion it cannot be said in the present case that this was a personal covenant with the particular landlords who granted the lease, or that it was impossible for the benefit of it to be conveyed to anybody else. It is not like entering into a contract with a particular painter to paint your picture, which would mean that he could not hand that over to anybody else. That is a contract made with him personally, and it must not be handed over to anybody else. In my opinion this is not a contract which is incapable of being assigned.

Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion, but there are other points on which this case might be decided independently of that. It is a contract relating to the way in which the business of the house is to be carried on; therefore, it is a contract relating to the public-house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on, relates to the land. It affects the value of the reversion; it affects the house; and, in my opinion, it is a contract running with the land. I

think, therefore, if that is so, that will enable the judgment to be supported, and will enable the present owner of the reversion in this case to sue.

But there is another ground on which I think the judgment might be supported. Here there has been a sale by the landlord of the goodwill to the plaintiff. He is, therefore, entitled to sue, independently of the question of its running with the land, so far as by assignment the landlord who entered into this covenant could give him the right. That being so, the difficulty which existed in the case before Hall, V.C., is got rid of.

There is no doubt that here there is an assignment of the benefit of the covenant to him, even if it did not pass by the mere assignment to him of the reversion of this public-house. Then, in my opinion, as he is entitled to sue in respect of that, the doctrine of *Tulk* v. *Moxhay*, properly applied, will enable him to enforce that covenant as against the defendant—that is to say, when the defendant obtains this public-house at a less rent, as we may assume he does (because it was put before us in the course of the argument that it might affect the rental value of the house), we ought not to allow him to deal with that public-house, as against the person entitled to the benefit of that covenant, in a way inconsistent with the covenant by reason of which he got the public-house at a lower rent. Therefore, in my opinion, on that ground, even if this covenant did not run with the land, the judgment of the Vice-Chancellor is right.

But then it is said—and that we ought to consider—that this court has decided that the doctrine of *Tulk* v. *Moxhay* will not be extended, except to restrictive covenants—that is, beyond the case of a restrictive covenant. In *Tulk* v. *Moxhay* it was not a covenant in its terms restrictive, but it implied restriction, because there was a covenant there that the premises were to be used only as an ornamental garden. That implied that the defendant was not to build on it, which was what he was about to do. What was meant was this, we will not enforce this doctrine where the covenants are covenants which, if enforced, will compel the defendant to put his hand into his pocket and spend money. Here the defendant has to have his beer—his very food. This covenant will compel him to buy it from the plaintiffs. But, even if this were a contract to buy all beer from the plaintiffs, that would involve a negative—that he should not buy his beer from anybody else, and therefore, in my opinion, that would not come within the rule which we laid down, I think, in the case of *Haywood* v. *The Brunswick Building Society*, where there was a contract which would involve the necessity, if it was enforced, of the defendant putting his hand into his pocket—(it was a company, but I will assume they had a pocket and some money in it)—to do something entirely separate and collateral. In that case the land was granted in consideration of a covenant to build and repair buildings, and that was a covenant which the court refused to enforce, considering the doctrine of *Tulk* v. *Moxhay* not applicable in such a case.

In my opinion, both on the ground that here the covenant did run with the land, and also on the ground that the doctrine of *Tulk* v. *Moxhay* does apply, I think the order of the Vice-Chancellor is right.

LINDLEY, L.J.—I agree with Mr. Collins in thinking that this case is one of very great importance, both to brewers and also to tenants who take "tied" houses, because certainly it is rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer you may find yourself bound to take bad beer of somebody else's. Whether you are or not, depends upon the agreement into which you have entered. The whole question here, to my mind, turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into an agreement with certain persons relying upon their skill and personal reputation in agreeing to buy beer of them and them alone, or whether he did not enter into a very much wider contract, agreeing to buy beer from them or persons to whom they might assign their business or the public-house. That question, as to whether it is a personal unassignable contract or not, must be gathered from the instrument itself, having regard, of course, to the position of both parties.

The lease has been gone through, and I will refer to it very shortly. The lessors are described as brewers—there is no reference to any particular place of business, or anything of that kind—and the lessee is described as a licensed victualler. Then there is an ordinary lease of a public-house, and then there come covenants by the tenant, that he will use and occupy the premises demised as and for a tavern or public-house only, and will conduct the same so as not to forfeit his licence—I am reading it shortly—and will keep open the premises for the sale of the articles before mentioned, which I will call ale and beer. Then there is a covenant about not getting ale or beer from other people. Now, just let me see whether this lease does or does not contain any indication, either one way or the other, as to whether the benefit of this was capable of being assigned. The very first thing that one comes across is the interpretation clause which follows the names of the brewers, and describes them as hereinafter called "the lessors"—including in such term "each of them and their and each and every of their heirs, executors, administrators, and assigns." Those words are never found in what are called personal contracts. If I were to enter into an engagement with an artist to paint my picture I should not put those words in. If he died I should not leave it with his executors to finish what he had not done. Such words are out of place altogether in a contract which is personal in that sense.

Now when we come to the covenant which more particularly relates to this matter, we find that the lessee has agreed with his lessors that he will not during the lease—I am again reading it shortly—sell or dispose of on the premises any ale or stout other than such as shall have been *bonâ fide* purchased of the said lessors, or from them or either of them alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them. That clause lets in partness. The covenant, on the true construction of the agreement, does not exclude such persons as these. It is not that I will only take beer from Clegg & Wright, but it lets in the partners. Well, does it go further? It turns upon the construction of a very few words. Mr. Collins says that by reason of the introduction into this clause of the words "from them or either of them," which occur also in the definition clause, it is tolerably apparent that the definition was departed from. I thought at first sight that there was a great deal in favour of that construction, but when you come to see what the whole clause is, it appears to me that you cannot put that limited construction upon it, and the true construction to put upon it is that which interprets "lessors" in the sense in which it occurs everywhere. That being the case, I think there can be no reasonable doubt that this contract is not a personal and unassignable contract. Accordingly the question then arises whether it has been assigned to Mr. Cain. Well, the answer to that is easy enough. Unquestionably it has. If it is capable of being assigned, it has been assigned. It has been assigned unquestionably and without any controversy in equity by the agreement by the brewers with regard to the sale of the business, which of course includes the benefit of the goodwill, and inasmuch as the purchaser and his

assignors are both suing, I see no answer whatever to this action upon that ground.

It has also been said that it is assigned to Mr. Cain by means of his being an assignee of the reversion in the lease. That raises a technical question, which, stated in legal language amounts to this — Whether the benefit of this covenant runs with the land? We have heard the authorities discussed by Mr. Collins, who has studied this branch of the law probably more carefully than anybody living, and he has not persuaded me, I confess, that this is a covenant which does not run with the land. I rather think it does. If you look at the authorities which he has cited, and look at them carefully, this does, in lawyer's language, so "touch and concern" the demise as to "run with" it at common law. But whether that is so or not it appears to me that it is absolutely no answer with regard to that covenant, the benefit of which has been expressly assigned to Mr. Cain, and Mr. Cain is therefore entitled to it.

Then comes a question as to whether this covenant is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. Collins has suggested that although this covenant is negative in point of form, it is affirmative in substance, and that an injunction, therefore, ought not to be granted. But when you look at the whole of this lease you find that the covenant which he suggests is affirmative really involves a negative element in it. If you take into consideration the covenant to keep open this place as a public-house and to sell beer there, you cannot treat the covenant that follows as an affirmative covenant to buy beer of the lessors, but you must put in "and of the lessors exclusively." If you get that, you get a negative portion of the covenant, which can be properly enforced consistently with the doctrine applicable to cases of this kind; and therefore, whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it appears to me that the decision is right, and the appeal must be dismissed, with costs.

DOPES, L.J.—The question in this case is on the construction of the covenant. In the definition clause the word "lessors" includes assigns. It is contended, with regard to this particular covenant, that by the words following "lessors" in the covenant—I mean those words "from them or either of them alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them"—being used, it was intended that the operation of the definition clause was to be excluded, and that the covenant must be dealt with entirely apart from the definition clause. I cannot adopt that view. I am bound to say that at first I was somewhat taken with it, but on consideration I think it cannot be maintained. It appears to me that the words, to which I have alluded, following "lessors," were introduced merely to cover the case of any partnership between the lessors and third parties, or their assigns and third parties—not only the assigns of the brewery with which the covenantees were then concerned, but any assigns, provided only that they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at a fair current price. The covenant, therefore, in my opinion, cannot be said to be a personal covenant.

But then a question is raised as to whether the benefit of this covenant runs with the reversion. It was contended by Mr. Collins that it did not run with the reversion, and that it was purely collateral. The benefit, to run with the reversion, must "touch or concern" the demised premises. Now does this covenant touch or concern the demised premises? It relates to the mode of enjoyment of a public-house. The thing demised is a public-house, and the covenant compels the covenantor to buy the beer of the covenantee and his assigns. In my opinion it touches and concerns the demised premises: it affects the mode of enjoyment of the premises, and, therefore, it runs with the reversion.

I entirely agree with what has been said with regard to the application of the case of *Tulk* v. *Moxhay*, and I think this appeal should be dismissed.

Appeal dismissed.

Solicitors, *Bartlett & Berry*, Liverpool; *Field, Roscoe, & Co.*, for *Miller, Peel, Hughes, & Co.*, Liverpool.

From Q. B. Div. [and Q. B. D. (Denman and Wills, JJ.)] — Feb. 3, 12; March 10.

DAVIES v. ANDRÈ & CO. (a.)

Practice—Action against firm—Service of writ on person who denies that he is a partner—Person having the control or management of the partnership business—Conditional appearance—Right to defend—Ord. 9, *r.* 6—*Ord.* 12, *rr.* 15, 16—*Ord.* 42, *r.* 10.

In an action against a firm the writ was served upon R. at his residence, where some of the partnership business was ordinarily carried on. R. was not informed in what capacity he was served, whether as a partner in the firm or under ord. 9, *r.* 6, *as a "person having at the time of service the control or management of the partnership business" at the place where the service was effected.*

Held, by the Divisional Court, *that R. was entitled to dispute both the amount claimed and the fact of his being a partner, and that, therefore, unless the plaintiff would give an undertaking not to apply under ord.* 42, *r.* 10, *for leave to issue execution against him as a partner, he might enter a conditional appearance, at the same time denying that he was a partner, such conditional appearance to stand until an issue directed as to his being a partner or not had been decided.*

Held, by the Court of Appeal (*reversing the decision of the* Divisional Court), *that there was no power to order such a conditional appearance.*

Appeal by the plaintiffs from the decision of Field, J., in chambers, allowing an unconditional appearance to be entered in this action for Ferdinand Rath. The circumstances of the case, and the conclusions which the court drew from the affidavits on both sides, are sufficiently stated in the judgment of Wills, J.

Lawson Walton, for the appellants.—The respondent has no *locus standi*. He has not been sued either as a partner or otherwise, and he is not entitled to appear and delay us in getting judgment against the true defendants. We have a right to get our judgment against André & Co., and afterwards, if we are so advised, to proceed against Rath as a partner under ord. 42, r. 10; he will then have an opportunity of disputing his liability. The service was a good one against André & Co. under ord. 9, r. 6.

Terrell, for the respondent Rath.—Rath has a right to appear. If the plaintiffs are allowed to get judgment they may say that he was sued as a partner in the name of the firm, and was served as a partner (ord. 12, rr. 15, 16), and they could then levy execution on his goods. Even if they have to proceed under ord. 42, r. 10, Rath

(a.) Reported by A. P. PERCEVAL KEEP and T. R. COLQUHOUN DILL, Esqs., Barristers-at-Law.

might be held to be a partner, and would then be too late to dispute the amount of the claim, judgment having been signed against the firm in his absence.

Walton replied.

Cur. adv. vult.

Feb. 12.—WILLS, J., delivered the judgment of the COURT.—In this case W. H. Davies, trading as W. H. Davies & Co., sues a firm of the name of André & Co. for a balance of account in respect of goods supplied to that firm from October, 1888, to March, 1889. The writ is addressed to André & Co., of 8, Ribblesdale-place, Hornsey, and it bears an indorsement dated the 2nd of November, 1889, in the following terms:—"This writ was served at 8, Ribblesdale-road, Hornsey, on the defendants by leaving the same with a person in charge of the business on Friday, 1st November, 1889. (Signed) F. SYDNEY SEARLE." The memorandum contains a contradiction in terms, and no doubt the writ was really served by leaving a copy at 8, Ribblesdale-place. On the 8th of November, leave having been obtained from a master, an appearance was entered in these words: "Enter a conditional appearance for Ferdinand Rath, having been served as a partner, but who denies that he is a partner, in the defendant firm of André & Co. (Signed) VALLANCE & Co., solicitors for the said Ferdinand Rath." A summons was heard by Field, J., on the 4th of December to strike out this appearance. No affidavits appear to have been used on this occasion, and the learned judge made the following order:—That the appearance entered by Ferdinand Rath be amended by striking out the word "conditional" and the words "but who denies that he is a partner in the firm of André & Co." On the same 4th of December Ferdinand Rath delivered a statement of defence headed "Between W. H. Davies & Co. and Ferdinand Rath, sued as André & Co.," in which he denied that he ever carried on business as André & Co., or was a partner in that firm, or bought the goods or any of them, or had any of the transactions mentioned in the statement of claim indorsed on the writ. Notice of appeal was given on behalf of the plaintiffs, asking that the said order should be reversed or varied, and that the said appearance might be struck out. On the hearing of this appeal before us three affidavits were used. [His lordship then referred at length to these affidavits, and continued:—] From these affidavits we conclude that the writ was served on Rath without any definite information to him in what capacity he was served, and that the indorsement was made after the copy writ left with Rath and returned by him had reached the plaintiff's solicitors. We also conclude that at the time of the service of the writ André & Co. had ceased to carry on business in Piccadilly; that some business, at least, was being done from 8, Ribblesdale-place, though it might be a private house; and that the plaintiff had reason, in the conduct of Rath, for believing that Rath was either a partner in André & Co. or their agent; that the circumstances bring the service within the terms of ord. 9, r. 6, as being "either upon one of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of the service the control or management of the partnership there"; and that the service was a good service upon André & Co. We think also that, although Rath had no means, at the time when he entered the appearance, of knowing in what capacity he was served, the service must be treated, until and unless it is established that he is a partner, as having been made upon him as having the control of the partnership business. We pass to the consequences of such service.

By ord. 12, r. 15, "where persons are sued as partners in the name of their firm they shall appear individually in their own names, but all subsequent proceedings shall nevertheless continue in the name of the firm." By ord. 12, r. 16, "where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm he shall appear in his own name, but all subsequent proceedings shall nevertheless continue in the name of the firm." Any person, therefore, who appears unconditionally to a writ addressed to a firm admits that either he is "sued as a partner," or that "he is carrying on business in the name" of the firm sued, whereas, in the present case, he is not told by the plaintiff that he is sued as a partner. To appear as a person sued as a partner is to confess that he is a partner. Therefore, under ord. 12, r. 15, in circumstances like the present, and under rule 16 in any case, no man can appear at all, if he appear unconditionally, without admitting he is a partner. If he is willing to do that, he can then defend the action, and may dispute the debt in whole or in part, and judgment will go against the firm for the amount, if any, really due. Execution may then go against the person who has so appeared under ord. 42, r. 10. If, again, a person who has been served with the writ, and served as a partner, appears in his own name, he can dispute the fact of partnership as well as the amount of the debt; and the latter part of ord. 42, r. 10, seems to be expressly framed to meet such a case. He will have been adjudged a partner if the verdict goes against him upon this point, and he will have had the opportunity of contesting the debt, and justice will be done. And so, again, if a person so served fail to appear, judgment will properly go against him. He has been served as a partner, and has had notice both of the amount alleged to be due, and of the allegation that he is a partner. If he chooses to contest neither point, execution rightly goes against him. But if he is not served as a partner he is in this position—if he comes forward and appears he treats himself as being sued as a partner, which is equivalent to admitting that he is one; if he does not make this admission he has no right to appear at all: and even if he does make the admission it is doubtful whether he falls within the rules we have cited, inasmuch as he has not been sued in that capacity. Not being entitled to appear, he cannot prevent judgment going against the firm by default for the full amount claimed, and then when the plaintiff, under ord. 42, r. 10, alleges that he is a partner, although not served or sued as one, he is too late to dispute the amount of the judgment. He may have the question of liability tried, but not that of the amount, and the penalty of having failed to admit at the outset that he is a partner is that he may have to pay a debt never due at all, or which was really far less than the amount of the judgment. This might be all very well if all persons who deny that they are partners where they really are partners were dishonest, though even then the infliction of such a penalty would not be consistent with the wide liberty given to a defendant in all ordinary cases to deny the case of the plaintiff.

But there are no more difficult questions of fact and law than those which occasionally arise as to the fact of partnership, witness the well-known case of *Cox v. Hickman*, 8 W. R. 754, 8 H. L. Cas. 268. It cannot be right that a person against whom a plaintiff may ultimately claim on the score of his being a partner in the firm sued can be heard to dispute the amount of the claim only on the terms of admitting his partnership, or to dispute his partnership only on the terms of being shut out from questioning the amount. It is quite clear from what passed on the argument before us that the plaintiff has no notion of releasing Rath from personal liability, and that, although he objects to the interposition of Rath to prevent him from getting judgment by default against André & Co., he reserves the right of proceeding against him, under ord. 42, r. 10, by way of execution, and he claims to be in a position to call upon Rath, as soon as judgment is signed, to discharge, as a partner, a claim which he now

says he ought not to be allowed to contest, because the plaintiff is not suing him as a partner.

We think the dilemma is one calling for the attention of the Rule Committee.

What seems needed in the way of alteration is that when leave to issue execution is sought under ord. 42, r. 10, the judge should be able to grant to the person sought to be affected upon such terms (if any) as he shall think fit, leave to dispute the claim as well as the fact of partnership. But in the meantime the rules stand as they are, and we must endeavour to prevent injustice being done. If, notwithstanding appearances, which are against him upon this point, Rath really knows nothing of the transactions in respect of which this action is brought, he ought to be allowed to dispute both the partnership and the existence or amount of the alleged debt. Whether or not the allegation that he is unconnected with the firm is true, is a question which cannot be settled upon the affidavits. On the other hand, if the plaintiff does not seek to hold Rath liable as a member of the firm, there is no reason why Rath should interfere with the right of the plaintiff to have judgment against the firm. If, therefore, the plaintiff is willing to undertake that he will not seek to issue execution against Rath as being a member of the firm, the appearance will be struck out and the plaintiff may sign judgment against the firm. In that case we think Rath ought to have his costs of this application. If the plaintiff is not prepared to give the undertaking, we see no course but to restore the conditional appearance with a modification of its terms, and to direct an issue as to the question of partnership. The form of the conditional appearance being: "Enter a conditional appearance for Ferdinand Rath, who, unless the plaintiff will undertake not to seek to hold him liable as a partner in the firm of André & Co., desires to appear though denying that he is a partner or that he carried on business under the name of André & Co." If in the result Rath should be found to be a partner the conditional appearance will be struck out and he will have leave to appear as a partner. If he should be found to be not a partner then the appearance will be struck out and the plaintiff will have judgment against André & Co. It may be that this is an extension of the procedure by way of conditional appearance. If it be so, however, it is one rendered necessary in the peculiar circumstances of this case by the impossibility under the rules of doing justice. The statement of defence is clearly wrong and must be struck out, Rath has no right to alter the title of the action. The proceedings under the rules must be continued in the name of André & Co. as defendants, and the statement that he is not a partner is *nihil ad rem*, he not having been served as a partner. It was objected on behalf of Rath that when judgment is obtained against the firm of André & Co. he might, under ord. 42, r. 10, have an execution levied on the property in his house as partnership property. This is an inconvenience that might happen to any person. The sheriff may make a mistake in respect of anyone's property, and Rath has no claim upon this score to any special consideration.

The plaintiffs appealed.

Cook, Q.C., and *A. D. Maclaren*, for the plaintiffs.—There is no power under the rules to order such a conditional appearance.

Duke, for Rath.—This form of appearance was sanctioned by a master in *Cram* v. *Paynter*, a case which is not reported, but is referred to in the Annual Practice, 1888-9, p. 231.

Lord ESHER, M.R.—In this case the writ was issued against a firm, and was served, in point of fact, on the man Rath. If it was served upon him as a partner it was his duty to appear unconditionally to the writ, and he would then be able to set up as a defence that the firm owed nothing and that he was not a partner. If it was served upon him as a partner and he did not appear to it, judgment would go against the firm, and he would be shut out from defending the action, and could not say that he was not a partner. Therefore, if in this case Rath was served as a partner he ought to have appeared, but he did not do so, he only entered what he called a conditional appearance. In my opinion no such conditional appearance is possible under the rules. If, however, we strike out that appearance altogether there is a difficulty, because if he was served as a partner he has not appeared, and therefore he cannot say that he is not a partner. I think, therefore, it is better to assume that he was not served as a partner, but as the person having at the time the control or management of the partnership busines under ord. 9, r. 6—as the figure-head, that is to say, of the business. Then, if he was a partner, he was bound to appear to the writ if he wished to defend the action, but if he was not, there was no need for him to appear. There is no rule allowing him to appear conditionally. He must make up his mind whether he was a partner or not and act accordingly. If there is no appearance to the writ, then judgment goes by default against the firm. That will not hurt him if he is not a partner. In order that execution should be issued against him it is necessary for the plaintiff, who has got a judgment against the firm, to show that he is a partner. That is the result of ord. 42, r. 10.

Wills, J., appears to have seen a difficulty in the position. He thinks that a man may not always know whether he is a partner or not. It is difficult to my mind to conceive a man of business in such a position, and can, I think, only be of rare occurrence. Wills, J., appears to think that the rules work an injustice. Even if they do, we must not amend that injustice by evolving, as he has done, out of our own heads a rule which does not exist. If the rules work an injustice they ought to be altered, but that must be done by the Rule Committee, and not by the courts.

I think, therefore, that Wills, J., in his anxious desire to do justice, has taken to himself the functions of the Rule Committee, and that his judgment cannot be upheld. When the matter comes before the Rule Committee I will consider it, but I am not yet prepared to say that I will give my suppert to his proposition.

The effect of our decision is, therefore, to strike out Rath's appearance altogether, but we will allow him two days in which to enter an ordinary unconditional appearance to the writ if he think well to do so.

FRY, L.J.—I am of the same opinion. I think that there can be no doubt that the courts have an inherent power to mould the practice to meet the exigencies of particular cases, but in this case the learned judge has gone much further than that, further than, I think, the case requires, and has invented a new rule altogether. He appears to think that there may be people who do not know whether they are partners or not in a firm. I confess that I have very little sympathy with such people if such there be. People ought to know their own positions and their own rights and liabilities. The rules contemplate judgment being given against a firm, and execution on that judgment going against a particular person, but execution will not be allowed to issue against him unless he is a partner in the firm or the goods against which the execution issues are partnership goods. Unless this is so execution cannot issue except after an application for leave, which may, of course, be opposed. If, therefore, in this case Rath was not a partner there was no need for him to appear, and he had no interest in the judgment against the firm. If he was a partner, he should appear unconditionally to the writ. I think, therefore, that Wills, J., was wrong, and that the time for trying the issue whether Rath was a partner or not

is not now, but after the judgment on the application to issue execution against him.

Appeal allowed.

Solicitors for the plaintiffs, *Learoyd, James, & Miller.*

Solicitors for Rath, *Vallance & Co.*

High Court of Justice.

Chan. Div. Kay, J. March 7.

In re Meyerstein & Co.'s Trade-Mark. (*a.*)

Trade-mark—Registration—"Invented word"—Word descriptive of quality—"Satinine"—Patents, Designs, and Trade-Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-section* 1 (d) (e).

The word "Satinine," when applied to starch and other articles which give a glossy surface, is descriptive of the effect produced by such articles, and is not capable of registration as a trade-mark under section 10, *sub-section* 1, *of the Patents, Designs, and Trade-Marks Act,* 1888.

Semble, *the word "Satinine," being formed from a well-known word by the addition of a termination well known in many other words, is not an "invented word" within section* 10, *sub-section* 1 (d), *of the above Act.*

Motion.

On the 20th of November, 1886, Messrs. Meyerstein & Co. applied for the registration of the word "Satinine" in classes 47 and 48, which comprise, amongst other goods, soap, starch, blue, and other preparations for laundry purposes, and perfumery.

The applications were held over by the comptroller in view of further legislation with reference to word marks; and after the passing of the Patents, Designs, and Trade-Marks Act, 1888, the comptroller refused to register the mark.

On the 20th of April, 1889, Messrs. Meyerstein & Co. made a new application under the Act of 1888 for registration of the word "Satinine," which was refused by the comptroller on the ground that the word did not consist of any of the essential particulars required by the Act.

The applicants appealed to the Board of Trade, who referred the question to the court.

The comptroller stated that his reasons for refusing registration were that "Satinine" was not an invented word within the meaning of section 10, sub-section 1 (*d*), of the Act of 1888, but merely the well-known word satin, with the common suffix "ine" added so as to form an adjective equivalent to the adjective "satiny," and that it had reference to the character or quality of the goods or some of the goods in classes 47 and 48. He also stated that the words "Satin Glaze" formed part of a trade-mark already registered for laundry starch.

R. W. Wallace, for the applicants.—The word "Satinine" is an invented word, since it does not appear in any dictionary. It is not necessary that there should be such invention in a trade-mark as is required by the patent law in order to support a patent. The word is not descriptive of the goods to which it is to be applied.

Sir R. E. Webster, A.G., and *Ingle Joyce,* for the comptroller, were not called upon.

Kay, J.—This is a word which describes the quality of the goods to which it is to be applied. There is, moreover, very little invention in it; the invention consists merely in adding a termination, well known in many other words, to a well-known word. The word proposed to be registered is to be used for starch, amongst other goods; starch gives a glossy appearance to linen, and it would be a good quality of starch that it gave a glossy surface. The comptroller states that the words "Satin Glaze" have already been registered as part of a trade-mark for starch. The applicants, therefore, intended to get a word which would suggest that the starch which they sold would produce a very glossy surface. The word "Satinine" is descriptive of the effect produced by the article to which it is to be applied, and is a descriptive word.

The application must be refused, with costs.

Solicitors, *W. A. Crump & Son; Solicitor to the Board of Trade.*

(*a.*) Reported by James H. Bakewell, Esq., Barrister-at-Law.

Chan. Div. North, J. Feb. 25.

Hart *v.* Colley. (*a.*)

Trade-mark — Registration — Infringement—Registration for one class of goods—Use for another class—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 62, 65, 70, 77—*Trade-Marks Registration Act,* 1875 (38 & 39 *Vict. c.* 91).

The right of action for improper user of a trade-mark registered under the Patents, Designs, and Trade-Marks Act, 1883, *is limited to the particular class of goods in respect of which the trade-mark was registered.*

Trial of action.

This was an action to restrain the defendant from using the plaintiff's trade-mark, and the question raised was, whether a person who has registered a trade-mark in respect of one class of goods is entitled to object to its use by another person in respect of another class of goods in which the party complaining has not registered it?

The plaintiff, Morris Hart, carries on business as the Patent Toilet Requisite Co., and sells toilet paper in perforated rolls. Passing through the centre of the roll is a hollow cylinder of cardboard, in which can be placed a metal rod attached to a framework, by means of which the roll can be conveniently suspended and the respective perforated lengths be readily torn off for use.

The defendant Colley, who was formerly in the employ of the plaintiff, carries on a similar business and sells similar articles.

In May, 1883, the plaintiff registered under the Trade-Marks Act, 1875, a trade-mark in respect of the class of goods No. 6 in the 1st schedule to the rules under that Act, which class is, "Machinery of all kinds and parts of machinery, except agricultural machines included in class 7." Each trade-mark was a pictorial representation of the framework or holder with a roll of perforated paper in it. Paper forms part of class 39. The article was described in the plaintiff's application for registration as "a toilet requisite, being a machine to hold a roll of perforated paper."

In the statement of claim it was alleged that "the defendant has, prior to the issue of the writ in this action, and since the registration, sold large quantities of perforated paper contained in wrappers, and has issued large numbers of circulars and advertisements whereon there was printed the registered trade-mark of the plaintiff"; and an injunction was claimed to

(*a.*) Reported by Francis T. Duka, Esq., Barrister-at-Law.

restrain the defendant from continuing to infringe the plaintiff's registered trade-mark; and relief was also claimed on the ground that the defendant had, by circulars, advertisements, and wrappers represented that the articles sold by him were those of the plaintiff. The defendant denied user of the plaintiff's trade-mark, and alleged that if he had at any time used a similar trade-mark, nevertheless the plaintiff's trade-marks were registered for a different class of goods from those mentioned in the statement of claim.

In the defendant's particulars he alleged that the plaintiff's trade-mark was registered in the class of iron goods, and not in respect of paper articles, the subject-matter of this action.

From the evidence it appeared that the plaintiff did not actually apply his trade-marks to, or mark them upon, the frame of the machine, but only on the wrappers round the rolls, which, though intended to be used with the machines, are sold separately. The defendant had also placed his marks on the wrappers round his rolls of paper.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the plaintiff.

Aston, Q.C., and *R. W. Wallace*, for the defendant.—The registration of a trade-mark in respect of the whole of a class of goods would not prevent another person from using it in respect of goods in that class for which the registered owner did not use it: *Edwards Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197.

North, J.—I do not think the plaintiff is entitled to sue in respect of this trade-mark. Assuming that he has a right to an injunction restraining the defendant from imitating his goods, which is a different relief from that in respect of the trade-mark, there appears to me to be an insuperable difficulty with regard to the trade-mark—viz., that the plaintiff has registered his mark in class 6 only, and he does not complain of the sale by the defendant of any goods which come within that class.

Mr. Cozens-Hardy says that the Act requires registration of a trade-mark, and that when once the registration has been made the registered owner is entitled to sue in respect of the use of that mark by any other person. Mr. Hardy relies on section 77 of the Act of 1883, which corresponds with section 1 of the Act of 1875, and provides that "a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade-mark unless, in the case of a trade-mark capable of being registered under this Act, it has been registered in pursuance of this Act or of an enactment repealed by this Act, or, in the case of any other trade-mark in use before the 13th of August, 1875, registration thereof under this part of this Act or of an enactment repealed by this Act has been refused."

It is quite true that without registration the plaintiff could not sue at all. But there is nothing in the section to say that, when once he has registered the mark, the owner is entitled to sue in respect of every use of it. The section is simply negative, imposing registration under the Act as a condition precedent, a necessary preliminary, to the right to sue.

Then the question arises, What is the registration under the Act? Section 65, which corresponds with section 2 of the Act of 1875, says: "A trade-mark must be registered for particular goods or classes of goods." Therefore a general registration in respect of all goods could not be effected. Then section 62 says: "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark," and it adds, "The application must be in the form set forth in the first schedule to this Act," and "the application must state the particular goods or classes of goods in connection with which the applicant desires the trade-mark to be registered." The form F given in the schedule, as well as the subsequent modification of it given in the second schedule to the Trade-Mark Rules, 1883, contains a request that the mark may be registered in specified classes of goods. It points, therefore, to particular goods or classes of goods. The form in use under the Act of 1875 was substantially to the same effect.

Then, again, section 70, which corresponds with section 2 of the Act of 1875, says: "A trade-mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill." It is true the plaintiff's mark was registered under the Act of 1875, but I referred to the sections of the Act of 1883 and to the existing rules merely for convenience. The provisions of the two Acts and of the two sets of rules are for the present purpose practically the same. I do not see what is the object of requiring registration for particular goods or classes of goods if, by registering a mark in respect of one class of goods, the owner can acquire a right to sue in respect of all classes, for that is what I understand the argument to be. I think the express provision requiring the application for registration to be made in respect of particular goods and classes of goods was to confine the registration and the right to sue in respect of the registration to the goods thus indicated. There is another thing which bears out this view, I mean the rule known as the "three marks rule" which was originally framed by the Commissioners of Patents under the Act of 1875, and has now been adopted by section 74 of the Act of 1883. That rule related only to old marks—*i.e.*, marks in use before the 13th of August, 1875, and it provided that identical or similar old marks should not be capable of being registered in relation to the same kind of goods by more than three persons, and that if the same mark had been used by more than three persons for the same kind of goods it must be treated as common to the trade in those goods. It would have been utterly useless to adopt such a rule if, when there were three similar old marks registered in respect of particular goods or a particular class of goods, a person who had registered a similar old mark in respect of a different class of goods could prevent the use of his mark in respect of the class of goods for which the three marks had been registered. Then, again, the common practice is in accordance with the same view. In turning over the leaves of the *Trade-Marks Journal* I constantly find four or five or more trade-marks all exactly alike, registered in respect of different classes of goods. Why is that? Because, by common consent, everyone understands that the right to registration under the Act is in respect of the particular goods or classes of goods for which the registration is obtained.

I am surprised to find that this point has never yet been expressly decided, for it must have arisen a great many times. But I find that in *Edwards* v. *Dennis* observations were made by the judges which, as it seems to me, point exactly the same way. In that case it was held that a person could not register a mark with respect to all the goods comprised in a particular class unless he had used the mark in respect of all those goods, and that when a mark had been registered with respect to a particular class of goods, but had been used only in connection with certain goods in that class, the registration must be rectified by limiting it to those goods only in connection with which the mark had been used. Now it would be absurd to say that, if a man registers a mark for class 1 in respect of particular goods comprised in that class, he cannot sue in respect of other goods in that class, and yet that, without any other

registration, he can sue in respect of all the goods comprised in all the other forty-nine classes. It is impossible to come to such a conclusion, and it having been decided that a man can register with respect to those only of the goods in any given class upon which he has used his mark, it follows *à fortiori* that a man whose mark is registered in respect of one particular class cannot, by virtue of that registration, sue in respect of goods which are not within that class at all.

In *Edwards* v. *Dennis* Cotton, L.J., said: "Now what was done in the present case? There was a registration by Mr. Edwards' predecessors in title for class 5, 'Unwrought and partly wrought metals used in manufacture.' That was registration in respect of all goods which come under class 5, a class which includes a vast number of things. . . . The registration in the present case has been for the entirety of that class. In my opinion that is wrong. Even if a trade-mark can be registered which is not in actual use, it ought to be restricted to those goods in connection with which it is going to be used. In my opinion it is not the intention of the Act that a man registering a trade-mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in that class. Can a man claim registration for all the articles specified in the class when the business he is engaged in comprises only one specific portion of the articles named in the class? I am of opinion he cannot." I may paraphrase that passage thus: Can a man who is registered in one class claim in respect of articles not comprised in that class but comprised in some other class? In my opinion he cannot.

There are some important observations in the judgments of the other Lords Justices to the same effect as those which I have read.

Under these circumstances I come to the conclusion that the registration gives the plaintiff no right to sue the defendant for infringement of the trade-mark. The defendant is charged with selling rolls of paper with the plaintiff's trade-mark upon them. Rolls of paper come under class 39 and under no other class, and inasmuch as the plaintiff has not registered his trade-mark in respect of paper or any other goods comprised in class 39 which might include paper, he is not entitled to sue the defendant in respect of his use of the trade-mark for paper, there being no registration in accordance with the statute which entitles him to sue as regards that class.

Solicitors, *Linklater, Hackwoods, & Co.; Truefitt & Gane.*

Chan. Div. } Nov. 1, 2, 4.
Kekewich, J. }

Worman v. Worman. (a.)

*Trustee—Power to invest in the purchase of freehold and leasehold hereditaments—Breach of trust—*Res judicata*—Estoppel.*

By a settlement, property was vested in trustees to be invested as the settlor directed, and also with power to them to invest upon freehold, copyhold, leasehold, or chattel real securities (including equitable mortgages by deposit), and in the purchase of freehold and leasehold hereditaments.

After the death of the settlor the trustees, to save a sum advanced during the life and by the direction of the settlor on second mortgage, agreed to purchase the equity of redemption of the property. One of the cestui que trusts *had brought an action alleging breaches of trust by reason of improper investments, and the details of the investments in question had been actually set out in an affidavit filed by the trustees. The plaintiffs in the present action, who, at the time of the first-mentioned action, were infants, had been served with the judgment and had leave to attend. The first action was compromised. The infants, on coming of age, brought the present action against the trustees for improper investment by reason of the purchase of the equity of redemption.*

Held, that the power to purchase freehold or leasehold hereditaments did not authorize the purchase of an equity of redemption, which was a breach of trust.

Held, also, that the question as to the breach of trust was not res judicata, *and the present plaintiffs were therefore not estopped from bringing this action.*

Trial of action.

In this action S. Worman, R. A. W. Worman, and J. J. E. Worman sued J. C. Worman and Elizabeth Worman, the trustees under a deed of settlement of the 11th of April, 1874, for having invested a portion of the trust funds in the purchase of an equity of redemption. By the deed in question a sum of £10,300 and other funds were settled upon such trusts as the settlor J. Smith should by deed or will appoint, and in default of appointment upon trust during the life of J. Smith to invest the trust funds in such manner as J. Smith should in his uncontrolled discretion, and as if he were absolute owner, from time to time direct; and to pay the income of the trust funds to J. Smith during his life, and after the death of J. Smith upon trust to pay thereout certain sums of money, and to invest the same in manner hereinafter provided, and to divide the same into five equal parts—namely, one-fifth part as the share of R. A. J. Worman, another fifth as the share of J. C. Worman, another as the share of Elizabeth Worman, one-fifth as the share of Georgina E. Loughnan, the wife of T. C. Loughnan, and the remaining fifth as the share of M. A. Worman—and, as to the share of R. A. J. Worman, the trustees were directed to stand possessed thereof in trust to pay the income to him during his life, and after his death the same to be in trust for his children as he should by will appoint, and in default of appointment (which event happened) in trust for his children who, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry under that age, in equal shares. The settlement contained a power to invest in Government securities, and also upon freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland (including equitable mortgages by a deposit), with power to vary investments, and also a power after the death of J. Smith to invest the trust funds in the purchase of any freehold hereditaments in England or Wales, or of any leasehold hereditaments in England or Wales, for any term of years whereof not less than seventy years should be unexpired, to be conveyed in the usual way to and upon the trusts of the settlement. In October, 1877, J. Smith died, at which date a sum of £6,400, part of the trust fund, had been advanced, with the consent of J. Smith, to one M. Scott on a second mortgage of four freehold houses in Harrington-mansions and two leasehold houses in Penywern-road. The first mortgage on the houses in Harrington-mansions amounted to £58,000, and on the leaseholds to £3,900.

Matthew Scott, shortly after the death of J. Smith, got into embarrassed circumstances, and, as the first mortgagees were on the point of selling the properties in case Scott became bankrupt, the defendants, in order to save the funds advanced by them, agreed to purchase the equity of redemption from Scott for £2,000, and at the same time it was arranged that the other properties comprised in the mortgages should be sold and the proceeds applied in reduction of the first mortgages.

(a.) Reported by J. W. Greig, Esq., Barrister-at-Law.

By deed dated the 12th of March, 1884, M. Scott conveyed the equity of redemption in all the premises to the defendants, subject, as to the freeholds, to £19,500, to which sum the first mortgage had been reduced, and, as to the leaseholds, to the sum of £3,300.

An action, "*In re J. Smith, deceased, Loughnan* v. *Worman* (1878, S., No. 523), was brought in December, 1875, by Georgina Loughnan and T. C. Loughnan against the defendants and R. A. J. Worman for alleged breaches of trust by reason of unauthorized investments, and claiming that the defendants might be charged, on the ground of wilful default, with the loss arising thereby. By a judgment of the 16th of June, 1880, an inquiry was directed as to the alleged unauthorized investments.

R. A. W. Worman and J. J. E. Worman, two infant children of R. A. J. Worman, were served with this judgment, and liberty was given them to attend the proceedings.

On the 13th of June, 1881, a petition in the same action was presented, the infants being made parties to it, praying (*inter alia*) for a partition of the trust property and for payment to the plaintiff, G. E. Loughnan, of her one-fifth thereof. The petition contained no reference to the alleged breaches of trust, but all details connected with the investments appeared in an answer to interrogatories filed by the defendants before the presentation of the petition.

The petition came on for hearing on the 27th of July, 1881, when an order was made declaring that it was for the benefit of the respondents (the plaintiffs in this action) that the action should be compromised, and all proceedings therein stayed, upon the terms therein mentioned, and all further proceedings were to be stayed except for the purpose of carrying the order into effect. The compromise was effected.

R. A. J. Worman died leaving two children, R. A. W. Worman and J. J. E. Worman, both of whom attained twenty-one years, and by his will appointed S. Worman his executrix.

This action was brought in July, 1888, by S. Worman, R. A. W. Worman, and J. J. E. Worman. The defendants denied that the investment was unauthorized and improper, and pleaded the compromise in the previous action as a bar to the present action.

Warmington, Q.C., and *Theobald*, for the plaintiffs.—The investments made previous to the death of the settlor cannot be questioned, but the purchase of the equity of redemption, which was made subsequently, was unauthorized. Trustees cannot buy an incumbered estate: Lewin on Trusts, 5th ed., p. 504; *Ex parte Orawen*, 17 L. J. Ch. 215. This question of improper investment cannot be opened now, as it is *res judicata*.

Hall, Q.C., and *C. P. Pauli*, for the defendants.—There was impliedly a power to invest in equitable securities in the settlement, more especially as there is a power to purchase land. There is no case showing that the purchase of an equity of redemption is a breach of trust. If this purchase had not been made greater loss would have been caused to the trust estate. The whole question is now *res judicata*, as the same persons were parties to the former action; the breach of trust appeared from the answers to interrogatories, and the order was made with knowledge of them.

They cited *Askew* v. *Woodhead*, 21 W. R. 573; *Henderson* v. *Henderson*, 3 Hare, 100; *Serrao* v. *Noel*, 15 Q. B. D. 549, 34 W. R. Dig. 70.

Warmington, Q.C., replied.

Kekewich, J.—There are two important points calling for decision in this case, and although they both arise under one settlement made by James Smith in 1874, they must be considered separately.

The first question is whether the trustees of that settlement committed a breach of trust in purchasing the equity of redemption in property which was already mortgaged to them. During the life of James Smith the settlor, who, by virtue of the language of the deed, had complete control over the trust funds, part of those funds had been invested on a second mortgage of the property with which we are concerned, partly freehold, partly leasehold. No question arises about that second mortgage, because it was made under James Smith's direction, and he was entitled to direct such an investment. Therefore the trustees were, at the time of his death, possessed of securities which would not ordinarily be held by trustees, but which were properly held by them under those circumstances. In 1884, for reasons which commended themselves to the trustees, they purchased the interest of the mortgagor, not paying off the first mortgage, but giving a sum of £2,000 for the ultimate equity of redemption—that is to say, the equity of redemption as against the second mortgagees—viz., the trustees themselves—and that is all they did.

The question is, whether it was right of them to spend the money in that way. Now that must depend on the terms of the deed—in other words, the question is whether that was a proper investment of the trust funds authorized by the deed. The trust investments authorized by the deed are described with reference to the period commencing with the death of James Smith, who, as I have already mentioned, had control up to that time, and in construing the language of the deed with reference to that period the court is, I think, bound to leave out of sight the fact, which until then was all-important, that James Smith was the settlor, and not merely dictated the terms of the deed, but reserved to himself the full control. What he might have done in his lifetime, what he might be presumed to have thought desirable after his death, became on the happening of that event of no importance whatever. From that time the powers of the trustees must be guided by the terms of the deed, and no other standard. They are authorized to invest on divers securities which comprise among other things, freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland, and then follow words which, not perhaps in the most accurate language, authorize the trustees, contrary to the usual rule, to invest on an equitable mortgage provided that equitable mortgage is effected in a particular way. The words are "including equitable mortgages by a deposit." Those words in effect say "which securities shall for the purposes of this deed be deemed to include what they would not otherwise include, equitable mortgages by deposit, but not equitable mortgages effected in any other way." Then after that, by a subsequent clause, the trustees are empowered, in words which are of common form, to invest any of the trust funds in the purchase of freeholds or leaseholds of a certain term, and which are to be conveyed to them on trust for sale, so that the property, though purchased and taken in their names, is preserved as really an investment of the trust funds. There is nothing there to suggest any enlargement of the ordinary powers granted to trustees when they are authorized to purchase freeholds or leaseholds. There is nothing there to suggest that they could purchase either an equity of redemption or take any other property than that which, on the ordinary construction of a clause of that kind they would be authorized to take. But it is argued that it must be construed largely because the words "equitable mortgages by a deposit" are included in the previous clause. To my mind there is no foundation for that argument. No doubt where there is the slightest vagueness one may look to see what language has been employed in a previous clause; but I cannot construe a power to invest in the purchase of land by such a phrase as "including equitable mortgages by a deposit" in an investment clause of a dif-

fesent character. Therefore I am brought back to the general question—can trustees who are authorized to invest in the purchase of land invest in the purchase of an equity of redemption?

That is the question broadly stated, notwithstanding that here the trustees were themselves the holders of the second mortgage, and, therefore, the question may be a little different from the abstract proposition which I have mentioned. My experience is entirely against any such investment. It is quite new to me that trustees may purchase an equity of redemption under such a power as is here contained, which, as I have already said, is substantially in the common form, nor has any authority in the shape of a decision been produced; only one case has been referred to, *Ex parte Craven*, and there the point arose in a very peculiar way. Persons who were entitled to a sum of £1,200 in court paid in by a railway company were anxious to purchase an adjoining estate for £2,800, and the difference between the £1,200 which they had available and the £2,800 which was the purchase-money was proposed to be provided by means of a mortgage. Of course, the proposed mortgagee would only take a first mortgage of the legal estate, and the result would have been that in the event there would have been conveyed to the uses of the settlement the equity of redemption—that is to say, the right to redeem the property which would have been mortgaged for £1,600—and the Vice-Chancellor refused the application, because it was in effect proposed to invest the money in court in the purchase of an equity of redemption, an investment which the trustees were not justified in making. The point before him was not whether trustees were justified in making it, because the money was paid into court apparently either under the Lands Clauses Act or one of those earlier Acts now represented by the Lands Clauses Act, and, as I gather from the report, the real question was not whether trustees were justified in making it, but whether it was an investment which the court could properly sanction under the Lands Clauses Act. I should gather from the report, which necessarily is rather scanty, that what the Vice-Chancellor meant was that such an investment was not one which the trustees would be justified in making under the common form of a power of investment, and likewise it was not an investment the court would be justified in sanctioning under the Lands Clauses Act. The application was made under the 69th section of the Lands Clauses Act, and that section authorizes money in court to be invested in the purchase of other lands to be conveyed, limited, and settled on the uses of the settlement. So far as it can be accepted as a decision at all, it seems to be one that the investment of money in the purchase of an equity of redemption is not an investment in the purchase of lands. That entirely confirms my own view of the real construction of such a clause as this. I think that on the proper construction an equity of redemption could not be purchased. An endeavour was made in the course of the argument to distinguish between what the trustees might do and what the trustees ought to do, and to say that the trustees are not to be held responsible for that which they may properly do according to the strict language of the deed, though it is not an investment which the court, if appealed to, would have sanctioned on their behalf. But the question which I have to consider is, whether the trustees were justified by the language of the power to make this investment, and I hold that they were not so justified.

The next question is an entirely different one. The present plaintiffs are entitled to a share of the property settled by the deed of 1874. Other persons entitled to a share of the same property under the same settlement took proceedings in 1878 against the trustees and against R. A. J. Worman, the father of the second and third plaintiffs in this action, for the execution of the trusts of the settlement, and they alleged breaches of trust and improper investment of the trust fund. What those alleged improper investments were, appeared in the answer of the defendants to the interrogatories delivered for their examination, and the improper investments turn out to be precisely those which are complained of in this litigation. With that question raised generally by the statement of claim, but particularly disclosed by the answers to interrogatories, a judgment was pronounced on the 16th of June, 1880, and an inquiry was directed upon what securities the trust funds were invested, and whether they were properly invested having regard to the powers of the settlement. Under that, no doubt, the whole story might have been brought out. The chief clerk might have found that this £2,000 was invested in the manner in which it was, in fact, invested, and the impropriety of that investment might have been certified or ascertained by further proceedings in the action. But the action never went any further; the parties came to an agreement, and they agreed that the plaintiffs in that action should take a sum of £2,500, and should have no further interest in the settled funds at all. In other words, it was agreed that, they receiving the £2,500, the trust fund should be divided as if they had not been interested in it, and it was necessary to have the sanction of the court to that. The trustees were, of course, entitled to that sanction, and, there being an action pending, could not wisely have allowed the compromise to be carried out without such sanction, and, moreover, there were infants concerned, notably the two plaintiffs in this case, and, therefore, the sanction of the court was required to bind them. The matter was brought before the court on petition, stating all the facts necessary for that purpose, but omitting any reference to the case which had been raised, and which was strictly and properly before the court on the inquiries directed by the judgment, and the court sanctioned the compromise and bound the infants to accept it, so as to bind the plaintiffs on the terms mentioned. It is said that the infants as well as the trustees, having been parties to that compromise, are not now entitled to say that these investments should be inquired into and the trustees made liable for any impropriety in the expenditure of the £2,000, and it is argued that it is *res judicata*. In support of that argument reference is made to the case of *Henderson* v. *Henderson*, and particularly to a passage in the judgment of the Vice-Chancellor on p. 115. I acknowledge the exact propriety of the language used by the Vice-Chancellor in the passage on which Mr. Hall relies, which is this:—"The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." But that sentence must be read with reference to that which immediately precedes it, where the Vice-Chancellor states the rule of the court to be that, "where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case." It seems to me that this question of the impropriety of this investment could not have been brought forward on the hearing of the petition for a compromise. It is true that after judgment all are actors, and that any one of the parties to that litigation might have insisted on the

point which was raised by the inquiry being made the subject of adjudication. But when the parties, with the sanction of the court, were prepared to compromise their claims on the terms I have mentioned, it would have been improper then to have had this point raised. The trustees, no doubt, might have said, "We will not assent to this compromise, because there is the question open of the greatest importance to us, and we will insist on the point being determined." The answer would have been, "You are not concerned to have that question settled now. All that is proposed to do is to buy out the present plaintiffs, and you will be in no worse or better position because the plaintiffs are bought out, or rather if you are in any altered position at all you will have fewer persons to whom to account, and to that extent it will be rather better for you than worse." The other parties might have said, "We are content to buy out the plaintiffs, we wish to reserve our rights against the trustees in regard to this alleged impropriety of investment." But the court would have replied, "You must take care of yourselves about that, the only question is whether this compromise is to be sanctioned or not, and the fact that there may be a question remaining between you and the other parties interested and the trustees cannot possibly affect that compromise." I suppose that if the attention of the court had been called to this question some means would have been found of utilizing the pleadings, the answer to interrogatories, and the judgment; but notwithstanding that, there must have been some independent proceeding, something to set it in motion, and in addition to the order of compromise, because by the plaintiffs being bought out, the action was at an end. That conclusion seems to me to be in entire accordance with what is said by Lord Herschell in the case *Concha* v. *Concha*, 35 W. R. 479, 11 App. Cas. 552, where he put it, if I may say so, in an extremely strong manner by saying in effect, "This point in the judgment of the Probate Court was not open to appeal, because it was not essential to the decision; then how can it be said that it was a matter which bound the parties?"

The point now under consideration was not brought to the mind of the court at that time. It might have been brought to the mind of the court, but if it had been brought to the mind of the court it would not have stood for a moment in the way of the order for a compromise which was made, and it could not have affected that order, and I do not think that the present plaintiffs are in the slightest degree debarred from raising the question now, because it was not brought to the attention of the court either by them or the trustees, who, at least, were as much concerned in having the question raised and disposed of. The other cases cited on this point do not seem to me to have much direct bearing on it. In *Askew* v. *Woodhead* a somewhat litigious plaintiff, having got liberty to attend the proceedings in one action in which he could have raised and disposed of the question which he raised in another, was anxious to continue this action also, and, of course, there the court stopped him from so doing. In *Serrao* v. *Noel* the only question was whether a man might, as Mr. Warmington has described it, split his relief, and, having a right to an injunction and damages in respect of the same cause of action, first bring an action for the injunction and then afterwards for damages, and the only point discussed in the judgment was whether the court before whom the injunction came was competent to award damages; and as the court came to the conclusion that that might have been done, it followed that it ought to have been done, and so the second action could not be allowed.

It seems to me, therefore, whether it is regarded as *res judicata*, whether it is called estoppel, whether it is called release to the trustees, the defendants fail to make out that what was done in the former action is any bar to the relief sought by the plaintiffs in this action. The point was never brought up for adjudication. There was no inadvertence or mistake, or even accident, in not calling the attention of the court to it when that order for compromise was made, because it was entirely outside the compromise. The compromise really was not as between the trustees and the present plaintiffs, but as between the plaintiffs to that action and the other parties interested in the trust funds. As between them it was said, "It is better to buy the plaintiffs out; let them take a lump sum, which may be fairly estimated, as what they will eventually be entitled to, let them go, and then the rest of the fund will belong to us." The trustees were, of course, parties to the order—the court could not have made the order without their concurrence; but they were not parties to it in the sense of making the bargain; there was no bargain between them and the parties interested. They were only there to inform the court and protect the fund, and I think it is impossible to say that now they can set up a release arising from a bargain which was really never made by them.

On both points I am in favour of the plaintiffs, but I must say one word on the subject of costs. Although I cannot allow the trustees' defence of what they have done so as to relieve them from responsibility because they acted judiciously and did their best, still I observe from the recitals in the deed of 1884, and I conclude from what I have been told, that the trustees were in a position of extreme difficulty by reason of the embarrassment, possibly impending bankruptcy, of the mortgagor, and it may be that, though they did not do what the deed authorised, they did what was under the circumstances the best for the estate, and it may be if they had come to the court, the court would have in some way or other sanctioned their doing exactly what they did or something of that character. Their *bona fides* is not impeached. I do not think they can be said to have acted otherwise than as honest trustees, and I also think that, though it is necessary to have this point decided, the real point has not been brought against them so clearly as to make it incumbent on the court to say that they ought to have acknowledged their mistake and submit to judgment. Therefore in deciding against them, though I cannot give them their costs out of the estate, I see no reason to make them pay any costs.

Solicitors for the plaintiffs, *Crosse & Son.*

Solicitors for the defendants, *Lee & Pembertons.*

Q. B. Div. (Pollock, B., and Hawkins, J.) — Jan. 21.

Onslow v. Commissioners of Inland Revenue. (a.)

Inland Revenue—Stamp duty—Settlement—Contingent interests—Investments liable to be varied—"Definite and certain amount of stock"—Proper stamp on settlement—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *schedule,* "*Settlement.*"

A marriage settlement was executed whereby certain stocks and other property were settled. The interest which the settlor had in the various stocks and property was contingent, and the investments representing the property comprised in such settlement could be varied by the trustees at pleasure.

Held, that this instrument was a "settlement" of a "certain and definite amount of stock" within the meaning of the word "settlement" in the schedule to the Stamp Act, 1870, *and required to be stamped accordingly*

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

with an ad valorem *stamp of five shillings for every £100, in addition to the ordinary stamp of ten shillings as a deed.*

Case stated by Commissioners of Inland Revenue, as to the proper amount of stamp duty chargeable upon a settlement made on the marriage of Denzil Onslow and Marion Onslow.

The instrument was presented to the Commissioners of Inland Revenue, under the provisions of the 18th section of the Stamp Act, 1870, for the opinion of the Commissioners as to the amount of stamp duty with which the instrument was chargeable.

The instrument was a settlement of certain moneys, stocks, funds, and securities, set forth in three schedules thereto, or of the interest of the said Marion Onslow therein, and the question was whether the said settlement was a settlement of a "certain definite amount of stock" within the meaning of the schedule to the Stamp Act, 1870.

At the time the marriage settlement in question was executed the interest which the settlor, Marion Onslow, then took was as follows: first, one moiety in reversion, expectant upon the death of her mother, of the proceeds of the sale of certain real estate and the personal estate of her late uncle; the second interest which she took was a reversionary interest, expectant on the death of her mother, and subject to defeasance if her mother had any other children; the third interest was an interest in reversion expectant upon the deaths of her mother and aunt, contingent upon the death of the aunt without issue, and subject to revocation if her mother had other issue. The investments representing these several interests were in the hands of trustees, and were all liable to be varied at the pleasure of the trustees.

The Commissioners were of opinion that this marriage settlement was chargeable under the head "Settlement" in the schedule to the Stamp Act, 1870, with an *ad valorem* duty of 5s. per £100, and also, by reference to section 8 of the Act, with the duty of 10s. as a "deed of any kind whatsoever not described in this schedule"; and they assessed the duty thereon accordingly, and the instrument was stamped according to that assessment.

Those interested under the settlement appealed against the assessment.

The question for the opinion of the court was whether the said instrument was chargeable with the duty as aforesaid; if not, with what duty it was chargeable.

"Settlement" is defined in the schedule to the Stamp Act, 1870, as "any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever"; and the duty on the same is declared to be 5s. for every £100 of the amount or value of the property settled or agreed to be settled.

Horne Payne, Q.C. (*Danckwerts* with him), for the appellants.—An instrument, to come within the meaning of the word "settlement" in this schedule, must be a settlement of a "definite and certain principal sum of money, or of a definite and certain amount of stock." Here the interests which the settlor has are wholly contingent interests, and in indefinite stock, and so do not come within the words "definite and certain amount of stock." As the interests were contingent, the settlor, at the time of making the settlement, had no stock existing which could have been definite and certain, and therefore, on that ground, the instrument was not a "settlement of a certain and definite amount of stock." Moreover, the investments were liable to be varied by the trustees at will, and therefore the settlor had no legal right to the stock, as it was in the power of the trustees to vary the same: *Sanville* v. *The Commissioners of Inland Revenue*, 2 W. R. 529, 10 Ex. 159.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Dicey*, for the respondents, were not heard.

POLLOCK, B.—There are two points in this case, and it requires very little more than to state them, to answer them. It has been contended that the interest under the settlement was contingent upon the death of the aunt; that is one of the points. It amounts to this, that in a case in which the settlor is not in present possession of that which is settled, it is a settlement which does not require to be stamped. Apart from the words of the Stamp Act, it is a curious thing to say that a settlement which is perfectly good in law should yet, for the purposes of revenue, not be treated as a settlement which had the effect of disposing of the property. That is the real test. Now when we come to the language of the Act the matter is perfectly clear, because in the schedule it says, "any instrument whereby any certain and definite principal sum of money, . . . or any definite and certain amount of stock, is settled, or agreed to be settled." For this purpose, what is the interest of the settlor?

It is rather curious that in section 125 of the Act a covenant for the payment of an annuity by the person entitled to the income of the reversioner is dealt with, and that section shows that those who drew the Act had a good knowledge of everyday practice—that is to say, that when people are making a settlement, they settle contingent property as well as property in their own possession.

In certain ranks of life the ordinary rule is that old stock is converted in order to provide for a child about to be married, and to say that a man, when he settles a specific sum, is not making a settlement within the words of this section, is a contention I cannot understand.

Then the other point, which is more shadowy still, is whether this was not specific stock. Although the parties have given in the schedule the actual specific stock now held by the trustees, it is argued that it is not to be treated as specific stock because at any time it may be changed by the trustees. It sometimes happens that a specific stock is made unconvertible, and in a case of that kind the argument would not apply. It would be curious that in that case there should be stamp duty payable, but no stamp duty payable where the trustees have the ordinary option of converting the stock. I cannot see that the words of the Act, "specific stock," affect that favourably to the appellants in any sense, and it is sufficient to say that in this case there is now an existing stock, and that stock, if changed afterwards, is within the power created by the original settlement, and it does not require much consideration to say that, if one stock is sold and another stock is bought, though it is a different stock, it is for all legal purposes the same stock as that which is dealt with in the settlement. It seems to me there is no ground for the contention.

HAWKINS, J.—I am of the same opinion, and I have nothing further to add.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Clay & Son*, Manchester.

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Q. B. Div. (Huddleston, B., and Mathew, J.) Nov. 24, 25.

Pyman Brothers v. Dreyfus Brothers & Co. (a.)

Shipping—Charter-party—Demurrage—Arrival in outer harbour—Computing of lay days.

By charter-party it was agreed that the plaintiffs' vessel should "proceed to Odessa, or so near thereunto as she might safely get, and load, twelve running days to be allowed for loading and discharging, and ten days on demurrage over and above the said lay days." The vessel arrived at a point in the outer harbour of Odessa, which was as near as she could safely get to a loading berth, and the captain gave notice to the defendants' (the charterers) agents that she was ready to load. The cargo was stored at a quay in the inner harbour, and the agents were unwilling to load it where the vessel then was. It was impracticable to load the steamship except at some quay in either the inner or outer harbour, but there was no custom by which ships were considered ready to receive cargo only when moored alongside the quay. The ship was not loaded till after the lapse of twelve days from the time of her arrival in the outer harbour owing to the crowded condition of the quay which was selected for her loading.

Held, that the lay days were to be computed from the time when the vessel arrived in the outer harbour, and that the defendants were liable for demurrage.

This was a motion by the defendants, charterers of the vessel *Lizzie English* to set aside an award which was made in favour of the owners in respect of a claim made by them for demurrage and detention at Odessa, the port of loading.

The charter-party stipulated that the vessel should proceed to Odessa, or so near thereunto as she could safely get, and there load a cargo which she was to take elsewhere, and "twelve running days to be allowed for loading and unloading, and ten days on demurrage over and above the said lay days at fourpence per ton on the steamer's gross registered tonnage per running day."

The award found that on the 22nd of December, 1888, the *Lizzie English* reached the outer harbour at Odessa and as near "as she might safely get" to a loading berth; that on that day the captain gave the charterers' agents notice that she was ready to load; that there were then no practicable means of loading there except at a quay in the outer or inner harbour; that a cargo was then ready for loading, and that the defendants were then willing to load it, if and so soon as the steamer got a loading berth alongside a quay in the inner harbour where the cargo was stored, but not before; that the harbour master refused to allow the steamer to go to a loading berth either in the outer or inner harbour until her regular turn came; that there was not at that time a custom at the port of Odessa that "steamships under charter-party were not considered ready to receive cargo until after being moored alongside the quays"; and that the *Lizzie English* was ordered in her turn to a quay berth in the inner harbour on the 8th of January, 1889, and the defendants began to load her on the 10th of January and completed her loading on the 15th of January, and occupied in loading and discharging her altogether twelve days.

Upon these facts the arbitrator found that the lay days commenced on the 22nd of December, 1888, and expired on the 5th of January, 1889, and that the defendants were liable to pay the plaintiffs £456 16s. for demurrage and detention of the vessel.

Barnes, Q.C. (*W. English Harrison* with him), for the defendants.—The finding of the arbitrator, that "there was no practical means of loading at Odessa except at or alongside a quay berth," shows that the lay days under the charter-party did not begin to run until the vessel obtained a quay berth. It was held in *Brown* v. *Johnson*, 10 M. & W. 331, and *Tapscott* v. *Balfour*, 21 W. R. 245, L. R. 8 C. P. 46, that the lay days began to run from the time of getting into dock as opposed to that of obtaining a quay berth, but the ground of those decisions was that the dock itself was the usual place for loading. That was not the case at Odessa, for the usual place of loading there was some quays either in the outer or inner harbour. A ship, therefore, which was chartered to load at Odessa, could not rightly be said to have arrived until she had obtained a loading berth at a quay. Further, the time from the 22nd of December to the 8th of January was not an unreasonable time for the captain to wait in order to obtain a place for his ship at a loading berth: *Nelson* v. *Dahl*, 29 W. R. 543, 6 App. Cas. 38.

Cohen, Q.C. (*J. G. Witt* with him), for the plaintiffs.—The arbitrator has found as a fact that ships were loaded at Odessa both in the outer harbour and in the inner harbour, and also that "there is no custom at Odessa by which steamships under charter are not considered ready to receive cargo until after being moored alongside the quay." The outer harbour, therefore, was one of the usual places of loading at Odessa, and the ship, having arrived there, had arrived at Odessa within the meaning of the charter-party, and the lay days began to run from that time. The defendants were no doubt within their right in ordering the vessel to the inner harbour, but, after she had got into the outer harbour, it became immaterial when she might obtain a quay berth. As soon as the lay days commenced the defendants became responsible to the plaintiffs for any failure to load within the stipulated time in whatever way that failure was occasioned, unless it was done by the negligence of the captain or other agent of the plaintiffs. The cause of the failure in this case was the dock regulation as to ships taking their turn at the quay, so that the defendants are clearly liable. This is shown in Brett, L.J.'s judgment in *Nelson* v. *Dahl*, and in the cases of *Brown* v. *Johnson* and *Tapscott* v. *Balfour*. [He cited also Carver on the Law of Carriage by Sea, section 627, p. 629; *Davies* v. *McVeagh*, 28 W. R. 143, 4 Ex. D. 265; and *Murphy* v. *Coffin*, 32 W. R. 616, 12 Q. B. D. 87.]

Barnes, Q.C., in reply.—The case for the defendants is supported by the decision in *Brereton* v. *Chapman*, 7 Bing. 559, and *Kell* v. *Anderson*, 10 M. & W. 498.

Huddleston, B.—I am of opinion that the decision of the arbitrator was correct. The court has to consider the terms of the charter-party in connection with the facts found in the award. According to the charter-party the plaintiff's steamship, the *Lizzie English*, was "to proceed to Odessa or so near thereunto as she might safely get and load." The arbitrator finds that on the 22nd of December the plaintiffs brought the *Lizzie English* into the outer harbour at Odessa "as near as she might safely get" to a loading berth, and gave the defendants notice that she was then ready to load. He finds that at Odessa it was impracticable to load the steamship except at some quay in either the outer or the inner harbour; that she might have been loaded at a quay berth in the outer harbour in which she arrived on the 22nd of December, but that she was in fact loaded at a quay berth in the inner harbour, which she did not reach till a subsequent date in January, that the defendants would only load her in the inner harbour as the cargo was stored there, and that, owing to the rules of the port and its crowded condition, when she arrived she could not have obtained a quay berth in either harbour earlier. It was conceded by the learned counsel for the plaintiffs that the defendants were entitled to order the vessel from the outer into the inner harbour where the cargo was, and that the time occupied

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

in so moving her ought not to be reckoned as part of the lay days under the charter party. Under these circumstances the question is, whether the lay days are to be computed from the 22nd of December, when the ship reached the outer harbour, or from the date at which she obtained a loading berth in the inner harbour?

The solution of this question is, I think, to be found in a passage in the judgment delivered by the present Master of the Rolls in *Nelson* v. *Dahl*, 28 W. R., at p. 60: "If the place named be of the larger description, as a port or dock, the notice may be given though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded, but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated."

Had the contract been that the ship was "to proceed to the inner harbour at Odessa and load" she could not be said to have arrived within the meaning of the charter-party till the 6th of January, when she reached the inner harbour, and the arbitrator would have been wrong. But the contract is that she is "to proceed to Odessa and load." This is satisfied by her arrival in the outer harbour at Odessa on the 22nd of December. The plaintiffs gave notice, as they were entitled to do, of their readiness to load on her arrival there on that day, and the lay days are to be calculated, as the arbitrator has calculated them, from that day. The same distinction was drawn by my learned brother Mathew, J., in his judgment in *Murphy* v. *Coffin*.

MATHEW, J.—I am of the same opinion. I think the conclusion arrived at by the arbitrator a perfectly correct one. It is unnecessary and it would be pedantic to repeat the clear and felicitous statements of the law which have been made by learned judges as from time to time they have been called upon to pronounce judgment in cases of this kind. The case of *Nelson* v. *Dahl* contains a valuable epitome of all the previous authorities. In this case it appears from the award, that Odessa the port to which this vessel had to go to load under her charter-party, was a port containing various places of loading, some at the quays in the outer, some at those in the inner harbour. Now, as was conceded by the learned counsel for the shipowners, the charterers were entitled, when the vessel arrived at Odessa, to require the captain to take her to some proper and usual berth to load. Had therefore the contract contained no stipulation as to the time within which the loading was to take place, it is obvious that the shipowners would have been exposed to the risk of the vessel being ordered to some crowded berth, where she might have been delayed for a considerable time. The loss and inconvenience which this delay might occasion to the shipowners would be a much more serious matter than any inconvenience likely to be caused to the charterers. One can conjecture, as is often the case as regards contracts of this and similar kinds, in the course of the negotiations the charterers say to the shipowners, "You must send your ship to Odessa." The shipowners reply, "There are several places at Odessa at which you will be entitled to call upon us to load. Some of these places may be crowded, and you may send our ship to one of these crowded places." The charterers meet this by saying, "We consent to enter into an obligation in the charter-party to load the vessel within a certain time." It might be premature to attempt to unearth the principle upon which the interpretation of such stipulations in contracts of affreightment depends with a view to laying down a rule of general application, but I think that in the particular class of cases of which the present is an example it may be stated to be the rule that where the port of loading or discharge named in the contract contains several places of loading or discharge, and the contract also names a time in which the vessel is to be loaded or discharged, the option of the merchant in the selection of the places of loading or discharge is to be exercised subject to the obligation into which he has entered, that the cargo shall be loaded or discharged within the time named. Here the vessel arrived on the 22nd of December at a point where she was at the disposition of the charterers. They had only to indicate the place to which she was to go for her cargo, and she would have been there immediately. The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait a considerable time. It appears to me that during all this time the charterers were contracting a liability under this contract that the ship should be loaded during the time specified in the charter-party. Accordingly the lay days are to be computed from the 22nd of December, and the plaintiffs are entitled to the sum awarded to them by the arbitrator in respect of demurrage and detention. The motion will, therefore, be dismissed.

Motion dismissed.

Solicitors for the plaintiffs, *T. Cooper & Co.*

Solicitors for the defendants, *Lowless & Co.*

Prob. Div. & Adm. Div. Probate. } Nov. 26.

In the Goods of AMELIA CLARK. (a.)

Administration—Wife's estate—Husband not heard of for more than seven years—Application to presume death.

Where a husband had not been heard of for more than seven years, the court refused to allow a party applying for administration to the estate of his wife to presume the husband's death.

Per curiam.—*The applicant would be entitled to take the grant on swearing her belief that the deceased died a widow.*

Motion on behalf of Mary Hannah Jackson for liberty to presume the death of Joseph Marshall Clark as and from July, 1880, and for a grant of letters of administration to her of the personal estate and effects of Amelia Clark, deceased.

Amelia Clark, late of Leeds, in the county of York, died on the 14th of March, 1889, intestate, without child or parent, and leaving Mary Hannah Jackson, her sister, and one of her next of kin, her surviving.

Amelia Clark was, on the 12th of November, 1868, married at Demerara to Joseph Marshall Clark, engineer of the railway there, and she lived with him at various places until he went to Chili in January, 1870, she remaining in England. He continued to correspond with his wife in England till July, 1872, when the letters ceased suddenly, and from that date nothing further had been heard of or from him.

Deane, in support of the motion.—The death of the husband ought to be presumed at a date seven years after he was last heard of.

BUTT, J., refused to make any order, as it was not usual for the court to give leave to presume the death of a husband in such cases. The applicant would be entitled to take the grant on swearing her belief that the deceased died a widow.

Motion refused.

Solicitors, *Smiles, Binyon, & Ollard.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England) July 29, 30, 1889.

Soper v. Arnold. (a.)

Vendor and purchaser—Forfeiture of deposit—Defect in title—Common mistake.

A contract for the sale of real property contained the usual conditions of sale and the ordinary provisions as to the forfeiture of the deposit. The vendor's title was fully disclosed and accepted, but the balance of the purchase-money was not paid and the deposit forfeited. The property was afterwards sold to someone else, when a flaw in the title was discovered.

Held, in an action to recover the deposit by the former purchaser, that, the title having been accepted, the contract went off owing to his default, and that he could not recover.

Decision of the Court of Appeal (36 *W. R.* 207, 37 *Ch. D.* 96) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Cotton, L.J., Sir James Hannen, and Lopes, L.J.), reported 36 W. R. 207, 37 Ch. D. 96, affirming Kekewich, J., reported 35 W. R. 451, 35 Ch. D. 384.

By an agreement dated the 4th of November, 1882, and made between the respondents, Arnold and Patten, of the one part, and the appellant, Soper, of the other part, the respondents agreed to sell to the appellant certain freehold property at Teignmouth for £6,100, of which sum £610 was to be paid on signing the agreement, and the remainder on the completion of the sale.

The agreement contained the usual condition providing that if the purchaser should fail to comply with the conditions of sale his deposit should be forfeited to the vendors, who should be at liberty to resell the property.

The £610 was deposited with the respondents, the abstract of title delivered and approved, but the appellant was unable to find the balance of the purchase-money when the time arrived for completion, and the respondents thereupon rescinded the agreement and retained the deposit as forfeited.

In June, 1885, the respondents agreed to sell the property to F. Slocombe, who took an objection to the title on the ground that a power of sale, under which the land had been purported to be sold to the defendants, did not really exist. And by an order of Chitty, J., upon a summons under the Vendors and Purchasers Act, 1874, it was declared that a good title to the hereditaments had not been shown. Thereupon the appellant demanded repayment from the respondents of his deposit, with interest, and commenced this action, which was dismissed, with costs, by Kekewich, J., and by the Court of Appeal.

J. M. Rigg (*J. A. Thorne* with him), for the appellant.

W. Barber, Q.C. (*Vernon Smith* and *Reginald Kemp* with him), for the respondents.

Cooper v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149; *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779; *Bingham* v. *Bingham*, 1 Ves. sen. 126; *Howe* v. *Smith*, 32 W. R. 802, 27 Ch. D. 89; *Hart* v. *Swaine*, 26 W. R. 30, 7 Ch. D. 42; *Torrance* v. *Bolton*, 21 W. R. 134, L. R. 8 Ch. 118; *Ex parte Barrell, In re Parnell*, 23 W. R. 846, L. R. 10 Ch. 512; *Want* v. *Stallibrass*, 21 W. R. 685, L. R. 8 Ex. 175, 184; *Brownlie* v. *Campbell*, 5 App. Cas., p. 937, 29 W. R. Dig. 232; *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351; *Stewart* v. *Stewart*, 6 Cl. & F. 911, were referred to.

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

July 29.—Lord Herschell.—The only question raised by this appeal is whether the appellant is entitled to recover from the respondents a sum of £610, which was paid to them some years ago as a deposit upon a contract of sale made between the appellant and the trustees of the will of Mr. Arnold, whereby the trustees agreed to sell certain property to the appellant for the sum of £6,100. By the conditions of sale it was provided that "all objections and requisitions (if any) in respect of the title or the abstract, or anything appearing therein respectively, shall be stated in writing and sent to the vendors' solicitor within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be deemed the essence of the contract."

An abstract was delivered by the trustees to the appellant. That abstract disclosed that Mr. Arnold had purchased from the trustees of the will of Mr. Henry Hoare, and that those trustees had purported to sell to Mr. Arnold under the authority of a power contained in the will. The abstract disclosed the terms of the will; it showed exactly the terms of the power which the trustees had purported to exercise in selling. The solicitors of Mr. Soper, the purchaser, made certain requisitions and objections. Some of the objections, indeed, were connected with the fact of the sale having taken place by the trustees of Mr. Hoare under the powers of his will; but they took no exceptions to the title except such as were removed to their satisfaction, and ultimately they accepted and approved the title. That fact is distinctly stated in the statement of defence to the action, and is not traversed in the reply, and therefore we may take it—indeed, we are bound to take it—that the title was so accepted and approved.

Thereupon a conveyance would have followed in the natural course; but the appellant, as is admitted, was unable to find the balance of the purchase-money, and for that sole reason the payment of the balance was not made, and the transaction was not carried through by a conveyance and the payment of the purchase-money accordingly. The time having elapsed when the payment was to be made, the vendors served a notice upon the appellant that, unless he paid the money in accordance with the contract within fourteen days, they should rescind the contract and not be under any further obligation to carry it out and complete the purchase. No payment was made, nothing was done, and matters remained in that position, the deposit continuing to be held by the respondents.

So matters stood for some years, until the present action was brought, in which the appellant seeks to recover back the money which he so paid, upon the ground that the trustees of the will of Mr. Henry Hoare had not power to sell the estate except upon a condition which had not happened. It must be taken, I think, for the purposes of this appeal, that the trustees had not the full power of sale which they purported to exercise; that their power was only exercisable absolutely in case there were no children of the marriage who could become entitled to the property under the trusts of the will; and it appears that there is a daughter of the marriage who, on her majority, will become entitled under those trusts. There was, therefore, the plaintiff insists, a defect in the title such as I have called attention to; and his point is this:—He says: "Inasmuch as I now discover that at the time when I paid the deposit on the sale, and at the time when I failed to pay the residue of the purchase-money and you declared the contract to be at an end, you, the trustees, the vendors, could not have made out a good title to the property, therefore I am entitled to have my deposit back."

Now, as I have pointed out, the defect, such as it was, was communicated, on the very face of the abstract

of title, to the appellant, and was as well known to him as to the trustees at the time when he accepted and approved the title. There can be no doubt that if he had possessed the money and had been in a position to pay it, notwithstanding that defect, the residue of the purchase-money would have been paid and a conveyance executed. I apprehend that it is clear that if that had taken place no objection could afterwards have been taken to the title such as is now suggested, and no relief could have been obtained on account of the defect to which I have alluded. How does the matter stand, then, with regard to the deposit? The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed. Now, under the circumstances which I have detailed, I cannot doubt that it must be regarded as a contract uncompleted through the default of the appellant. As I have said, he took no exception to the title—he was willing to take that title; he had intimated his willingness to take that title by accepting and approving of it, and the trustees, the vendors, were ready and willing to convey to him that title, which he had so intimated his willingness to accept. But he, although he did not object to the title at all, was not prepared to carry out his contract—he had not the means, and that became known to the vendors. Thereupon they, after due notice, determined the contract as against him.

Now, when an action is brought by the appellant to recover the deposit, and the objection is taken that the vendors were not able to make out what is in law a complete and perfect title, the answer seems to me to be this, that the vendors were perfectly ready and willing to convey to the appellant that title which he had accepted and approved and declared himself willing to take, and the contract only went off because he afterwards was not in a position or prepared to carry it out on his part. That seems to me to show that it was owing to his default that the contract came to an end; and I venture very much to doubt whether, under circumstances such as I have described, if the vendors had brought an action for specific performance to compel him to complete the purchase and to pay the residue of the purchase-money, he could have resisted such an action on the ground, even if he had then ascertained that it was a fact or realized that it was a fact, that there was some defect in the title. No authority has been cited to show that, under such conditions, where a purchaser has accepted and approved a title, all the facts being known to him at that time, he can resist a decree for specific performance and claim to have the title investigated, and not have it declared that he has accepted the title, and that he is, therefore, bound specifically to perform his contract. However, it is not necessary to decide that point. If that be the case, it seems to me that it would be out of all reason to suppose that he could recover the deposit on the ground that the contract had come to an end, not through his default, but through that of the vendors, when the circumstances were such that they could have compelled him specifically to perform the contract. But, as I have said, I do not think it necessary to determine this point, because, for the reasons which I have stated, it seems to me that he was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit. It seems to me that any other decision would lead to most inconvenient consequences, because, under circumstances such as these, where trustees were selling, the deposit might have been distributed by them amongst their beneficiaries, and then, at any time within six years afterwards, if the purchaser discovered that there was some defect of title which would have prevented their making out a perfect conveyancing title, he could bring an action against the trustees to recover back the deposit which he had so paid, though he had accepted and never taken any objection to the title. That would be a result which would be productive of the gravest inconvenience. I know of no authority in point of law to warrant it, and I therefore move your lordships that this appeal be dismissed.

Lord FITZGERALD.—I have, during the course of this rather singular and unusual case, had upon my mind a considerable degree of hesitation in affirming the judgment of the court below; but a great deal of it has been removed, I must confess, by the argument which Mr. Barber has addressed to us. Therefore, while I shall add a few words, I am able to say that I do not dissent from the judgment which has been announced by Lord Herschell—nay, more, that I concur in it.

The case is very singular, and the hesitation which I have expressed was based upon certain legal propositions which I had in my mind and thought ought to govern the case. Now I look upon it as settled that where money is paid to another under the influence of a mistake—that is to say, upon the supposition that a fact is true, which fact is untrue—an action will lie to recover that money back again; and, furthermore, if the purchaser here parted with his money under a mistake it seems to be rather against justice and good conscience that the receivers of that money, who fell into the same mistake themselves, should retain it.

Now, I must observe that the parties here have been perfectly candid—indeed, the pleadings and the course of the case have been quite refreshing. There is no controversy between them as to fact. In truth, the statement of claim seems to have been framed in that perfectly candid manner which characterizes it with a view to invite a decision upon demurrer; and in the defence the principal statements put forward are not controverted.

Now, how did the case arise? The defendants offered for sale certain property. It was not a sale by auction, it was a private sale, and in the contract of sale I find what the defendants professed to be selling:—"The vendors shall sell and the purchaser shall purchase the freehold property called 'The Rowdens,' at Teignmouth, in the county of Devon, and the inheritance thereof in fee simple in possession free from incumbrances." The language is quite specific. The purchase-money is £6,100, of which sum the sum of £610—that is, part of the purchase-money—is to be paid "immediately after the signing of this agreement," and the remainder on a given day. So that the sum of £610 was part of the purchase-money, though it fulfilled the double purpose of also being a security to the vendors that the purchase would be gone on with and completed, and the concluding provision of the conditions of sale shows that that was partially the object of the deposit.

Now there has been a mistake here for which neither party is to blame. The vendor put forward his case very candidly upon the abstract of title. I do not mean to say that he disclosed the defect, or stated the defect, or communicated the defect of the title, but he disclosed the will of Mr. Hoare, which was the foundation of his title, and he disclosed that accurately. But he had committed an error (I assume for the present purpose that it was an error) in the deduction which he had made from that will in supposing that the trustees of Mr. Hoare had a right to sell until the limitations to his children had failed to take effect; that defect, if it is an error, goes to the very root of the title; for, though it is true that the abstract offered to the purchaser the life estate of Mrs. Hoare, which was still in existence, yet beyond that, supposing that error to exist, the purchaser, if he had completed the purchase, would have got nothing—he would only have got the life estate of Mrs.

Hoare. He would have got the legal estate in fee no doubt, but he would have got it bound with a trust the period for the carrying out of which had not arrived, because it could not arrive until the death of Mrs. Hoare. So that, assuming the construction put upon that will by Chitty, J., to be well founded, all the purchaser would have got would have been simply the life estate of Mrs. Hoare. I need not say that that is not "an estate of inheritance in fee simple free from incumbrances."

The vendors I acquit of all intentional misrepresentation or the slightest insinuation of fraud in their conduct. If there was an error on their part the purchaser or his solicitor fell into the same error; and the language of the will is so obscure and so difficult to interpret that I can quite understand how all the legal gentlemen concerned in this purchase fell into a common error; but the thing, if it is an error, is transparent always, supposing the decision of Chitty, J., to be well founded; upon that I offer no opinion.

The transaction then proceeded, and the abstract was finished, and certain requisitions were made; but I do not find that any requisition was made in respect of the will of Mr. Hoare or anything connected with it, save this:—"The succession duty payable in respect of the estate of the late Henry Arthur Hoare should be commuted and paid or provision must be made for payment thereof." I think that is the only allusion to the will. In truth, both parties fell into a common error, and they did not see it until the case came before Chitty, J. It is quite true that the purchaser was unable to complete his purchase, but his solicitor raised no objection to the title on this ground. The other objections were mere objections of conveyancing, things required to be done; rights of way and matters of that kind were provided for; but amongst the requisitions there is no objection whatever going to the title; that is passed over in silence, and it is the foundation of a common mistake in respect of which the plaintiff alleges that he is entitled to recover the £610.

I cannot say either that there is any *laches* on the part of the plaintiff. Unfortunately he became a lunatic in 1883, probably before the time arrived for completing the contract, and though he had a partial recovery of his reason and was discharged in April, 1883, yet, in 1884, he became a lunatic again, and remained under confinement until the close of that year. Those misfortunes are such as rather to excite sympathy and to incline one to look with narrowness in order to see whether he ought not to be entitled to recover this £610. But, of course, those reasons cannot influence the House in its judgment in point of law if, in point of law, he is not entitled to maintain this action.

Now I wish again to refer to the course taken by the respondents in this litigation in the argument below and in the argument here, for up to the very latest stage to-day, until we had heard Mr. Barber, I was under the idea that this common error was admitted, that the decision of Chitty, J., was not questioned, and that there was a defect of title, and a defect which could not be removed, but went to the very root of this title in fee, and prevented the trustees of Mr. Hoare from ever giving what could be called "an inheritance in fee simple." It is now said (I daresay with truth) that that decision may be questioned. I express no opinion whatever upon that as to whether the decision is or is not well founded. But it has struck me that the proper course to adopt would have been to have said in reply to this demand of the plaintiff, the purchaser, when he instituted this suit to recover his money, after Chitty, J.'s decision:—"We deny that the title was a bad title. It is true we did not carry it beyond Chitty, J., because the expense would have been great, and we can find a purchaser notwithstanding that decision; but we deny that it was a bad title, and, furthermore, we deny that you have a right to question it, and we refuse to enter into the question with you." I confess that the authorities cited rather bring my mind to that view. If that course had been taken in place of the one which was adopted in the court below, in the Court of Appeal, and here, the question presented to us would have been: After the purchaser has accepted the title, having had it fully laid before him, although the objection to it was not communicated because it was not known or did not strike the parties, still, having had an opportunity of judging for himself, and not having rejected the title, on the contrary, having accepted it, can he make this claim? He says, and says truly:—"I would have carried out the transaction to a conveyance if I had had the means of paying the balance of the purchase-money, but I was obliged to drop it because I had not the money." I confess I am very much shaken by that view. If the true course had been adopted the decision of the Court of Appeal should have been, not upon the ground upon which it went in this case, but upon the ground—"This question is closed; we cannot permit you to reopen it; you having once accepted the title, even if there has been error in fact, we cannot help you—you must abide by the consequences."

Whilst I express these opinions upon the case, I confess I am very unwilling to do so, because I cannot fail to see that this case involves, in addition to the ordinary questions of law which it presents, a good deal of the practice of conveyancers, and the practice of conveyancers I have always understood to be a portion of equity practice, with which I am not familiar, and I have some hesitation in expressing an opinion upon it. But, upon the whole, though I had some hesitation in the course of the case, I think that the sounder view to take is that which has now been presented at the close of the case, that this objection is not open to the plaintiff, and that he cannot succeed in recovering the part of the purchase-money which he seeks to recover.

Lord MACNAGHTEN.—I certainly mean no reflection on the learned counsel for the appellant, who has argued the case with perfect fairness and much ability, if I say that the appellant's claim seems to me to be groundless and almost absurd.

There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered, the vendor's title was fully disclosed, that title was duly accepted and approved, the conveyance was prepared, and everything was ready for completion; but when the time came for paying the price, the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract, the deposit was forfeited, and the matter was closed, and I think finally closed, between the vendor and purchaser. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business, and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

Some years after the deposit was forfeited it appears there was a contract to sell the property to someone else, and that person found out a flaw in the title which, in the opinion of a learned judge, prevented the vendor from enforcing the contract. The appellant now comes forward and says: "Give me back my money, because if I had found out that flaw I should not have allowed my money to be forfeited." I am not sure that every judge would have taken the same view of the construc-

tion of Mr. Hoare's will that Chitty, J., took; but I express no opinion upon that, and I assume that this flaw was a fatal defect in the title.

The real answer to the claim of the appellant, I think, is that the deposit was forfeited for a good and sufficient reason. It was forfeited because the purchaser could not pay the stipulated price, and for no other reason. If, instead of forfeiting the deposit, the vendor had brought an action for specific performance after the purchaser had accepted and approved the title, as it is admitted in this case he did, he would, I think, have been entitled to a judgment for specific performance, with a declaration that the title had been accepted, and I apprehend the court would have declined to go into any question as to the construction of Mr. Hoare's will. Under these circumstances, in my opinion, it would be most inequitable to allow the appellant, on a purely hypothetical state of circumstances, to reopen a matter which has been finally closed.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors for the appellant, *Granville, Smith, & Co.*, for *T. & J. Hutchings*, Teignmouth.

Solicitors for the respondents, *Lovell, Son, & Pitfield.*

Privy Council.

Jan. 31; Feb. 1; Aug. 1, 1889.

STEEL *v.* SCOTT. (*a.*)

(*On appeal from the Court of the Recorder of Rangoon.*)

General average—Jettison—Master's default—Right to contribution.

Where jettison was rendered necessary by the master's default in navigating the ship,

Held, that the owners of the cargo jettisoned were entitled to general average.

The owner of goods sacrificed for the common benefit has (1) *a direct claim against each of the owners of the ship and cargo for a* pro ratâ *contribution towards his indemnity, and* (2) *a lien, to be enforced through the master, upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim.*

Hallett *v.* Bousfield, 18 *Ves.* 187, *explained.*

This was an appeal from an order of the Recorder of Rangoon, dated the 15th of August, 1887, whereby he decided in favour of the respondents in an action by them for a sum of money paid under protest to the appellants, agents for a ship on which the respondents were consignees of cargo, and claimed by the appellants for general average to meet losses of jettison.

The recorder found that the jettison was caused by the negligence of the master, and held that no claim to general average contribution could, therefore, be enforced.

The facts appear in their lordships' judgment.

Finlay, Q.C., and *Barnes, Q.C.*, for the appellants.—The respondents are liable to contribute to general average as owners of goods salved by the jettison. The master's negligence having caused the jettison makes no difference to the rights of the innocent owners of the goods so lost. [They referred to *Simonds* v. *White*, 2 B. & C. 805, 811; *Crooks* v. *Allan*, 28 W. R. 304, 5 Q. B. D. 38; *Schloss* v. *Heriot*, 11 W. R. 596, 14 C. B. N. S. 59; *Dobson* v. *Wilson*, 3 Camp. 480; *Hallett* v. *Bousfield*, 18 Ves. 187; *Burton* v. *English*, 32 W. R. 655, 12 Q. B. D. 218; *Cargo ex Laertes*, 36 W. R. 111, 12 P. D. 187; *The Glenfruin*, 33 W. R. 826, 10 P. D. 103; and *Royal Exchange Shipping Co.* v. *Dixon*, 35 W. R. 461, 12 App. Cas. 11]. In this case the bills of lading exempted the owners from all liability for the master's negligence, and their lien on the cargo was not affected: Lowndes on General Average, 4th ed., p. 332; Abbott on Shipping, 12th ed., p. 532; citing the Digest on the position of the master; Parsons on Marine Insurance, ch. v., s. 10, vol. II., p. 285.

Bigham, Q.C., and *Fitzgerald*, for the respondents. The grounding of the vessel and consequent jettison were the faults of the master, who was the ship-owner's agent, not the agent of all concerned, in what he did. The practice of general average is not applicable in the circumstances of this case: 2 Parsons on Marine Insurance, pp. 217, 225; Abbott on Shipping, ed. 1881, p. 449. When the jettison takes place because the goods have been brought into extra peril by the owners or master, then the goods salved are under no liability to contribute: 2 Parsons on Marine Insurance, p. 285; Law of Shipping, vol. I., p. 211; the cases referred to on deck goods jettisoned in Ware's Admiralty Decisions (District of Maine), p. 326; and *The Paragon.*

They also cited *Crooks* v. *Allan*; *Wright* v. *Marwood*, 29 W. R. 673, 7 Q. B. D. 62; *The Norway*, 13 W. R. 296, Br. & Lush. 377, 404; *Huth* v. *Lamport*, 34 W. R. 386, 16 Q. B. D. 442, 735; *Ashmole* v. *Wainwright*, L. R. 2 Q. B. 837.

Barnes, Q.C., replied.

Cur. adv. vult.

The judgment of their lordships (Lord WATSON, Lord FITZGERALD, Lord HOBHOUSE, and Lord MACNAGHTEN) was delivered by

Lord WATSON.—The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th of October, 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang, Steel, & Co., local agents for the ship, intimated to the respondents, A. Scott & Co., and other consignees of the cargo then on board that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim"; and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th of October, six days after the arrival of *The Abington*, they paid the required deposit, amounting to Rs.1,592 11, under protest, and obtained delivery of their goods.

The respondents, on the 27th of October, 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed the respondents applied to the court, under section 492 of the Civil Code, for an injunction to restrain the appellants, Strang, Steel, & Co., from remitting to England, or removing from the jurisdiction of the court, the deposit paid to them on the 25th of October. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the court,

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th of February, 1887, the respondents were allowed to add to their original ground of action an allegation to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of *The Abington* and the consequent jettison of part of the cargo were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the recorder, who ultimately, on the 15th of August, 1887, gave the respondents decree for Rs.1,592 11, and for Rs.200, in name of damages, with costs of suit. The learned judge found, as matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods before they paid the deposit to the appellants.

In the course of the argument upon this appeal three separate points were raised and fully discussed. The appellants argued (1) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that in respect the bills of lading for the cargo of *The Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the respondents did not, before the 25th of October, 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the appellants that *The Abington* was stranded through the negligence of her master; and, on the other hand, the respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October, 1886.

The first question raised is one of general importance, and, so far as their lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* Lord Ellenborough said, "If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument his liability in that respect was questioned upon the authority of certain *dicta* of Lord Eldon's in *Hallett* v. *Bousfield*, 18 Ves., at p. 190. The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their lordships see no reason to doubt that, assuming the applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks & Co.* v. *Allan* Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed that "the right to detain for contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England."

The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as preserved by Paulus (Dig. Lib. 14, Tit. 2) is, "*Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright* v. *Marwood*, said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract *inter se* to contribute by those interested." The present Master of the Rolls, in *Burton* v. *English*, disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its founda-

tion in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice.

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Erle, C.J., and Willes and Keating, JJ.

The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed 30,000dols., and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of *The Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of their master cannot, in the opinion of their lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution, not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in *Schloss* v. *Heriot* are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing *The Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

In support of the legal proposition which they induced the learned recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping, ed. 1881, p. 499. It is in these terms:—"The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their lordships that, if Lord Tenterden had really meant to lay down the rule that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which the respondents placed their chief reliance was that of Mr. Parsons, who, in his treatise on the Law of Insurance, vol. II., p. 285, and also in his Law of Shipping, vol. I., p. 211, states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrongdoing of the master." In both works the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of maritime law; but their lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears the meaning that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their lordships are unable to concur in the opinion expressed by the learned recorder. The correspondence which passed, before the deposit was paid, appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in *The Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their lordships will humbly advise her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action, with costs in the

court below. The respondents must also pay the costs of this appeal.

Solicitors for the appellants, *Crump & Son.*

Solicitors for the respondents, *Badham & Gore.*

Court of Appeal.

From Chan. Div. [and Kay, J.] Feb. 7, 11; March 12, 20.

GARRARD *v.* EDGE. (*a.*)

Patent — Action for infringement—Practice—Costs—Particulars of objections — Certifying for costs of particulars—Costs occasioned to plaintiff by objections alleged to be "improper, vexatious, or unnecessary" proceedings—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29 (6)—*R. S. C.,* 1883, *ord.* 65, *r.* 27, *sub-rules* 20, 21.

In an action for infringement of a patent, the defendant denied the infringement and also delivered particulars of objections to the validity of the patent. The action was dismissed with costs, on the ground that there had been no infringement, the question of validity not being gone into. The defendant did not apply to the judge to certify, under section 29 (6) *of the Patents, &c., Act,* 1883, *that his particulars of objections were reasonable and proper, and his costs of those particulars were, on that ground, disallowed* en bloc *by the taxing master, without being gone into in detail as on taxation. The plaintiff then brought in a bill of costs alleged to have been occasioned by the defendant's particulars of objections, and claimed to have such costs set off, under ord.* 65, *r.* 27, *sub-rules* 20, 21, *against the costs payable by him to the defendant, but the taxing master considered he had no power to go into the question of the propriety of the objections, or, consequently, to allow the plaintiff the costs he claimed.*

Held, by the Court of Appeal (*affirming the decision of* Kay, J.), *that disallowance of costs, or some specified costs, of a party, on the particular grounds specified by sub-rule* 20 (*such as that the proceedings in respect of which those costs had been incurred were improper, vexatious, or unnecessary*) *is (in the absence of an express direction under the same rule by the judge to the taxing officer) a condition precedent to the right of the other parties to have any costs occasioned to them by such proceedings paid by the offending party or set off against costs payable to him; and that, in the present case, the costs of the defendant's particulars having been disallowed merely because they were not certified for by the judge, the condition precedent was not fulfilled, and the taxing master, having no jurisdiction to go into those costs as on taxation, or (therefore) to consider the question whether the proceedings in respect of which they were incurred were improper, unnecessary, or vexatious within sub-rule* 20, *had no power to allow the plaintiff's claim to set off or to payment of any costs occasioned him by such proceedings.*

Per the Court of Appeal.—*Parties who desire, under such circumstances, to raise the question whether, in consequence of any proceedings improperly taken by other parties, such first-mentioned parties have been put to costs, ought to ask the judge to direct the taxing master to look into that question, and, if he finds in the affirmative, tax those costs and order them to be paid by the parties by whose improper proceedings they have been occasioned.*

Adjourned summons.

This was a summons by the plaintiff to review the taxation of a bill of costs brought in by him, and as to which he claimed a right of set-off against costs due to the defendants.

The action was for the infringement of the plaintiff's letters patent, and the defendants, by their defence and particulars of objections, had raised the usual issues of non-infringement and invalidity. The action was tried before Kay, J., and dismissed with costs on the ground of non-infringement, and this decision was affirmed on appeal. No certificate that the particulars of objections delivered by the defendants were reasonable and proper, was asked for or granted at the trial. The plaintiff had called witnesses to meet the defendants' objections to the validity of his patent.

The defendants had included in the bill of costs carried by them into taxation the costs of their particulars of objections, but they were disallowed *en bloc* by the taxing master, on the ground that no certificate had been obtained. The plaintiff then brought in a bill of costs on the ground that unnecessary costs had been occasioned by these objections, and applied that such costs might be set off against the costs payable by him to the defendants; but the taxing master refused to tax the bill, and disallowed it altogether.

The plaintiff accordingly issued this summons.

Marten, Q.C., and *Swinfen Eady,* for the plaintiff —Although a certificate is a condition precedent to the obtaining of costs by the defendants, yet the want of it does not preclude the taxing master from looking into the particulars to see if they are improper, vexatious, and unnecessary. The Patents, Designs, and Trade-Marks Act, 1883, s. 29 (6), only enacts that the defendant shall lose his costs if this condition is not fulfilled: *Badische Anilin und Soda Fabrik* v. *Levinstein,* 29 Ch. D. 366, at pp. 418-9, 33 W. R. Dig. 151; *In re Wormsley,* 27 W. R. 36; R. S. C., ord. 65, r. 27, sub-rules 20, 21. As regards some of the objections, evidence was given by the defendants, and the plaintiff gave rebutting evidence, and your lordship did not believe the defendants' evidence. As to other objections, no evidence was given by the defendants. Unnecessary expense had been incurred by the plaintiff with the view of meeting those objections. The taxing master is at liberty to look into the matter on the materials before him, and to say whether, under the circumstances, the defendants' objections were improper, vexatious, and unnecessary. The want of the certificate is looked upon by the taxing master as a stop to further investigation.

Longbottom v. *Shaw,* 37 W. R. 792, 43 Ch. D. 46, was also cited.

Aston, Q.C., and *Chadwyck-Healey,* for the defendants.—The costs of the particulars of objections were disallowed by the statute, since no certificate had been obtained, and not by the exercise of the taxing master's discretion. The Patents Act, 1883, overrides the general directions of the Supreme Court Rules in this respect: *Boyd* v. *Horrocks,* 6 Rep. Pat. Cas. 152. The rules give no further jurisdiction to the High Court over costs than the Court of Chancery had: *In re Mills' Estate,* 35 W. R. 65, 34 Ch. D. 24; and this case is provided for by the Patents Act, 1883, which punishes a defendant by disallowance of costs only. Also the taxing master has already exercised his discretion in this case.

Marten, Q.C., replied.

KAY, J.—This is a patent action which has been dismissed with costs. The defendants denied both the

(*a.*) Reported by J. H. BAKEWELL and R. H. DEANE, Esqs., Barristers-at-Law.

validity of the patent and infringement. I have never heard that a defendant is not entitled to have two strings to his bow and to raise both these issues; and because he does not succeed upon the first it does not follow it was one that was unreasonable or improper to raise. But at the trial the court did not give a certificate for the particulars of objections under section 29 (6) of the Patents, Designs, and Trade-Marks Act, 1883, nor express any opinion as to whether these particulars were reasonable and proper, so that the defendants could not get the costs of them, and when such costs were carried in by him, the taxing master disallowed them *en bloc*. The plaintiff now says that these proceedings of the defendants have caused him considerable costs with the view of meeting them, and that those costs should be allowed to him and set off against the costs payable to the defendants, and he relies upon R. S. C., ord. 65, r. 27, sub-rules 20, 21. The plaintiff's contention is that the taxing master should have looked into the particulars, and said which of them had proved to be "improper, vexatious, or unnecessary," within the meaning of ord. 65, r. 27, sub-rule 20, and therefore whether the costs occasioned by them to the plaintiff should be allowed to him, and set off under sub-rule 21. But under those rules it is necessary that there should be, as a condition precedent, a disallowance by the court or a taxing master of the defendants' costs, because they are improper, vexatious, or unnecessary. The taxing master says that he has disallowed the defendants' costs of their particulars of objections because they had not obtained the proper certificate. That is the only reason for the disallowance of those costs. The condition precedent for the set-off of costs by the plaintiff therefore fails, and the summons must be dismissed with costs.

From this judgment the plaintiff appealed.

Marten, Q.C., and *Swinfen Eady*, for the appellant.—The taxing master declined to inquire whether the defendants' particulars of objections were improper. The objections (which are numerous) are so unreasonable and improper that the defendants themselves did not venture to ask for a certificate for the costs of them, and they are disallowed *en bloc;* but surely the taxing master is not thereby relieved of inquiring into them for the purpose of allowing us the costs occasioned by them. If so, a plaintiff or defendant, by simply omitting from his bill of costs any objectionable matter like these items for particulars of objections, may deprive his opponents of the costs occasioned by having to meet those particulars which are *ex hypothesi* unreasonable and improper. That they are so in fact is further shown by their being disallowed by the taxing master. These particulars were "improper, vexatious, unnecessary," within ord. 65, r. 27, sub-rule 20, of the Rules of Court, 1883. The defendants cannot, by leaving out their objectionable costs, deprive the court of its jurisdiction to order them to pay the costs occasioned by their improper particulars. The matter ought to be referred back to the taxing master, who is the most proper and competent person to determine the question under sub-rule 20. Under that rule it is not necessary that there should have been an actual disallowance expressly on the ground of impropriety. This is a question of principle. Are costs incurred in consequence of frivolous objections by the other side not to be paid by them?

They referred to *Badische Anilin und Soda Fabrik* v. *Levinstein; In re Wormsley, Baines* v. *Wormsley; Boyd* v. *Horrocks; Longbottom* v. *Shaw;* Memorandum as to Costs, by Sir J. Leach, V.C., in 1 Sim. & St., at p. 357; and R. S. C., ord. 65, r. 27, sub-rules 20, 21, 25.

Aston, Q.C., and *Chadwyck-Healey*, for the respondents.—The decision below was right, both technically and on the facts. "Disallowance," on the ground mentioned in sub-rule 20, is a condition precedent. In sub-rule 20 "such question" means the question whether any proceeding is unnecessary, &c. The condition precedent is that there shall be a question raised as to whether any of the defendants' costs shall be disallowed on the grounds specified or not. There must be a question raised, and properly raised, before they can be so disallowed. If the plaintiff's construction were right, a party who has been successful in every respect might be ordered to pay costs; that could not be so: *Foster* v. *The Great Western Railway Co.*, 30 W. R. 398, 8 Q. B. D. 515; *In re Mills' Estate.*

Marten, Q.C., in reply.—The latter part of sub-rule 20 imposes on the taxing master the positive duty of looking into the question whether the proceedings are improper or not, if it has not been raised before the judge.

Cur. adv. vult.

March 20.—COTTON, L.J.—This comes before us by way of appeal from a decision of Kay, J., refusing an application to review the taxing master's certificate. The action is a patent action, and the defendants were successful on the question of infringement. A good many objections were taken by the defendants to the validity of the patent, but the court gave no decision on that point; and for some reason or other the defendants made no application to the judge at the trial, under section 29, sub-section (6), of the Patents Act of 1883, to certify that their objections were well taken. The judge could certainly not have found them proved, and he was not asked to find that they were reasonable and proper. Then, when the taxation of costs took place, the defendants asked for a certificate that their objections had been well taken, though the judge had not been asked at the trial to find that they were reasonable and proper. First of all the master allowed the costs of the objections, but afterwards, without entering into the question of their propriety, or that of the proceedings taken, he struck them out. He did that in consequence of his attention having been called, I suppose by the plaintiff, to section 29 (6) of the Patents Act, which says that "on taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they, respectively, shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the court or a judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case." But then the plaintiff brought in a bill of costs relating to the proceedings which he said he had taken with reference to the objections brought in by the defendants, and he contended that, under rule 27, sub-rule 20, of order 65, he was entitled to charge the defendants with those costs with reference to the proceedings which he, the plaintiff, had taken to meet those objections taken by the defendants. Well, the taxing master declined to enter into the question at all, and the judge, on the appeal to him, thought he was right, because he considered that, as he had not been called upon, and could not be required to tax the costs brought in by the defendants relating to the objections which they had taken, and on which the judge did not decide at all, he had no power to act under this rule 20.

It is said with reference to the costs of any proceedings taken by the defendants, if on taxation it is found, either at the instance of the judge or at the instance of the taxing master, that those proceedings were improper, unnecessary, or vexatious, then any costs which they have consequently caused the other party to incur will be ordered to be paid by them. But here, of course, as I stated, the taxing master never had power to enter into the question, on the taxation of the defendants' costs, whether these proceedings were in any way improperly or vexatiously taken by them. Therefore, he said, I cannot enter into this question which the plaintiff wishes

to bring before me. With that the judge agreed, and in my opinion he was right, because, although it is very true that power is given to the taxing master, of his own mere motion, to enter into the question if he finds that proceedings by one party are vexatiously or improperly taken, and to see what expense was caused to the other party by those improper or vexatious proceedings, yet there is, in my opinion, a condition precedent to his having the power to enter into the question of what, if anything, ought to be paid to the other person in consequence of improper proceedings? It was said that these particulars must be taken to be improper and vexatious with reference to this rule because the judge has not certified that they are either proven, or that they are reasonable and proper, and, therefore, that the mere absence of the certificate of the judge, which would enable the defendants to carry in their costs, and to be allowed such of them as the taxing master did not strike out, of itself shows that these particulars were vexatious or improper. But I cannot agree with that. The Act of Parliament says that regard shall be had to the particulars of objections taken in the case of the defendant, and that then, if he does not get the certificate, he shall not be allowed on taxation any costs of those particulars. But that is for an entirely different object from that aimed at by this 20th sub-rule. It does not at all follow that, because the defendants have not liked or wished or thought it desirable to ask for a certificate, or because the judge has not granted a certificate, this must be considered to bring the case within this 20th sub-rule so as to enable the other party, the plaintiff, to charge them with the costs of any proceedings which he has taken in consequence of the objections raised by the defendants, but as to which they have not got a certificate. It is very true that this may seem to be hard on the plaintiff; but, in my opinion, he took the wrong course. If he wished to raise this point he ought to have asked the judge to direct the taxing master to see whether, in consequence of any proceedings which had been taken by the defendants improperly, he had been put to costs, and to tax those costs and grant them to him as against the defendants. He did not think of doing that, just as the defendants did not think of asking for a certificate that, although these objections were not proved, yet they were properly taken. For some reason the plaintiff—whether because he did not think of it, or because he did not think it prudent to do so—did not ask the judge to give any such direction. That, in my opinion, having regard to sub-rule 20, is what ought to be done.

The judge can direct the taxing master to look into the costs, and to see whether any proceedings were vexatious or improperly taken, and, if he does not do it, the taxing master, in taxing the costs of any party, can consider whether the proceedings to which those costs relate were vexatious or improperly taken. Yes, but if it does not come to the taxing master to tax the costs of any party, he cannot enter into the question under this rule as to whether those costs have been improperly or vexatiously incurred, and have put the other party to unnecessary costs, which the party occasioning those costs ought to pay. Of course, if a plaintiff thinks that, in consequence of improper or vexatious objections taken by his opponent, he has been put to unnecessary and improper costs, he can ask the judge, if there is a decision in favour of the defendant, and the defendant does not ask for a certificate that those objections were properly taken, to direct the taxing master to see whether any proceedings have been vexatiously or improperly taken by the defendant, and to direct that he, the plaintiff, shall get from the defendant the costs of any proceedings which he, the plaintiff, has taken in consequence of objections improperly taken by the defendant. In my opinion that was the view which the taxing master took in this case, and which Kay, J., took, and I think it was the right view. I do not read the whole of the rule, but the case turns upon this:—"In such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties, and in any case where such question shall not have been raised before and dealt with by the court or judge, it shall be the duty of the taxing officer to look into the same . . . for the purpose aforesaid." He is to see, in relation to the costs which he can tax, and which it is his duty to tax, whether or not the proceedings in which these costs were incurred, if improperly taken, have occasioned costs to other parties. Here, as I stated, in consequence of the course which was taken by the defendants, he could not enter into this question. The costs of the proceedings, in respect of which the defendants did not get a certificate, never came for taxation in such a sense that the taxing master could judge whether or no such proceedings were vexatiously or improperly taken. In my opinion, the appeal fails. In future, parties, if they desire to raise such a question as this, should see that they get a direction from the judge so as to enable and direct the taxing master—which he can do on the judge's directions, of course—to look into what the plaintiff here is desirous should be looked into.

LINDLEY, L.J.—I think there is a difficulty in applying the 20th sub-rule of rule 27 of order 65 to patent cases. That rule is expressed in general terms as applicable to all actions, and there is nothing at all in the rule about notices of objections in patent actions. They are not specially dealt with at all, and the difficulty arises from having to apply that rule to a case in which particulars of objections are specially dealt with. They are specially dealt with by the 29th section of the Patent Act, and when you come to look at and work the two together, there is a little difficulty about it, but I am not at all prepared to say that the true construction is not that which has been said to be correct by the taxing master, by Kay, J., and by my learned brother. There is a difficulty about it, but not a difficulty so great as to lead me to express a contrary opinion. I think, when you come to spell it out, that that view is correct, and that if ever a plaintiff wants to get costs occasioned by improper objections he must ask for them. That has this immense convenience, that the judge, who knows all about it, can give directions, whereas the taxing master, who knows nothing about it, would be excessively embarrassed in applying this rule to patent cases, when the point raised is, as here, that the particulars of objections have not only not been certified for, but have put the other party to extra cost. It is a very difficult matter for the taxing master to settle, and a comparatively easy matter for the judge to settle when he has tried the case. I think, therefore, the appeal fails.

LOPES, L.J.—Having regard to what has happened in this case, and also to section 29 (6) of the Patents, &c. Act, 1883, I think there has been no such disallowance of the defendants' costs of these particulars within the meaning of sub-rule 20, rule 27, of order 65, as to give the taxing master jurisdiction to deal with the costs in this case. Of course this depends on the construction of the rule, and I think both the judge and the taxing master have put the proper and correct construction on it. In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Francis & Johnson.*

Solicitors for the respondents, *Robinson, Preston, & Stow*, for *A. Pointon*, Birmingham.

High Court of Justice.

Chan. Div.
Chitty, J. } March 15, 18.

In re BUILDING SOCIETIES' TRUST (LIMITED).
Ex parte LAUGHTON.
Ex parte POOLEY. (*a.*)

Company—Winding up—Two petitions—Priority—Presentation—Advertisement—Costs—General Order, November, 1862, *r.* 2.

Where two petitions to wind up a company have been presented, of which the second in date of presentation is first advertised, and the same day has been fixed for answering both petitions, the order will be made upon the petition first presented, unless it be proved that it is not presented bonâ fide. *A petitioner is entitled to a reasonable delay in the day for which his petition is to be answered, subject to the risk of losing his priority.*

In re Norton Iron Co., 26 *W. R.* 92, *approved and followed.*

In re United Ports Co., 39 *L. J. Ch.* 146, 18 *W. R. Ch. Dig.* 73, *commented on.*

Petition.

The Building Societies Trust (Limited) was registered on the 26th of July, 1888, under the Companies Acts, 1862 to 1886, as a limited company. Daniel Charles Laughton was a creditor of the company for £92 5s. 2d. On the 25th of February, 1890, he presented a petition to have the company wound up.

George Pooley was a judgment creditor of the company for £65 2s. upon a judgment obtained on the 19th of February, 1890. He caused a writ of *fi. fa.* to be issued thereon, upon which a return of no assets was made, and he presented a petition to have the company wound up on the 4th of March, having previously been informed, on the 26th of February, that Laughton's petition had been presented. Pooley's petition was advertised in the *London Gazette* of the 4th of March, and in the *Times* and *Standard* of the 6th of March.

Laughton's petition was advertised in the *London Gazette* of the 7th of March, and in the *Standard* of the 7th of March.

Both the petitions were to be answered for the same day, the 15th of March.

Romer, Q.C., Oswald, and *Pochin,* for Laughton's petition.—If there are two petitions, the question of priority must be strictly investigated. Pooley's petition is wrongly presented, as he presented it with full knowledge of our petition: *In re Norton Iron Co.,* 26 W. R. 92.

Byrne, Q.C., and *T. B. Napier,* for Pooley's petition.—Pooley deferred presenting his petition for some time after finding that Laughton's petition was presented. Laughton did not advertise within a reasonable time; he might have done so in the *Gazette* of the 25th or 28th of February. The priority of advertisement is the test: Chadwyck-Healey, 2nd ed., at p. 458; Buckley, 5th ed., at p. 215; *In re United Ports Co.,* 39 L. J. Ch. 146, 18 W. R. Dig. 73; and *In re Trades Bank Co.,* W. N., 1877, p. 268. In any event Pooley will have his costs up to the time of presenting his petition: *In re General Financial Bank,* 30 W. R. 417; 20 Ch. D. 276; but as he had good reason to believe that Laughton's petition was not rightly presented, he is entitled to have his full costs.

T. Douglas, for a judgment creditor, asked for a winding-up order.

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

CHITTY, J.—In the present case there are two petitions before me, Laughton's, presented on the 25th of February, and Pooley's, presented on the 4th of March; both of them are answered for the 15th of March.

I find, on inquiry, that the present practice is to allow the petitioner to have some option as to the day for which his petition is to be answered, but a short postponement only, say a week, will be allowed, unless good cause be shown for a longer adjournment. A petitioner who chooses to have his petition answered for a day later than is necessary, of course runs the risk of a second petitioner obtaining an order before the first can be heard. In this case Laughton might have had his petition answered for the 8th of March, which would have given him time to have put in the necessary advertisements, but he chose the 15th, instead of the 8th. If Pooley could have had his petition answered for the 8th of March, he might have obtained an order, in spite of Laughton's petition, which was fixed for the 15th of March. Laughton did not advertise his petition till the 7th of March, which, by the rules, gave him sufficient time to have his petition heard on the 15th. This delay is not evidence against Laughton of want of *bona fides.* I cannot attach blame to him for having selected the 15th of March instead of the 8th; and there may have been circumstances which fairly justified his postponing his advertisements, so I do not think blame can be attributed to him for not advertising his petition earlier, as he might have done. The result is, that I think Laughton's petition was rightly presented. Now as to Pooley's petition, according to the practice a second petitioner always has notice that there is an earlier petition already presented, and nothing is to be gained by presenting a second petition if the first is *bonâ fide* presented. The rule stated by Jessel, M.R., in *In re Norton Iron Co.,* which I adopt, is that the second petition would have been rightly presented if Pooley could have proved that Laughton's petition was not a proper one—*e.g.,* was a collusive one. Here the suggestion that Laughton's petition, the first one, was not properly presented has been disposed of, so by the rule I have mentioned, the right course to adopt will be to make the winding-up order on the first petition and to dismiss the second, because it is not properly presented.

It has been said that James, V.C., in *In re United Ports Co.* held that the petition first advertised ought to have priority, but on looking into that case, although there are strong expressions showing that in that case, where the order was made on the third petition, priority of advertisement gave priority, I cannot find that any such rule was laid down absolutely, and if it were so, it was certainly not followed by Jessel, M.R., in *In re Norton Iron Co.,* decided in 1877. If I had to distinguish the two cases I should choose as the right one the rule laid down in *In re Norton Iron Co.* In *In re London and Australian Agency Company,* 22 W. R. 45, where there were three petitions properly presented, the carriage of the order was given to the petition first presented, and priority of presentation was looked upon as the right element. In another case in 1877, *In re Trades Bank Co.,* it should be pointed out that there was really only one petition before Jessel, M.R., and he did not intend to overrule the principle he had laid down in *In re Norton Iron Co.* Another case which has been cited is *In re General Financial Bank.* In that case a *bonâ fide* creditor presented a petition which, as it was held, he was justified in carrying on; the conduct of the winding up was given to him, in preference to the first petitioner, whose petition was shown to be collusive. This is in accordance with the rule which I have already stated. If there had been two petitions before me both properly presented, I might have given the carriage of the winding up to the petitioner who first advertised, but that is not the case here. I make the winding up

on the first petition, Laughton's, and dismiss Pooley's. Mr. Douglas' client and Pooley will have their costs, one set between them, as supporting the order for a winding up, and there will be no costs against Pooley on his petition, as the company does not appear. Mr. Pooley will have his costs up to the time of the presentation of his petition.

Solicitors, *Herbert F. Oddy; W. A. Bilney; Ernest Todd.*

Chan. Div. North, J. March 22.

In re Olive. (*a.*)

Costs—Local authority—Purchase of land—Payment out of court—Petition—Incumbrancer—Service—Lands Clauses Consolidation Acts, 1845, 1860, 1869.

On petition for payment out of purchase-money paid into court under the Lands Clauses Consolidation Act, 1845, *the company or local authority (as the case may be) must pay the costs (but not exceeding 42s.) of incumbrancers on the fund, and the costs of an affidavit of service of the petition upon the incumbrancers, even though the incumbrance be created subsequently to the date of the payment into court.*

Eden *v.* Thompson, 12 *W. R.* 789, 2 *H. & M.* 6, *followed.*

In re Gough's Trusts, 32 *W. R.* 147, 24 *Ch. D.* 569, *commented on.*

Petition.

This was a petition for payment out of purchase-money paid into court under the Lands Clauses Consolidation Acts on a compulsory purchase.

Walter Olive, late of Cheltenham, deceased, by his will, dated the 11th of October, 1844, devised certain copyhold premises in Cheltenham to trustees upon trust, as to one-third part of the rents and profits thereof, to permit his sister, Charlotte Olive, to enjoy the same for life, and after her death in trust for such of her children as should attain the age of twenty-one equally as tenants in common.

The testator died on the 7th of November, 1844. Charlotte Olive intermarried in 1845 with Frederick Rodway, and four children of the marriage lived to attain the age of twenty-one, three of whom were the petitioners, the fourth being resident abroad.

In 1885 the Corporation of Cheltenham, under compulsory powers, acquired the copyhold premises and paid the purchase-money into court. Charlotte Rodway died on the 7th of January, 1890.

Two of the petitioners had mortgaged their shares subsequently to the payment into court of the purchase-money, and the mortgagees had been served with the petition.

Micklem, for the petitioners and the mortgagees of one share, asked for payment out, and an order against the Corporation of Cheltenham for payment of the costs of the mortgagee who appeared separately: *Eden* v. *Thompson*, 12 W. R. 789, 2 H. & M. 6; *In re Brooshooft's Settlement*, 37 W. R. 744, 42 Ch. D. 250; *In re Bareham*, 29 W. R. 525, 17 Ch. D. 329; *In re English's Settlement*, 37 W. R. 191, 39 Ch. D. 556; *In re Nicholl's Trusts*, 14 W. R. 475, W. N., 1866, p. 93.

Farwell, for the mortgagee of the other share.

E. E. H. Brydges, for the corporation.—The corporation are not liable to pay the costs of incumbrancers of shares created after the fund has been paid into court: *In re Gough's Trusts*, 32 W. R. 147, 24 Ch. D. 569; *In re Jenkin Jones' Estate*, 18 W. R. 312. In any event the corporation should not be required to pay more than 42s.: *In re Artizans' and Labourers' Dwellings Improvement Act*, 1875, 14 Ch. D. 624, 28 W. R. Dig. 126.

North, J.—I think the mortgagee appearing in this case is entitled to costs, notwithstanding that the mortgage is subsequent in date to the taking of the premises. I think the case of *Eden* v. *Thompson* goes quite to the point. Wood, V.C., in that case says, "The principle of the later cases is that if a suit has been instituted specifically dealing with the particular fund, then the petition, which is necessarily a petition in the suit, should be served like any other petition in the suit, and not merely as a petition under the Act; and the practice which has grown up has been to serve these petitions on all parties to the suit. Then it is objected that a petition ought to have been presented before suit for payment of this fund out of court, in which case it would have been simply a petition by the trustees for payment to them, and the only costs payable would have been theirs. But persons whose estates are taken by railway companies or other bodies under compulsory powers . . . are entitled to deal with their estates to suit their own convenience, not that of the company, and if it happens in the course of such dealing that a suit is instituted, not being litigation properly so called, but merely administration, . . . the company would have to pay the costs of all necessary parties occasioned, not by any particular adverse claims, but by the ordinary course of dealing with property. This principle clearly covers the case of a mortgage, and would provide for the payment of all ordinary costs of mortgagor and mortgagee so long as there was no suit to set aside the mortgage or other contest of that nature between the parties." This is dealing with a case similar to the present. I need not refer to the case of *In re Bareham*, and in the case before Kay, J. (*In re Brooshooft's Settlement*) he points out that where there is nothing vexatious, the company should pay the costs arising through ordinary dealing with the property, as the action of the company has increased the costs of dealing with the property. Two cases are cited which appear contrary to the authorities, one decided by James, V.C.—*In re Jenkin Jones' Estate*—but the report is so short that I cannot tell on what grounds it was decided. I do not understand it, and there may have been special reasons in that case. The other case is the decision of Bacon, V.C.—*In re Gough's Trusts*. In that case the property was settled on a tenant for life with remainders over, and some of the remaindermen afterwards mortgaged their reversionary interest, and it was held that the company were not liable to pay the costs incurred by the mortgagees in proving their incumbrances, as the title was intricate. That was not a question of mortgagee's costs. The point raised in that case was who was to bear the costs of proving the incumbrances. I do not think the authorities support the conclusion. Bacon, V.C., says the costs which they (the company) are liable to pay are not to be increased by any adverse litigation or by any subsequent matters of account as between the persons entitled. The Act of Parliament says nothing about the latter, and I hold that the corporation must pay the costs. But I think that they are only bound to pay 42s. for mortgagees' costs, according to the rule laid down in *In re Artizans' and Labourers' Dwellings Improvement Act*, 1875, together with the costs, if any, of an affidavit of service on the mortgagees, but nothing further.

Solicitors, *Waterhouse, Winterbotham, & Harrison; Mear & Fowler; Peacock & Goddard*, for *Brydges*, Cheltenham.

(*a.*) Reported by Francis T. Duke, Esq., Barrister-at-Law.

Chan. Div. North, J. } Dec. 17, 18, 21.

In re MANCHESTER ROYAL INFIRMARY.
MANCHESTER ROYAL INFIRMARY *v.* ATTORNEY-GENERAL. (*a.*)

Trustee — Corporation holding funds for charitable purposes — Power of investment—Trust Investment Act, 1889 (52 & 53 *Vict. c.* 32), *ss.* 3, 5—7, 9.

A corporation incorporated by a special Act holding funds for charitable purposes is a trustee within the meaning of section 3 *of the Trust Investment Act,* 1889, *and is entitled to invest any trust moneys in its hands on any of the securities mentioned or referred to in that section, unless expressly forbidden to do so by the instrument (if any) creating the trust.*

A trustee cannot, however, sell existing securities for the purpose of reinvesting the proceeds in the securities authorized by section 3, *unless the instrument creating the trust contains a power to vary securities.*

This was an originating summons by the plaintiffs to have it determined whether the plaintiffs or their trustees, treasurers, and managers were entitled to invest the funds and moneys belonging to the plaintiffs on such securities as are specified or referred to in section 3 of the Trust Investment Act, 1889, and whether that Act applied to the Manchester Royal Infirmary, and the funds and moneys thereof.

The Manchester Royal Infirmary was regulated by four special Acts of Parliament. The first, 48 Geo. 3, c. 127, was passed in the year 1808, and was entitled "An Act for enabling Sir Oswald Morley, Baronet, to grant certain lands and hereditaments in the parish of Manchester, in the County Palatine of Lancaster, for the purposes of the Manchester Public Infirmary, Dispensary, Lunatic Hospital, and Asylum, and for vesting the property and effects belonging to the said charity in trustees for the benefit thereof." By section 1 power was given to Sir Oswald Morley, his heirs and assigns, to grant certain specified lands to trustees nominated and appointed as therein mentioned, for the purpose of accepting and taking such grants by the major part of the benefactors and subscribers to the said charities for the time being, upon the trusts and for the purposes thereinafter mentioned, which grants were to be taken to be valid and effectual, notwithstanding the Act 9 Geo. 2, c. 36, or any of the Statutes of Mortmain, and the trustees for the time being so to be appointed were immediately empowered and enabled to accept and take the same grants.

Section 2.—"The property of all and singular the money, implements, materials, furniture, goods, chattels and effects, matters and things whatsoever already belonging, due, or owing to the said infirmary, asylum, dispensary, and charities, or the subscribers or benefactors thereto, in respect or on account thereof, or which shall hereafter be purchased, subscribed, contributed, or provided for the purposes of the said charities, shall from and after such nomination and appointment of trustees as aforesaid, be vested in such trustees so to be nominated and appointed as aforesaid, their executors, administrators, and assigns, upon the trusts and for the purposes hereinafter mentioned," and the trustees were thereby empowered to bring actions for the recovery of property of or belonging to the charity, and it was also provided that in all such actions it should be sufficient to state generally that the property for which the action should be brought was the property of "the trustees for the time being of the Manchester Infirmary, specifying the names of the trustees."

Section 4.—"The said trustees so to be nominated and appointed as aforesaid, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivors respectively, shall stand and be seised and possessed of and interested in the hereditaments and premises which have been so demised or granted as aforesaid, or which shall or may be granted or otherwise conveyed or assured by the said present Sir Oswald Morley, his heirs or assigns, in pursuance of the power and authority hereinbefore contained in that behalf, and also of and in all and singular the moneys, securities for money, implements, materials, furniture, goods, chattels and effects, matters and things whatsoever, which may become vested in them in consequence of this Act, and every part thereof respectively, in trust for and for the benefit of the said charities and charitable purposes accordingly, and subject to the rules, orders, and regulations now made and used, or such orders, rules, and regulations as shall hereafter be made, either with respect to the said lands, buildings, hereditaments, and premises, and the said goods and chattels of the said infirmary, dispensary, lunatic hospital, and asylum, or with respect to the recommendation and admission of patients, or otherwise relating to the management, regulation, and government of the said charities, by the major part of the benefactors and subscribers to the same charities for the time being.

By section 8 it was provided that the Act should be printed by the King's printer, and that a copy thereof so printed should be admitted as evidence thereof by all judges, justices, and others.

The second Act (5 Vict. c. 1) was passed in the year 1842.

Section 2.—"The president, treasurers, deputy-treasurers, benefactors, and subscribers for the time being of and to the Manchester Royal Infirmary, Dispensary, and Lunatic Hospital or Asylum, shall be incorporated by the name of 'The President, Treasurers, Deputy-Treasurers, Benefactors, and Subscribers of and to the Manchester Royal Infirmary, Dispensary, and Lunatic Hospital or Asylum,' and by that name shall be a body corporate, with perpetual succession, and a common seal, and with power to hold and retain, for the purposes of this Act, the lands comprised in the several hereinbefore mentioned indentures, and all buildings now erected, or to be hereafter erected, upon the said lands, with the appurtenants; provided always that if any member of the said corporation shall be guilty of a breach of trust or any misfeasance in respect of any property or lands belonging to the Manchester Infirmary, Dispensary, and Lunatic Hospital or Asylum, or either of them, whether, under the sanction of the corporate seal or not, he shall be subject to the same liabilities as if this Act had not been passed."

By section 3 it was provided that, immediately after the passing of the Act, and by virtue of the same, the land and buildings of the charity should vest in the corporation according to the true intent and purport of the conveyances executed of the same to the trustees of the charities, and that in like manner all the moneys, stocks, funds, and securities for money, goods, chattels, rights, credits, and effects belonging, done, and owing to the charities, should be vested in the corporation, and for that purpose the persons in whose names any sums of money, stocks, funds, mortgages, securities for money, or other effects should, at the time of the passing of the Act, stand or be secured, the beneficial interest wherein should belong to the charities thereby incorporated, should forthwith transfer or assign the same respectively, so and in such manner as that the same should be vested in the corporation."

Section 4. — "As well the moneys arising from the sale or transfer of any of the public or Government funds, stocks, securities, or any other securities, as also any other moneys for the time being belonging to the said charities, may from time to time be invested, either in the name of the said corporation hereby created, or in

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

the names of any other persons on behalf of, and to be named and appointed by the said corporation, upon trust for the said charities on mortgage of any hereditaments of a clear and indefeasible estate of inheritance in fee simple, to be situate in England or Wales, free from incumbrances, except quit rents or other annual small payments, and leases at rack rent to tenants or occupiers . . . or the same moneys, stocks, funds, and securities may in like manner be invested in any of the public or Government stocks, funds, or securities, and all such mortgages, stocks, funds, and securities may be from time to time called in, and the money arising therefrom be again invested in manner aforesaid, so often as may be deemed expedient."

Section 11.—"This Act shall be a public Act, and shall be judicially taken notice of as such."

The third Act (7 & 8 Vict. c. 43) was passed in the year 1844, to enable the corporation to enlarge the infirmary, and to purchase and hold land for the erection of a new lunatic hospital or asylum. Section 12 provided that "this Act shall be a public Act, and shall be judicially taken notice of as such."

The fourth Act (15 Vict. c. 3) was passed in the year 1852 for the purpose of uniting a charity called the Manchester House of Recovery with the Manchester Royal Infirmary. Section 12 provided that the Act should not be a public Act, but should be printed by the Queen's printer, and a copy thereof so printed should be admitted evidence thereof by all judges, justices, and others.

The greater portion of the funds belonging to the corporation was invested in Government securities in the name of the corporation, but there were some small sums invested in the name of the official trustee of charities.

Cozens-Hardy, Q.C., and *Farwell*, for the plaintiffs.—The Acts of 1842 and 1844 are not really public Acts. The provisions of section 11 of the Act of 1842 and section 12 of the Act of 1844 were inserted merely that those Acts might be judicially taken notice of. They are not printed with the public Acts. The question whether an Act is a public or private Act does not depend on technical considerations, but upon the nature and substance of the case: *Dawson* v. *Paver*, 5 Hare, 415. There is nothing in the "instrument creating the trust" which prohibits the investment of the funds of the charity on the securities mentioned in section 3. When the corporation was created the trusts were not in any way altered, but the corporation was substituted for the individual trustees as trustees of the charity.

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the Attorney-General.—It was not intended by the Act of 1889 that property owned by a corporation should be treated as held by them as trustees in the ordinary sense. It is difficult to see how in such a case the court could execute the trust. The officers of a corporation might be made liable for misappropriation of the funds, and yet it could not very well be said that they were trustees of the funds in the ordinary sense of the word. Again, the funds of a joint-stock company are under the control of its directors, but the directors are not trustees of the funds. The Act of 1889 relates to "trust funds." The Act was passed to amend the law relating "to the investment of trust funds." It is doubtful whether corporation property would be properly described as "trust funds"; nor is it correct to say that when a fund belongs to a corporation because it is a corporation, there is any "instrument" creating a trust. [North, J.—The use of that expression rather seems to indicate that there may be trusts without an instrument creating them; if so, what can be meant but trusts reposed in bodies such as this corporation or trusts created by parol?] The provision in section 5 that every power conferred by the Act shall be exercised "subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds," points to the consent of some individual. By the Act of 1842 the plaintiffs are constituted a public body holding funds for public purposes, they cannot be said to be "trustees" within the meaning of the Act of 1889.

Cozens-Hardy, Q.C., in reply.—Corporations can be trustees for charitable purposes in respect of property vested in them: *In re Norwich Town Close Estate Charity*, 36 W. R. 853, 37 *Ibid.*, 362, 40 Ch. D. 298; *In re Clergy Orphan Corporation*, 22 W. R. 789, L. R. 18 Eq. 280. [North, J.—I feel some difficulty as to what is the "instrument creating the trust." Although I think the special Acts relating to the charity are private Acts, still I have considerable doubt whether they are "an instrument" within section 2 of the Act of 1889]. The plaintiffs only asked for a declaration that they are trustees within the meaning of the Act of 1889.

North, J.—This case raises a question as to the application of the Trust Investment Act, 1889. [His lordship stated the provisions of the special Acts, and continued:—]. The corporation have very considerable funds belonging to them, the bulk of which is invested in the name of the corporation, though there is a small amount standing in the name of the official trustee of charities.

The question is upon what securities can these funds be now invested—in other words, does the Act of 1889 apply to them. The Act is entitled, "An Act to amend the law relating to the investment of trust funds." It provides by section 3 that "it shall be lawful for a trustee unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following." We have, first of all, to find whether a person is a "trustee" within the meaning of the Act, and if he is a trustee then the extended power of investment applies to "any trust funds in his hands." Then section 5 provides that "every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds." And by section 6 the Act is to apply as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are to be in addition to the powers conferred by the instrument (if any) creating the trust.

Then section 7 is, I think, material in this way. First of all, it seems to me to contemplate that such bodies as the council of a county or borough, or an urban or rural sanitary authority come within the scope of the Act, because I do not think it would be the right construction to say that this section is dealing with bodies entirely outside the Act, and giving them powers which, unless they have them as trustees, would not properly find a place in this Act at all, but ought to be found in an Act relating to different subjects. It shows that this section is not, as I was at first inclined to think, one which merely limits the powers of these bodies, but that they have power to make the investments which are contemplated in the Act.

Then the point put, and it is one requiring serious consideration, is whether it can be said that the property belonging to this corporation, which is their own property, is a trust fund in their hands as "trustees" within the meaning of the Act. I think it is. I think that the money is clearly held on trust for charitable purposes. It was, in the first instance, in terms vested in trustees by the Act of 1808, and when by the subsequent Act the funds were vested in the corporation, this was done for the purpose of facilitating the dealing with the funds, but I do not think it in any way prevents that from continuing to be a trust fund which beyond all question had been a trust fund down to that

time. Moreover, it is a fund for the purposes of the Infirmary Lunatic Asylum, which is referred to in the Acts. It seems to me beyond all question that the funds are held on a charitable trust, with respect to which the rights and duties of trustees belong to, and are imposed on, the body in whom the funds are now vested in trust, just as they would in the case of any ordinary trustee. Suppose that this corporation proposed to advance some of their money to the Corporation of Manchester for the improvement of their streets, that would clearly be a breach of trust, and on the application of the Attorney-General I should at once restrain them from committing any such breach of trust. Supposing that an advance was actually made in the same way, but a security was taken for the money, precisely the same rules would apply, unless it turned out that the security taken was one upon which the corporation are authorized to invest their funds, in which case the advance would not be a breach of trust.

It seems to me, therefore, clear that these funds are trust funds vested in the corporation of the Manchester Infirmary as a "trustee" within the meaning of the Act.

Mr. Cozens-Hardy referred to *In re Clergy Orphan Corporation*, which is very like the present case, but, curiously enough, the point which I have now to decide seems to have been withdrawn from the consideration of the judge there. The headnote to the report is as follows:—"Stock in the funds belonging to a charity incorporated by Act of Parliament, and having power to invest in the public funds, may, under section 11 of the statute 23 & 24 Vict. c. 38, be sold out for the purpose of reinvestment on any of the stocks, funds, and securities on which cash under the control of the court may be invested." Section 11 of that Act provided that "when any such general order as aforesaid shall have been made" (that is, as to cash in the control of the court) "it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon Government securities or Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such General Order cash under the control of the court may from time to time be invested." But the petition presented sought the advice and direction of the court as to whether funds already invested could be sold for the purpose of reinvestment, and the argument of Mr. Cozens-Hardy for the petitioners was this: "No question is asked as to the power under section 11 to invest in the manner desired any funds to be hereafter acquired by the society, but the decision in *In re Warde*, 2 J. & H. 191, has caused a question to be raised as to the power of the trustees to sell out funds already invested with a view to reinvestment where there is no express power of varying existing securities." Then Malins, V.C., said: "I consider that the intention of section 11 was to enlarge the powers of investment previously belonging to trustees by allowing them to invest any fund in their hands in the stocks, funds, and securities from time to time sanctioned by the court; and my opinion is that the petitioners, being trustees, and having funds directed by their Act of Parliament to be invested in the public funds, come within the enabling clause, and that, consequently, all the funds of this charity, whether invested or not, may be dealt with as cash under the control of the court. I do not say that the decision in *In re Warde* was not right, but though I do not see very clearly the grounds of that decision, it must, I think, be treated as depending upon its special circumstances. I consider, therefore, that the petitioners may sell out the existing stock with a view to reinvestment, and I shall, therefore, answer the question in the affirmative." The point, therefore, decided there, was not whether the trustees could reinvest, but whether they could sell out existing stock for the purpose of reinvestment. No doubt there is an observation made by Malins, V.C., which shows he thought that they were trustees within the meaning of the Act, although that was not the point to which his attention had been directed by the argument, and which was being answered by him. The further point was suggested whether Metropolitan Consolidated Stock was within the power of investment, and that turned upon section 13 of the Board of Works Act, 1871. The Vice-Chancellor said: "That section seems wide enough to include the present charity. The petitioners will, therefore, be allowed to invest in that stock." That, again, was an observation upon a point not raised by the petition, and not calling for decision; still, so far as the case goes, it shows that the Vice-Chancellor took that view, although the point had not been argued, and that is in favour of the view which I have taken of the construction of the Act of 1889.

I propose, therefore, to make a declaration that the corporation are trustees within the meaning of the Trust Investment Act, 1889, and are entitled to invest any trust funds in their hands in the manner thereby authorized unless expressly forbidden by any instrument creating the trust.

I should add that I do not consider *In re Clergy Orphan Corporation* in any way interferes with the decision in *In re Warde*, and therefore my decision is not intended to go to this, that the corporation have any power to sell existing securities for the purpose of making other investments under powers given by the Act. That depends entirely on what those powers may be, independently of the Act. The Act does especially provide by the final clause of section 3 that trustees who may invest as therein mentioned may "also from time to time vary such investments." Those words are necessary for this reason. If trustees, by the instrument creating the trust, had a more limited power of investment, and had also power to vary investments, there might have been a question whether the power contained in the instrument to vary the investments authorized by it, could extend to investments which are authorized, not by the instrument, but by the Act, and it is for the purpose of preventing any question of that sort from arising that the words which I have just read are inserted in section 3. But the express direction that trustees are to have power to vary the investments authorized by the Act goes a long way to show that it does not touch the question whether they had any previous power to vary securities for the purpose of making such investments as are authorized by the Act. That is the reason why I limited the declaration which I have made expressly to funds in the hands of the corporation.

Solicitors for the plaintiffs, *Pritchard, Englefield, & Co.*, for *Earle, Sons, & Co.*, Manchester.

Solicitors for the Attorney-General, *Hare & Co.*

Chan. Div. (Kekewich, J., for Kay, J.) April 1.

In re METROPOLITAN COAL CONSUMERS' ASSOCIATION. GRIEB'S CASE. (*a.*)

Practice—Costs—Taxation—Separate proceedings by the same solicitor—Duplicate copies—Counsel's fees—R. S. C., 1883, *ord.* 65, *r.* 27 (8)—*Appendix N., Copies.*

Three shareholders, W., T., and G., brought separate

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

actions to have their names removed from the list of shareholders. The same solicitor acted for the plaintiff in each action. W.'s action was decided first, and it was arranged that the evidence taken in that action should be used in the other two, which subsequently came on and were decided by the same judge on the same day, judgment being given for the plaintiff in each case, with costs. T.'s costs were taxed in the usual way, but the taxing master struck out en bloc *a number of items in G.'s bill, on the ground that the two actions were similar, and that duplicate copies of documents ought not to have been prepared: he therefore disallowed the charges for copies which had already been allowed in T.'s bill. The same counsel appeared for the plaintiff in each case, and the taxing master reduced their fees in G.'s bill.*

Held, that the whole bill must be referred back to the taxing master, with the direction that, except as regards attendance or other matters which were, or ought to have been, done at one and the same time in both actions, the plaintiff's solicitor was entitled to charge in G.'s action as if he had not been engaged in T.'s action.

Adjourned summons.

This was a summons to review taxation taken out by the plaintiff, and he asked that his objections to the taxation might be allowed, and that it might be referred back to the taxing master to vary his certificate accordingly.

The judgment under which the taxation was made, was dated the 16th of January, 1890, and made on a motion by H. L. O. Grieb to have his name removed from the list of shareholders of the association on the ground of fraudulent misrepresentations. The court granted the relief asked, and ordered that the register of members should be rectified accordingly, the applicant's money returned to him, and his costs of the application paid by the association, such costs to be taxed by the taxing master.

A similar application was made by one Thursby on the same day, and to the same judge, but before Grieb's case, and a similar order made. Both applicants appeared by the same counsel and solicitor.

The taxing master taxed Grieb's costs at £65 11s. 3d., and disallowed a number of items on the ground that they were duplicates of copies which had been allowed in Thursby's bill, and he also reduced counsel's fees as excessive.

Grieb filed objections to the certificate, in which he stated that his action and Thursby's were quite distinct, and that there was no agreement between them that the result of one should affect the other; that the grounds of opposition were different; that Thursby's documents belonged to him and could not be used by the plaintiffs; and that it was a mere accident that they were represented by the same counsel. The items which had been disallowed consisted of copies of evidence taken in *Wainewright's case*, minutes of the association, notice to produce correspondence, shorthand notes, articles of association, petition to wind up the company, notes of inspection of minute book, and a copy of correspondence for the judge.

The taxing master reviewed his taxation, and stated as his reasons that Wainewright, Thursby, and Grieb, three shareholders in the Metropolitan Coal Consumers' Association, brought separate actions to have their names removed from the register of shareholders. The same solicitor acted for the plaintiffs in all the three actions. Wainewright's action having been tried and decided in favour of the plaintiff, it was arranged that the evidence taken in that action should be used in the other two actions, which were set down for trial and succeeded one another in the list of Kay, J. Both actions were heard on the 16th of January, 1890, the plaintiffs in the two actions being represented by the same counsel, each of whom was supplied with two copies of all the documents and evidence mentioned in the objections—the copies supplied being identical—identical copies being also supplied to the judge. The items in question were disallowed because items similar in every particular were allowed in the bill relating to Thursby's action.

George White, for the summons, asked the court to direct the taxing master to tax the costs on the same principle as if the parties had appeared by separate solicitors: *Oppenshaw* v. *Whitehead*, 2 W. R. 172, 9 Ex. 384; *Sharp* v. *Wright*, 14 W. R. 552, L. R. 1 Eq. 634; *Robb* v. *Connor*, 9 Ir. Rep. Eq. 373, 23 W. R. Dig. 164.

Quin, for the official liqdidator.—The question is within the discretion of the taxing master: R. S. C., ord. 65, r. 27 (8); Appx. N. "Copies"; Annual Practice, p. 1154.

KEKEWICH, J. — There has been a miscarriage of justice in this case. I regard the question from the client's point of view. Grieb sued the company for rescission of contract. He said that he had been induced to take shares by fraudulent misrepresentations. When he retained a solicitor, Grieb was entitled to say to him, "I will have my case taken into court in the best possible way. The briefs and the proofs and the documentary evidence shall be complete; counsel must be instructed; you must go in to win." If the solicitor had said that he was engaged in another case of a similar character, and that it would save expense if he only made one copy of the documents and treated the two actions as one action—if he had said that—Grieb might have said, and if a sensible man he would have said, "I have nothing to do with that action, but I am entitled to the full benefit of your experience, and I ask you to use it for me, and put my case fully before the court." If that is a proper view for the client to take, the solicitor must be entitled to be paid for carrying out those instructions, and if he does the same thing for another client, he is entitled to be paid by him too. It is said that the cases were so much alike that the decision in one must cover the other. But this is a case of fraud, and it does not follow that what was conclusive in one case must be conclusive in the other; and if so, the defendants ought to have said, "Let us try one case, and we will then submit to a similar decision in the other." In my opinion, the solicitor is entitled to be remunerated as if Grieb's case had been the only case. If he had had to serve a subpœna on the same person in both actions, or make a journey, he could not have made the full charge against both his clients, and there are several other matters of the same character which might require to be done but once, for both actions, in which duplicate charges could not be allowed. That was held in *Oppenshaw* v. *Whitehead*, which is a useful case, and one which I shall endeavour to follow. Then there is the question of counsel's fees. I am extremely unwilling to refer this question back to the master. He is competent to decide it, and in an ordinary case I should say nothing about it. But I cannot help seeing that the circumstances on which he relies in making the reduction are that the cases are similar, and that they came on together. I do not think that is right. I think counsel ought to have proper briefs in every case. Accordingly, I will refer the whole bill back for taxation, with the direction that, except as regards attendances or other matters which were, or ought to have been, done at one and the same time in both actions, the plaintiff's solicitor is entitled to charge in this action as if he had not been engaged in Thursby's action. The costs of the applicant will be paid to him in any event.

Summons allowed.

Solicitors, *W. A. Colyer; Lumley & Lumley.*

Q. B. Div. (Fry, L.J., and Mathew, J.) Feb. 5.

REG. v. BRIDGE. (a.)

Justices—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 125-9—*Removal of refuse—"Trade refuse"—Decision of magistrate—Right to require magistrate to state case—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33.

The decision of a magistrate under section 129 *of the Metropolis Management Act*, 1855, *as to what is "trade refuse" within the meaning of that Act is a decision involving a question of law, and a person aggrieved thereby may require the magistrate to state a case for the opinion of the High Court, section* 33 *of the Summary Jurisdiction Act*, 1879, *having modified section* 129 *of the earlier Act, which states that the magisterial decision shall be "final and conclusive."*

Rule *nisi* under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, for an order requiring one of the Metropolitan police magistrates to state a case for the opinion of the High Court.

The circumstances were these. The proprietors of the Hotel Metropole in Northumberland-avenue laid an information against the vestry of St. Martin's-in-the-fields complaining that they had not removed from the hotel the produce of certain furnaces. These furnaces were used for working engines which served various purposes connected with the hotel, such as supplying electricity and pumping water, and they produced a large quantity of hard vitrified matter called "clinkers." The vestry was the proper body (referred to in the Act as "scavengers") for "collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, . . . in or under houses and places within their parish or district," within section 125 of the Metropolis Management Act, 1855. Section 128 of that Act provides that the scavengers shall, if required to remove "the refuse of any trade, manufacture, or business," be entitled to be paid a reasonable sum for so doing. Section 129 provides that "If any dispute or difference of opinion arise between the owner or occupier of any such house or land and the scavengers required to remove such refuse as to what shall be considered as refuse, it shall be lawful for any two justices, upon application made to them by either of the parties in difference, to determine whether the subject-matter of dispute is or is not refuse of trade, manufacture, or business . . . and in every such case the decision of such justices shall be final and conclusive." The magistrate decided that the "clinkers" were not trade refuse, and made an order against the vestry. He refused to state a case for the opinion of the High Court on two grounds, firstly that there was no point of law involved, and secondly that under section 129 his decision was final and conclusive.

Crump, Q.C., showed cause.—The question is one of fact, and there was no power to state a case. In *Gay* v. *Cadby*, 2 C. P. D. 391, 25 W. R. Dig. 156, the question of whether the magistrate's decision was final was not argued, and section 129 is distinct upon the point and has never been repealed.

R. G. Glenn, in support of the rule.—The decision of the magistrate is no longer final since the Summary Jurisdiction Acts were passed: 20 & 21 Vict. c. 43; 42 & 43 Vict. c. 49, s. 33. The magistrate is bound to state a case if "a person aggrieved desires to question" his decision "on the ground that it is erroneous in point of law or is in excess of jurisdiction." That the question which arises here—whether these "clinkers" are or are not trade refuse—is a point of law is clear from the case of *Gay* v. *Cadby*.

FRY, L.J., after stating the facts, said:—The learned magistrate refused the application that he should state a case upon two grounds—namely, that his decision was final and conclusive under section 129 and that there was no question of law involved. It is no doubt true that for some time after the Act of 1855 was passed the decision of the magistrate was final and conclusive, but now, under the Summary Jurisdiction Acts, a party can require the magistrate to state a case for the opinion of this court, on the ground that his decision is erroneous in point of law or is in excess of jurisdiction. In a large number of cases the decision of the magistrate was without appeal, but it was the intention of the Legislature that where a question of law arose it should come before the High Court to decide. The Act of 1855 is so far modified by the later Acts. As to the magistrate's second ground, I consider that a point of construction of a statute is a point of law. There might be cases in which there was simply a dispute as to fact, the words of the Act being clear, and the difficulty being as to the nature of the particular thing in question. But here the question arises on the meaning of the words "ashes" and "trade refuse" in the Act itself, and then the further question may arise as to whether the vestry is bound to remove this refuse. For these reasons I think the magistrate is bound to state a case.

MATHEW, J.—I am of the same opinion. There is a point of construction arising here; that is a point of law and must be decided by this court.

Rule absolute.

Solicitors for the applicant, *Fladgates.*

Solicitors for the respondent, *Ingram, Harrison, & Ingram.*

Prob. Div. & Adm. Div. Divorce. Dec. 3.

TRUBNER v. TRUBNER AND CHRISTIANI. (a.)

Divorce — Service of citation — Foreign law—Person serving English process liable—Registered letter.

The respondent and co-respondent to a husband's petition for divorce were living in Switzerland. The co-respondent was a foreigner, and, by the Swiss law, anyone serving him with the citation would be liable to an action for damages.

The court dispensed with personal service, and allowed the petitioner to serve the citation by inclosing it in a registered letter, sending also in the same way a copy to the wife, who was living in the same house with the co-respondent.

Motion for leave to dispense with personal service of the citation on the co-respondent.

This was the husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent. The respondent and co-respondent were living together in the same house at Geneva. The respondent had been served there, but the agent of the petitioner's solicitor stated that he could not serve the co-respondent, who was an Austrian subject, as, by the Swiss law, any person serving him would be liable to an action for damages.

Dove, for the petitioner, in support of the motion.

BUTT, J.—You may serve the co-respondent by enclosing the citation in a registered letter addressed to the co-respondent, and also sending a copy to the wife by registered letter.

Solicitor, *John Greenfield.*

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Privy Council.

Nov. 14.

WOOLCOTT v. PEGGIE. (a.)

(On appeal from the Supreme Court of Victoria.)

Vendor and purchaser—Conditions of sale—Rescission.

Among conditions of sale it was provided that, if the purchaser should, within the time limited, make any objection to, or requisition on, the title, which the vendor should be unable or unwilling to remove, it should be lawful for the vendor to annul the sale.

The purchasers offered to give time for the removal of an objection they had made, but only on condition of being given an indemnity, and threatened litigation if the condition were not accepted.

Held, that the vendor acting bonâ fide, *was entitled to rescind.*

This was an appeal from a judgment dated the 24th of July, 1888, affirming a judgment of Webb, J., dated the 13th of April, 1888.

The facts appear in their lordships' judgment.

Finlay, Q.C., and *G. Lawrence*, for the appellants, cited *Bowman* v. *Hyland*, 26 W. R. 877, 8 Ch. D. 588.

Sir H. Davey, Q.C., and *Methold*, for the respondent, were not called upon.

The judgment of their lordships (Lord HOBHOUSE, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH) was delivered by

Lord MACNAGHTEN.—This is a purchasers' action for specific performance of a contract for the sale of some real property. The defence was that before the action was brought the contract had been annulled by the vendor under a condition in the contract. There was a counter-claim, the result of which necessarily depended on the result of the action.

The condition on which the vendor relied provided that in case the purchaser should, within the time limited, make any objection to, or requisition on, the title which the vendor should be unable or unwilling to remove, it should be lawful for him to annul the sale.

The requisition which led to the question between the parties was, in substance, this. The purchasers called the attention of the vendor to the fact that on the registry there appeared to be the entry of a previous contract by him for the sale of the very same property to a Mr. Taylor, and they required that this entry should be removed. After some little delay, which is fully accounted for by the circumstances of the case, the vendor stated, apparently with perfect truth, that he had never heard of the entry before the purchasers brought it to his notice; and he asserted, and apparently with equal truth, that he had never entered into such a contract as that referred to in the entry. The vendor at once set about getting the entry removed. He commenced proceedings against the person who had improperly procured the entry to be made, but as that person had left the colony he found that it was impossible to bring the matter to a speedy issue. All this was communicated to the purchasers, and they were asked what course they proposed to take. They were willing to give time if the vendor would give an indemnity, but otherwise they insisted on the entry being removed according to the requisition—that is removed forthwith, or, at any rate, before the vendor was to be at liberty to deal with any part of the purchase-money. The vendor was unwilling to give the required indemnity, and unable to remove the entry forthwith. At last, on the 2nd of September, 1887, one of the purchasers, who was a solicitor, and had the conduct of the matter, wrote as follows:—"With regard to Mr. Taylor's claim, I will, as already stated, give you any reasonable time to clear this away. Unless you accept my offer, which is in terms of your letters and the contract, on or before Monday next, I shall take such action as I may be advised to enforce the same." That was in distinct language, threatening the vendor with litigation unless he accepted the purchasers' offer. Their offer was an offer to give time on condition, but only on condition, that he gave an indemnity. The vendor intimated that he should be obliged to annul the sale. The purchasers still insisted on what they considered to be their strict rights. Under these circumstances the vendor gave notice that he rescinded the contract. Their lordships agree with the courts below that he was justified in so doing.

Whether his action is to be regarded as founded upon inability to remove the objection in accordance with the exigency of the requisition, or on unwillingness to proceed further on the footing of a subsisting contract, in face of the consequences with which he was threatened (which seems the more natural view) is wholly immaterial. In either case he was entitled to rescind the contract, provided he acted in good faith.

Their lordships, therefore, will humbly advise her Majesty to dismiss the appeal, and the appellants will pay the costs.

Solicitors for the appellants, *Wadeson & Malleson.*

Solicitor for the respondent, *J. G. Kempster.*

(a.) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

Jan. 29, 30; March 9, 1889.

BANK OF NEW SOUTH WALES v. O'CONNOR. (a.)

(On appeal from the Supreme Court of Victoria.)

Mortgage—Equitable mortgage—Title deeds—Detinue—Summary proceeding for recovery.

The refusal by a mortgagee of a proper tender of the money due to him does not entitle the mortgagor to an action to recover the deeds.

It is now the practice, in relaxation of the rule in Postlethwaite v. Blythe, 2 *Swans.* 256, *where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into court a stated sum sufficient to cover the amount of principal, interest, and probable costs of suit, and, upon such payment, requiring the mortgagee to deliver up the title deeds.*

Chilton v. Carrington, 3 *W. R.* 17, 248, 376, 15 *C. B.* 95, 730, 16 Ibid. 206, *explained.*

The action which gave rise to the present appeal was for detinue of title deeds against mortgagees with whom they had been deposited as equitable security for a loan; and damages to the amount of £1,500 was awarded by the court below. The facts and proceedings in the Supreme Court of Victoria, including the orders appealed from, dated the 26th of August, 1887, and the 2nd of November, 1887, respectively, appear in their lordships' judgment.

Finlay, Q.C., and *Lofthouse*, for the appellants, contended that the damages awarded were too remote, and the evidence thereof inadmissible.—In any case they were excessive.

They cited *The Notting Hill*, 32 W. R. 764, 9 P. D. 105; *British Columbia Saw Mill Co.* v. *Nettleship*, 16 W. R. 1046, L. R. 3 C. P. 499.

Channell, Q.C., and *Gould*, for the respondents.—Detinue will lie in a case of this kind when the detention is wrongful: *Chilton* v. *Carrington*, 3 W. R. 17, 248, 376, 15 C. B. 95, 318, 730, 16 C. B. 206; *Phillips* v. *Hayward*, 3 Dowl. 362; *Williams* v. *Archer*, 5

(a.) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

C. B. 318. On the question of damages see *Grébert Borgnis* v. *Nugent*, 15 Q. B. D. 85, 33 W. R. Dig. 70; *Moore* v. *Shelley*, 8 App. Cas. 285, 31 W. R. Dig. 199; *Bodley* v. *Reynolds*, 8 Q. B. 779; *Davis* v. *Oswell*, 7 C. & P. 804; *Brewer* v. *Dew*, 11 M. & W. 625; *Waters* v. *Towers*, 8 Ex. 401.

Finlay, Q.C., in reply.

Cur. adv. vult.

The judgment of their lordships (Lord WATSON, Lord FITZGERALD, Lord HOBHOUSE, Lord MACNAGHTEN, and Sir WILLIAM GROVE) was delivered by

Lord MACNAGHTEN.—The question involved in this appeal is one of some importance to persons who may be concerned in lending or borrowing money on mortgage in Victoria.

There are no facts in dispute.

O'Connor, the plaintiff in the action, was a coach builder in Beechworth, a comparatively small town in daily communication by rail with Melbourne, and distant, apparently, some few hours' journey from that city. He was in a fair way of business. His profits, he says, averaged from £400 to £500 a year, and his business seems to have been increasing down to the end of 1886.

O'Connor kept an account with the Beechworth branch of the Bank of New South Wales from October, 1884. In the course of the next two years he somewhat crippled his resources by contesting a seat in the Legislative Assembly, and by incurring some expense in furnishing a house on the occasion of his marriage. He borrowed from his mother, Mrs. Pye, who lived in Melbourne, two sums of £150 and £200 without security, both of which he paid back with interest. He also incurred a debt of £100 to the bank. To secure that sum he deposited the title deeds of a small plot of ground where he carried on his business. The land is said to have been worth £200, and the buildings on it, which were of wood, and about eight years old, some £400 more. He acquired the property from his uncle by a voluntary conveyance in January, 1886. He mortgaged it to the bank by a deed dated the 22nd of February, 1886, which was duly registered. The mortgage was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt, with interest, and the surplus was to be paid to the debtor as personal estate. The deed had a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the bank was entitled to in respect of the deposit of the title deeds relating to the property.

On the 24th of January, 1887, O'Connor's working account with the bank was in credit to the amount of £1 4s. 9d. On the following day it was overdrawn, and it was never again in credit. On the 4th of February, Hannaford, the manager of the bank at Beechworth, wrote to O'Connor, stating that his account was £61 overdrawn, and requiring him to pay in £125 to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage of February, 1886, O'Connor had a discount account with the bank. It comprised two classes of bills discounted for him by the bank—(1) bills of which he was indorsee, and (2) acceptances of his discounted at his request for the convenience of other persons. In reply to Hannaford's letter O'Connor called at the bank and said that he could not pay in £125 straight off at such short notice. He seems to have satisfied Hannaford that the bills referred to in his letter were or would be provided for.

On Monday, the 14th of February, 1887, Hannaford wrote again to O'Connor, stating that his working account was £67 overdrawn, that it was the balance day of the week, and that O'Connor must get the account largely reduced before three o'clock. He added that he hoped that O'Connor did not give out any wages cheques on Saturday. O'Connor went immediately to the bank, and assumed a somewhat indignant tone, apparently on the ground that he had been in the habit of having an overdrawn account. It was a strange way of doing banking business, he said, to send him a letter on Monday, knowing his wages cheques were all paid on Saturday. However, he got Hannaford to promise to honour some small cheques of his which were outstanding, and then he said, "One thing, you won't trouble me much longer with letters of this kind. I'll go to Melbourne some time this week, and get enough money to carry on independent of the bank."

On Friday, the 18th of February, O'Connor called at the bank, and said he was going to Melbourne to get the money to carry on his business. Thereupon, at his request, Hannaford consented to pay a bill for £12 15s., which would fall due on the next day. O'Connor promised to be back about Wednesday, the 23rd.

O'Connor went to Melbourne and saw his mother. She promised to lend him £600. She said at the trial he might have had £1,000. She advanced him £300 in cash, on the terms that the money was to be used for lifting his deeds at the bank, and for no other purpose. He was to take his sister with him to the bank and hand over the deeds to her. The deeds were to be brought back or the money restored at once.

O'Connor returned to Beechworth on Saturday night. The wages of his men, which were due at one p.m. on that day, were unpaid. When he returned home he had only £6 or £8 of his own, and he owed about £20 for wages. The men reassembled for work on Monday, the 21st. He told them he would pay them at dinner time, but he failed to do so, and some of the men struck work then and there.

On the same day, Monday, the 21st—but whether before or after this occurrence is not stated—O'Connor went to the bank with his sister, taking with him his mother's money in a bag. Hannaford had made out O'Connor's account up to the 23rd of February, showing a balance of £371 3s. 4d. in respect of indebtedness and liability. The items shortly were as follows:—

	£	s.	d.
Secured account	103	12	0
Working account	81	14	5
Discount account—			
As indorsee	106	7	6
As acceptor	79	9	5
	£371	3	4

O'Connor objected to the last item of £79 9s. 5d., saying it was "monstrous," as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them over unless the whole amount of debt and liability were cleared off, saying he had to obey instructions. O'Connor observed that he had to return the money or take back the deeds at once. Hannaford then said that he would send the deeds and bills to the head office in Melbourne. O'Connor, after consideration, said that he would take the money to Melbourne, and he asked for and obtained a copy of the document on which the bank relied. It does not appear that O'Connor told Hannaford, at that interview, how he was situated with his workmen, or that he asked for any further indulgence from the bank.

Instead of taking the money to Melbourne at once, O'Connor wrote a letter to his mother which she seems to have mislaid. On Tuesday, the 22nd, she sent a reply in the handwriting of her son, a boy of about eight or nine years old, which said, "Ma went to the bank and found that the money did not come down. Ma

is annoyed about it, as she expected the money to be there to-day. Ma said she does not want no humbugging with you." On receipt of this letter O'Connor went to Hannaford and said his mother had written to him an angry letter, and that he should now be unable to get money from her. On Thursday O'Connor took the money back to his mother.

On Saturday, the 26th of February, Hannaford wrote to O'Connor, saying that he had had a communication from the head office, and that the bank would not insist on payment of the £79 9s. 5d., less rebate, though they were entitled to do so.

On the 28th of February the writ in this action was issued.

On the 8th of March the bank waived their claim to a general lien.

Under these circumstances, if O'Connor had brought an action for redemption on the day on which the writ was issued, he might possibly have been entitled to costs up to the 8th of March. On the other hand, if he had persisted in the action after the bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the court, have had to pay the costs of the action.

A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. In *Cotterell* v. *Stratton*, 21 W. R. 234, L. R. 8 Ch. App. 295, Lord Selborne observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions, and he goes on to point out that such a departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions. In the present case it is not easy to understand how the bank, or their manager, can be charged with vexatious or unreasonable conduct. It is admitted that Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the bank were careful to take a formal security for £100, it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so bold and defiant a tone in his communications with Hannaford, if it had not been taken for granted on both sides that the bank had some security in their hands. Hannaford was merely a subordinate, acting under instructions, as O'Connor knew. O'Connor had given no notice that he intended to draw a line at a certain point in the account. There was no opportunity of consulting the head office. Hannaford, therefore, seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the affair was not completed in Melbourne was not the fault of the the bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money to her at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition,—"My mother would not lend me the money again. She was angry with me."

The action, however, which O'Connor brought against the bank was not an action for redemption. It was an action of detinue. The writ was issued in haste. But the statement of claim was not delivered until the 14th of April. It is certainly a singular document. It does not refer to the mortgage of February, 1886, or notice the fact that the deeds were deposited as a security. It simply states that the bank on the 21st of February, 1887, detained, and had always since such time detained, from the plaintiff his title deeds. It specifies the deeds, and states that by reason of such detention the plaintiff had suffered damage as follows:—"He was rendered unable to procure a loan of £600 from Annie Pye . . . and unable to pay his workmen in his business as coach builder, and was compelled to discharge some of his said workmen, and was rendered unable to meet his liabilities in his said business, and was sued in respect thereof, and his credit was injured and his trade diminished, and his said business was otherwise injured." Then it claims a return of the deeds, or £1,000 for their value, and £2,000 for their detention.

The defence was delivered on the 29th of April. It is equally remarkable. For some unexplained reason, the bank also abstained from referring to the mortgage of February, 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the plaintiff deposited the said deeds with them to secure the repayment of £100, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability, they brought into court £50 and one shilling, and they delivered a counter-claim for money due to them.

In reply, the plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still remained due. He then stated the tender on the 21st of February, and its refusal.

Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the bank allowed the action to be set down for trial. It came on to be tried on the 20th of July, 1887, before Mr. Justice Holroyd and a jury. In addition to proof of the facts already stated, evidence of a somewhat loose and unsatisfactory description was offered, with the view of proving the special damages alleged in the statement of claim. This evidence was objected to, on the ground that the damages claimed were too remote. The learned judge admitted the evidence, but reserved the question of its inadmissibility for the consideration of the full court. No evidence was given on the part of the defence. The jury estimated the value of the property at £700. They gave £1,500 damages for detention, and they found that there was due to the bank under the counter-claim the sum of £284 2s. 7d., which was afterwards reduced by consent to £202 1s.

The question reserved came on to be argued before the full court on the 10th of August, 1887, when it was held that the evidence objected to was admissible.

On the 26th of August, 1887, on motion for judgment, the court adjudged:—

1. That the plaintiff recover against the defendant £1,500 on his claim.

2. That the defendant recover against the plaintiff the sum of £202 1s. on the counter-claim.

Provision was made for set off and payment of the balance, and the bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the plaintiff. The bank was ordered to pay the costs of the action and the costs of the argument before the full court, after deducting the costs of the counter-claim.

On the 2nd of November, 1887, the bank moved the full court for an order to set aside the verdict for the plaintiff, on the grounds that it was against the weight of evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The court ordered that the verdict should be affirmed, and that the motion for a new trial should be dismissed, with costs.

The bank has appealed to Her Majesty in Council from the two orders of the full court and the judgment of the 26th of August, 1887.

The whole matter is therefore open with this exception, that the bank cannot now be permitted to rely upon the legal mortgage of the 22nd of February, 1886, although it was put in evidence at the trial by the plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit, and the appeal must be decided on that footing.

The learned counsel for the appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which mortgagees would be exposed if such a verdict were upheld. They contended, too, that no damages, or at any rate no substantial damages, were due either in fact or in law. These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But in their lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the court below was apparently not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action both parties have chosen to ignore them.

The question that suggests itself is, can such an action as this be maintained? It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants, during a great part of their argument, as an action for damages occasioned by a wrongful act arising out of breach of contract. What is the wrongful act? And what is the breach of contract? Their lordships have not had the advantage of seeing a note of the summing up. But in the full court the learned judge who tried the case states his views as follows:—"In my opinion there was a contract here to deliver up the deeds on payment of a certain sum of money. That was broken when the money was tendered and ought to have been accepted. Then the bank was in the same position as if it had actually taken the money and then refused to deliver up the deeds. That was a wrongful detention of another man's property, and, therefore, a tort." The bank was, no doubt, bound to deliver up the deeds on payment of the sum secured, with interest and costs, if any. But, in their lordships' opinion, there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrong-doer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem, must do equity and pay principal, interest, and costs before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a court of equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now, when law and equity are both administered by the same court, if there be any conflict the rules of equity must prevail. In *Postlethwaite* v. *Blythe*, 2 Swans. 256, where property had been conveyed to secure a debt of a comparatively small amount, the Lord Chancellor refused to direct a release upon payment into court of the largest sum to which the debt would in probability amount. Lord Eldon said: "I take it to be contrary to the whole course of proceeding in this court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into court, but not till then, the mortgagee is required by the order to deliver up the title deeds. It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper tender he can always obtain his deeds on a summary application on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. A form of order adapted to such a case is to be found in Seton on Decrees, 3rd ed., p. 1040.

No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A court of equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects a tender he rejects it at his own risk, and in an action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further, a proper tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee; *Gyles* v. *Hall*, 2 P. W. 377. But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie.

The learned counsel for the respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In *Chilton* v. *Carrington*, the experiment was tried once and again. But the result of two actions in that case, so far as they are reported, affords but little encouragement for a repetition of the experiment.

In *Chilton* v. *Carrington* the assignee of a bankrupt publican sought to recover the title deeds of a public-house which had been deposited with the defendants to secure a sum of £150. The action was brought after tender. The plaintiff sued for detention of the deeds, which were described in the declaration as "goods and chattels," and for damages. The defendants did not put in an equitable plea, but their case was that the deposit was intended to secure an account for beer as

well as the £150. That question was tried on demurrer. It was held that the deposit was only a security for the £150. The parties then went to trial, and, there being no equitable defence, they agreed that the jury should find the damages for the detention, and that they should not be required to assess the value of the so-called goods and chattels. Upon this arrangement the jury found a verdict for £60 damages. The plaintiff then applied to the judge in chambers for delivery up of the deeds. The defendants urged that they ought not to be required to deliver up the deeds before payment. The learned judge, however, made the order. The defendants then applied to the full court to set aside the order, and argued that, according to the settled principles of equity, they could not be required to part with their security until they were paid. The learned judges were puzzled by the course which the parties had taken. In the course of the argument, addressing the counsel for the defendants, Williams, J., observed with perfect accuracy, "If you are right the plaintiff ought not to have succeeded in the action." Ultimately, the court got over the difficulty by setting aside the order in chambers, on the ground that by arrangement between the parties the jury had been discharged from finding the value of the deeds detained. As the result of that action the plaintiff was no nearer getting back his deeds. However, he still contended that, having made a proper tender, and that tender having been refused, he was entitled to have his deeds without payment of the money. So he brought another action of detinue. On this occasion the defendants were better advised, and they put in a plea by way of equitable defence that the deeds were deposited to secure £150, and that that sum remained unpaid. On argument, the court allowed the plea to be put in, and nothing further seems to have been heard of the action.

That case, so far from being an authority in favour of the respondent, is really an authority against him.

Their lordships are therefore of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances their lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their lordships, cannot arise.

The proper order will be to dismiss the action, to allow the verdict on the counter-claim as reduced by consent to stand, and to direct payment to the appellants of the reduced amount, together with interest and the costs of the counter-claim.

As to the costs of the action, having regard to the way in which the bank has acted in the conduct of the litigation, their lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal.

Their lordships will humbly advise her Majesty accordingly.

Appeal allowed.

Solicitors for the appellant, *Wadeson & Malleson.*

Solicitors for the respondent, *Geare, Son, & Pease.*

Court of Appeal.

From Chan. Div. March 11.

In re BRYANT AND BARNINGHAM'S CONTRACT. (*a.*)

Vendor and purchaser—Contract for sale of settled land by trustees—Trustees with no power of sale at date of contract—Tenant for life willing to convey under the Settled Land Act, 1882*—Repudiation by purchaser before day fixed for completion.*

Trustees of real estate, with a power of sale only arising on the death of a tenant for life, who have during the life of the tenant for life entered into a contract as vendors to sell the estate, cannot make a good title by showing, before the date fixed for completion, both that the tenant for life is willing to convey under the Settled Land Act, 1882, *the estate to the purchaser, and that trustees for the purposes of the Act have been appointed.*

Trustees entered into a contract to sell the fee simple in possession of certain real estate. The conditions of sale fixed a day for completion, and stipulated that the vendors and other necessary parties (if any) would, on completion, convey the property to the purchaser. The abstract of title disclosed the fact that the vendors' power of sale did not arise until the death of a life tenant. The purchaser by his requisitions took this objection, and the vendors answered that the tenant for life (who was living) would make a title under the Settled Land Act, and had agreed in writing to the sale by the vendors, and would execute all necessary assurances to give effect to the sale, and that an appointment of trustees for the purposes of the Settled Land Act, 1882, *was then pending. The purchaser, in reply—and before the day fixed for completion of the contract—declined to purchase from the tenant for life, repudiated the contract, and demanded a return of the deposit. Trustees for the purposes of the Settled Land Act were appointed, and notice of such appointment was given to the purchaser by the vendors before the day for completion.*

On the day fixed for completion the purchaser took out a summons under the Vendor and Purchaser Act, 1874, *to have it declared that the vendors had not shown a good title in accordance with the contract, and claiming a return of the deposit, with interest thereon at four per cent. per annum from the date of the contract until payment, and the costs of investigating the title.*

Held (affirming Kay, J.*), that the purchaser was entitled to an order in the terms of his summons.*

Appeal from Kay, J.

By the will, dated the 12th of March, 1884, of W. J. Bryant, deceased, a small residential estate called "Highwoods" was devised unto and to the use of Walter G. T. Bryant and F. J. Cullingford, upon trust, to permit the testator's wife to reside therein during her life, she keeping the same in repair, and after her decease the same was to fall into the residue and be held upon the trusts thereof; and the residuary real and personal estate was devised and bequeathed unto and to the use of the said Walter G. T. Bryant and F. J. Cullingford, on trust to sell.

On the 22nd of October, 1889, a contract for the sale of the "Highwoods" estate was entered into between the said Walter G. T. Bryant and F. J. Cullingford, as vendors, and W. Barningham, as purchaser.

This contract was entered into by the trustees with the approval of the tenant for life (the testator's widow), who was then, and still is, living, but she was not a party to the contract.

The conditions of sale stipulated that the contract was to be completed on the 2nd of December, 1889; that

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the purchaser was to pay a deposit on signing the contract; and that (condition 8), "upon payment of the remainder of the purchaser-money, . . . the vendors and other necessary parties (if any) will convey the property to the purchaser. The conveyance, and every assurance, act, matter, and thing (if any) which shall be required by the purchaser for getting in or releasing any outstanding estate, rent, or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be made and done by, and at the expense of, the purchaser."

The purchaser, in his requisitions, sent in on the 14th of November, 1889, took the objection that the trust for sale did not arise till after the death of Mrs. Bryant; that her death was not abstracted; and that if she were still living the trustees could not make a good title.

The reply was, that Mrs. Bryant was still living, and would make a title as tenant for life under the Settled Land Act; that an application to the court for the appointment of trustees of the will for the purposes of the Settled Land Act was, in fact, pending; and that Mrs. Bryant had given her consent in writing to the sale being carried out and to execute all necessary documents to give effect to the sale.

On November 25, 1889, the purchaser, with reference to this answer, wrote that he declined to enter into any fresh arrangements or to purchase the property from Mrs. Bryant, and that he, therefore, required the vendors to return his deposit, with interest thereon at 5 per cent. per annum from October 22 until payment, and to pay his costs of investigating the title.

On November 28 Walter G. T. Bryant and F. C. Johnson were appointed trustees of the will for the purposes of the Settled Land Acts.

On November 29 the vendors' solicitors wrote giving the purchaser notice of this appointment of trustees, and that the vendors insisted, both on their own behalf and on behalf of Mrs. Bryant, that the purchaser must complete his contract.

On December 2, 1889, the purchaser issued a summons under the Vendor and Purchaser Act, 1874, asking to have it declared that a good title to the property comprised in the contract of sale had not been shown in accordance with such contract; that the vendors might be ordered to repay to the purchaser his deposit, with interest at 4 per cent. from October 22, 1889, until payment, and to pay the purchaser's costs of investigating the title, to be ascertained by the judge in chambers in case the parties differed, and the costs of the application.

The summons was adjourned into court, and was heard before Kay, J., on December 19, 1889, who decided in favour of the purchaser, the applicant, and made an order in the terms of the summons.

The vendors appealed.

Renshaw, Q.C., and *Frederic Thompson*, for the appellants.—The contract was repudiated by the purchaser on November 25, but it was not open to the purchaser to repudiate until December 2, the day fixed for completion; if the tenant for life had died before December 2 the trustees could have given a good title to the purchaser. Though vendors may not have a good title at the date of the contract, it is settled law that if they acquire a good title before the day fixed for completion, or even before the date of the chief clerk's certificate, the court will decree specific performance of the contract: *Langford* v. *Pitt*, 2 P. Wms. 629; *Mortimer* v. *McCallan*, 6 M. & W. 58; *Hibblewhite* v. *McMorine*, 5 M. & W. 462. The 8th condition of the contract of sale shows that it was contemplated that there might be a conveyance required from persons other than the vendors for the purpose of completing the vendors' title, "or otherwise." The vendors are not, therefore, forcing a new contract on the purchaser. On December 2 the vendors were in a position to carry out the contract and to give the purchaser a complete title to the fee by means of the concurrence of the tenant for life in the sale, *Marlborough* v. *Sartoris*, 35 W. R. 55, 32 Ch. D. 616; *Hatten* v. *Russell*, 36 W. R. 317, 38 Ch. D. 334. If A. contracts to sell land which he has not got, but which B. has got, if B. consents to the sale by A., the purchaser will be held to his bargain: *Sidebotham* v. *Barrington*, 4 Beav. 110; *Paton* v. *Rogers*, 1 Ves. & B. p. 353; *Wynn* v. *Morgan*, 7 Ves. 202; *Murrell* v. *Goodyear*, 8 W. R. 398, 1 De G. F. & J. 432; *Nock* v. *Newman*, cited in Dart. V. & P. 6th ed., vol. 2, p. 1179.

Marten, Q.C., and *J. G. Wood*, for the purchaser, were not called on.

COTTON, L.J.—In my opinion this appeals fails. I do not doubt that if the vendors, the present appellants, could have made a good title before the date fixed for completion, the purchaser would have been bound to accept it. But that is not the case here. The vendors cannot even now make a good title; they, the vendors, cannot themselves convey the estate. The vendors' power of sale only arises on the death of a tenant for life, and she is still living. If the tenant for life was a person who could concur so as to make the title of the trustees as vendors a good title, the case would be very different. But the title of the trustees as vendors is not made good by the concurrence of the tenant for life. The trustees cannot, therefore, make a good title as vendors, and, though the tenant for life can make a good title as vendor under the Settled Land Act, yet the purchaser has never contracted to buy from the tenant for life as vendor, and cannot, therefore, be compelled to do so.

LINDLEY, L.J.—I agree.

LOPES, L.J.—I am of the same opinion. The contract with the purchaser was that a good title was to be made out by the trustees as vendors, and what is now proposed is, to substitute the tenant for life as vendor. The purchaser cannot be forced to accept that.

Appeal dismissed.

Solicitors for the appellants, *Simpson & Cullingford.*

Solicitor for the respondent, *A. H. Holmes.*

From Chan. Div. Jan. 29.

In re HARGREAVES.

MIDGLEY *v.* TATLEY. (a.)

Practice — Originating summons — Rules of Supreme Court, 1883, ord. 55, r. 3—Jurisdiction—Will—Power of appointment—Remoteness.

A testatrix devised freehold estate to the use of trustees in fee, upon trust to pay the net income to her sister M. for life, and then to M.'s children for life successively in order of age, and after the death of M. and all her children, to the testatrix's sister E. for life, and then to E.'s children for life successively in order of age, and after the death of M. and E. and all their children, the said trustees were to stand seised of the property in trust for such persons and in such manner as the longest liver of M., E., and their children should by deed or will appoint, and, in default of appointment, in trust for the testatrix's heir-at-law absolutely. M. and E. having both survived the testatrix, one of M.'s children, who turned out to be the longest liver of M., E., and their children, made a will purporting to appoint the property

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

to a trustee in trust for the appointor's children, and died in 1889. *The trustees under the will of the original testatrix having taken out an originating summons for the decision of the question whether they ought to convey the property to their testatrix's heir-at-law or to the appointee under the will of the longest liver,* Kay, J., *held that there was no jurisdiction to try what was really an equitable ejectment on such a summons.*

Held, by the Court of Appeal (*reversing the decision of* Kay, J.), *that the case was within ord.* 55, *r.* 3, *and that there was, therefore, jurisdiction to decide it on originating summons.*

All the parties being present and requesting to have the case on the merits decided, it was held by the Court of Appeal *that the longest liver of M., E., and their children, being not necessarily ascertainable within a life in being and twenty-one years, the power of appointment given to such longest liver was void, and, therefore, upon the termination of the life estates given to M., E., and their children, the heir-at-law of the original testatrix was entitled to the property as undisposed of.*

Avern *v.* Lloyd, 16 *W. R.* 669, *L. R.* 5 *Eq.* 383, *disapproved.*

Appeal from Kay, J.

By will of the 24th of November, 1838, Hannah Hargreaves devised specified freeholds to the use of John Townsend and Henry King upon trust to receive the rents, issues, and profits, and, after deducting expenses, pay the residue to the testatrix's sister Mary for life for her separate use, as therein mentioned, and after her decease upon further trust to pay the residue of such rents, &c., to her oldest child during his or her life, and after the decease of such oldest child to the next oldest child during his or her life, and so on in succession till all the children of Mary should have died, and after the decease of Mary and all her children upon further trusts to pay the residue of such rents, issues, and profits to the testator's sister Eliza for life for her separate use, as therein mentioned, and after her decease to pay such residue to her children successively in the same way as to Mary's, and from and after the decease of the testatrix's said sisters Mary and Eliza and all their children, she directed that the trustees should stand seised of the said freeholds, in trust for such person or persons, in such parts, shares, and proportions, as the longest liver of the said sisters Mary and Eliza and their children should, notwithstanding coverture, by deed or will appoint, and, in default of appointment, upon trust for the testatrix's heir-at-law absolutely.

The testatrix died in December, 1838. Her sister Mary died in 1864, leaving two children. The testatrix's other sister Eliza died in 1873, without issue. Of Mary's two children, one died in 1871, and the other, Hannah Tatley, in 1889, after appointing the property by will to a trustee in trust for her children.

An originating summons was taken out by the persons on whom the legal estate in the property had devolved to decide the question whether the trust limitations following the limitations of life estates to Mary, Eliza, and their children were valid, and, if not, who was entitled to the property. The person claiming under the original testatrix's heir-at-law and the trustee appointed under Hannah Tatley's will were made defendants. The summons was adjourned into court.

Kay, J., held that he had no jurisdiction on an originating summons to determine a question affecting the rights of a person claiming adversely to the will, and that this was really an equitable ejectment. He therefore declined to hear it.

The plaintiffs appealed.

Byland, for the appellants.—There is jurisdiction to decide such a case as this upon an originating summons under ord. 55, r. 3: *In re Davies*, 36 W. R. 587, 38 Ch. D. 210; *In re Royle*, *ante*, p. 17, 43 Ch. D. 18. Everything which can be decided in an administration action can be decided on an originating summons. We are willing to have the case decided here upon the merits.

Upjohn, for the person claiming under the heir-at-law.—The court has jurisdiction to decide this question upon summons. As the property is very small it is desirable to have the case disposed of here without further expense.

F. Thompson, for the trustee of Hannah Tatley's will, concurred.

The COURT decided to hear the case on the merits.

F. Thompson, for H. Tatley's trustee.—This being a general power, the appointment is not to be read into the will of the original testatrix: Sugden on Powers, 8th ed., pp. 394-5. The appointor's children could have disposed of their interests, vested and contingent, immediately after the death of the tenants for life, so that the case is not within the mischief of the rule against perpetuities, which is intended to prevent land being rendered inalienable. In *Avern* v. *Lloyd*, 16 W. R. 669, L. R. 5 Eq. 383, where the gift of the absolute interest to the survivor of unborn issue was substantially equivalent to the power here, that gift was held not void for remoteness.

He also referred to *Gilbertson* v. *Richards*, 4 H. & N. 277, 5 *Ibid.* 453, 7 W. R. C. L. Dig. 82, 8 *Ibid.* 69; *In re Harvey, Peek* v. *Savory*, 39 Ch. D. 289, 297, 37 W. R. Dig. 203; *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 562; and Lewis on Perpetuity, p. 164.

Upjohn was not called on.

COTTON, L.J.—This case came before Kay, J., who appears to have thought that he had no power to decide it upon an originating summons under ord. 55, r. 3; but I cannot quite agree with his view. It is a case in which trustees of a will who have vested in them the legal estate in fee in the property, and are also in possession of it, come here and ask us to decide the question to whom they ought, upon the construction of the will, to hand over the property. I think it would be giving too narrow a construction to rule 3 of order 55 if we were to decide that this question cannot be raised by the trustees by an originating summons under that rule. That being so, and all parties being willing to have the question decided here, we have, in order to save further expense, heard the question of merits in this court.

The question to whom the beneficial interest in the property now belongs depends upon whether the power of appointment given by the will to the longest liver of the sisters of the testatrix and their children was void for infringing the rule against perpetuities. Of course the gifts to the sisters themselves and their children for their lives were good; but, in my opinion, the power of appointment was bad. Can it be said that this limitation was to persons who must be in existence within the period fixed by the rule against perpetuities? The power was given to the last survivor of the sisters and their children. Well, the last survivor might not have been ascertainable within the period allowed by that rule. Therefore, in my opinion, that limitation was bad. On the death of the last survivor of the class the equitable estate devolved upon the testatrix's heir-at-law, not under any trust in his favour contained in her will, but by reason of the intestacy caused by the invalidity of the ulterior limitations.

The case of *Avern* v. *Lloyd*, before Stuart, V.C., was very like this indeed. I do not say whether that case is consistent with the decision in *London and South-Western Railway Co.* v. *Gomm*. In *Avern* v. *Lloyd* Stuart, V.C., asks

why, a limitation of life estates to unborn children being valid, an ultimate limitation following those life estates should not be valid too? Unquestionably it may be, provided it is to persons who are necessarily ascertainable within the period allowed by the perpetuities rule. But that is not the case here—the question is whether the limitation is not made to a class of persons the last survivor of whom may not be ascertainable within that period. It is true (apart from the question of invalidity for remoteness) that the children could have disposed of their vested and contingent interests immediately after the death of the tenants for life, and it was contended that, therefore, as there was nothing to prevent alienation, the limitation was not within the mischief of the rule against perpetuities. But, in my opinion, that is not the way in which we must look at this case. An executory limitation which is to take effect on the happening of an event which may possibly not happen within a life or lives in being and twenty-one years afterwards, is not rendered valid by the fact that the person in whose favour it is made may be able to dispose of it.

LINDLEY, L.J.—I am of the same opinion. The person who is to exercise this power is not necessarily ascertainable within the limits of the rule against perpetuities, and therefore the power cannot be good, though the case of *Avern* v. *Lloyd* is relied on against that view by the appellant.

As regards the point of jurisdiction, I cannot help thinking that Kay, J., must have formed his judgment under some misapprehension as to the nature of the case. It is impossible to say that this case is not within both the words and the spirit of ord. 55, r. 3. There may be cases where, the facts being disputed, the judge may think he cannot safely decide the question in a summary way, and may therefore require the parties to proceed by action; but there are no facts in dispute here at all, and it is clear that there is jurisdiction to decide the question upon a summons.

Then, as regards the merits of the case, as I have said, the person to exercise this power is not necessarily ascertainable within the prescribed period, and the power is therefore void. The only difficulty is presented by the case of *Avern* v. *Lloyd*, but, as that case has not been followed, that difficulty can be got over, as I do not think it was rightly decided.

LOPES, L.J.—I think this case comes within the words and spirit of rule 3 of order 55, and that Kay, J., had, therefore, jurisdiction to decide it on an originating summons under that rule.

As regards the question of validity, I am of opinion that the ulterior limitations are bad for the reasons given by Cotton, and Lindley, L.JJ.

Appeal allowed.

Solicitors, *Woodcock, Ryland, & Parker; Wynne, Holme, & Wynne.*

From Prob. Div. and Adm. Div. Feb. 12.

"THE ORCHIS." (*a*.)

Ship—Action by master for disbursements—Arrest of ship—Mortgagees paying claim—Indemnity against owners.

A ship having been arrested in an action by the master for disbursements, the plaintiffs, who were the registered mortgagees of forty-eight sixty-fourth shares, in order to obtain the release of the ship, paid the master's claim, and brought an action to recover the amount so paid from the defendants, the owners of the remaining sixteen sixty-fourth shares.

Held, that, as the plaintiffs' shares in the ship had been lawfully seized for a debt for which the defendants were liable, and as the plaintiffs had been compelled to pay that debt in order to obtain the release of their property, there was an implied promise on the part of the defendants to reimburse the plaintiffs the sum so paid; and the action was, therefore, maintainable.

Edmunds v. Wallingford, 33 *W. R.* 647, 14 *Q. B. D.* 811, *followed.*

Appeal from the judgment of Butt, J.

The plaintiffs were the registered mortgagees of forty-eight sixty-fourth shares in the steamship *Orchis*, belonging to the defendant Hornstedt, who was the managing owner of the ship, and who had mortgaged the shares to the plaintiffs. The defendants other than Hornstedt were the owners of the remaining sixteen sixty-fourth shares.

In May, 1886, the defendants became liable to the master of the ship for necessary disbursements to the amount of £422 15s. 7d. incurred while the ship was prosecuting a voyage for the joint benefit of the defendants, and the master brought an action *in rem* in the Admiralty Division to recover that amount, and the ship was arrested. The plaintiffs, being desirous of taking possession of the ship under the mortgage, and in order to do so, paid the master the above-mentioned sum and £18 9s. 3d. for costs, and obtained the release of the ship. The plaintiffs thereupon brought the present action to recover the sum so paid, on the ground that the payment was made by the plaintiffs under compulsion, and was one which the defendants were legally compellable to pay. The defendant Hornstedt admitted liability, and the action was proceeded with against the other defendants, the owners of the sixteen sixty-fourth shares.

Butt, J., gave judgment for the plaintiffs.

The defendants appealed.

French, Q.C., and *Joseph Walton*, for the defendants.—The master had no maritime lien on the ship for disbursements: *The Sara, ante*, p. 129, 14 App. Cas. 209,* and, therefore, had no priority over the mortgagees. The master had no right as against the mortgagees' shares, and the plaintiffs were not, therefore, compelled to pay.

They also referred to *Edmunds* v. *Wallingford*, 33 W. R. 647, 14 Q. B. D. 811; *The Volant*, 1 W. Rob. 383; *The Nelly Schneider*, 3 P. D. 152, 27 W. R. Dig. 202; *The Heinrich Bjorn*, 33 W. R. 719, 10 P. D. 44, 11 App. Cas. 270, 34 W. R. Dig. 179; *The Cels*, 36 W. R. 540, 13 P. D. 82.

J. G. Barnes, Q.C., and *J. P. Aspinall*, for the plaintiffs, were not called upon.

Lord COLERIDGE, C.J.—This action, which is a pure common law action, though tried in the Admiralty Division, is brought by the mortgagees of forty-eight sixty-fourth shares in *The Orchis* to recover a certain sum of money from the defendants. This sum was paid by the plaintiffs to secure the release of the ship from arrest by the Admiralty Court in an action by the master for disbursements for necessaries. To enforce his claim the master was entitled to have the ship seized. The arrest was, therefore, legal. The plaintiffs were entitled as mortgagees to possession of the ship, but, in consequence of the arrest, they could not get possession. They accordingly paid the master's claim, and obtained the release of the ship. They now seek to recover this sum from the defendants, and the question is, whether

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* See now the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), s. 1.

the defendants, who are the owners of sixteen sixty-fourth shares in the ship, are liable? It seems to me that the moment that state of facts is established—a lawful seizure of the ship as between the owners and the master, and payment by the mortgagees to obtain its release—it is clear that the mortgagees have a claim to be repaid that sum.

In *Edmunds* v. *Wallingford* Lindley, L.J., in delivering the judgment of this court, said:—"In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the sons' goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized all that is meant is that, as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises." There we find the principle clearly stated. The result is that where there is a seizure rightful in law the person, who pays money to extricate property of his own from that seizure, and who in extricating that property pays money on behalf of another person, can recover the money so paid from that other person. That principle applies to and covers this case, and the plaintiffs, therefore, are entitled to recover.

Lord ESHER, M.R.—This is a question of some general importance. The action is a common law action for money paid on behalf of the defendants upon an implied promise by the defendants to repay it. Before the Judicature Act I do not think that this action could have been tried in the Admiralty Court, and now it is tried by the judge of the Admiralty Division as a common law action. It is only necessary to refer to the admiralty law for the purpose of ascertaining the master's rights. The master was employed by the owners of the ship, both by the part owner who had mortgaged his shares and by the other owners. They were not merely co-owners of the ship, but they had agreed to employ the ship as a money-earning machine, and were, therefore, partners in the adventure in respect of which they had employed the master. The master was not employed by the mortgagees. The master made certain disbursements for the benefit of the ship while so employed. The rights of the master according to admiralty law were that if he was not paid he could institute proceedings in the Admiralty Division and have the ship arrested, and the effect of the arrest would be that the ship would be held by the court as security for the master's claim if he made it out. That would be a good seizure against all the world, and, therefore, good as against the mortgagees, though they did not owe the master anything.

The mortgagees, however, by their mortgage, had a right to immediate joint-possession of the ship with those owners who had not mortgaged their shares. The admiralty law stepped in, and prevented them from exercising that right. They could not obtain joint-possession of the ship without an order of the Admiralty Court, and the court would not take off its hands unless the claim of the master was paid, or bail put in. If the claim were paid or bail put in, the ship would be released, and the mortgagees and co-owners would be entitled to take joint-possession, and if either took possession it would be a possession taken for all. The mortgagees desired to have possession of the ship, and they had good business reasons for such desire. They had rights which the law prevented them from exercising, and this occurred solely through the default of the defendants in not paying the master. Under these circumstances, in order to get immediate possession, they paid the amount, and that brings the case at common law within the rule laid down in *Edmunds* v. *Wallingford*, that if, by reason of the default of one person, another person's goods are lawfully seized for that person's debt, and the latter pays the debt, the law implies a promise by the one whose debt is paid to reimburse the person paying it. The judgment, therefore, was right, and must be affirmed.

FRY, L.J.—I agree. It seems to me that this case is peculiar to this extent, that the pressure on the plaintiffs arose from the right of the Admiralty Court to seize the entire ship and detain it until the master's claim was paid. It was said that there was no compulsion on the mortgagees, as their shares in the ship could not be made liable to satisfy the master's claim. That may be true, but, inasmuch as the whole property was seized under the admiralty law, and might have been detained until the questions in the action had been settled, an implication arises in law of an implied promise on the part of the defendants to repay the plaintiffs the sum paid by the latter to protect their property.

Appeal dismissed.

Solicitors for the plaintiffs, *F. B. Moss*, for *Moss, Lowe, & Co.*, Hull.

Solicitors for the defendants, *Wynne, Holme, & Wynne*, for *H. Forshaw & Hawkins*, Liverpool.

High Court of Justice.

Chan. Div. } Chitty, J. } March 25.

ECCLESIASTICAL COMMISSIONERS *to* KING. (*a*.)

Vendor and purchaser—Ecclesiastical Commissioners—Site of parsonage house—Power to resell site purchased—Church Building Acts (58 *Geo.* 3, *c.* 45, *s.* 51; 1 *&* 2 *Vict. c.* 107, *s.* 9).

The Ecclesiastical Commissioners have power under the Church Building Acts to sell lands which have been purchased by them for the site of a parsonage house, and which have subsequently become unsuitable for that purpose.

Vendor and purchaser summons.

This was a question as to whether the Ecclesiastical Commissioners can resell land purchased by them for a site for a parsonage house.

By a deed of the 27th of February, 1884, made under the Church Buildings Acts, and particularly under 19 & 20 Vict. c. 55, a piece of land situate in the parish of St. James, Clerkenwell, was, together with other hereditaments since sold, conveyed by way of sale by E. W. Javens to the Ecclesiastical Commissioners for England, for the purposes of the said Acts and to be devoted to ecclesiastical purposes for ever as and for the site of a parsonage, or house of residence with garden and glebe thereto, for the incumbent for the time being of the said parish of St. James according to the meaning of the said Acts.

No parsonage house was ever built on the site so purchased, the land having become unsuitable for the purpose.

The commissioners took steps to sell the land, and

(*a*.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

for this purpose on the 22nd of July, 1889, entered into a contract with Edwin King to sell the same to him.

King raised the objection that the commissioners had no power to sell, particularly under 58 Geo. 3, c. 45, s. 51, and 1 & 2 Vict. c. 107, s. 9.

Blakesley (*F. H. Jeune, Q.C.*, with him), for the commissioners.—The commissioners have power to resell the land purchased by them for the site of a parsonage. It is admitted they have power to resell land acquired for the site of a church. The power to acquire land for church sites is given by 58 Geo. 3, c. 45, ss. 35, 36, and the power to resell lands not used for the purposes of the Acts is contained in section 51. There is a distinction between lands purchased and lands acquired by gift, but that does not arise in the present case, for the land was purchased by the commissioners. All the powers created by 58 Geo. 3, c. 45, are incorporated by 1 & 2 Vict. c. 107, s. 9, and are extended by that enactment so as to apply to lands taken by purchase for the site of a parsonage house.

A. R. Rudall, for King.—This is a case of purchase, not of gift, so section 33 of 58 Geo. 3, c. 45, does not apply. The recital at the beginning of section 51 restricts the power of resale to lands acquired for sites of churches or chapels, and the commissioners only obtain power by 1 & 2 Vict. c. 107, s. 9, to acquire land for sites for houses by sale or exchange. The power, created by section 51 of the first Act is not incorporated, and section 9 of the second Act gives no special power to resell. No further incorporation of 58 Geo. 3, c. 45, with 1 & 2 Vict. c. 107 is caused by 8 & 9 Vict. c. 70, s. 25. King is a willing purchaser.

Blakesley replied.

CHITTY, J.—The question is whether, upon the true construction of the Church Building Acts, the Ecclesiastical Commissioners have power to sell a piece of land which they acquired by purchase for the site of a parsonage, but which site they now find is not required for the purpose for which they bought it. Their power to acquire arose under section 9 of 1 & 2 Vict. c. 107. By that section it is enacted that all powers and authorities given by 58 Geo. 3, c. 45, "for enabling the bodies politic and persons therein mentioned to convey, and the commissioners to take, land for the sites of churches and chapels, shall extend to the transfer, by sale or exchange only, of land for a site for a house of residence of any incumbent provided the same do not exceed five acres." That in terms, therefore, relates only, so far as the commissioners are concerned, to their taking the land, and the only mode in which they can take the land under this section is by sale or exchange. In terms, in 1 & 2 Vict. c. 107 there is no power of sale conferred on the commissioners, and the question is whether the land thus acquired under section 9 does not become, by virtue of the joint operation of the two statutes taken together, subject to section 51 of 58 Geo. 3, c. 45, which does empower the commissioners to sell the land not wanted. Now the Act of Geo. 3 contains, in section 33, provisions under which the commissioners may take, by way of gift, the sites for churches, and also sites for the residences of the spiritual persons serving the churches. That Act contains also a power for the commissioners to buy sites for churches, but no power for them to buy sites for parsonages. Section 51 no doubt only extended at the time when this statute became law to the sites purchased for churches, for the commissioners had then no power to buy land for sites for houses. The recital in section 51 shows the motive of the enactment which follows, but that enactment is in wider terms than the recital, and is not, according to the rule, to be cut down by the recital; and the words are: "It shall be lawful for the commissioners to grant and convey by way of absolute sale for a consideration in money," not the lands purchased for the site of a church, but "such lands, tenements, or hereditaments, or any such part or parts thereof as shall not be wanted for the purposes of this Act." So that it is in form a general enactment enabling the commissioners to sell lands not wanted for the purpose of that Act.

I think it is reasonably clear that the land acquired under 1 & 2 Vict. c. 107, s. 9, which is not wanted for the purposes for which that land was originally acquired falls within the power of sale created by 58 Geo. 3, c. 45, s. 51. It cannot be supposed that the Legislature could have left matters in such an extraordinary position, I mean that if the commissioners buy a site for a church which is not wanted, they can sell it, but if they buy a site for a parsonage house which is not wanted, they must keep it in their hands for ever. No one can suggest a reason why the law should have intentionally been so framed. This is the general reason why I give this interpretation to the statute, and there is also a particular reason which is of weight, that is the peculiar form of section 9. That is an extension of some of the powers—namely, the powers of purchase—and it seems to bring property bought by means of that extended original power into the same category as other lands of a similar class, which have been bought under the original power, so I hold that the commissioners can make a good title.

I will say nothing on 8 & 9 Vict. c. 70, s. 25, on account of the complicated condition of that enactment, except that it seems to contain nothing contrary to my judgment.

Solicitors, *White, Borrett, & Co.; Potter, Sandford, & Kilvington.*

Smith - Hammond (1896) 1 Ch. 572

Chan. Div. North, J. — Feb. 28.

ZUCCATO v. YOUNG. (a.)

Practice—Setting aside writ for irregularity—Misdescription of defendant—Entry of conditional appearance—Rules of Supreme Court, 1883, ord. 12, r. 30.

The writ in an action described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate-hill." The defendant, who was not in fact carrying on the business, entered an appearance as "J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate-hill, but who denies that he is carrying on business as the Edison Mineograph Co. at No. 60, Ludgate-hill aforesaid or elsewhere."

Held, on motion by the defendant to set aside the writ and subsequent proceedings on the ground of irregularity, that there was no irregularity in the writ, and that the mistake had been set right by the form in which an appearance had been entered by the defendant; and the motion was refused.

Motion.

The action was brought by Messrs. Zuccato & Wolff, who were the owners of certain letters patent, to restrain an alleged infringement of their patent. The writ, which was issued on the 6th of February, 1890, described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co." in the title, which description was repeated in the body of the writ, with the addition of the words "at No. 60, Ludgate-hill, in the City of London," and claimed an injunction, damages, and an account. The writ was served on the defendant at No. 60, Ludgate-hill on the 10th

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

of February, together with a notice of motion for an injunction.

On the 12th of February a letter was received from the defendant's solicitor stating that he had been instructed by the defendant, and would enter an appearance in due course, and on the 15th of February the defendant's solicitor gave notice to the plaintiffs and their solicitors that he had that day entered an appearance "for the defendant, J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co., of No. 60, Ludgate-hill, in the City of London, but who denies that he is carying on business as the Edison Mineograph Co. at No. 60, Ludgate-hill aforesaid or elsewhere."

This was a motion by the defendant, J. L. Young, notice of which was given on the 18th of February, asking "that the writ of summons in this action, and all subsequent proceedings therein, and the service of such writ upon the defendant, may be set aside, on the ground that the said writ of summons describes, and was issued against, the said defendant as carrying on business as the Edison Mineograph Co. at No. 60, Ludgate-hill, in the City of London, whereas the defendant, Jonathan Lewis Young, does not carry on business, and never has carried on business, and has no interest in the business carried on as the Edison Mineograph Co. at No. 60, Ludgate-hill aforesaid or elsewhere, and on the ground that No. 60, Ludgate-hill aforesaid is not the usual or proper address of the said defendant."

It appeared from the evidence that the plaintiffs, having reason to suppose that articles which they regarded as an infringement of their patent were being sold at the office of the Edison Mineograph Co. at No. 60, Ludgate-hill, sent an agent and purchased one, which was sold to him by the defendant, who, the agent deposed, had been pointed out to him as the manager of the business; and the plaintiffs, when they issued their writ, believed that the business of the Edison Mineograph Co. was, in fact, carried on by the defendant alone. The defendant, however, in an affidavit, stated to the effect that the business belonged to his brother, and that he himself had no interest in it, though he had lent money to his brother for the purposes of the business.

Bramwell Davis, for the motion.—The defendant is entitled to have the writ and subsequent proceedings in the action set aside on the ground of irregularity: Rules of Court, 1883, ord. 12, r. 30.

He also referred to rules 15 and 16 of order 12; *The W. A. Scholten*, 36 W. R. 559, 13 P. D. 8.

Willis Bund, for the plaintiffs.—The proceedings ought not to be set aside, as, if there was any irregularity in the writ, it has been set right by the notice of appearance of the defendant.

He referred to ord. 70, rr. 1, 2; *The Helenslea*, 30 W. R. 613, 7 P. D. 57.

North, J.—I do not think there is any irregularity in the writ. The effect of the evidence is that the defendant is not carrying on business as the Edison Mineograph Co., but it is not denied that he did what he is alleged to have done. It is the same thing as if a defendant named John had been sued as James, in which case the mistake could be easily corrected in all subsequent proceedings, as the mistake has been corrected in the present case. In this case matters have already been set right by the form in which the appearance has been entered by the defendant. If the amended title is used in the subsequent proceedings, they will be perfectly regular, and the defendant will be in no way prejudiced. I must refuse the motion, the costs to be costs in the action.

Motion refused.

Solicitors, *Carruthers; Paddison, Son, & Fullilove.*

Chan. Div. North, J. — Dec. 17, 18, 21

In re National Permanent Mutual Benefit Building Society. (*a.*)

Building society—Trust funds—Trustees—Directors—Trust Investment Act, 1889 (52 & 53 *Vict.* c. 32).

The funds of a building society which are invested in the name of the society, or in the names of trustees who have no power of investment, but are trustees for the society acting under the direction of the board of directors, are not within the Trust Investment Act, 1889.

Petition.

This was a petition by the directors and trustees of the National Permanent Mutual Benefit Building Society, for the purpose of determining whether the funds of the society invested in the names of trustees under the direction of the board of directors, were trust funds within the Trust Investment Act, 1889.

The National Permanent Mutual Benefit Building Society was established in 1849, and registered under the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32). The certified rule of the society as to investments provided, that all money not employed in advancing the shares of members should "be laid out in such investments, or advanced upon such legal or equitable securities as the law permits in the names of the trustees, but under the direction of the board."

In 1880, the society was incorporated under the Building Societies Act, 1874, which repeals the Act of 1836, and enacts, by section 25, that "any society under this Act may, from time to time as the rules permit, invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities, or in the public funds, or in or upon any Parliamentary stocks or securities, or in or upon any stock or securities, payment of the interest on which is guaranteed by authority of Parliament, or in the case of terminating societies, with other societies under this Act; and for the purpose of investments in the public funds, or upon security of copyhold or customary estate, the society, or the board of directors or committee of management thereof, may from time to time appoint and remove trustees;" and also, by section 27 (as amended by section 3 of 40 & 41 Vict. c. 63), enacts that "all rights of action and other rights, and all estates and interests in real and personal estate whatsoever, belonging to or held in trust for any society certified under the said repealed Act, shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments, the title to which cannot be transferred without admittance."

The society possessed funds invested in the name of the corporation, and also sums invested in Consols in the names of trustees; and the petition was presented to obtain a decision of the question whether the Consols could be sold out, and the proceeds invested in some of the securities mentioned in section 3 of the Trust Investment Act, 1889.

The Trust Investment Act, 1889, s. 3, enacts that: "It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in the manner following, that is to say, . . . and also from time to time to vary any such investment," and that section enumerates fifteen classes of securities. Section 5 enacts, "Every power conferred by this Act shall be

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust, with respect to the investment of the trust funds." And by section 6 the Act is made to apply to trusts created before, as well as to trusts created after, the passing of the Act.

Swinfen Eady, for the petition.—The funds of the building society which are not in use in advancing members, and are invested in the name of trustees, are trust funds within the Trust Investment Act, 1889. The trustees in whose names the Consols stand, and who are not "expressly forbidden by the instrument creating the trust," come within section 3 of that Act. Then the directors of the building society are trustees within the meaning of that Act. They have the control of the funds of the building society not employed in advancing members, which are trust funds: *Hardy* v. *Metropolitan Land and Finance Co.*, 20 W. R. 425, L. R. 7 Ch. 427.

NORTH, J., stated the facts, and proceeded:—The question is whether the Consols belonging to the building society standing in the names of trustees can be sold by them and invested in other securities within the Trust Investment Act, 1889. In my opinion they cannot. In the first place I think that the powers of investment contained in the Act are larger powers given to trustees who have already power to invest, and merely apply to trustees who hold funds for the purpose of investment. In respect of building societies under the Building Societies Acts this general enactment relating to trustees, which does not refer to building societies, cannot be intended to alter the powers of such societies, which are regulated by the 25th section of the Building Societies Act, 1874. In order to give to such societies larger powers than are contained in that section, I think there should be in the Trust Investment Act, 1889, either an express direction, or something that shows by necessary implication an intention so to enlarge the powers. But I do not think that is the only answer. Even supposing the 25th section of the Building Societies Act would be affected by a general investment Act, does the Trust Investment Act, 1889, apply to such a case? In my opinion it does not. I do not think the funds of a building society are trust funds. The property of a building society belongs to the society or its members, and its members do not hold the property on any trust. The property of such a society is quite different from that of a charitable institution. In my opinion the funds of the society are not trust funds at all in the sense used in the Trust Investment Act, 1889. And, further, it is to be noticed that it is not the object of a building society to invest.

Then it is suggested that the trustees in whose names the Consols stand are trustees for investment, so as to bring the funds standing in their names under the operation of the Trust Investment Act, 1889. It will be recollected that the rule of the society relating to investments provided that funds should be invested in the names of trustees, but only under the direction of the board of directors. This is a rule which has not been altered, and is still subsisting so far as these investments are concerned. I do not think, therefore, these trustees are trustees holding funds in their hands which they can invest, or that this Act applies to trustees who do not hold funds in their hands upon trust to invest. In my opinion the Act extends the powers in respect of the kind of securities upon which trustees who already have limited power to invest may invest, but it does not give power to invest to trustees who have not power to invest independently of the Act. It seems to me that the trustees of the society are not trustees under the Act. If there were a person absolutely entitled to a fund in the hands of a bare trustee for him, and such person did not wish to take the funds into his own hands, and did not wish to have the investment of the fund changed, it could not be contended that the bare trustee could have power given him by this Act of varying such investment.

Then it is said that the directors of the society are trustees having trust funds in their hands within the meaning of the Act. In my opinion they are not. In point of fact they have not any trust funds in their names, and are not trustees for investment, but are the agents of the society for the purpose of carrying on its business. It is said that they are in a fiduciary position; and no doubt if property of the society come to their hands, is misappropriated, they will be liable for it. But so is any other agent. It seems to me, therefore, that the directors are not trustees having trust funds in their hands to invest within the meaning of the Act.

I come to the conclusion that the Act does not apply to a building society whose funds are invested in their own name, or in the name of trustees who have no power of investing. That view is confirmed by the 5th section of the Trust Investment Act, which provides "That every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust." From that it appears that the Act is intended to apply to trustees who have a discretion as to investment independently of the Act.

Solicitors, *R. & A. Russell.*

Chan. Div. } Nov. 16.
Kekewich, J. }

In re OLIVER & SCOTT'S ARBITRATION. (a.)

Practice — Arbitration — Jurisdiction — Application to extend time for setting aside award—Expiration of time—9 & 10 Will. 3, *c.* 15, *s.* 2—*Judicature Act*, 1873, *s.* 26—*Judicature Act*, 1875, *s.* 17—*Ord.* 64, *rr.* 7, 14.

The court has jurisdiction, under ord. 64, *r.* 7, *to extend the time for applying to set aside an award, notwithstanding that the time limited for the purpose by* 9 *&* 10 *Will.* 3, *c.* 15, *s.* 2, *as modified by ord.* 64, *r.* 14, *has expired.*

Motion.

This was a motion to set aside an award under the following circumstances. By deed dated the 1st of February, 1886, R. Oliver and T. B. Scott became partners for fourteen years from the 28th of January, 1884. By this deed it was provided that on the death of either partner the surviving partner should be entitled to purchase the business, by agreement between him and the executors of the late partner, on a valuation to be ascertained by arbitration. R. Oliver died the 4th of June, 1888, having appointed A. Oliver and J. B. Colton his executors. By agreement dated the 24th of July, 1888, and made between A. Oliver and J. B. Colton of the one part and T. B. Scott of the other part, T. B. Oakshott and C. S. Beecroft were appointed arbitrators, to ascertain the value of the capital and effects and goodwill of the partnership as provided by the partnership deed, and it was agreed that the submission to arbitration and any award thereunder might at the instance of either party be made a rule or order of any division of the High Court of Justice.

On the 11th of August, 1888, the arbitrators made and published their award, and on the 24th of October, 1889, it was ordered that the agreement of the 24th of

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

July, 1888, and the award thereunder be made an order of the Chancery Division of the High Court of Justice.

On the 2nd of November, 1889, A. Oliver and J. B. Colton as executors of R. Oliver served T. B. Scott with a notice of motion asking that, notwithstanding that the time limited had expired, they might be at liberty to move to set aside the award of the 11th of August, 1888, on the ground of fraud on the part of T. B. Scott.

Warmington, Q.C., and *Astbury*, for the motion.

Henn Collins, Q.C., and *Roby*, for T. B. Scott, raised the preliminary objection that the court had no jurisdiction to extend the time.

Warmington, Q.C.—Ord. 64, r. 7, empowers the court to enlarge or abridge the time appointed by the rules for doing any act. Rule 14 of the same order directs that an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties. By 9 & 10 Will. 3, c. 15, s. 2, it is provided that an application to set aside an award must be made in the "term" next after the award has been published; but by the Judicature Act, 1873, s. 26, terms were abolished except as a measure for determining the time within which anything had to be done until "provision is otherwise made by lawful authority." The Judicature Act, 1875, section 17, empowered the judges to make rules relating to the "practice and procedure" of the court. This is a matter relating to the practice and procedure of the court, and the rules are made by lawful authority. This motion is on the ground of fraud: *Rogers* v. *Hadley*, 11 W. R. 1074.

He referred to Russell on Awards, 6th ed., p. 664 *et. seq.*, and the cases there cited.

Henn Collins, Q.C.—This is not an arbitration in an action or under the Common Law Procedure Act, but under a statute which limits a certain time to apply to set aside the award; and unless that statute has been repealed by another statute, the court cannot hear an application after the expiration of that time. The Judicature Acts and Rules have substituted "sittings" for "terms"; but otherwise the matter stands as it was before the Judicature Acts and Rules, whose operation was to modify the practice and procedure of the courts, not to repeal a specific enactment like that in question. The inherent power in the courts of enlarging time on application after the time limited has never been extended to a case like the present: *In re North British Railway Co. and Trowsdale*, L. R. 1 C. P. 401, 14 W. R. C. L. Dig. 3; *Moore* v. *Darley*, 1 C. B. 445; *In re Corporation of Huddersfield and Jacomb*, 22 W. R. 255, L. R. 17 Eq. 476; *Auriol* v. *Smith*, T. & R., p. 126; *Dawson* v. *Sadler*, 1 Sim. & & S. 537; *Heming* v. *Swinnerton*, 2 Ph. 79.

Kekewich, J.—I have no doubt about this point. I shall certainly not hold that this Act of Parliament limiting the time could be altered otherwise than by the authority which made the enactment—namely, the Legislature itself. The Act of Will. 3 says that any motion to set aside an award must be made in the term next after the award has been made and published to the parties, and that applies to this award which was made under that Act. Unless I can find that that has been altered by Act of Parliament, I should have no hesitation in saying on this part of the case that the court has no jurisdiction to set aside the award, as the term next after the publication of the award has expired. But since that Act was passed terms have ceased to be operative for many purposes, indeed, they are now observed only for certain purposes outside the courts of justice. They have been abolished, being now fused in the "sittings." We in the Court of Chancery were familiar with both. We sometimes had sittings before term and sometimes sittings after term, and the year was made up quite as much of sittings out of term as of sittings in term. They were known as "sittings," but that, of course, did not alter the Act. When the Judicature Act came in, this anomaly of certain business being done in term time, the term having ceased to have the importance which it had before, was noticed and provided for, and by the 26th section of the Judicature Act, 1873, terms were abolished, but they were to continue to be regarded as a measure of time "unless and until provision is otherwise made by any lawful authority." Now before proceeding to discuss what authority was necessary, I wish to refer to the case of *In re Governors of the College of Christ, Brecknock* v. *Martin*, 25 W. R. 637, 3 Q. B. D. 16. There the application was made out of time according to the provisions of the Act of Will. 3, no alteration having been made by any lawful authority, and the Court of Appeal held that, there having been no provision made by lawful authority, they were bound by the Act of Will. 3, and that, hard as it might be, nothing could be done. Cockburn, C.J., said:—"This may lead to considerable conflict between the two modes of reckoning 'terms' and 'sittings,' and I hope something may be done to prevent hardship to suitors." The consequence, then, was that subsequently the rules were made which are called in question here—Ord. 64, rr. 7 and 14—and they make certainly an entirely different provision. I think rule 14 ought to be read first. "Application to set aside an award may be made at any time before the last day of the sittings next after such an award has been made and published to the parties." That was really only putting into the form of a rule with the one word "sittings" substituted for "term" what was in the Act of Parliament. That alteration of "term" into "sittings" is admittedly within the powers of the judges who have to make the rules.

Then rule 7 gives the court or a judge power "to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require." Really the question is whether that was within the power of the Rule Committee who made the rules. For that purpose I must turn to section 17 of the Judicature Act, 1875, which provides that any rules may be made "relating to the practice and procedure of the court." Is this a matter of practice and procedure? It seems to me that the time within which an application may be made is necessarily procedure. Indeed, a large majority of the applications which are made to the court, and which are called procedure summonses or procedure applications, relate to the time within which a certain thing has to be done. Therefore that seems to me to be clearly procedure. Then it is said that, though the Rule Committee might alter the time in this sense, substituting "sittings" for "term," they cannot extend the sittings. I fail to comprehend that argument. That they might have shortened it seems to me perfectly clear. They might have said, "The sittings are very long, and the term is very short. The sittings are rather more than justice requires for setting aside an award, and, therefore, we will say only a certain portion of the sittings," and the rule might have said, "In the first three weeks of the sittings," or "In the first half of the sittings," or in any other way might have fixed the time being less than the whole of the sittings. And if they could make it less than the sittings, why not more, and why not in the next two or three sittings? I find it difficult to follow the argument that the Rule Committee can only substitute "sittings" for "term" when necessarily the sittings and term are not commensurate. I fail to see how one must be substituted for the other without any other alteration. We in the Chancery Division are in the

habit of rising on the last day of the sittings, but the Queen's Bench judges are often detained on circuit, and do work some days after the sittings. It would have been very easy to say, "So long as the circuits continue," or to make some other arrangement of that kind. Instead of that they have said that the sittings shall be substituted for the term, with a proviso, that if the court before which the matter comes sees fit to enlarge that time, then that shall be done on such terms as justice requires. I think that, given the power to alter the Act of Parliament at all, which is not, and cannot be, denied, there was power to alter it in the manner which has been done. Therefore, I am of opinion that it is now competent for me to consider whether the justice of the case requires that, on terms which are within my judicial discretion, the enlargement for which the applicant asks shall be granted.

The motion was subsequently heard and decided on its merits.

Solicitors, *Pritchard, Englefield, & Co.*, for *Boote & Edgar*, Manchester; *Bower, Cotton, & Bower*, for *Allen, Prestage, & Co.*, Manchester.

(1891) 223. 237.

Q. B. Div. (Denman and Vaughan Williams, JJ.) Feb. 21.

Richard *v.* Talbot. (*a.*)

Practice—Official referee—Appeal—Ord. 36, *r.* 50.

An appeal from the official referee is to the judge at chambers.

Byrne *v.* Browne, 37 *W. R.* 592, *distinguished.*

This was an appeal from the decision of Mr. Ridley, the official referee, refusing to postpone the hearing until the defendant returned to England.

Lyon, for the appellant.—The appeal is brought under ord. 36, r. 50. [Denman, J.—Have we any jurisdiction to hear such an appeal; ought you not to go to the judge in chambers?] *Byrne* v. *Brown*, 37 W. R. 592, is a decision that this was the proper court to appeal to. I was under the impression that the judge in chambers was the proper person to appeal to, but in view of that case I come here.

Fillon, for the respondent.

Denman, J.—We will take the appeal, but we do not consider the course taken in the present case, the proper one. The matter ought to have been brought before the judge in chambers. Rule 50 says "subject to any such order as aforesaid," referring to rule 49, which shows it is a matter for the judge in chambers.

Vaughan Williams, J.—The subject-matter of the rule, discovery and inspection, shows that it is a matter for the judge in chambers.

The hearing of the appeal was then proceeded with.

Solicitor for the appellant, *Graham.*

Solicitors for the respondent, *Hulbert & Crowe.*

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Q. B. Div. (Cave and A. L. Smith, JJ.) Feb. 6.

Ex parte Society of Apothecaries. (*a.*)

Costs—Appeal—Security.

The court will not, as a rule, require security for the costs of an appeal from the county court where leave to appeal has been unconditionally given by the judge of the county court.

Motion for security for costs.

An action for penalties had been brought in the county court at Swansea by the Society of Apothecaries against a herbalist for practising as an apothecary without a licence, and not being duly qualified so to practise. The defence rested upon the construction of 34 & 35 Hen. 8, c. 8. The county court judge gave judgment for the plaintiffs for a £20 penalty, with costs but gave the defendant leave to appeal.

Houghton, for the plaintiffs, applied for security for costs, as the defendant was a poor man.

Stanbury Eardley, for the defendant.—The county court judge said that the question raised upon such an old statute was an important one, and gave unconditional leave to appeal.

Cave, J.—I think this is a case where no security ought to be required. The county court judge thought the point raised to be a difficult one to decide, and gave the defendant leave to appeal. The defendant has a right to appeal. If no leave to appeal had been given the defendant, having a verdict against him, would still have been entitled to show some ground why the decision against him might reasonably be appealed from, and doubtless might have been required to show that he had some means of securing to the plaintiffs their costs should he fail in that appeal. For my own part I think this is a case in which we might have seen grounds for dispensing with such security had any been required. But, as it is, we should, by requiring him to give security now, be depriving him of a right to an appeal which the judge below thought reasonable. I think that where leave to appeal has been so unconditionally given by the court below we should not be right in restricting the exercise of that right.

A. L. Smith, J., concurred.

Motion dismissed.

Solicitors for the plaintiffs, *Upton, Athey, & Upton.*

Solicitor for the defendant, *P. Hodgkinson.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 23.

The London Library (*Appellants*) *v.* Carter (Surveyor of Taxes) (*Respondent*). (*b.*)

Inland revenue—Inhabited house duty—Exemption—Library—House used as—Attendant sleeping on premises—Customs and Inland Revenue Act, 1878 (41 *Vict. c.* 15), *s.* 13, *sub-section* 2.

A house was occupied by the London Library and used as a library and reading rooms for the use of members, who paid subscriptions thereto, but who derived no pecuniary profit therefrom. The use of a sitting room and bed room was given to an attendant, in addition to his wages, and the attendant and his wife dwelt in these

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

(*b.*) Reported by Sir Sherston Baker, Barrister-at-Law.

rooms both by day and at night for the protection of the premises. No other person dwelt in the premises.

Held, that the library is liable to inhabited house duty, as it is not exempt therefrom by the provisions of sub-section 2 of section 13 of the Customs and Inland Revenue Act, 1878.

Case stated by Commissioners of Income Tax.

Appeal on behalf of the Committee of the London Library against an assessment to inhabited house duty made upon their premises situate and being No. 14, St. James'-square, in the parish of St. James, in the city of Westminster, under 14 & 15 Vict. c. 36, for the year 1887-8, in the sum of £600 at 9d. in the £.

The London Library occupy the whole house, which is used as a library and reading rooms, and is open to members between the hours of 10 a.m. and 6.30 p.m.

The use of a sitting room and bed room therein is given, in addition to his wages, to an attendant in the service of the library, and this man and his wife dwell in those rooms both by day and at night for the protection of the premises. No other person dwells on the premises.

The London Library is a society existing for the purpose of providing a public library from which books may be had by the subscribers at their own homes.

The government of the library is vested in a committee, and members of the library, when elected by the committee, pay an annual or life subscription, and the income of the London Library is wholly derived from these subscriptions; the income so derived is expended in the purchase and binding of books, and generally in the maintenance of the library.

The library is not conducted with a view to making a profit, one of its regulations providing that "no dividend, gift, division, or bonus in money shall be made unto or between any of the members."

It was contended, on behalf of the library, before the commissioners that the premises were occupied for the purpose of "business," and that the attendant who dwelt there came within the category of a "servant" or "other person," as contemplated by sub-section 2 of section 13, of 41 Vict. c. 15; that the words "trade," or "business" in the clause referred to should be taken by themselves, that they were not qualified by the succeeding words, "by which the occupier seeks a livelihood or profit," and that the latter words referred to "profession" or "calling" only, being severed from the words "trade" or "business" both by the grammar and punctuation.

The surveyor of taxes contended that this construction of the clause was not admissible, and, further, that the Committee of the London Library did not carry on a "trade" or "business" within the meaning of the sub-section.

The commissioners were of opinion that the sub-section should be read together as a whole; that the Committee of the London Library did not occupy the house solely for the purposes of any "trade" or "business," or of any "profession" or "calling" by which the occupier sought a livelihood or profit; that they were correctly charged to inhabited house duty; and they confirmed the assessment.

The Committee of the London Library appealed.

Douglas Walker, for the appellants.—These premises are occupied by the London Library for the purpose of a "business" within the meaning of sub-section 2 of section 13 of the Act. They are therefore exempt: *The Chartered Mercantile Bank of India, London, and China*, v. *Wilson*, 26 W. R. 265, 3 Ex. D. 108. The house is not an inhabited dwelling-house within the meaning of the statute: *Riley* v. *Read*, 27 W. R. 414, 4 Ex. D. 100.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Dicey*, for the respondent were not heard.

Pollock, B.—It is admitted that this assessment would be a good assessment unless it be brought within a certain exemption in the Taxing Act.

The first and most material exemption to which our attention is called is that which is contained in the Act of 1878 (41 Vict. c. 15), s. 13, sub-section 2. The words are these: "Every house or tenement which is occupied solely for the purposes of any trade or business or any profession or calling by which the occupier seeks a livelihood or profit," shall be exempted from the duties.

If we take the earlier Act of Parliament—namely, 57 Geo. 3, c. 25, s. 1—which uses the words, "houses used solely for the purposes of trade," then 5 Geo. 4, c. 44, which extended the exemption to houses used as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling whereby the person occupying it seeks a livelihood or profit, I think it is quite clear that the broad intention of the Legislature is to make a distinction between a house which is inhabited for the purposes of dwelling, and a house which is occupied for the purpose of carrying on a business from the profit of which any person derives a benefit.

In the present case it seems to me that the London Library is not an institution, or a house in which an institution has its habitation, that it is not a house which is inhabited for the purposes of business or profession or calling whence any profits arise. It is an institution whereby a number of persons, all its members, derive an individual and mutual benefit, but in no way do they, or can they, make a profit by it, any more than persons make a profit by a clubhouse.

Many of our clubs have libraries, and many of the persons who meet there meet for the purposes of reading these books and bringing to their homes such books as they may not have. The same thing goes on in the London Library, and in no sense has any business for profit entered into the scheme. Therefore I think the London Library is not within that exemption.

A second point was taken, that the house is not an inhabited dwelling-house, and it is quite true that, within the decison of the court in *Riley* v. *Read*, there was no occupation of the club, no inhabitancy by the members. In the London Library there is a sitting room and a bed room which are given, in addition to the wages of the attendant, to that attendant, who is in the service of the library, and this man and his wife dwell in these rooms both day and night for the protection of the premises, and no other person dwells in the premises. It is obvious that there must be such an attendant that the members of the library should obtain the proper use of it, and the fair inference is that this man does inhabit that house and dwell in it for the benefit of the members. We were referred to the exemption in one of the earlier Acts, 48 Geo. 3, c. 55, schedule B., case 5, but in that case the person, and the only person, who resides in the house resides for the purpose only of taking care thereof. Therefore it is obviously intended to meet the case of what is called an empty house, a house awaiting a tenant, or awaiting its owner, a house in charge of a servant, who resides there for the purpose only of taking care of the house. That is not intended to meet the case which constantly occurs, of a servant of the owner being left in the house, not merely for the purpose of taking care of it, but for the purpose also of being ready to wait upon the owner when he comes to dwell there. In such a case his occupancy and inhabitancy is just as sufficient for the purpose of the inhabited house duty as if the master himself were there.

It seems to me, therefore, that this appeal must be dismissed, with costs.

Hawkins, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Gedge, Kirby, & Millett.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 21, 22.

GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES (SURVEYOR OF TAXES). (*a.*)

Inland Revenue—Income tax—Life assurance company—Sale of annuities for lump sum—Liability of company to income tax in respect of such annuities—Sums "paid out of profits or gains"—Schedule D, 16 *&* 17 *Vict. c.* 34.—5 *&* 6 *Vict. c.* 35, *s.* 102.

A life assurance company which, in addition to its ordinary business, carries on the business of selling annuities for a lump sum paid down, is not entitled to deduct the amount paid in respect of such annuities from their gross income for income tax purposes, but such annuities are liable to income tax in the hands of the company, and the company are the proper persons to pay the tax in respect thereof, as such annuities are sums "payable out of profits and gains" within the meaning of section 102 *of the Income Tax Act,* 1842.

Case stated by the Commissioners for General Purposes of the Income Tax Acts for the City of London.

The Gresham Life Assurance Society appealed to the Income Tax Commissioners for the City of London against an assessment of £276,278 under schedule D to the Act 16 & 17 Vict. c. 34 for the year ending the 5th of April, 1886.

The Gresham life assurance society carries on the ordinary business of a life assurance society.

The consideration for the granting of an insurance of a lump sum payable on death is either the payment periodically of sums of money or premiums, or the payment of a lump sum at the time of the insurance.

The consideration for the granting of an immediate annuity is the payment of a lump sum or premium paid down, and the consideration for a deferred or contingent annuity is the payment of periodical premiums or of a lump sum paid down.

The annuity obligations of the society are in many instances dischargeable abroad. The returns of the society are based (*inter alia*) upon actuarial calculations of prospective liabilities under existing contracts.

The valuation balance-sheet showed a surplus profit for three years of £93,056 16s. 8d., and the society had, during the triennium, paid income tax on £120,722, chiefly by the tax being deducted at its source on payment to them of interest and dividends. In arriving at the amount of profits and gains for three years—namely, the sum £93,056 16s. 8d.—the society had taken into account (among other items of expenditure) the following items:—

The sums paid in discharge of its annuity contracts, amounting to £253,252 5s. 10d., and the sum which had been paid for income tax, amounting to £3,247. These two sums added to the profit of £93,056 16s. 8d. amount together to the sum of £349,556 2s. 6d.

From this amount the surveyor of taxes admitted by way of deduction the sum on which income tax had already been paid—namely, £120,722—and he claimed that the appellants—the society—were chargeable for the three years with the difference—namely, £228,834 2s. 6d.

One year's proportion, or one-third part of this sum, amounts to £76,278 0s. 10d., for which amount the society was assessed for the year ending the 5th of April, 1886.

Before the commissioners, the surveyor of taxes contended that the exception of the annuities and the income tax paid by the society was by way of deduction from the gross income of the society in arriving at the amount on which income tax should be charged, and that that was not allowable under 5 & 6 Vict. c. 35, ss. 100, 159, and 16 & 17 Vict. c. 34, s. 40, and, further, that the society was entitled to deduct, and should deduct, the amount of the duty on payment of each annuity under 5 & 6 Vict. c. 35, s. 102, and 16 & 17 Vict. c. 34, s. 40.

For the society it was contended that they had treated, and were entitled to treat, the payment of annuities in the same manner as the payment of sums payable on the death of the assured, and that the same cannot be treated as a deduction from, or be brought into account so as to increase profits, or be treated as paid out of profits or gains, either within the meaning of schedule D, 4th rule, 1st case, section 100 and section 102 of 5 & 6 Vict. c. 35, or as otherwise brought into charge by such Act, or as sums on which income tax is payable under 16 & 17 Vict. c. 34, and they also contended that the amount of the gains and profits for the triennium being £93,056 16s. 8d., and they having paid tax on £120,722, they were not liable for any further assessment.

The commissioners confirmed the assessment of £76,278.

The Gresham Life Assurance Society appealed.

The questions for the opinion of the court were—(1) Whether the society is liable to be assessed in respect of the amount paid by them for annuities, or any part thereof? (2) whether the society is in any event liable to be assessed for any sum in excess of the amount on which tax has already been paid by way of deduction at its source?

Sir Horace Davey Q.C. (*Lumley Smith, Q.C.,* and *W. Fooks* with him), for the appellants.—It is said that we are not to deduct these annuities from the gross income of the society, but we submit that the sums paid in respect of these annuities are payments of debts incurred by the society out of the gross income of the society. These annuities are not paid out of profits or gains brought into charge, and are therefore exempt from taxation in the hands of the society. When an annuity is sold a lump sum is paid down for the annuity, and this lump sum would most likely be invested, and the tax would be deducted from the interest arising from such investment, so that the society would already have paid the tax on the interest arising from such investments. That being so, they ought not to be asked to pay the tax on the annuities they pay in respect of those lump sums. These annuities cannot be treated as paid out of profits or gains, nor are they paid out of profits or gains brought into charge by virtue of the Act within the meaning of section 102 of 5 & 6 Vict. c. 35. The society is entitled to deduct them from the gross income.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Dicey,* for the respondent, were not called upon.

POLLOCK, B.—It seems to me we cannot decide in favour of the appellants without disturbing, not only the mere enactment in language, but the spirit of the Income Tax Acts, which has been acted upon for a long series of years. The question raised here is not whether this is a certain profit or gain belonging to the assurance company, who are the appellants, but the question is whether they who have to pay, pursuant to their contracts and mode of business, certain annuities, are the proper persons to be taxed in respect of those annuities, or whether the persons who are the recipients of those annuities ought and must be taxed.

The appellants are treated as any other trading company, and the process of ascertaining what are the taxable items in the receipts of a trading company is by showing what all their receipts are, and then, on the other side of the account, giving them credit for sums which must be taken off, being sums paid in the course of the trade without which it may be said the net profits never would have been earned. In the present case the

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

important fact is this—the company, in the course of their trade and business, have two different classes of business, the one life assurance, the other the sale of annuities. In the case of life assurance no question can arise, because, on a life lapsing by the death of a customer, a lump sum is paid to his personal representatives, and therefore there is no question of annuity or annual payment at all. In the case of an annuity the reverse operation takes place, because the annuitant pays a lump sum to the society, and the society, in return for that, pay an annual sum or annuity to him during his life, and it is in respect of its being an annual sum that it comes within the language of the Act.

Now when we turn to the statute itself it is obvious that the intention of the Legislature is to give to the revenue the benefit of taxing upon the first possible occasion of taxation any moneys which are taxable. In the case of the Bank of England the matter is clearly provided for, and the provisions are compulsory. Those provisions are contained in section 89 and following sections of the Act, and it is expressly declared that, in respect of all dividends, the Company of the Bank of England must, in the first instance, set apart and retain for income tax such sums as are proper in respect of all dividends paid by them.

Now there are other cases where the payment is not in the nature of a payment made by the Bank of England or a public company, but where it is a payment made in respect of some private arrangement, and that was dealt with in section 40, which has been cited to us, in which the matter is left optional to deduct the income tax from any annuity or interest on money, which they have contracted to pay, which is spoken of in the section as a "personal debt or obligation by virtue of any contract." The deduction here is optional, but if it is made then it is provided that the person to whom the annuity is paid shall have the benefit of the payment as in the other case.

Now the present case is different from either of these cases, and the question is whether it comes within section 102 of the Act. It is said that this is not payable out of profits or gains. I think the true answer to that is that it is payable out of profits or gains, on the principle that, unless the lump sums received are chargeable with these annuities, those lump sums paid would be profits and gains. It is equally clear that, although they are not net profits or gains, they are as much gains as any sums brought into the account of a merchant, being a payment to him in respect either of goods sold, services rendered, or in respect of some personal contract.

Therefore, when you come to see what is the intention and the language of the Legislature, it seems to me clear that the intention is to do in this case what the Legislature have done with respect of the Bank of England, and other annuities in other cases, and to find at its source a taxable item and to tax it while in the hands of the assurance company, that those who are the annuitants may have the benefit if they should be called upon to account for the same sum.

It seems therefore on these grounds that the appellants must fail, and that this appeal must be dismissed, with costs.

Hawkins, J.—I am of the same opinion, and I do not think it necessary to pronounce a separate judgment.

Appeal dismissed.

Solicitor for the appellants, *R. L. Devonshire.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Priby Council.

Nov. 7, 30.

Ocean Steamship Co. (Owners of s.s. "Hebe") *v.* Apcar & Co. (Owners of s.s. "Arratoon Apcar").

"The Arratoon Apcar." (*a.*)

(*On appeal from the Vice-Admiralty Court of the Straits Settlements (Settlement at Singapore).*)

Ship—Collision at sea—Statutory Regulations, art. 18.

There is no power to absolve a vessel from the consequences of neglecting the Statutory Regulations for Preventing Collisions at Sea, unless an absolute necessity is proved for disregarding them.

Where a vessel was proved to have been navigated recklessly, yet where another which collided with her had neglected to slacken speed in good time, in accordance with article 18,

Held, the latter to blame.

This was an appeal from a decree, dated the 3rd of August, 1888, of the Vice-Admiralty Court at Singapore. That court decided in favour of the respondents, the owners of *The Arratoon Apcar*, in an action brought by them against the steamship *Hebe* and freight, and also in an action brought by the appellants against the steamship *Arratoon Apcar*, and condemned *The Hebe* and her bail in the amount to be found due to the respondents in the first action, and in costs.

The facts appear in their lordships' judgment.

Sir R. E. Webster, A.G., and *Kennedy, Q.C.* (*Aspinall* with them), for the appellants.—*The Hebe* was alone or partly to blame for porting improperly. Article 22 of the regulations was infringed, also article 18 by not slackening in time: *The Ceto*, 14 App. Cas. 670; *The Benares*, 32 W. R. 268, 9 P. D. 17; *The Beryl*, 32 W. R. 648, 9 P. D. 137, 32 W. R. Dig. 188; *The Khedive*, 29 W. R. 173, 5 App. Cas. 876, 882.

Sir W. Phillimore, and *Hollams*, for the respondents, argued that in the circumstances *The Arratoon Apcar* acted rightly, and non-compliance with article 18 was justified: *The Jesmond*, L. R. 4 P. C. 1, 20 W. R. H. L. Dig. 21; *The Rhondda*, 8 App. Cas. 549, 31 W. R. Dig. 176; *The Emmy Haase*, 32 W. R. 880, 9 P. D. 81.

Sir R. E. Webster, A.G., replied.

Cur. adv. vult.

The judgment of their lordships (Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch), was delivered by

Lord Macnaghten.—The collision which led to this litigation took place in the Straits of Malacca on the 22nd of May, 1888, about 3.35 a.m., between the steamship *Hebe* and the steamship *Arratoon Apcar*.

Both vessels were under steam alone. The wind was southerly and moderate. The weather was fine and the sky clear. The regulation lights of both vessels were in order and burning brightly.

Both vessels were considerably damaged by the collision.

Cross actions were brought in the Vice-Admiralty Court of the Straits Settlements. Each vessel accused the other of being the sole cause of the disaster. The actions were consolidated, and tried together. Judgment was given on the 3rd of August, 1888.

The learned judge found *The Hebe* alone to blame. He accepted the account given by the witnesses for *The Arratoon Apcar*, and came to the conclusion that *The*

(*a.*) Reported by J. M. Collyer, Esq., Barrister-at-Law.

Hebe was navigated with reckless neglience, and that the persons in charge of her at the time of the collision were, one and all, ignorant and incompetent.

From the decree founded on this judgment the owners of *The Hebe* appealed.

At the hearing before their lordships the learned counsel for the appellants did not deny that *The Hebe* was to blame; but they contended that the evidence of the respondents' own witnesses proved that *The Arratoon Apcar* was also in fault.

The facts of the case as they may be gathered from the evidence on behalf of *The Arratoon Apcar* are in substance as follows:—*The Arratoon Apcar*, steering S. 60 degrees E. sighted the masthead light and the red and green lights of *The Hebe* when the two vessels were about five miles apart, and apparently as nearly as possible on opposite courses. *The Arratoon Apcar* was going about ten knots an hour at the time. She ported one point, and in about two minutes lost *The Hebe's* green light, and then she steadied on that course. Shortly afterwards the green light of *The Hebe* appeared again about two points on her port bow. *The Arratoon Apcar* then ported another point and again lost *The Hebe's* green light, and kept on that course until *The Hebe*, being about 2½ points on the port bow, suddenly shut out her red light and showed her green light for the third time. It is impossible to determine the distance between the two vessels at this moment; but their lordships think that the learned judge was probably right in supposing that it must have been a little more or a little less than half a mile. The officer in charge of *The Arratoon Apcar* at once saw his danger. He gave the order "hard-a-port," and went himself to the wheel house to make sure that the order was carried out. He saw his vessel beginning to come round before he left the wheel. Then he went to the telegraph and stopped the engines. The collision took place almost immediately afterwards, the starboard bow of *The Hebe* which was still going full speed striking the port bow of *The Arratoon Apcar* at something less than a right angle. The engines of *The Arratoon Apcar* were not reversed until after the collision.

On this state of facts it was contended by the learned counsel for the appellants that *The Arratoon Apcar* infringed the Regulations for Preventing Collisions at Sea in three particulars. They argued (1) that *The Arratoon Apcar* ought to have slackened speed before the green light of *The Hebe* came into view the third time; (2) that the engines of *The Arratoon Apcar* ought to have been stopped and reversed at the time when the officer in charge gave the order "hard-a-port"; and (3) that at any rate the engines of *The Arratoon Apcar* ought to have been reversed as well as stopped before the collision.

The learned judge in the Vice-Admiralty Court, who does not seem to have had the assistance of nautical assessors, appears to have felt little or no difficulty upon any point of the case except upon the one question whether it was the duty of the officer in charge of *The Arratoon Apcar* to reverse as well as to stop. The excuse put forward at the trial for not reversing was that *The Arratoon Apcar* had a left-handed screw, and that its action would have "deadened" the effect of the port helm if the engines had been reversed. With some hesitation the learned judge accepted this excuse, and exonerated *The Arratoon Apcar* from all blame.

Their lordships are, however, compelled to take a different view. They are advised by their nautical assessors that before the green light of *The Hebe* appeared the third time there were sufficient indications to the officer in charge of *The Arratoon Apcar* (supposing him to have been a person of ordinary skill using reasonable care) to show that the two vessels were approaching so as to involve risk of collision. They are further advised that a prudent seamen in the position in which that officer was placed by the conduct of those on board *The Hebe* would have stopped, or at the least have slackened speed, until the course of the approaching vessel could be made out with something like certainty.

Under any circumstances their lordships would be slow to differ from their nautical assessors on a question of navigation. In the present case, thinking as they do that the risk of collision was not determined when *The Arratoon Apcar* ported the second time, they see no reason for not giving effect to the advice which they have received. They are therefore obliged to hold that *The Arratoon Apcar* was to blame for not slackening in good time before the third appearance of *The Hebe's* green light.

The error on the part of *The Arratoon Apcar* may seem venial compared with the misconduct of those on board *The Hebe*. But their lordships have no power to absolve a vessel which infringes the Regulations for Preventing Collisions at Sea from the consequences prescribed by statute unless a plea of necessity is made out.

The view which their lordships have taken under skilled advice renders it unnecessary to pronounce an opinion on the conduct of the officer in charge of *The Arratoon Apcar* after *The Hebe's* green light appeared the third time. It was probably too late then to prevent a collision. Their lordships however think it right to say that they are not satisfied that the excuse for not reversing ought to have been accepted as sufficient, nor are they convinced that the officer in charge of *The Arratoon Apcar*, after he saw the danger, was justified in going to the wheel before giving orders to stop. Though the time lost was short, there was an appreciable delay in complying with the regulations.

In the result their lordships will humbly advise Her Majesty that the decree under appeal ought to be varied by pronouncing *The Arratoon Apcar* to blame as well as *The Hebe*, with the usual consequences, including a direction to assess the damages sustained by *The Hebe*, and by discharging the order as to costs.

There will be no costs of the appeal.

Solicitors for the appellants, *Pritchard & Sons.*

Solicitors for respondents, *Hollams, Sons, Coward, & Hawkesley.*

Court of Appeal.

App. Bankruptcy. April 25.

In re WALLIS.

Ex parte LICKORISH AND ANOTHER. (a.)

Solicitor—Mortgage—Solicitor - mortgagee—Profit costs —Taxation.

A mortgagee solicitor who acts in person as a solicitor in realizing his security cannot recover profit costs from the mortgagor, but only expenses out of pocket.

Sclater v. Cottam, 5 *W. R.* 744, *affirmed.*

Appeal from an order of Mr. Registrar Linklater.

The appellants, Messrs. Lickorish & Bellord, solicitors, were mortgagees of certain railway shares deposited with them as security, by way of equitable mortgage, in consideration of a loan by them to the debtor Wallis, the present respondent. Having failed to realize their mortgage debt (for which they had obtained judgment) by writs of *fieri facias* and *elegit*, they filed their petition, and a receiving order was made against the debtor on the 3rd of October, 1889. Subsequently, upon the

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at Law.

application of the debtor, the petition was reheard, and the registrar ordered that the receiving order should be made unless the debtor paid, within a certain time, the debt of the petitioners, the costs of the bankruptcy proceedings, and the costs as between mortgagor and mortgagee. Upon an appeal this order was confirmed, but a further extension of time given, and, finally, by consent, on the 20th of January, 1890, the registrar referred the question of costs to the taxing master, provided that any legal question be referred back to him. The debtor deposited sufficient to meet the debt and the probable costs, but upon taxation contended that the petitioners were only entitled as to the mortgage costs, for costs out of pocket, and not for profit costs. Upon reference to the registrar, he held that he was bound by the judgment of Kay, J., in *In re Roberts*, *ante*, p. 225, 43 Ch. D. 52, to hold that the petitioners were only entitled as mortgagees to their costs out of pocket, and that all items in "secured creditors' costs," except out-of-pocket expenses, be disallowed. Against this decision the petitioning creditors now appealed.

Lane, Q.C., and *Maidlow*, for the appellants.—Where the solicitor's costs of realizing a security are chargeable against the debtor there is no case showing that a mortgagor debtor escapes such liability because the mortgagee creditor has acted for himself. Professional costs have been allowed to a solicitor acting as party to the suit for himself: *London Scottish Benefit Society* v. *Chorley*, 32 W. R. 523, 781, 12 Q. B. D. 452, 13 *Ibid.* 872; *The National Provincial Bank* v. *Games*, 34 W. R. 600, 31 Ch. D. 582. *Sclater* v. *Cottam*, 5 W. R. 744, has not been considered as binding in chancery practice. *In re Donaldson*, 27 Ch. D. 544, 35 W. R. Dig. 61, and *Price* v. *M'Beth*, 12 W. R. 818, left the question open. *In re Roberts* is not a case between a mortgagee and mortgagor, and, if applicable, should be overruled.

Wallis, the respondent, in person, was not called upon.

Lord ESHER, M.R. — A long argument has been addressed to us, founded on the assumption that the one case of the *London Scottish Benefit Society* v. *Chorley* inferentially overrules previous decisions, especially that of Kindersley, V.C., in *Sclater* v. *Cottam*. Such an argument is a most dangerous one, and I decline to follow it unless it can be shown that the later decision necessarily implies the overruling of earlier decisions. Here the later decisions of the *London Scottish Benefit Society* v. *Chorley* and the *National Provincial Bank of England* v. *Games* do no such thing. We have a judgment of Kindersley, V.C.'s, given thirty years ago, which lays down that the rights between mortgagor and mortgagee depend upon contract, and when in ordinary form, without any express contract otherwise, the mortgagee is not allowed to charge the mortgagor for remuneration for his own services, if such were given in reference to matters such as are now before us. The statement of the court in *Sclater* v. *Cottam* is not confined to solicitors, but applies to any mortgagee, and to such work and labour as he might perform for himself and did so perform. For remuneration for such work he is not entitled to charge by the contract formed out of the relation of mortgagor and mortgagee. This decision, given so long ago, and never, practically, questioned, must be well known to the profession, especially to solicitors. Even if the services involved between mortgagors and mortgagees be not precisely the same now as then, it must be assumed after the lapse of so many years that subsequent contracts are made in view of and in accordance with such an established decision as to the practice. Even if I differed, I should not attempt, under such circumstances, to overrule such a well-established decision. But I do not feel at all disposed to differ from it. On the contrary, I think it one absolutely just; while to say that a man is entitled to charge for his own services when he has incurred no expense thereby seems to me unjust on the face of it. As to the other cases cited, one counsel says we must overrule them, and the other, that they can be distinguished from this case. I agree with the first counsel, but I decline to overrule the cases cited; and as to the two cases which are said to overrule the earlier decisions, the *National Provincial Bank* v. *Games* and the *London Scottish Benefit Society* v. *Chorley*, I consider that they do nothing of the sort; first, because they apply to cases of litigation where the solicitor has acted for himself, and merely rule that he is entitled to the same costs as if he had employed a solicitor, except as to certain items for which, from the fact of his being a solicitor, such as for instructions, he has incurred no expense; and, secondly, because the decisions in those cases do not affect at all cases of relationship between mortgagor and mortgagee such as we have before us. The proper construction of the ordinary contract between mortgagor and mortgagee is that laid down by Kindersley, V.C., in *Sclater* v. *Cottam*. This appeal must, therefore, be dismissed.

FRY, L.J.—The case turns on the relation between a mortgagor and mortgagee. Where no express contract is made in relation to the equity of redemption the mortgagor must pay the principal and interest, and the costs, charges, and expenses properly incurred in reference to the mortgage debt, and the costs of suit; but here we have not to deal with any costs of suit in relation to the mortgage, but only with costs or expenses or charges for work undertaken by the mortgagee himself. There has been no case cited to us where a mortgagee has been allowed to recover remuneration for work and labour done as for a charge incurred or cost expended. And the courts have long held that there can be no remuneration allowed to the mortgagee for work done by himself. For instance, suppose a land surveyor to be a mortgagee, he could not charge for surveying work undertaken by himself, or, again, a mortgagee in possession might appoint a receiver charging a commission, but he could not claim for such commission if he himself acted as receiver. This principle was well established before 1858, and was properly acted upon, and not introduced by the Vice-Chancellor in *Sclater* v. *Cottam*; there has been no exception shown to the regular exercise of this rule, nor is it in any way affected by the cases dealing with costs of litigation conducted by solicitors in person.

LOPES, L.J.—The terms of redemption are the payment of principal, interest, and costs. What costs? Costs in the ordinary acceptance of the term are not for the services rendered or charges incurred by the mortgagee, but for the services of a solicitor. Here there was no solicitor employed by the mortgagee, he did the work himself. There can, therefore, have been no costs incurred in the ordinary meaning of that word. I think this case falls within the authority of *Sclater* v. *Cottam* and *In re Roberts*, and I may add that I consider the judgments in those cases to be just and wholesome decisions.

Appeal dismissed.

Solicitors for the appellants, *Lickorish & Bellord.*

Solicitor for the respondent, *W. Rogers.*

From Chan. Div. Jan. 17, 18; Feb. 4, 6, 7.

REILLY v. BOOTH. (a.)

Easement—Deed—Construction—Parcels—Conveyance of land, "together with exclusive use" of "gateway"—Corporeal hereditament, general easement for all purposes, or right of way only.

A piece of land at the back of a row of houses was granted in 1839, with two of the houses, to a purchaser in fee simple, "together with the exclusive use of" a covered gateway or passage, which formed a sort of tunnel leading from the land at the back through another house in the row into the street in front, and the description of the parcels included the following words:—"Which said piece of ground and premises are more particularly delineated and described by the portion on the plan or ground plot thereof drawn in the margin of these presents coloured pink." The passage was described by its measurements in length, width, and height, but it was not coloured at all on the plan, though it was suggested that that might have been because the parts of the building above and below the passage were not included in the grant, the house through which it passed not being so included. In 1882 that house was demised to R. In 1885 the piece of land at the back of the houses was demised to B., "together with the entrance-way and passage thereto belonging." B. not having confined himself to using the passage as a "way" of exit into and entrance from the street, but having used it as a room or shop for a variety of purposes, the original grantor and R. brought an action against B., claiming a declaration that he was not entitled to use the passage otherwise than as in exercise of a right of way, and an injunction to restrain him from doing so.

Held (affirming the decision of Kekewich, J.), *that, even if the entire property in the passage did not pass by the conveyance of* 1839, *the grantee, and B. as claiming under him, were, at any rate, not restricted to using it merely as a way, but were entitled to use it, and the floor, walls, and ceiling of it, for any purposes not inconsistent with the rights of the adjoining owners or the public.*

But, semble, *the entire property in the passage did pass by the conveyance.*

Appeal from Kekewich, J.

Certain freehold messuages, afterwards numbered 271, 273, 277, 279, and 281, Oxford-street, together with some pieces of land with sheds, lying at the back of such messuages, and then used as stables and a stable-yard, formerly belonged in fee to the trustees of the will of George Pollen. There was an opening or tunnel through No. 277, forming a covered gateway for horses and carriages from Oxford-street to the said stables and stable-yard at the back. This gateway or passage was bounded above, below, and on each side by various parts of the messuage through which it passed, there being a vaulted shooting-gallery below the floor of the gateway. On the 10th of July, 1839, the messuages afterwards numbered 271 and 273, with the stables and stable-yard at the back, were conveyed to Samuel Wimbush in fee, under the following description:—"All that piece or parcel of ground, and all that messuage or tenement and other buildings erected and built thereon, situate, standing, and being on the south side of Oxford-street . . . containing in length from east to west, on the north side thereof, 30ft. 11in.; from the north to the south on the east side of the gateway, 41ft. 6in.; then returning from east to west across the said gateway, 12ft. 9in.; then returning from south to north on the west side of the said gateway, 8ft. 6in.; then continuing from east to west abutting on the back fronts of three newly-erected houses in Oxford-street, 32ft. 8in.; then returning from north to south, on the west side, 98ft.; then returning from west to east, on the south side, 79ft. 3in.; then returning from south to north, on the east side, 88ft. 11in.; then returning from east to west, 3ft; and, lastly, from south to north, abutting on premises in Oxford-street, 27ft. 9in." This description was followed by the words "*together with the exclusive use of the said gateway into Oxford-street,* being 10ft. 11in. in the clear on the north side, 11ft. 7in. on the south side, in depth 41ft. 6in., and height 15ft. . . . which said piece of ground and premises are more particularly delineated and described by the portion on the plan or ground plot thereof drawn in the margin of these presents coloured pink. Together with all and singular houses . . . walls, ways . . . yards, areas . . . easements, rights . . . and appurtenances whatsoever, to the said messuage or tenement, buildings, hereditaments, and premises . . . belonging or in anywise appertaining." The tunnel or gateway, though shown on the plan, was not in fact coloured on it.

The messuage, No. 277, was afterwards, by lease dated the 25th of March, 1882, demised to the plaintiff, R. W. Reilly, for a term of twenty-one years. In 1885 the hereditaments at the back or south side of the messuages were demised, by indenture of the 6th of October, 1885, to the defendant, William Booth, "together with the entrance way and passage thereto belonging," for a term of fifty-three and a quarter years from the 25th of December then last, less the last seven days of such term.

The said defendant took the premises for the purpose of holding meetings there of a religious body known as the Salvation Army. He put up match boarding along the roof of the gateway, and he put inscriptions and fixed notice boards on the walls of it. He also had a book-stall in it for the purpose of selling newspapers, books, and tracts, and he had fixed up at the front of the entrance abutting on Oxford-street a large transparency in such a way as to extend above the top of the entrance and lean against the front of the messuage No. 277, Oxford-street, to which it was fastened by a screw or screws.

This action was commenced on the 16th of May, 1888, by the present trustees of George Pollen's will and by Reilly against the said William Booth. The plaintiffs alleged that Booth was merely entitled to a right of way through the gateway, but that he was treating it as his absolute property, including the floor, walls, and roof, and that by his acts the risk of fire to No. 277 was increased, and the general character and appearance of the house prejudicially affected. They accordingly asked for a declaration that the defendant was not entitled to use the entrance otherwise than in exercise of a right of way, and claimed an injunction to restrain him from doing so. The defendant pleaded that he was entitled to the exclusive use, occupation, and ownership of the entrance or gateway during the continuance of his term, and not merely to a right of way through it.

Kekewich, J., held that the defendant was not restricted to using the entrance merely as in exercise of a right of way, and accordingly dismissed the action

The plaintiffs appealed.

S. Hall, Q.C., and *Maidlow,* for the appellants.—The question is whether under the words "the exclusive use of the gateway" the exclusive use of the space passed, or merely the exclusive use of the way. The context and circumstances indicate that the intention was merely to pass an exclusive right of way. The word "use" must be read as limited by the nature of the thing to be used, and therefore the grant of "the exclusive use of the gateway" is nothing more than the grant of a right of way and an undertaking not to allow anyone but the grantee to use it. It is an easement, not

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

property: *Heap* v. *Hartley*, *ante*, p. 136, 42 Ch. D. 461; *Hill* v. *Tupper*, 11 W. R. 784, 2 H. & C. 121; *Keppell* v. *Bailey*, 2 My. & K. 517, 535, 536; *Aspden* v. *Seddon*, 24 W. R. 828, 1 Ex. D. 496. If this was intended to be conveyed as property it would have been coloured on the plan like the rest of the property conveyed. The dimensions given exclude the walls of the house. The defendant has interfered with the walls by screwing into them a large "transparency," and that is clearly unjustifiable.

They referred also to *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348, 8 W. R. H. L. Dig. 4.

Warmington, *Q.C.*, and *Sargant*, for the respondent.—First, if the words only amount to a covenant, it is a negative covenant, and a court of equity will restrain a person taking the land with notice from acting in breach of such a covenant. Secondly, on the true construction of the words, it amounted to a grant in fee of the particular space, just as there may be a grant of chambers in Lincoln's-inn in fee. The passage was not coloured in the plan like the rest of the property conveyed in fee, because the space above and below the passage was not intended to be conveyed. "The gateway," as it existed at the time of the grant, was a corporeal hereditament, and the grant of it was a grant of the hereditament itself: *Willis* v. *Watney*, 30 W. R. 424. Thirdly, assuming that it was not a grant of the freehold in the space, yet it was, at all events, a grant of a general easement—*i.e.*, an easement for all purposes. The word "gateway" does not limit that which is granted, it is merely descriptive of the *locus in quo*: *Allan* v. *Gomme*, 11 Ad. & Ell. 759; *Henning* v. *Burnet*, 8 Ex. 187; *Watts* v. *Kelson*, 19 W. R. 338, L. R. 6 Ch. App. 166; *Cook* v. *Gerrard*, 1 Saun. 170; *Rabbeth* v. *Squire*, 7 W. R. 657, 4 De G. & J. 406; *Mannox* v. *Greener*, L. R. 14 Eq. 456, 21 W. R. Dig. 289; *United Land Co.* v. *Great Eastern Railway Co.*, 23 W. R. 896, L. R. 10 Ch. App. 586; *Newcomen* v. *Coulson*, 25 W. R. 469, 5 Ch. D. 133. A grant of the profits of lands is a grant of the land itself: Thomas's Co. Litt., vol. 1, p. 200, 4b (g); "for what is the land but the profits thereof?" The words "together with" are not always used in conveyances to introduce mere appurtenances, but sometimes to introduce other parcels. The words "exclusive use" convey at least as much as "profits." A conveyance of the "exclusive use" of a meadow would pass the entire property in it. A single room can be reserved out of a house conveyed in fee: Perkins's Profitable Book, paragraph 641. [They also referred to *Rex* v. *Inhabitants of Eatington*, 4 T. R. 177, Co. Litt. 4b; *Knight* v. *Pursell*, 27 W. R. 817, 11 Ch. D. 412; *Weston* v. *Arnold*, 22 W. R. 284, L. R. 8 Ch. App. 1084; *Finch* v. *Great Western Railway Co.*, 28 W. R. 229, 5 Ex. D. 254; Gale on Easements, c. 3.] The fact that the length of the passage is specified is fatal to the right of way theory. In *London Taverns Co.* v. *Worley*, November 24th, 1888, before the Court of Appeal, the grant was of an exclusive "right" of gateway. The bookstall is a proper exercise of a right of "gateway." As to the construction of the grant, the position of the property at the time was this:—There was a small frontage to Oxford-street, and a large piece of land at the back. This is a grant for ever in fee of the use of a gateway. Such a grant of a house or orchard would surely pass the fee, and why not in the case of a gateway? The appellants' counsel are trying to make a word, which is a perfectly good description of the property, a measure of its use. They are seeking to introduce the words "as a means of passage into Oxford-street," or "as a gateway." It is for the grantor, who is seeking to limit the grant, to satisfy the court clearly that the grant has a limited construction. The effect of the grant (not limited) is to make the land at the back equivalent to frontage land. The grantee would have had an implied right of way without any express grant, which goes to show that the words were intended to give something more.

S. Hall, *Q.C.*, in reply.—Assuming that the respondent is not the owner of the passage, the burden is on him to show the nature of the easements he is entitled to. The respondent has really only an easement of way. The use of a gateway is the use of it for the ordinary purposes of a gateway—that is, for passing through. The walls are not included in the measurements. The argument for the respondent was based on the erroneous assumption that the walls were included. The obvious meaning of the words is "the use of the way into Oxford-street." In order to grant what the respondent claims, the words should have been "together with all that space, or room, or chamber." At the time of the grant it was simply a rough paved road. *Willis* v. *Watney*, and the other cases cited on this point, are distinguishable.

COTTON, L.J.—This is an action about apparently a small matter, but the action may be of some importance, if the matter complained of is small, because if the defendant has not got the property in this passage or gateway, he may acquire it by the acts which are complained of by the plaintiffs. One can understand, therefore, how it is that such an action as this is brought. But, really, what we have got to consider is this, whether the plaintiffs are entitled to complain of acts done by the defendant beyond the grant under which he claims. I cannot say that this deed of conveyance of 1839 is a very careful bit of conveyancing, but, still, we must decide what is the result of it. The property of the original grantors consisted of a row of houses on the south side of Oxford-street, facing the street, and through one of the houses there was a passage or gateway. I think I had better use the word "passage," so as not to introduce the word "gateway," which has been so much discussed. There was a passage, going through the ground-floor of one of these houses, back into what was a large stable, built by Messrs. Wimbush. Then there was a conveyance in terms which have created very considerable difficulty. The difficulty which arises is as to what right Wimbush, and those who claim under him, had granted to them, in this passage or gateway, as it is called in the deed, going from Oxford-street, on the south side of Oxford-street, through the ground-floor of one of those houses into the stables which were undoubtedly granted to Wimbush. The conveyance to Wimbush was in fee, and was a conveyance of "all that piece or parcel of ground, and all that messuage or tenement and other buildings erected and built thereon, situate, standing, and being on the south side of Oxford-street." Then the length is given. I need not read that, except to point out that in describing the width of the parcels, which are clearly conveyed in fee to Wimbush, there is a reference to that part of them which goes across the gateway, and there it is recognized as "the gateway," as some physical thing there which is to be recognized, and which is important in describing the metes and bounds of the back portion of the property which has been conveyed, and which was undoubtedly conveyed in fee simple to Wimbush. After giving that description of the parcels, there is a reference, to the gateway I have mentioned, in these words, "together with the exclusive use of the said gateway"—(that gateway had been already referred to for the purpose of defining the length of the boundaries)—"into Oxford-street, being 10 ft. 11 in. in the clear on the north side, and 11 ft. 7 in. on the south side, in depth 41 ft. 6 in., and in height 15 ft. . . . which said piece of ground and premises are more particularly delineated and described by the portion on the plan or ground plot thereof in the margin

of these presents coloured pink." The portion which is undoubtedly conveyed in fee simple is coloured pink on the plan, but the portion occupied by the gateway or passage from the stables of Wimbush into Oxford-street is not coloured pink at all. Then there are general words, "together with all and singular houses, outhouses, buildings, walls, ways," &c.

What interest is conveyed in that gateway to Wimbush by this deed? It is contended by the plaintiffs that there is a right to use that passage simply for the purpose of a way from the stables into Oxford-street, and from Oxford-street into the stables, not that anything was to restrict them to a passage to the stables so long only as they were used as stables, but they say there is only a right of way granted. As far as I can see, their argument depends on two things—that what is granted is the exclusive use of the said gateway "into Oxford-street," and that it is not introduced in the ordinary way of adding to parcels a part of which has been already enumerated, but that it is introduced by the words "together with," which usually introduce mere general words, easements, or appurtenances. In my opinion one cannot, by the mere reference to this passage as "the gateway," confine the user of it to the use for the purposes of a way. It is "the exclusive use." What is granted is not the use merely for the purpose of getting into Oxford-street, or from Oxford-street into the stables, but "the exclusive use of a gateway into Oxford-street." It is said the gateway is to be restricted to a use for the purposes of a way. In my opinion that is not so. One finds here a gateway to that which I have sometimes called a tunnel, but which I would rather call a passage through this house. It is defined as an existing thing, called by that name, and to give the exclusive use of an existing thing, though it may be called a gateway, does not, in my opinion, convey this restriction—that it is to be used only for the purpose of a way. It is not the use of the right of way through the gateway that is granted, but it is "the exclusive use of the said gateway." Then one finds, as I have read in the parcels, that the particular thing called "the gateway" is described by height, by length, and by width. In my opinion that is inconsistent with the term "gateway" being referred to, as a limit to the use to which that which was described was to be put. Although these words are not very apt, yet there is nothing in them which can enable us to restrict the exclusive use which is granted in fee to Wimbush. No one else had any right or interest in this for ever; the exclusive use is granted to him in fee, and the grantors retain no interest in that use of it at all. They only had a use in the walls, the ceiling, and the floor, because they had a shooting gallery underneath the floor and they had the rooms of a house above, and they had, on one side certainly, the house which was afterwards Reilly's. Therefore they had an interest in the floor, in the ceiling, and in the walls on the side. Of course they had a right with respect to the wall on the east side, but not any in respect of the house belonging to them, except a right to support for that portion of it which was built over that wall and supported by that wall. In my opinion it would be wrong to say that there is anything to restrict the user. What is given is the exclusive user of the gateway, which the grantee can use in any way and employ for any purpose not inconsistent with the rights of the neighbours or with the rights of the public. Therefore we must consider this as intended to be not only exclusive—that is, excluding others from sharing it—but a right to use this passage, which is called a gateway, for any purpose which the law will allow, and which does not interfere with the rights of the neighbours.

It is said that will be granting a new kind of easement not recognized by the law. There would be a difficulty, I think, in granting the right to use this passage by way of easement merely, without describing it in any way as a gateway or passage. But I do not at all think, even if this is a mere grant of easement, that it would be right to construe it as a covenant on the part of the grantor that this passage shall be restricted from being used for any lawful purpose to which it might be applicable by Wimbush. That being so, I should not myself be willing to assist, by way of injunction, the plaintiffs, when there was a covenant, of which they had notice, that the grantee Wimbush, through whom the defendant claims, should be at liberty to use that passage for any lawful purpose, or for any purpose for which it could be used without any interference with the rights of neighbours. But it may be (and I think this is probably the true construction of it) that the grant of an exclusive use for ever of this passage does convey the property in that passage. All we have to decide is whether anything is now being done of which the plaintiff can complain. We have not now to decide the question whether, if there is a grant of this portion of the house, it is a grant of that passage, just as there might be a grant of a set of chambers which would give a right to the chambers, with certain restrictions as to the use of the walls, the ceiling, and the floor. It is not necessary, and I think it is undesirable, when the question does not arise, to decide, when a person has a set of chambers conveyed to him, what are the rights as regards floors, walls, and ceiling, but clearly he cannot do anything to interfere with the rights of his neighbours, which still exist notwithstanding the grant to him of the particular portion of the house.

What we have to consider is this—whether, looking at this either as a grant for ever of a use for all purposes, of this portion of the building which is now occupied by Reilly, or looking upon it as a conveyance of the property, there is anything of which the plaintiffs can complain. My view is that it is a conveyance really of the property in that passage which is so described. It is said that on the plan this passage is not coloured. I think the reasonable answer, as regards that, has been given by Mr. Warmington, that this was not a conveyance of the property in that portion of the building so as to give the right to the soil down below, and so as to give the right to the air going upwards over that, because that was, as we know, dealt with in a contemporaneous deed. In the conveyance of the building now occupied by Reilly there were some rights given to him below and some rights given to him in the house over that passage, and so it would have been wrong to have coloured this like the rest of the plan, which would have indicated that there was an absolute conveyance of this piece of the building giving the right to the ground below and giving the right to everything above this passage. Therefore I think that is a reasonable explanation which has been given by Mr. Warmington.

That being my view of the true effect and construction of this deed, has anything been done of which the plaintiffs can reasonably complain? If anything had been done which would injure the walls, so as to prevent the walls supporting the building above; if anything had been done to the ceiling or roof, so as to prevent that supporting what was above, or if anything had been done to the floor, so as to cause injury to the shooting gallery which was below, the plaintiffs, in my view, would have had a right to complain. The dado and lights which have been put up or affixed are not shown to have been put up, affixed, or dealt with in such a way as to cause any interference with the support, or to cause anything else which the plaintiff Reilly, as the owner of the house on the side, above, and below, was entitled to complain of. The only thing, in my opinion, which the plaintiffs have a right to complain of—I mean by that to call upon the court to interfere in respect of—is this, that this transparency has been fixed up in part to the house of

the plaintiffs—that is to say, this large transparency, which extends down over part of the gate which goes into this passage, is fixed by screws to that part of the house which clearly belongs to Reilly. In my opinion that is wrong. If Mr. Warmington had been here before I began my judgment, I should have asked him whether he was willing to undertake that those screws affixed to the house of Reilly should be removed, and the transparency brought down so as to cover only the passage, and not to cover any portion of the house belonging to the plaintiffs. The matter is a very trifling one, although I agree it was a wrong—that is to say, an excess by the defendant of any right which was granted to him. If that is done I do not think we ought to make any other order in favour of the plaintiffs. In my opinion the substantial question is whether the defendant is entitled only to a limited user of this passage so as to enable him to go out into Oxford-street and go in from Oxford-street. As to that I think the plaintiffs are wrong. That was the substantial question, but we ought to deal with it so as to prevent it being said that we allowed the defendant to do what was in excess of the rights which, in our opinion, were granted to him, and which he possesses under the conveyance contained in that deed.

LINDLEY, L.J.—I have studied this deed of 1839 and the map annexed to it with all the care I could, and the conclusion at which I have arrived is that there are not sufficient grounds to authorize us judicially to limit the exclusive use of the gateway which is granted to those through whom the defendant claims. The words of the grant here are very different from the words of the grant which we had to construe not very long ago in a case (*London Taverns Co.* v. *Worley*) which arose in the City, which were "the exclusive '*right*' of gateway." There is nothing here about any "*right*," as distinguished from "*use*." Now the first thing to ascertain is, what is meant by the word "*gateway*." "*Gateway*" is an ambiguous word. It may mean a right of passage. It may mean a place, and in this particular deed it appears to me that "gateway" is used to denote a place, a strip of land the dimensions of which are given. It is obviously so used, to my mind, in the first place where it occurs in the deed. When we have a grant of the exclusive use of a gateway leading into Oxford-street, and then the dimensions given, it appears to me that what is conveyed is the exclusive use of that strip of land the dimensions of which are there given, and which is denoted by the word "gateway." It is said that we ought to construe the use of the gateway into the use of a way, and that it is a mere easement. That, to my mind, is to limit, without sufficient warrant or justification, the words used in the grant. It was pressed upon us by Mr. Hall very ingeniously that if we construe this grant as the grant of the exclusive use for all purposes, it involves the ownership, and he says that is inconsistent with the manifest intention of the parties, as is to be gathered from the deed and the map. I thought there was a great deal in that at first, but the more I think of it the less I am disposed to attribute the weight to it which he desires. The grantor has granted the exclusive use of this gateway, and if, in order that the grantee may enjoy the exclusive use of the gateway, it is necessary for us to say that the grantee has got the ownership of the gateway, so be it. That will be the necessary legal consequence. I am not sure that is not so. I rather think it is. The inferences to be drawn from the map are explained in this way: it is quite obvious that the grantor, assuming he granted this gateway as a corporeal hereditament, was not granting it to the same extent that he was granting the yard at the back. He was granting the yard at the back in the ordinary way without limit up or down. He was not granting the gateway in the same way at all; he was not granting it up or down. He was reserving to himself that which was above it, and he was reserving to himself that which was below it. That is a sufficient reason for not colouring the gateway in the plan in the same way as the land which was at the back, and which was granted, was coloured.

That appears to me to remove what at first seemed a strong argument, that the gateway is not coloured in the plan. Now, if we look at the matter we must see what has been granted and what has been reserved. What has the grantor granted? He has granted the exclusive use of the gateway which I have mentioned. What has he reserved? In terms, nothing; but, by necessary implication, he has reserved a right of support for that part of the house which is over the gateway, and a right of support, so far as the floor goes, for that part of the house which is under the gateway. There is nothing said about it, but that follows as a necessary implication. It appears to me that these rights, which he necessarily has reserved, impose the only limit to that which is granted. That being so, I think the plaintiffs are asking us to put a limit which cannot be justified, and that the defendant is not exceeding his rights, except as regards the transparency. So far as I understand, that transparency is not in the gateway at all, it is in the wrong place, but we will hear what Mr. Warmington has to say about it.

LOPES, L.J.—In the year 1839 there was a conveyance to Wimbush, which conveyance we are called upon to construe, and it becomes material, to my mind, to consider in the first place what the state of the property was in 1839. There was this large yard, and there was this passage leading from Oxford-street into the yard, and from the yard into Oxford-street. Then in the deed of 1839 certain parcels are conveyed to Wimbush, which beyond all question he takes absolutely; and then follow these important words, "Together with the exclusive use of the said gateway into Oxford-street, being 10ft. 11in. in the clear on the north side, 11ft. 7in. on the south side, in depth 41ft. 6in., and in height 15ft.; be the said several dimensions little more or less." Now, what passed in respect of this gateway? It is said by Mr. Hall that a mere easement passed, an incorporeal hereditament, a right on the part of Wimbush to pass from Oxford-street into this yard, and from the yard into Oxford-street, and nothing more. It is said, on the other hand, by Mr. Warmington that a corporeal interest passed—in point of fact, that property or ownership passed. In my opinion, Mr. Warmington's contention is right. I think ownership passed. The exclusive use of "the said gateway" was given. The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to the law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes. Again, a mere easement can be conveyed, or may be conveyed, by words other than these, and would pass under general words. But here we have the words to which I have called attention. A mere easement or right of way, as a general rule, I venture to think, is not set out by measurements in the way that what passes here is set out by measurements. But then it is said by Mr. Hall you have the word "gateway"; and he relies on the word "gateway" as meaning a right of way, and nothing more.

Now, in my opinion, Mr. Hall is not entitled to rely on the word "gateway" to that extent. I think the word "gateway" is a mere description of the thing—a mere mode of identifying the thing which has to pass, and it cannot in any way be construed as restrictive of the previous words "exclusive use." This case seems to me very much like the illustration I am about to give. A. is owner in fee simple of a certain set of chambers in

the Temple, and he grants to an under-tenant the exclusive use of one of the rooms in that set of chambers. I take it the ownership in that room passes, and the person who takes, is entitled to use that room in every reasonable way. I take it he may use the floor of that room in a reasonable way, the walls of that room in a reasonable way, and the ceiling, if it were necessary to use it, in a reasonable way. The conclusion that I arrive at in this case is this, that there was conveyed to Wimbush the absolute ownership in the passage, subject to this, that he must use the passage reasonably—that he must not in any way interfere with the concurrent or correlative rights of his grantor—that he may use what I may call the floor of the passage or the ceiling or walls of the passage in every reasonable way—I need scarcely add not in any way creating a nuisance, or in any way infringing upon the rights of the grantor. For myself I entertained a very strong opinion, early in the case, that Mr. Warmington's contention was right, but there was one matter which caused me to pause and hesitate, and that was the plan. For some time I felt a difficulty in understanding why, whilst the other parcels passing by the deed of 1839 were coloured pink, this passage was not coloured pink, what passed being described in the deed by reference to a plan. But, to my mind, that has now been satisfactorily explained, and the explanation is this. With regard to that portion of the property which is coloured pink, everything above and below was being conveyed. With regard to this part of the property, the passage, nothing below and nothing above was conveyed. I take it that is the reason why we find this diversity in the colouring. I think, therefore, that the judgment of the learned judge below was right, and that the appeal should be dismissed.

Appeal dismissed.

The following form of undertaking by the defendant as to the transparency was proposed, and approved by the court, to preface the order:—"Defendant, by his counsel, undertaking to remove the screw, or other means by which the transparency in the pleadings mentioned is fastened to the facia of the plaintiffs' shop, and to reduce the height and size thereof so as to bring the same within the gateway referred to in the deed of the 10th of July, 1839."

Solicitors for the appellants, *Janson, Cobb, Pearson, & Co.*

Solicitors for the respondent, *Ranger, Burton, & Co.*

From Chan. Div. Dec. 16.

MYERS v. CATTERSON. (a.)

Easement—Light—Implied grant—Railway company—Sale of surplus land—Obstruction—Injunction.

A railway company sold to the plaintiff a piece of their surplus land, with a house erected thereon, facing the railway, which at this place ran over a series of brick arches, through which there was some access of light to the lower windows of the house. The company retained in their hands lands adjoining the property sold, and the conveyance contained a recital that the company required all the land other than that sold to the plaintiff for the construction of their railway; but it contained no express grant of a right to light.

The defendant's predecessor in title subsequently acquired from the company the fee simple of the lands opposite the plaintiff's house, on which he erected buildings, and took a lease of the arches. Afterwards the defendant acquired the property, and blocked up the openings of the arches on the side nearest the plaintiff's house with hoardings.

Held, that the company, on selling the land, entered into an implied obligation not to do anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land purchased by him, except what was necessary for the construction of their railway; and that, the hoarding erected by the defendant not being necessary for that purpose, an injunction ought to be granted as to it.

Decision of Kekewich, J., *affirmed.*

Appeal from Kekewich, J.

In 1863 the London, Chatham, and Dover Railway Co. sold to the plaintiff Myers a piece of their surplus lands, with a house which they had permitted him to erect thereon, situate in Newington-causeway, on the south-west side of their line of railway, which at this place ran over a series of brick arches at a distance of about eight feet from the plaintiff's house. Through two of these arches access of light was obtained to the lower windows of the house facing the railway. The railway company retained in their own hands the lands adjoining the property sold.

The conveyance from the railway company to the plaintiff recited that the company required all the land other than that sold to the plaintiff for the construction of their railway, but it contained no express grant of a right to light, nor any covenant or agreement as to light.

In 1872 Isaacs, the predecessor in title of the defendant, acquired from the railway company the fee simple of the land on the north-east side of the line opposite the plaintiff's house, and took from them a lease for 1,000 years of the arches. Since that date the latter had been used for storing machinery, by which the light to the plaintiff's windows had, to a certain extent, been obstructed.

In 1887 the defendant, who had purchased the property from Isaacs, erected buildings on the north-east side of the railway, a short distance from the two arches on the side nearest the plaintiff's house, the openings of which he blocked up with hoardings.

The plaintiff had, as he alleged, since 1863 enjoyed the access of light to his windows through the openings of these two arches.

This was an action brought by the plaintiff to restrain the defendant from obstructing such light by the buildings or by the hoardings, and for damages.

The plaintiff having died in 1888, the action was continued by his representatives.

On the 10th of July, 1889, Kekewich, J., granted the injunction as to the hoardings and directed an inquiry as to damages.

The defendant appealed.

Neville, Q.C., and *Russell Roberts*, for the appellant.—No grant to the plaintiff of a right to light can be implied, as such a grant would be inconsistent with the recital in the conveyance. Further, the plaintiff is not entitled under the Prescription Act (2 & 3 Will. 4, c. 71, s. 3) by reason of the interruption of his enjoyment of the light in 1872.

They referred to *Birmingham, Dudley, and District Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295; *Presland* v. *Bingham*, 37 W. R. 385, 41 Ch. D. 268; *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. 212; *Clarke* v. *Clark*, 14 W. R. 115, L. R. 1 Ch. 16.

Warmington, Q.C., and *Swinfen Eady*, for the respondent, upon waiving their right to the inquiry as to damages, were not called upon.

COTTON, L.J.—All we have to decide is the ques-

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

tion brought before us on this appeal, which is from a judgment of Kekewich, J., granting an injunction and requiring the removal of a hoarding put up by the defendant so as to obstruct the light coming through an arch under part of the line of the London, Chatham, and Dover Railway. [His lordship then stated the facts of the case, and continued :—] The first question we have to consider is this, Is there any right at all in the plaintiff, or, rather, is there, under the circumstances which I have stated, any obligation on the railway company not to obstruct the plaintiff's lights? If a person, who is the owner of two plots of lands, on one of which a house has been built sells the plot with the house on it, and retains the other, then, from the position in which he has placed himself towards the purchaser, there is the implied obligation or contract or covenant (call it which you will) on his part not to interfere with the lights of the house which he has sold; and if this railway company was a mere ordinary owner of land, that would be the obligation which, unless rebutted, would *primâ facie* result from the position in which the vendor has placed himself towards the purchaser. Here the vendors were a railway company, and the difference, as it is argued, is this, that a railway company will not be presumed to do anything which would interfere with the construction of their railway. And no doubt that is so. It is clear upon the face of the conveyance, and I think it appears from the evidence that there was a limitation on the implied contract entered into by the vendors (the railway company)—viz., that they were not to be restricted from doing what was necessary for the purposes of constructing their railway. That, in my opinion, is the true nature of the obligation here. But then it is argued that this really makes this obligation entirely dependent on the will of the railway company, and that that is quite inconsistent with and is repugnant to the grant of the house to the purchaser through whom the plaintiff claims. But that is not so.

I think the true view is that the limitation of the obligation contracted by the railway company is not entirely dependent on the will of the railway company. It is that they may do anything which is required for the construction of their railway; and the engineer will determine, subject to the directors, what is necessary for the construction of the railway. That, therefore, is not a matter left entirely to the will of the company, but certain definite purposes are pointed out, for which only the railway company are entitled to use the land retained so as to interfere with the obligation which is entered into by them as regards the light to the windows. What I hold therefore is, that in this case the railway company as owners, not only of the lands sold, but of the land adjoining, entered into an implied obligation not to do anything on the adjoining land to interfere with the plaintiff's reasonable enjoyment of the land sold, except that which was necessarily required for the construction of the railway. So the first question we have to consider is whether this hoarding which was complained of by the plaintiff was required for the construction of the railway. In my opinion it certainly was not. It is not that the railway company in making an alteration of their line have put up this hoarding, but the facts are that the company have granted to the defendant a lease or interest under which he is in occupation, and for the purpose of making that occupation profitable to himself —and therefore possibly to some extent so as to give the railway company a larger rent for the archway—he has put up the hoarding which is complained of. That is either for his own pecuniary benefit or for the benefit of the railway company, I do not care which—take it for the pecuniary benefit of the railway company. But it is not for the purposes of the construction of their line, for which only are they entitled to deviate or be relieved from the obligation as regards the house. The obligation is, not to interfere with the light except in doing what is required for the construction of the railway.

It is said that in the case of such an implied covenant the court will not interfere unless there is a substantial interference with the light of the plaintiff. With that I agree. It was argued also on behalf of the defendant that there could be no implied obligation in a case where, upon the evidence, the angle of light as it came to the house was less than forty-five degrees. In my opinion that is entirely wrong. The court will not interfere by injunction where it sees there is still a reasonable access of light of sufficient extent to the person complaining; but the obligation would be implied quite as much where there was no obstacle existing at the time opposite the house sold—no difficulty arising from anything there was on the land of the plaintiff or the adjoining land. Take for example a house on Salisbury Plain, without anything to interfere with the light which came from the horizon. Could it be said that the vendor of such a house, in retaining adjoining land, did not subject himself to the implied obligation not to do anything thereon which would interfere with the access of the light to the house which he has sold? It may be that, if he put up something which only diminished the light in an infinitesimal degree, it would not be held to be such an interference as to call for the interposition of the court; but that does not affect the question whether or not an obligation was entered into by the vendor.

In dealing with the question whether or not there has been such a breach of the obligation as to justify or require the interference of the court it must be borne in mind that the position of the house and windows is such that a very small diminution of the light to the access of which the plaintiff had a right would be prejudicial. The railway is close to the house, only eight feet off, and any interference with the light which came to it before the acts complained of would produce a serious effect.

The learned judge had before him a variety of witnesses who all say that since the act done by the defendant there has been a substantial alteration in the light. One of them said (and this was very much commented upon in argument), that he saw the light "streaming down through this archway." I do not think one ought to criticize that expression very closely, but I understand this to mean that there was a substantial amount of light coming through this archway. Opposed to that is certain expert evidence. Without intending any disrespect to these witnesses I agree with the learned judge that evidence as to facts and experience is much more to be relied upon than any scientific evidence as to what will be the consequence of a certain act, and when I find here that the judge, after seeing and hearing all the witnesses, relies upon the witnesses of experience in opposition to the expert witnesses, I cannot differ from the conclusion at which he has arrived.

Then there is one remaining point which was pressed upon us, that of acquiescence. But how has there been acquiescence? There has been no acquiescence in the thing complained of, because that has not been done until recently. There was, no doubt, a non-interference by the plaintiff with a temporary obstruction of a small amount of light caused by some machinery put up by Isaacs. But, to my mind, there has been no acquiescence in the putting up of the hoarding by the defendant. In my opinion this appeal fails, and, as the counsel for the respondents have properly waived the inquiry as to damages in respect of the buildings on the north-eastern side of the railway, the appeal must be dismissed, with costs.

BOWEN, L.J.—I am of the same opinion. As to the question of fact involved in the appeal, I shall really

add nothing to what the Lord Justice has said, with this slight exception, that I do not consider that, in a case of this sort, we ought to review the decision of the judge below, who has seen the witnesses, just as if we had seen the witnesses ourselves. We are not in that position. I am further impressed, in the present instance, by this, that the judge below apparently founded his judgment mainly upon the evidence of one gentleman, Dr. Tanner, to which he seems to have attached much weight and importance, and if Dr. Tanner was a first-rate witness, and if his evidence was worthy of all the attention and respect which the judge gave it, it is impossible to say that his evidence does not justify the finding that the light here has been substantially or appreciably diminished by the hoarding. I think, therefore, the matter being one peculiarly within the cognisance of the judge, we cannot review his decision as to the fact, even if we differed from him. At the same time, it must not be at all supposed that I differ from the learned judge, and so far as I can judge from the paper evidence that is before me, I do not say that I should not have come to the same conclusion.

But as to the point of law, which is perhaps of more general importance, I will add one or two words. Here is a railway company which is possessed of a large piece of land, along a portion of which the railway is intended to be constructed. The company allow a purchaser to enter on the residue of the land, close to the place where the line will in the end be carried, to occupy it under an agreement, and to build a house upon it, which house they finally convey to him.

Now, what is the implied obligation that the company came under as regards the use of so much of the land as they retain for the purposes of their own railway? As in the case of all other implied covenants or implied obligations, in order to see what the measure of the obligation is we must look at the reason of the thing and at the surrounding circumstances in order to ascertain, if we can, what was the obvious intention of the parties, so as to give to the transaction between them that minimum of efficacy and value which, upon any view of the case, it must have been their common intention it should have.

Supposing this were the case, not of a railway company, but of an ordinary landowner who has two pieces of land, which either adjoin, or are so near to one another that the enjoyment of the one, perhaps for all purposes, at any rate for some purposes, depends upon the user to be made of the other portion of land. What is the obligation which the law assumes to arise between the parties as soon as the conveyance has been made and comes into effect? The owner of a piece of land which is not sold is selling a piece of adjoining land, the full enjoyment of which depends upon the use which he makes of that portion which is not sold. Surely it must be in the contemplation of the parties that, in the absence of any express agreement one way or the other, the vendor shall not so use that land which he retains, as to preclude any possible use of the building or lands which he sells, or to prevent that use of it for which he knows he is selling it to the purchaser. It would be contrary to common notions of justice and fair dealing if it were otherwise; and the truth is that the law in such a case, when the parties have entered into the relation of vendor and purchaser, assumes from the circumstances an obligation on the part of the seller not to do anything with his own land which would defeat the known mutual intention of both parties upon the sale. Now, apply that to a house. Suppose I have a large piece of land, on one part of which is standing a house, that house may be a mere congeries of bricks, never intended to be used as a house, but which may be pulled down and carted away so as to be sold as bricks. If I sell a house merely as bricks, of course the transaction would be different, but if I sell a house which is standing on part of my land as a house with windows in it, to be used as a house, and the windows in it to be used as windows, the least that the law implies from the necessary reason of the thing is that I am not, upon the remainder of my land which I keep back, immediately I have sold the house and its windows, to do something which prevents all use of the house as a house, and all use of the windows as windows.

The law imposes that obvious duty in the form of what it calls an implied obligation, or implied covenant or contract, on the part of the vendor, who is selling one portion of his property and retaining the other, under circumstances like this, that he will not, on the property which he retains, use all his rights as owner with respect to the property which he retains, but will only use such of his rights of ownership as can be used consistently with the convenient and reasonable enjoyment of the house he has sold as a house. That is the ordinary implication. But, as is clear, this implication depends upon what one gathers from observing the transaction, and trying to find in it a clue to the mutual intention of the parties, and as soon as you add facts which make it obvious that the intention of the parties was one way or the other, then you have facts which give a colour to the inference which the law draws, and which very often lessen the obligation which, in the absence of those facts, or that fact, would be supposed to have arisen. I keep a piece of land, and sell the house as a house. The obvious intention, in the absence of anything else, is that I intend it to be used as a house. But if, at the time I sell it, I make it clear to the person who is taking the house—or supposing the circumstances of the case make it clear to him—that, although I sell it to him as a house, I am intending, nevertheless, to use the remainder of my land, which I keep, in a way which may interfere in some degree with the full enjoyment of the house as a house—then you get a new fact or a new element introduced into the case, which shows that the intention of the parties was a limited one, and that it was not intended by the parties that the full use of the house as a house, or the full enjoyment of the lights and windows as windows was the essence of the transaction.

Now here it is said that, at the time that the railway company sold this house as a house, with its window lights to be used as lights, the purchaser had notice that the railway company intended to use the remainder of the land in a particular way which would necessarily interfere with the enjoyment of the light to the windows, and would, so to speak, modify the ordinary implication which the law would extract from the transaction.

Therefore it becomes necessary to look at what was the exact character of the conveyance, and at what the purchaser of the house was told at the time he made the purchase. It is clear that he was told that the railway company intended to construct a part of their line on a portion of the remainder. I neglect, for the purpose of this judgment, any consideration of what the exact terms would be about anything else except this part of the land which immediately fronts the windows of the plaintiff; but the purchaser was told, what it was most material for him with reference to his window lights to know, that the railway company, when they sold him the house and gave him the windows, required the remainder of the land for the construction of the railway. Now to what extent did that modify the obligation which the law would infer? I think it would modify it to this extent—that the vendor would no longer be bound to leave the window lights intact, but he would have a right to diminish the light to the windows and to interfere with the enjoyment of the land so granted so far as he required to do so for the purpose of constructing the line, but no further. And this would be the case unless you had some further fact or

some further notice—something further to modify the intention of the parties to the transaction. Of course, the broad rule applies, that the person who gives a thing to be enjoyed intends that it is to be enjoyed, and has no right afterwards to do anything which defeats the enjoyment to which he has consented, and which is the creature of his own gift. The appellant's argument, therefore, breaks down because, although the purchaser clearly could not complain of the railway company interfering with his windows in the construction of their line; yet if the interference was one which went beyond the construction of the line, then the ordinary presumption of the law would apply.

It seems to me that the erection of this hoarding is certainly not for the purpose of the construction of the line, but goes beyond it. Our decision rests on the broad ground that the vendor cannot derogate from his own grant, but is bound to allow the premises which he has sold to be enjoyed so far as they reasonably can be enjoyed, limiting the enjoyment only by the kind of user of his own land which he must be taken to have desired to preserve. So much for the law of the case.

The appellant seems to me to fail, and the decision of the court below must be affirmed.

As to the building on the other side of the arch, I agree with what the Lord Justice has said.

Fry, L.J., concurred.

Appeal dismissed

Solicitors, *Saffery, Huntley, & Son; Hicklin, Washington, & Pasmore.*

High Court of Justice.

Chan. Div. North, J. — March 7.

In re Doré Gallery (Limited). (*a.*)

Practice — Cross-examination of witnesses before an examiner — Order of cross-examination — Rules of Supreme Court, 1883, *ord.* 37, *rr.* 21, 22.

An application was made by a shareholder for the rectification of the register of a company. When the application came on for hearing, the shareholder applied to have the witnesses who had made affidavits on behalf of the company cross-examined upon their affidavits, and an order was made that the witnesses on both sides should attend for cross-examination before an examiner. On attending before the examiner, the question was raised whether the shareholder's witnesses or the company's witnesses ought to be cross-examined first.

Held, that, under the circumstances of the case, the shareholder's witnesses should be cross-examined first if the company desired to cross-examine them.

Motion.

This was a motion for directions to an examiner of the court as to what order ought to be pursued in the cross-examination of witnesses before him.

An application was made by A. Honrich, a shareholder of the above-mentioned company, under section 35 of the Companies Act, 1862, for the rectification of the register of members of the company by having his name removed therefrom.

On the 20th of December, 1889, the application came on for hearing, and the applicant asked that the witnesses who had made affidavits on behalf of the company might be cross-examined upon their affidavits. The motion accordingly stood over, and an order was made that the witnesses on both sides should attend before an examiner for cross-examination if the opposite party should desire to cross-examine them.

An appointment for cross-examination was accordingly made by the examiner to whom the matter was assigned, for Monday, the 24th of February, 1890; and the parties, their counsel, solicitors, and witnesses attended on that day. What then took place appears from the report of the examiner, which was as follows:—"It was contended by Mr. Terrell (counsel for the applicant) that, being in the position of plaintiff, he was entitled to have his witnesses cross-examined, if Mr. Chester (counsel for the company) desired to cross-examine them, before cross-examining the witnesses of the company, and he tendered Messrs. Honrich, Ingrey, Reydellet, and Mayhew for cross-examination accordingly. Mr. Chester, on the other hand, contended that, the adjournment of the motion and the order to cross-examine having been obtained at the applicant's request, the company's witnesses should be cross-examined before the applicant's witnesses, and he tendered Messrs. Beeman, Lowles, and Ibbetson for cross-examination accordingly.

"Both parties regarded the matter as one of principle, and desired to have it decided by the court. Under the above circumstances I adjourned the examination for the purpose of the parties obtaining the decision of the court upon it. Both counsel used other arguments upon the point, but I have not thought it necessary to state them. None of the witnesses were sworn by me."

The present motion was accordingly made by A. Honrich to obtain the decision of the court upon the question as stated in the examiner's report.

The Rules of the Supreme Court, 1883, ord. 37, provide, by rule 21:—"Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at, or with a view to, a trial."

And by rule 22:—"The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage."

Cozens-Hardy, Q.C., and *H. Terrell*, for A. Honrich.—The applicant is entitled to have his witnesses cross-examined first if the company intend to cross-examine them. The practice with reference to the cross-examination of witnesses before the examiner is the same as before the court: Rules of Court, 1883, ord. 37, rr. 21, 22.

Napier Higgins, Q.C., and *J. Chester*, for the company.—As the order for the cross-examination of witnesses was obtained at the applicant's request he should cross-examine the company's witnesses first.

North, J., stated the facts, read rules 21 and 22 (which are set out above) of order 37 of the Rules of the Supreme Court, 1883, and proceeded:—With respect to what took place before the examiner I read the statements contained in his report and pay no attention to anything else. [His lordship then read the report set out above, and continued:—] Counsel for the applicant contended that the proceedings before the examiner should be commenced by the cross-examination by the respondents' counsel of the applicant's witnesses, if they were to be cross-examined at all, while the respondents' counsel contended that, as the order for cross-examination had been obtained at the instance of the applicant, the respondents' witnesses ought to be cross-examined first. It was not put to the examiner that he should enter into any special arrangement for the convenience of the parties, and both parties wished to have the matter decided by the court. I think the order in which the witnesses should be cross-examined ought to be the same as if the proceed-

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

ings had taken place in court. Suppose I had ordered the witnesses to be cross-examined before me in court instead of before an examiner, I should follow the usual course, and have the affidavits in chief on behalf of the applicant read first, and then the affidavits in chief on behalf of the respondents, or so much of the respondents' evidence as might be necessary for the understanding of the applicant's evidence in reply; and when the reading of the applicant's affidavits had been completed, then would be the time for cross-examining the applicant's witnesses. After that the respondents' case would be reached, and their affidavits in chief would be read more fully if the former cursory reading of them was not sufficient; and when the reading of the respondents' affidavits had been completed, then would be the time for cross-examining the respondents' witnesses. In this case the applicant's witnesses should be cross-examined first if they are to be cross-examined at all; but on their being tendered for cross-examination, counsel for the respondents declined to say whether he wished to cross-examine them or not. In that I think he was wrong. But in stating my opinion I do not wish to lay down any rule which would debar the exercise of his discretion by the examiner in any case in which a different order may be advisable. I send the case back to the examiner with an intimation of my opinion that, under the circumstances of the case, the applicant's witnesses should be cross-examined first.

Solicitors for Honrich, *Kilby & Co.*

Solicitor for the company, *Gorton.*

Q. B. Div. (Lord Coleridge, C.J., and Lord Esher, M.R.) March 14.

Davis v. Stephenson. (a.)

Licensing—Gaming—Permitting house to be used for the receipt of money deposited for purpose of betting—Money brought into house after receipt outside—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

The appellant was the keeper of a licensed tavern, in close proximity to which were a piece of waste ground and a public footway. On the day of a race meeting a betting man was for some hours on the waste ground and the footway, receiving from persons who resorted thither packets containing money, which they deposited with him for the purpose of backing various horses. The packets were brought into the tavern at intervals by the appellant's daughter. This plan was adopted for the purpose of evading the provisions of the Betting Act, 1853, *and with the connivance of the appellant.*

Held, that the appellant was not liable to be convicted under section 17 *of the Licensing Act*, 1872, *of having suffered his house to be used in contravention of the Betting Act*, 1853.

Case stated by the Recorder of Birmingham on an appeal from a conviction under section 17 of the Licensing Act, 1872.

The case stated that Davis, the appellant, was the keeper of a licensed beerhouse called "The Justice Tavern," in Moor-street, Birmingham. There was a side-door to the tavern which opened into an entry, leading from Moor-street, by the side of the tavern, and terminating in a small piece of waste ground at the back of the tavern. There was also a back-yard door which opened into the entry. The piece of waste ground was on the other side open to a public footroad known as Nelson-passage. The back-yard door and the entry could be seen from the waste ground and from Nelson-passage. Neither the entry, the piece of waste ground, nor Nelson-passage was included in the licensed area, nor were they in the occupation of the appellant.

On the 20th of June, 1889, a man named Hicks was standing in Nelson-passage and upon the piece of waste ground from 12.30 to 2.35 p.m. In Nelson-passage a great number of persons, and on the piece of waste ground two persons, during that time came up to him, and each handed to him a closed packet containing money wrapped up in pieces of paper, upon which were written the names of horses running at Ascot races on that day, which were intended to be backed, the name of the backer, the amount deposited for the purpose of backing each horse, and the hour at which the race was to be run at Ascot. The persons who handed the said packets to Hicks were either the backers themselves or their authorized agents in that behalf. Such packets containing money were delivered by the said persons respectively, and were received by Hicks on an agreement that if the horse named therein won the race named, Hicks was to pay to the said backer the amount deposited in addition to the amount won, according to the odds current against such horse at starting.

While Hicks was in Nelson-passage or on the waste ground Miss Davis, who was the daughter of the appellant, and lived at home at the tavern, came to him three times at intervals and received from him a number of the said packets, which she brought into the tavern either by the back or the side door.

At 3 p.m. on the same day a search warrant was executed at the tavern. The appellant was found behind the bar, and Hicks was found on the licensed premises in the public bar among the ordinary customers. The appellant had in front of him a glass containing money, and also a paper containing a list of names known as a "paying-out sheet" (relating to other days than the 20th of June), and used in connection with betting on horse racing. A number of papers forming part of the packets which had been given to Hicks in Nelson-passage and on the waste ground were also found in an envelope in a drawer in the public bar near where the appellant was. The said packets, which had contained money as well as the said papers, had been opened and their contents brought to the knowledge of the appellant.

Hicks was apprehended and charged under the Betting Act, 1853, with using the waste ground and Nelson-passage for the purposes of betting, and was convicted by the stipendiary magistrate, and fined £20 and costs. The fine and costs were paid, and there was no appeal.

Davis was charged under section 17 of the Licensing Act, 1872, with suffering his house to be used in contravention of the Betting Act. He also was convicted and fined by the stipendiary magistrate.

He appealed against that conviction to the court of quarter sessions.

The case stated that Hicks was a person using the house, and that Miss Davis acted in the aforesaid matters for and on behalf of Hicks; and they were the persons who were alleged to have used the house in contravention of the Betting Act.

The case further stated that Nelson-passage and the waste ground were resorted to, and the packets and the money were received there by Hicks, and conveyed thence by Miss Davis, as his agent and on his behalf, into the tavern, for the express purpose of endeavouring to evade the provisions of the Betting Act, and with the knowledge and connivance of the appellant, who was throughout aiding and abetting Hicks and Miss Davis, and who suffered his house to be used to receive the said packets, well knowing that the said packets were brought into his house on behalf of Hicks, and that they contained money which was received by Hicks as the consideration for an assurance to pay thereafter money on a contin-

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

gency relating to horse racing. None of the persons from whom the said packets were received were proved to have been persons resorting to the licensed premises. It was contended on behalf of the appellant that the Licensing Act, 1872, and the Betting Act, 1853, were not contravened unless the persons with whom the bets were made actually resorted to the house or other place alleged to have been kept or used, or unless the money received by or on behalf of the keeper or persons using such house or other place was actually received at such house or other place, and not merely carried there after having been originally received elsewhere. The recorder overruled these contentions, and dismissed the appeal.

By section 17 of the Licensing Act, 1872, "If any licensed person . . . opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Act of the sixteenth and seventeeth years of the reign of her present Majesty, chapter one hundred and nineteen, intitnled 'an Act for the suppression of Betting-houses,' he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding, for the second and any subsequent offence, twenty pounds." By section 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119), "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of, or relating to, any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid." By section 3, "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting, the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them; shall on summary conviction thereof" be liable to a penalty not exceeding one hundred pounds.

Hugo Young, for the appellant.—The house was not a recognised place for the purposes of betting. The betting took place and the money was received away from the house. The user of the house took place after the betting was all over.

Poland, Q.C. (*Russell Griffiths* with him), in support of the conviction.—The appellant suffered his house to be used as a betting office. The nearness of the passage and the waste ground must be taken into consideration. There was a continuing receipt of the money, which lasted till the packets were opened in the house. The facts are sufficiently found against the appellant to warrant the conviction.

Lord COLERIDGE, C.J.—I have come to the conclusion that this conviction must be set aside, though I have been reluctant to do so, as the result will be that it can be said there has been a deliberate attempt to evade the Act, scarcely disguised, and yet successful. It is clear that the case must fail unless it can be shown that Hicks received the money in Davis's house with Davis's knowledge and connivance; otherwise it cannot be said that Davis suffered his house to be used for the purpose of the money being so received. No doubt there was an arrangement between them that the money which Hicks received in the paper packets on the waste piece of land should be brought into Davis's house, and when the betting was over Hicks went into the house and opened the packets. But it is impossible to say that this was a receipt of the money by him in the house. The case does not come within the Act, and the conviction cannot be supported.

Lord ESHER, M.R.—The question is not whether the appellant has tried to evade the law, but whether he has succeeded in keeping himself outside the Act. The offence with which he is charged is that he suffered his house to be used for the purposes of betting. But the bets were made and the money was received, not in the house, but outside of it. Mr. Poland contended that there was a continuing receipt which was not completed till Hicks came into the house and opened the packets. But I am of opinion that there is no such thing as a continuing receipt, and that the appellant is not liable to be convicted on this charge.

Conviction quashed.

Solicitors for the appellant, *Sharpe, Parker, & Co.*, for *Horton & Redfern*, Birmingham.

Solicitors for the respondent, *Soames, Edwards, & Jones*, for *C. A. Carter*, Birmingham.

Q. B. Div. (Mathew, J.) Feb. 10, 14.

LAW GUARANTEE AND TRUST SOCIETY (LIMITED) AND HUNTER *v.* GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. (*a.*)

Banker—Bank of England—Registration of holders of Consols—Joint tenants—Tenants in common—5 & 6 *W. & M. c.* 20, *s.* 19—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 1, 22.

A transfer of stock into the joint names of a corporation and an individual creates a tenancy in common, and not a joint tenancy, and therefore, by virtue of sections 1 *and* 22 *of the National Debt Act*, 1870, *the Bank of England is under no obligation to register such transfer.*

Case tried before Mathew, J., without a jury.

The plaintiff Hunter was the surviving trustee of a trust estate of which a certain sum of Consols formed part. Hunter had appointed the Law Guarantee and Trust Society to be a trustee in the place of one Power, deceased, and by the deed of appointment agreed to transfer the said sum of Consols standing in the defendants' books in his own name into the joint names of himself and the plaintiff company.

The action was brought for a *mandamus* directing the defendants to register the transfer, which they refused to do, on the ground that, under 5 & 6 W. & M. c. 20, s. 19, and the National Debt Act, 1870, ss. 1, 22, they were not bound to register a corporation and an individual as joint owners of stock.

Sir R. E. Webster, A.G., and *R. S. Wright*, for the plaintiffs.

Sir H. Davey, Q.C., and *Pollard* (*W. Latham* and *C. Musgrove* with them), for the defendants.

In the course of the arguments, which are dealt with in the judgment, the following were cited:—*Wildman* v.

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Wildman, 9 Ves. 174; *Sloman* v. *Bank of England*, 14 Sim. 475; *Crossfield* v. *Such*, 1 W. R. 82, 470, 8 Ex. 825; Blackstone's Commentaries, book ii., pp. 182, 183, 184; Coke upon Littleton, lib. iii., c. 3, s. 281 (181b), 2 lib. iii., c. 4, s. 297 (190a); Bacon's Abridgment, 7th ed., Joint Tenants (B); Comyn's Digest, 5th ed., vol. 4, p. 107; Williams's Saunders, 5th ed., vol. 2, pt. 2, p. 318, n. 4; Rolle's Abridgment, vol. 2, p. 91, "Tenants in Common" L (4).

Cur. adv. vult.

Feb. 14.—MATHEW, J.—This was an action brought by the Law Guarantee and Trust Society (Limited) and John Hunter for a *mandamus* requiring the Governor and Company of the Bank of England to register a transfer of stock made to the co-plaintiffs jointly. The defendants refused to do so, on the ground that they were not bound to register a corporation and an individual as joint owners of stock.

It was admitted by the learned counsel on both sides that the practice of the Bank of England, as custodian for the Government of the records of the different funds which form the National Debt, has always been to register only absolute owners of stock, and in cases of joint ownership to treat the owners as joint tenants, and to deal with them as having the legal estate, to use old phraseology, in the property transferred to them of which they claim registration. This practice, it was said, probably had its origin in the difficulties attending the creation of limited and successive interests in personal property. The usual course was to interpose trustees, and the bank dealt with trustees as having the legal estate, and was thus exonerated from having any regard to the subordinate interests which the trustees were brought into existence to protect.

It was said that this course of business was recognized by the courts of law, and the case of *Crossfield* v. *Such* was referred to. That case certainly shows that the Bank of England is supposed to deal only with the legal estate, and that in a case where stock is registered in joint names the owners held the stock as joint tenants with the ordinary right of survivorship, and the bank may safely deal with the survivor as representing the whole interest in the stock. It was further said that in the National Debt Act of 1870, which now regulates the operations of the Bank with respect to holders of stock, there is no indication of any intention on the part of the Legislature that the defendants shall deal with any but the legal owners of the stock registered, while it expressly exonerates them from having regard to trusts of any kind.

Such being the practice and such the effect of the statute, it was submitted, on the part of the defendants, that the result was that the bank was not bound to register a transfer of stock to persons as tenants in common.

It was argued that the effect of such a transfer, if the bank could be called on to register it, would be to impose on the bank the obligation of ascertaining what the interests in the stock were—in other words, to enter upon such an investigation as it is expressly exonerated from making by the provision of the statute which relieves the bank from the necessity of following trusts. Tenants in common, it was said, do not necessarily have equal interests in the stock of which they are tenants in common, and upon registration the bank would have imposed on it the duty of ascertaining the share of each tenant in common, and at each devolution of the property a similar investigation might have to be held.

All this appeared to be in a great measure conceded by the counsel for the plaintiffs; but it was asked, What was the practical difficulty of the bank in the present case? Here was a transfer to this trust company and the co-plaintiff which purported to be a transfer to the two jointly. Why should the bank refuse to register such a transfer any more than one in which the transferees were individuals? The object of the transfer was plain, and any man of business would know what was intended—viz., that the individual should be empowered to act as trustee during his lifetime, and that on his death the whole interest should pass to the company. What difficulty, then, need there be? Why was this technical obstacle presented to what would seem to be a very convenient course of dealing with the stock?

The answer of the counsel for the defendants was, What you call a transfer to the company and the co-plaintiff does not operate to create a joint tenancy, because it is impossible to create a joint tenancy between a company and an individual. Therefore, what you ask the bank to do is to recognize a tenancy in common between owners of stock, and this the bank has never been required to do, and, for the reasons which have been given, ought not to be required to do.

To establish this position recourse was had to ancient law. It was pointed out by the learned counsel for the defendants that unquestionably in the case of real estate an assignment of property to an individual and a corporation would not create a joint tenancy, but a tenancy in common. From Coke upon Littleton, 190a, William's Saunders, vol. ii., pt. 2, p. 318, note 4, Blackstone's Commentaries, and the other ancient text writers which were cited, it no doubt appears that an attempt to create a joint tenancy in a corporation and an individual must fail, for two reasons. In the first place the grantees take in different capacities. The grant to the corporation is a grant to the corporation and its successors; the grant to an individual is a grant to the individual and his heirs; and those two estates cannot be blended in the manner necessary for the creation of a joint tenancy.

Further, there cannot be a right of survivorship between the grantees, and this right is an indispensable incident of a joint tenancy. The further proposition was to my mind satisfactorily made out, that these rules embrace the cases of personal chattels and *chose in action*. The case cited from Rolle's Abridgment appeared to be a direct authority on the point.

These propositions were not controverted by the learned counsel for the plaintiff. They merely sought to cast ridicule upon the conduct of the bank in adhering to rules which they referred to as "obsolete" and "old fashioned," and against which they invoked the robust common sense of modern times. "True," they said, "there may be these old rules; but the court ought to look to the substance of this transaction. The manifest intention here is to create a joint tenancy, and the court ought to give effect to that manifest intention." I by no means say that it would be beyond the resources of conveyancing to devise a form of assignment which would have this effect, but the plan adopted here is a simple transfer to the company and the co-plaintiff.

It is said that, as the transferees are in fact trustees, a transfer in this simple form is sufficient indication that they are intended to hold the stock as joint tenants.

But in the face of the statute, which expressly says that the bank is not to pay attention to the fact that holders of stock are trustees, I do not think that the bank is bound to have regard to the element of trusteeship at all, and I think that if the bank registered a transfer into the names of trustees under such circumstances it would be establishing a precedent, and that the next step might be to call upon it to register such transfers where the holders were beneficiaries and not merely trustees.

I have, therefore, to consider what the position of the bank would be, supposing a tenancy in common in stock to be created between this company and this individual. I am not satisfied that the bank would be safe without investigating what share each of the tenants in common had when this original transfer was registered; nor do I

think that the bank would be safe when any subsequent devolution of the property took place without ascertaining how the shares went—a difficult investigation. In the case of a joint tenancy a death, as I have already pointed out, creates no difficulty. The bank is entitled to treat the survivor as absolute owner. I am asked now to say that the bank ought to depart from what is conceded to be its established practice in these matters—ought to go from old ways to new ways. I feel that the case is one which requires the utmost judicial caution. I have to bear in mind the enormous interests with which the bank has to deal, and the serious liabilities that may be incurred if there be any departure from the ordinary method of dealing with stock.

I do not think that Sir Horace Davey succeeded in pointing out the exact difficulty which might arise in case the bank permitted this transfer. But I have to deal, not with probabilities merely, but with possibilities in this case, and I cannot avoid the apprehension that if, for instance, an individual who was a tenant in common of stock under a transfer to a company and himself as trustees was minded to commit a breach of trust, the bank might be placed in a position of some difficulty. Suppose, for example, that an assignment were made by such a person of his share of the trust estate, I by no means say that it would be impossible to extricate the bank from the conflicting claims that might be made upon it in such a case. Probably the resources of the court would be found extensive enough, by interpleader or otherwise, ultimately to relieve the Bank of England from the necessity of taking part in the proceedings; but before that point was reached there might be troublesome and difficult investigation, and I do not see that the burden of such an investigation ought to be cast upon the Bank of England.

I therefore do not feel at liberty to grant this *mandamus*. At the same time, what is proposed to be done by the plaintiff in this case would seem to be highly convenient and a fair transaction, and I regret that there should be this technical difficulty in the way. While this technical difficulty exists the court must give effect to it. It can only be removed by the intervention of the Legislature. My judgment is, therefore, for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Torr, Janeways, Gribble, & Oddie.*

Solicitors for the defendants, *Freshfields & Williams.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew and Wills, JJ.) Nov. 11, 12.

MARSH *v.* ESTCOURT. (*a.*)

Election law—County elector—Occupation as householder or by virtue of service—Payment of rates—Poor Rate Assessment and Collection Act, 1869 (32 & 33 *Vict. c.* 41), *ss.* 7, 19—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 32—*Representation of People Act,* 1884 (48 *Vict. c.* 3), *ss.* 2, 3—*Registration Act,* 1885, *Form* (*D*), *No.* 1, *Division* 1—*County Electors Act,* 1888 (51 *Vict. c.* 10), *s.* 2, *sub-section* 1.

Certain labourers resided in cottages situated on the farms of their employers; they were permitted, but not required, to live in the cottages, on condition that they were to give up possession when their employment ceased, and the rent was either calculated in their wages or was reduced in consequence of their employment. The rates for the cottages were paid by the farmers who employed them, but the names of the labourers appeared in the rate-book as occupiers. They claimed to be registered in Division 1 *of the Registration Act,* 1885, *as parliamentary voters in respect of their occupation, and to be enrolled as burgesses.*

Held, that the facts showed an occupation by the claimants as householders, and not by virtue of service; that it was not necessary for the claimants to actually pay or tender the rates in accordance with section 32 *of the Municipal Corporations Act,* 1882; *that the claimants possessed a burgess qualification, and were therefore entitled to be registered as both parliamentary and county electors.*

Case stated by the revising barrister for the Isle of Wight.

Charles Chiverton and fifty-seven other agricultural labourers claimed to be placed on Division 1 of the occupiers' list as parliamentary voters and county electors. Each of them occupied a cottage on a farm, but were not required to do so by the farmers who employed them. They were simply allowed to reside there under verbal agreements, by which they were to pay a reduced rent, or were to have the rent deducted from their wages, and were to give up possession as soon as their employment ceased.

All the claimants had occupied for the qualifying period, but none of them had personally paid any rates. The cottages were rated with the farms and the rates paid by the farmers; but the names of the labourers were inserted in the rate-book as occupiers of the cottages on the farms.

The revising barrister placed the claimants in Division 2 of the occupiers' list as parliamentary voters qualified in respect of occupation "by virtue of office, service, or employment" under section 3 of the Representation of the People Act, 1884. If he was wrong the names were to be transferred to Division 1.

R. S. Wright, for the appellant.—*Smith* v. *Overseers of Seghill,* 23 W. R. 745, L. R. 10 Q. B. 422, which was decided upon the authority of *Hughes* v. *Overseers of Chatham,* 5 Man. & G. 54, is an authority for showing that the claimants occupied their cottages, not as servants, but as householders. They are also clearly entitled to the burgess qualification for the election of county authorities under section 2, sub-section 1, of the County Electors Act, 1888.

William Graham, for the respondent.—Section 2, sub-section 1, of the County Electors Act, 1888, refers to section 9, sub-section 2, of the Municipal Corporations Act, 1882, which must be read with section 32 of the same Act. The effect of section 32 is to repeal former provisions, such as those contained in section 19 of the Poor Rate Assessment and Collection Act, 1869, which makes it immaterial whether the occupier himself pays the rates or the owner, because section 32 makes it clearly incumbent upon the occupier either to pay or to tender the rate himself, and this the present claimants have not done. Besides this, the facts show that the claimants occupied their houses by virtue of their employment, because as soon as the employment ceased they were under the necessity of giving up their houses; and in *M'Lean* v. *Pritchard,* 36 W. R. 508, 20 Q. B. D. 285, it was held that the occupation franchise by virtue of service does not qualify for the municipal franchise.

R. S. Wright, in reply.—There is no ground for suggesting that it is necessary for the occupier to pay his rates himself. By section 3 of the Poor Rate Assessment and Collection Act, 1869, owners are entitled to make agreements with the overseers to pay all the rates of certain properties and to receive 25 per cent. commission for so doing. By section 4 vestries are enabled to order owners to be rated instead of occupiers; and by section

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

7 the payment of rates by owners is made equivalent to payment by occupiers for the purpose of any qualification or franchise. By section 19 the overseers are directed in every case to enter the name of the occupier in the occupiers' column in the rate-book, and it is enacted that such occupier shall be deemed to be duly rated for any qualification and franchise as aforesaid. The only question of importance, therefore, is whether the rates have been paid, and not by whom. In *Smith* v. *Overseers of Seghill* it was decided that section 19 was of general application, and this was declared to be the law in section 14 of the Parliamentary and Municipal Registration Act, 1878, which was passed for the purpose of making the matter clear. The Municipal Corporations Act, 1882, is merely a consolidation Act, and itself expressly applies the Act of 1868 in section 147, and the Act of 1878 in sections 44, 45, and 47. It cannot, therefore, have been intended to repeal section 19 of the Act of 1878, which, it is submitted, is entirely consistent with its provisions. The operation of section 32 is confined to cases in which the landlord is not rated or has not paid the rates, and in which, therefore, the tenant is properly allowed to pay or tender the rates himself in order that his name may appear on the rate-book.

WILLS, J.—I am of opinion that this appeal should be allowed. No doubt the court ought to be slow to hold that any portion of a statute is superfluous or has been introduced *per incuriam*. But I think that if it were necessary to come to this conclusion in this case the court would be well warranted in doing so. We cannot be blind to the fact that the uniform tendency of recent legislation has been to recognize the occupier of land as a person on whom the burden of taxation is sure to fall, in part at least, whether actually or in the shape of increased rent, and therefore to provide him with the means of having his name placed on the rate-book in order that it may in due course appear in the list of occupiers published by the overseers. Now the Municipal Corporations Act, 1882, is a measure the main object of which is the consolidation of prior enactments relating to municipal corporations. It deals incidentally, but only incidentally, with the municipal franchise. It would be strange indeed in my opinion that a section of this measure, a section which repeats a provision contained in a previous Act, should have the effect of reviving personal payment of rates as a necessary qualification for the municipal franchise. Such personal payment is not necessary as regards the parliamentary franchise, and if this Act has the effect which has been contended for, then this Act must be supposed to repeal enactments, which it purports merely to consolidate with amendments, and thus, under the guise of an amendment not specified as such, to go back upon political history, and to deal with the franchise in a manner wholly contrary to the well-ascertained spirit of recent legislation. As the Act was introduced in order to simplify the existing law, it would be more natural to regard the 32nd section as hastily adopted in forgetfulness of the exact state of the existing law than to suppose that the Legislature really intended to revert to a limitation which it had deliberately abolished.

But the learned counsel for the appellant has removed the difficulty by pointing out that the section has still a sphere of operation. If the name of the tenant does not appear in the rate-book as occupier, the result to the tenant may in some cases be disfranchisement. This section comes to his rescue, and enables him, if his landlord is not rated or has not paid the rates, himself to pay or tender the amount due to the overseers, and so to entitle himself to have his name entered on the rate-book as occupier. The section is not therefore superfluous. It has a specific effect. An identical provision is to be found in the 30th section of the Reform Act of 1832. It might, indeed, be necessary to construe the same words in the subsequent Act differently, if subsequent legislation had shown an intention that they should be so construed; but here subsequent legislation has shown no such intention.

The other point admits of no doubt. In the cases referred to by the learned counsel for the respondent the occupation was admitted to be occupation by virtue of service. Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service.

Lord COLERIDGE, C.J., and MATHEW, J., concurred.

Appeal allowed.

Solicitor for the appellant, *Frith Needham.*

Solicitor for the respondent, *Woolridge*, Sandown, Isle of Wight.

Prob. Div. & Adm. Div. Probate. } Nov. 26.

In the Goods of MORRIS. (a.)

Probate—Administration—Grant to committee of lunatic—Security.

An administratrix became a lunatic, and was so found by inquisition. £11,150, part of the estate, had been paid into the Chancery Division, but an administrator was required to receive the remainder, £850, due on a mortgage. On the application of the committee for administration for the use and benefit of the lunatic, the court allowed the security to be given by the sureties to be limited to twice the amount of the balance outstanding, but required the bond given by the administrator to be for the full amount.

Motion for a grant of letters of administration of the estate and effects of Annie Morris, deceased, to the committee of her daughter, a lunatic so found, for her use and benefit, and that the usual sureties to the administration bond might be dispensed with.

Annie Morris died in March, 1869, intestate, and in April of the same year letters of administration to her estate were taken out by her daughter. In November, 1872, the daughter became insane, and was so found by inquisition, and Mr. Banner was appointed committee of her estate. The value of the estate was £12,000, of which £11,150 had been paid into the Chancery Division. The remaining £850 consisted of a mortgage about to be paid off, and the grant of administration was required in order to give a proper discharge.

Middleton, in support of the motion.—The committee has given security to the Chancery Division for the amount paid in there.

BUTT, J., allowed the security to be given by the sureties to be limited to £1,700, twice the amount of the balance outstanding, but required the administrator to give a bond for the whole amount.

Solicitors, *Chesters.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

Original application. May 7.

In re KERSHAW.

WHITAKER *v.* KERSHAW. (*a.*)

Practice—Appeal—Security for costs—Married woman—Separate estate restrained from anticipation—R. S. C., 1883, *ord.* 58, *r.* 15.

The fact that an appellant is a married woman having only separate estate subject to a restraint on anticipation, is a special circumstance which will induce the Court of Appeal to require such appellant to give security for the costs of the appeal.

Original application.

This was an application by the respondent to an appeal, that the appellant, a married woman, might be ordered to give security for the costs of the appeal. The appellant was a defendant in an action in which the present applicant was plaintiff, and at the trial, judgment had been entered against the defendant with a direction that execution thereon be limited to separate property of the defendant not subject to a restraint on anticipation, as in the form prescribed in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120.

The defendant's solicitors had given the plaintiff notice that the defendant had no separate estate except what she was restrained from anticipating. The defendant had given notice of appeal from the judgment of the court below.

Upfohn, for the plaintiff, submitted that the defendant, under the circumstances, should be required to give security for the costs of the appeal.

Edward Ford, for the defendant, the appellant.—There is no evidence of the appellant's *inability* to pay costs; the plaintiff has not shown that the defendant is unable to pay the costs. There might be ample means to pay the costs out of arrears of income. The fact that the defendant is unwilling to pay the costs is not a sufficient ground for requiring security to be given. *Weldon* v. *Maples*, 36 W. R. 154, 20 Q. B. D. 331, is distinguishable, as there the appellant in her affidavit declared her intention of not paying any costs if unsuccessful, and the case was treated by the court as being a threatened abuse by the appellant of the process of the court.

COTTON, L.J.—I think that the appellant ought to be required to give security for costs. It is not correct to say that the rule of the court is that security for costs will never be ordered unless it be shown that the appellant is unable to pay. The question we have to consider in this case is whether there is any property of the appellant's against which the respondent, if successful, can enforce the payment of his costs. The appellant is a married woman who only has separate estate subject to a restraint on anticipation. The Married Women's Property Act enables her to sue without a next friend, but as she has no property against which the respondent, if successful, can enforce payment of his costs, that fact constitutes a special circumstance, and the appellant must give security for the costs of her appeal.

LINDLEY and BOWEN, L.JJ., concurred.

Security to the amount of £30 ordered to be given.

Solicitors for the applicant, the respondent on the appeal, *Woodcock, Ryland, & Parker.*

Solicitors for the appellant, the defendant, *Pitman & Sons*, for *J. E. & R. Whitworth*, Manchester.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

App. Bankruptcy. April 18, 19, 21, 25.

Ex parte MAY.

In re SPACKMAN. (*a.*)

Bankruptcy—Act of bankruptcy—Assignment of debtor's property for benefit of creditors generally—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a) (b).

On the 22nd of November the debtor, at the instance of his creditors, gave by letter an authority to an auctioneer whom he had instructed to sell certain furniture and effects, which constituted practically the whole of his property, to pay the proceeds of sale into a bank to the joint account of certain persons, who were to hold it for the benefit of his creditors.

Held (reversing the decision of the Divisional Court, ante, *p.* 368), *that this was not an act of bankruptcy within section* 4, *sub-section* 1 (a), *since the conveyance or assignment there mentioned must be a formal conveyance or assignment by deed, and did not include any dealing with the property by agreement or declaration of trust.*

Appeal from the decision of a divisional court in Bankruptcy (Cave and A. L. Smith, JJ.), reported *ante*, p. 368.

The facts of the case are fully set out in the report of the case in the court below, and it is sufficient here to state that in 1886 the bankrupt had consulted Messrs. May, Sykes, & Batten as to a settlement with his creditors, and had authorized them to sell certain property for him. This having come to the ears of his creditors, Mr. Jones, who acted for them, informed Messrs. May that, unless the proceeds of sale were retained for the benefit of the creditors, he should take proceedings in bankruptcy. Thereupon, on November 22, 1886, the bankrupt wrote to Mr. Redway, an auctioneer, whom he had directed to sell his furniture and effects, a letter in the following terms:—"Sir, I hereby authorize you to retain the proceeds of my furniture and effects, and to pay the same into the Wilts and Dorset Bank at Swindon, in the names of Messrs. May, Sykes, & Batten and yourself." The same day Messrs. May wrote to Mr. Jones stating that it had been arranged that all moneys received from the sale should be retained for the benefit of the creditors, and should be paid into the Wilts and Dorset Bank in the names of the firm and Mr. Redway.

On December 4, 1886, a receiving order was made against the bankrupt, the act of bankruptcy on which it was founded being stated to have been committed on December 3, but the county court judge held that the letter of November 22 constituted an act of bankruptcy within the meaning of section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, and therefore he only allowed the solicitors costs up to that date. Messrs. May appealed, but the Divisional Court upheld the decision of the county court judge. Messrs. May, Sykes, & Batten appealed.

Henn Collins, Q.C., and *F. C. Willis*, for the appellants.—This was not an assignment within the meaning of section 4, sub-section 1 (*a*): *In re Glanville*, 33 W. R. 523, 2 Morr. Bank. Cas. 71. The money has been paid by the debtor in good faith to his solicitors to defray the expense of opposing proceedings in bankruptcy: *In re Sinclair*, 15 Q. B. D. 616, 34 W. R. Dig. 19. [Lord ESHER, M.R.—We should not be inclined to extend the principle laid down in that case.]

They referred to *Whitwell* v. *Thomson*, 1 Esp. 68; and *Bowker* v. *Burdekin*, 11 M. & W. 128.

Cooper Willis, Q.C., and *Wall*, for the respondent.—

(*a.*) Reported by A. P. PERCEVAL KEMP, Esq., Barrister-at-Law.

The debtor assigned an equitable interest in the property by his letter to Redway.

They cited *Siggers* v. *Evans*, 5 E. & B. 367, 3 W. R. C. L. Dig. 143; *In re Wensley*, 11 W. R. 241, 1 De G. J. & S. 273; and *Smith* v. *Cannan*, 1 W. R. 338, 2 E. & B. 35.

Henn Collins, Q.C., replied.

Cur. adv. vult.

April 25.—The following judgments were delivered:—

Lord Esher, M.R.—The point in this case arises on the application by the trustee of a bankrupt against a firm of solicitors to recover back a sum of money which they had received in payment of costs from the bankrupt before his bankruptcy on the ground that at the time they received the money the bankrupt had, to their knowledge, committed an act of bankruptcy. The case of the trustee, therefore, depends on that being made out. If the bankrupt had committed an act of bankruptcy there can be no question that the solicitors knew of it, since the act on which the trustee relies was done by the bankrupt with their knowledge, if not by their advice. It is immaterial whether or not the bankrupt did, after the payment, commit an act of bankruptcy, the only question now is, whether the transaction which took place on November 22 amounts to an act of bankruptcy or not. The suggestion of the trustee is, that it was an act of bankruptcy under sub-section 1 (*a*) of section 4 of the Bankruptcy Act, 1883, in that it was an assignment of the debtor's property to trustees for the benefit of his creditors. That transaction was, no doubt, fully known to the solicitors who were acting for the debtor. At that time the debtor had not put the whole of his property into the hands of the auctioneer, but he came to an agreement that certain persons should take and sell his property, and that the proceeds of sale should be paid into a bank for distribution among his creditors. This action on his part was forced upon him by the threats of his creditors. There is no doubt that he agreed that what amounted substantially to his whole property, should be sold by the direction of other people, and that the proceeds of sale should be held for distribution among his creditors. Does such an agreement amount to an act of bankruptcy? Taking it to be an agreement to realize all his property and to divide the proceeds among all his creditors, I do not think that it can be contended that it was done with intent to defeat or delay the creditors or that it is fraudulent on that ground. But does it fall within the sub-section? Is it a conveyance or assignment of the debtor's property to trustees for the benefit of his creditors generally? I think that the words of the sub-section must be construed according to the known acceptance of the terms used in it in bankruptcy law before the Act was passed. A conveyance is a well known term applicable to real property, and I think the meaning of an assignment is equally well settled. Where a man has executed a deed by which he transfers his property to trustees for the benefit of his creditors, that is such an assignment as the section contemplates. I do not think that any dealing with the property of a debtor by means of a declaration of trust, or an agreement, or by anything short of an absolute assignment by deed, is an act of bankruptcy within the meaning of sub-section 1 (*a*). The reason why the sub-section was put in seems to me to be this. By the old law an assignment by a man of all his property was evidence of a fraud on the bankruptcy laws, and the question as to the intention of the debtor had to be left to the jury. Now, in order to avoid any such inquiry, which was generally futile if the assignment was substantially of all the property of the debtor, the mere fact of such an assignment is made at once, without any inquiry into the debtor's intentions, an act of bankruptcy. The assignment must be of all, or substantially all, the debtor's property in order to constitute an act of bankruptcy. I do not think that an assignment of part would be within the sub-section.

This agreement, therefore, does not, in my opinion, amount to an act of bankruptcy, and therefore I think that the trustee has failed to make out his title to this money. I am unable, therefore, to agree with the decision of the Divisional Court, and I think that this appeal must be allowed.

Fry, L.J.—The question whether what was done by the debtor on the 22nd of November amounted to an act of bankruptcy depends on the construction of section 4, sub-section 1 (*a*) (*b*), of the Bankruptcy Act, 1883. It was first said that the transaction was fraudulent. The question of fraud is, as has been often said, a question of fact in each case. So far from this transaction being intended to defeat or delay creditors, it was carried through at the instigation of the creditors, and for their benefit. Therefore, as a fact, there was no fraud in the transaction. Then comes the question, Was it an assignment for the benefit of creditors? Sub-section 1 (*a*) deals only with a conveyance or assignment of property to trustees, while sub-section 1 (*b*) speaks of a conveyance, gift, delivery, or transfer, thus showing that the Legislature had in view the fact that there were many other methods beside conveyance or assignment by which property would be transferred. There are many such modes of transfer. The debtor might declare himself to be a trustee for his creditors, he might make use of an agreement, of delivery, or of payment, to effect the same object, but none of those methods would be an assignment as contemplated by the section. It is plain, therefore, that, while property may be dealt with in many modes, the Legislature only intended to make a conveyance or assignment of it an act of bankruptcy. The assignment must also be of substantially the whole property of the debtor. An assignment of part is not sufficient. Sub-section 1 (*a*) speaks only of the debtor's "property," sub-section 1 (*b*) speaks of his "property or any part thereof." Therefore, if sub-section 1 (*a*) had been intended to apply to an assignment of part of the debtor's property it would have been so expressed. Therefore a formal conveyance or assignment of the whole, or substantially the whole, of a debtor's property for the benefit of creditors is made an act of bankruptcy, without the necessity of any fraudulent intention on his part, but it was not intended that any other methods of dealing with property should be an act of bankruptcy unless they were fraudulent. This transaction was not a formal assignment, and was not fraudulent; therefore, it is not an act of bankruptcy, and the trustee cannot succeed.

Lopes, L.J.—I agree. I do not think this transaction was an act of bankruptcy within the meaning of section 4, sub-section 1 (*a*) or (*b*). I think sub-section 1 (*a*) meant to refer only to all, or substantially all, the bankrupt's property, and the words conveyance or assignment there used are words of art meaning instruments under seal which actually transfer the legal or equitable interest in the property. Sub-section 1 (*b*) relates only to acts which are fraudulent, being for the purpose of delaying or defeating the creditors, and this transaction is manifestly not within it. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *May, Sykes, & Batten.*

Solicitors for the respondent, *G. L. P. Eyre & Co.*

From Q. B. Div. April 22.

HOPKINS v. SMETHWICK LOCAL BOARD. (a.)

Local government — Local board — Building without approval of board — Demolition — Notice — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

A local board cannot, under section 158 *of the Public Health Act*, 1875, *pull down buildings erected without their approval until it has given the building owner notice of its intention to pull them down.*

Cooper *v.* Wandsworth Local Board, 11 *W. R.* 646, 14 *C. B. N. S.* 180, *and* Masters *v.* Pontypool Local Government Board, 9 *Ch. D.* 677, 27 *W. R. Dig.* 121, *approved.*

Appeal from the decision of a divisional court (Denman and Wills, JJ.).

The action was brought for trespass on the part of the local board in pulling down certain buildings erected by the plaintiff.

In October, 1888, the plaintiff being desirous of erecting some houses on land owned by him within the district, deposited plans with the local board in obedience to the bye-laws made by them. These plans were rejected by the board, and the plaintiff substituted others which were also disapproved.

On December 19 the plaintiff, without any authority from the defendants, commenced to build. The defendants at once gave him notice that the houses were contrary to the Public Health Act and to their bye-laws, because the plans for them had not been approved, and required him to remove the buildings within forty-eight hours. No notice was taken of this, and the board then took out two summonses against the plaintiff under which he was fined by the justices for obstructing the highway by his scaffolding and for building without the plans having been approved by the board.

On January 11 a resolution was passed by the board to pull down the buildings, and on January 12, without any notice being given to the plaintiff, the surveyor to the board came with some other men on to the premises and pulled down the buildings. Pollock, B., at the trial, entered judgment for the defendants, but the Divisional Court set this aside and entered judgment for the plaintiff on the ground that, according to *Cooper* v. *Wandsworth Local Board*, 11 W. R. 646, 14 C. B. N. S. 180, the defendants ought to have given the plaintiff notice of the resolution of January 11 before acting upon it.

The defendants appealed.

By section 158 of the Public Health Act, 1875, where a notice, plan, or description of any work is required by any bye-law made by an urban authority to be laid before that authority, the urban authority shall within one month after the same has been delivered or sent to their surveyor or clerk signify in writing their approval or disapproval of the intended work to the person proposing to execute the same, and if the work is commenced after such notice of disapproval or before the expiration of such month without such approval, and is in any respect not in conformity with any bye-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed.

By the bye-laws made by the local board:—

"22. Every person who shall intend to erect any new works or buildings shall give a fortnight's notice to the local board of such intention by writing delivered to the local surveyor or left at his office, and shall at the same time leave or cause to be left at the said office detail plans and sections of every floor of such intended new building drawn to a scale of not less than 1in. to every 8ft., showing the position, form, and dimensions of the several parts of such building, and of the water-closets, privies, &c., and all other appurtenances. Such plans and sections shall, if required, be accompanied by a description of the materials of which the building is proposed to be constructed, and of the intended mode of drainage and means of water supply. A block plan shall be left at the same time drawn to a scale of not less than 1in. to every 44ft., showing the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street, the level of the lowest floor of the intended building, and of the yard or ground belonging thereto. The plan shall show also the proposed lines of house drainage and their size, depth, and inclination."

"33. The local board shall by their order approve or disapprove proposed new works or buildings within the times severally specified herein for the deposit of notices thereof. But if the owner or person intending to construct any new street or erect any new buildings fail to give the notice, herein required, or proceed to the execution of any of the works before the expiration of such notice without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works or do any act, or omit to do any act, or comply with any requirements of the local board, or shall make any alteration in any works after they have been completed, whether in new or existing buildings, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding £5, and he shall pay a further sum not exceeding 40s. for each and every day which such works shall continue or remain contrary to the said provisions; and the local board may, if they shall think fit, cause such works to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner as provided by the Public Health Act, 1848."

Alfred Young and *Shakespeare*, for the appellants.—The cases of *Cooper* v. *Wandsworth Local Board* and *Masters* v. *Pontypool Local Government Board*, 9 Ch. D. 677, 27 W. R. Dig. 121, are distinguishable, as there no communication passed between the plaintiff and defendants before the houses were pulled down. In this case the plaintiff knew that he was defying the local board, and had had notice requiring him to remove the buildings, which he had disregarded.

Jelf, Q.C., and *Vachell*, were not called upon to argue.

Lord ESHER, M.R.—In this case the power which the local board assumed to exercise is one affecting property in a highly penal manner. To enter upon a man's premises and pull down buildings erected by him are acts of such a character that it behoves those who claim the authority to exercise such a power to show that that they have taken care to follow every necessary step in the strictest manner possible. The cases of *Cooper* v. *Wandsworth Local Board* and *Masters* v. *Pontypool Local Board* are authorities to show that, when a local board have the power, after and in consequence of the misconduct of a building owner, to enter upon his land and demolish his buildings, there is a necessary implication by the fundamental principles of justice that they must give him notice that they intend to do so, in order that he may have an opportunity of showing cause against their resolution. In the very fair argument that has been addressed to us on behalf of the appellants we were not asked to overrule those cases. We could not have done so, for, in my opinion, the principle there laid down was entirely right, and must be affirmed. Nor can they be distinguished from the present case. They seem to me exactly to apply, and,

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

therefore, I think that we must say that the defendants, having failed to give the plaintiff notice of the resolution of the 11th of January, committed a trespass in demolishing his buildings, for which they must be held liable.

FRY, L.J.—I entirely agree. The principle of *Cooper* v. *Wandsworth Local Board* seems to me to be founded on fundamental principles of justice, and it exactly applies to the present case. It is unnecessary now to discuss the nature of the notice that must be given, since in this case it is admitted that no notice was given; but I think that some opportunity must be given to the building owner to show cause against a resolution for the demolition of his buildings.

LOPES, L.J.—In my opinion the case is clearly governed by the decisions in *Cooper* v. *Wandsworth Local Board* and *Masters* v. *Pontypool Local Board*, with which I entirely agree.

Appeal dismissed.

Solicitors for the appellants, *Robinson & Co.*, for *Shakespeare*, Birmingham.

Solicitors for the respondents, *Pattison, Wigg, & Co.*, for *H. G. & J. E. Hill*, Birmingham.

High Court of Justice.

Chan. Div. } Chitty, J. } March 25.

JOHNSON *v.* WILD. (*a.*)

Landlord and tenant — Assignment — Under-lessees— Payment of chief rent by one—Common liability— Contribution.

C. demised to M. a piece of land for 999 years, at a yearly rent of £11 7s. 8d. M. assigned by way of mortgage a part, at an apportioned rent, to A., the predecessor in title of the plaintiff, for the residue of the term, and also assigned by underlease another part, at an apportioned rent, to W., the predecessor in title of the defendants, for the residue of the term, less ten days. The defendants subsequently bought this apportioned rent from M. The plaintiff paid, under threat of distress, the whole chief rent to C., M. being insolvent, and sought to recover from the defendants a proportionate part of the rent.

Held, that no right to contribution existed, for there was no common demand to which the parties were liable, there being no one entitled to sue the defendants for their proportion of the rent.

Special case stated by consent, pursuant to order 34.

By an indenture of lease, dated the 27th of May, 1878, and made between Maria Ann Hyde Clarke, of the one part, and William John Bonnell Minor of the other part, M. A. H. Clarke demised unto Minor a plot of land at Hyde, containing 1,366 square yards, for a term of 999 years from the 29th of September, 1878, at a yearly rent of £11 7s. 8d.

By an indenture of mortgage, dated the 8th of April, 1879, and made between Minor of the one part and Reginald Samuel Adams of the other part, Minor assigned unto Adams a plot of land, containing 466 square yards (being part of the land demised by the said lease), for the residue then unexpired of the said term of 999 years, subject to the payment of the yearly rent of £3 17s. 8d., as an apportioned part of the said yearly rent of £11 7s. 8d., and to the covenants contained in the said lease, so far as the same affected the premises assigned, and subject to a proviso for redemption on payment of the sum of £500 and interest. Minor also covenanted with Adams that he, his executors, administrators, and assigns, would pay the yearly rent of £11 7s. 8d. and keep him, his executors, administrators, and assigns, indemnified from all loss arising by reason of its non-payment.

By an indenture of underlease, dated the 21st of May, 1879, Minor, in consideration of a premium of £20, demised unto Ann Whittaker a plot of land, containing 759 square yards (being other part of the land demised by the lease), for the residue of the term of 999 years, save the last ten days thereof, subject to the yearly rent of £6 6s. 6d., and covenanted with Ann Whittaker that he, his executors, administrators, and assigns, would pay the entire yearly rent of £11 7s. 8d. reserved by the lease, and keep her, her heirs, executors, administrators, and assigns, indemnified in respect thereof.

By an indenture of the 28th of September, 1880, Minor, in consideration of the sum of £118, assigned and released unto Ann Whittaker, her executors, administrators, and assigns, the said yearly rent of £6 6s. 6d. reserved by the underlease of the 21st of May, 1879.

Minor filed a petition for the liquidation of his affairs on the 8th of February, 1878, and a composition of 2s. in the pound was accepted; and on the 17th of February, 1882, Adams entered into possession of the mortgaged premises.

The residue of the land comprised in the lease of the 27th of May, 1878, was assigned to one Brooks. This land, with some buildings erected thereon, was sufficient to satisfy a part only of the full annual rent, and the land demised to Ann Whittaker remained, and still is, entirely unbuilt upon. The land and buildings belonging to the plaintiff, who was assignee thereof from Adams by virtue of an indenture of the 2nd of August, 1887, were the only property capable of being distrained upon for the full annual rent.

The plaintiff continued in possession from the date of the assignment from Adams, and paid, under threat of distress, the whole of the chief rent of £11s. 7s. 8d., to M. A. H. Clarke.

Ann Whittaker died on the 19th of May, 1888, and the defendants were the trustees and executors of her will, and were in possession of the premises comprised in the underlease to her.

The questions submitted for the opinion of the court were:—

1. Whether the defendants, as trustees and executors of the will of Ann Whittaker, were liable to contribute any, and what, proportion of the rent reserved in the lease of the 27th of May, 1878, in respect of the portion of the plot which was demised by the underlease of the 21st of May, 1879.

2. Whether the defendants were liable, as such trustees and executors, to repay to the plaintiff any, and what, part of the sum of £28 9s. 2d., which had been paid by him under the lease of the 27th of May, 1878?

Levett (*Romer, Q.C.*, with him), for the plaintiff.—The plaintiff is entitled, on equitable grounds, to a contribution for what he has done in paying the rent for the benefit of all parties: Story's Equity Jurisprudence, s. 493. The principle of contribution exists as between underlessees: *Webber* v. *Smith*, 2 Vernon, 103. The plaintiff has paid the rent to preserve the defendant's property. This action resembles the old writ of contribution: Fitzherbert, De Nat. Brev., 9th ed., p. 162. In this case there can be no difficulty about the apportionment.

Maclean, Q.C., and *Swinfen Eady*, for the defendants.—The underlessee paying the entire rent has no right against another underlessee: *Hunter* v. *Hunt*,

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

4 C. B. 300. A tenant in common has no right of action against his co-tenant for contribution for money expended in repairs: *Leigh* v. *Dickeson*, 33 W. R. 538, 15 Q. B. D. 60. No one can sue the defendants for their proportion, so there can be no right of contribution. The plaintiff must be taken to have known the liability to which his property was subject; he has only Minor to look to.

Levett, in reply.—The plaintiff is entitled as paying to save the defendants' estate; they could be ejected if he did not pay.

Chitty, J.—The plaintiff claims contribution from the defendants in respect of the payment that he, the plaintiff, has made for the rent under a lease for a term of 999 years granted in 1878. The plaintiff claims under the lessee. Adams took a mortgage from the lessee of part of the property, his security being framed in this way:—He became the assign of part of the land comprised in the lease for the whole term granted by the lease, so that, in law, he was an assign of that part of the land demised, and, consequently, Adams remained liable to the landlord for the rent that was reserved upon the lease. Adams has assigned over to the plaintiff, who stands in his place. Adams, for his protection, took the covenant from his mortgagor for the payment of the entire rent of the lease, and also a covenant for indemnity. The defendants have a title to another part of the land comprised in the same lease, their title being derived out of the lessee's interest.

The defendants, or their immediate predecessors, took an underlease; but the underlease was drawn in a different form. Instead of taking an assignment for the whole of the term granted by the original lease in the part of the land with which the defendant's predecessor was dealing, they took an underlease, and so escaped all liability for payment of the original rent; and they also, by way of precaution, took from the original lessee a covenant to pay the rent and to indemnify them against the rent. Now Minor, the original lessee, has got into difficulties and cannot pay the rent. I do not think it is material, but, on the statements of this case, it does not appear that he is discharged from payment of the rent. He remains liable, and he remains liable apparently on those covenants which I have mentioned—the covenant to pay the rent and the covenant to indemnify. But he cannot pay, and under those circumstances the landlord has distrained for the rent; and, finding he could obtain his distress best upon that part of the land which is in the plaintiff's holding, he has distrained, or threatened to distrain, which is the same thing, on the plaintiff. The plaintiff, in order to avoid the distress, has paid the entire rent reserved by the lease of 1878, and that is the payment in respect of which he demands the contribution.

Now, he does not demand contribution from a person who is liable to a common demand, because the defendants are not only not liable for the rent, but nobody can sue the defendants in respect of this supposed liability, unless it be the plaintiff; whereas, in a common demand on which two persons are liable, if one pays, then there is a right of contribution on the part of the one who makes the payment against the one who does not. But there is no authority for the proposition that has been now advanced. Co-sureties are liable to the principal demand either in the whole or in part; and, as between the co-sureties, there is not only the common law right of contribution, but there is the equitable right of contribution.

The next remarkable part of this case is, that the kind of question must, in fact, have arisen time after time during the centuries that this class of law has been known—a first demise, a sub-demise, and a sub-demise again to the second, third, fourth, fifth, or even tenth degree. If I were to assent to this principle I should have to pursue, not the first, as it were, in the series of under-lessees, but I should have to go down to the end of them. The thing is absurd.

The position of the plaintiff is unquestionably unfortunate. He has in this case got a person who stands on the same level as he himself does in respect of the demand—that is to say, the rent; but unfortunately that person cannot pay. He would have a right of contribution, and something much more, because he would have a right under the special covenants against Minor, and he need not, as against him, resort to any such device as this. But he has lost that, and he cannot get contribution from the defendants. I can find no authority to justify the plaintiff's contention; and I think I should be erring if I said there was any principle which let in this demand. The result is, that the plaintiff's case fails.

Judgment for defendants, with costs, including costs of the special case.

Solicitors, *Robbins, Billing, & Co.*, for *Johnson & Johnson*, Stockport; *A. J. Nash*, for *F. & T. Drinkwater*, Hyde.

Chan. Div. North, J. Feb. 19.

Colley v. Hart. (a.)

Patent—Action to restrain threats of legal proceedings against party infringing—Action by patentee for infringement—"Due diligence"—Discontinuance of action—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

An action for infringement of a patent was commenced with due diligence, and subsequently discontinued before trial.

Held, that no right of action accrued, under section 32 *of the Patents, Designs, and Trade-Marks Act,* 1883, *to the party sued in the discontinued infringement action.*

Trial of action.

This was an action brought by Walter William Colley, a manufacturer of toilet papers, against the defendant, Morris Hart, who carried on a similar business under the style of the Patent Toilet Requisite Co., claiming an injunction to restrain the defendant from issuing circulars, letters, or advertisements containing threats of proceedings against any person dealing in articles manufactured by the plaintiff in infringement, as the defendant alleged, of the defendant's patent rights.

Hart was the owner of a patent for perforated toilet rolls, and on the 15th of September, 1888, he issued a circular to the trade to the following effect:—"It has come to my knowledge that W. W. Colley, late in my employ, is offering to the trade perforated toilet rolls, which is an infringement of my patent, 1885, No. 106. I further learn that W. W. Colley is not only offering this paper in breach of my patent rights, but also that he is infringing my trade-mark, a copy of which is enclosed, and which is duly registered in pursuance of the Act. This is well known to Mr. Colley, he having been in my employ until April, 1888. His proceedings are therefore a distinct breach of my rights under both patent and trade-mark, and I think it right to inform you that I intend to commence proceedings forthwith against every person whom I find in any way dealing in any perforated toilet paper manufactured in breach of my patent rights under the above patent or under my trade-mark."

(a.) Reported by Francis T. Duka, Esq., Barrister-at-Law.

Thereupon Colley, on the 22nd of September, 1888, issued the writ in this action, in which he claimed an injunction to restrain the defendant from issuing the above circular, or any circulars, letters, or advertisements containing threats against purchasers of the articles manufactured by Colley, a declaration that the defendant's alleged trade-mark rights were null and void, and damages.

Notice of motion for injunction before the vacation judge was given on the 3rd of October, and it was ultimately ordered to stand over until the 2nd of November, when North, J., granted an interlocutory injunction. Hart thereupon on the 6th of December commenced two actions against Colley, one to restrain infringement of his patents, the other to restrain infringement of his trade-mark. The statement of claim in the threats action was delivered on the 8th of February, 1889. The statement of claim in the patent action was delivered on the 13th of May, 1889, and the defence in that action on the 27th of May. On the 6th of November Hart discovered, by means of inspection obtained in the threats action, that Colley's manufactures did not infringe his patent, and he accordingly served notice of discontinuance of the patent action, and paid the costs. The threats action (*Colley* v. *Hart*) and the trade-marks action (*Hart* v. *Colley*) now came on for trial. The latter is reported *ante*, p. 440.

Aston, Q.C., and *R. Wallace*, for the plaintiff.—Hart did not commence his action with due diligence, nor prosecute it with due diligence: *Herrburger* v. *Squire*, 5 Rep. Pat. Cas. 581; *Challender* v. *Royle*, 36 W. R. 357, 36 Ch. D. 425; *Kurtz* v. *Spence*, 36 W. R. 438, 36 Ch. D. 770; *Combined Weighing Co.* v. *Automatic Weighing Co.*, *ante*, p. 233, 42 Ch. D. 665; *Halsey* v. *Brotherhood*, 30 W. R. 279, 19 Ch. D. 386.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the defendant, cited *Day* v. *Foster*, *ante*, p. 362, 43 Ch. D. 435; *Sugg* v. *Bray*, 2 Rep. Pat. Cas. 223, 33 W. R. Dig. 86.

NORTH, J. [His lordship read the circular letter of the 15th of September, 1886, set out above, and continued:—].—I have at present no evidence that this was published maliciously, and hence there is no right of action in respect of it, unless it is given by the 32nd section of the Patent Act, but I think that section would have given a right of action but for the proviso in it. Now the proviso to section 32 is:—"That this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." The action instituted on the 6th of December, 1888, by Hart against Colley clearly was an action for infringement, and, if commenced and prosecuted with due diligence, prevents any right of action under section 32. It is suggested in this case that this action for infringement was not such an action. The first question is whether it was commenced with due diligence. It is said that the issue of the writ on the 6th of December was not commencing with due diligence, and *Herrburger* v. *Squire* is cited, in support of that view, but before dealing with that case I am of opinion that no precise period can be fixed within which an action must be commenced. The circumstances must decide in each case. In *Herrburger* v. *Squire* there were threats in 1885 not of any importance, but on the 21st of October, 1886, a threat was published to the trade, and Charles, J., says (p. 594, 5 Rep. Pat. Cas.):—"At the time he issued that circular he must have become aware, I suppose, that the plaintiffs, amongst other persons, were selling the damper with the arrangement of the arm attached to the body of the damper, but he took no step. He states that he intends to take legal proceedings, but he took none, and a whole year passed away." Now Charles, J., in his judgment, acts on the fact that the party had known of the state of things existing for a year—that there had been threats issued for a year, in which no proceedings were taken. Then another advertisement was issued, and he goes on to say:—"What did the defendant do? All September passed, and nothing was done. All October passed, and nothing was done by the defendant. But something was done by the plaintiffs. The plaintiffs, on the 12th of October, issued their writ under section 32. Even then the defendant did nothing, and it was not until the 14th of November that he instituted two actions against two persons who had purchased the plaintiffs' check-action with this armed damper, and then, in due time, in December, he counter-claimed." Then the judge asks whether that is due diligence, and he says, "I cannot say so." Then he proceeds: "He intended to do it in 1886, but he does absolutely nothing. I must assume that he must have known that sales were going on of these armed dampers in England; otherwise I do not see why he should have issued the circular of October 21, 1886. He does nothing for nearly a twelvemonth. At the end of the twelve months, in September, 1887, he returns to the charge, and he gives another notice in the *Music Trades Journal* that he intends to commence an action in the Chancery Division of the High Court of Justice against anyone infringing, but he does nothing, and it is not until more than a month after the plaintiffs have commenced their action under section 32 that he does institute two actions against two other persons for the infringement of his patent. I cannot think that that is due diligence, and therefore I do not think that he has brought himself within the proviso." His lordship further added: "He has not, having regard to all the circumstances of the case, in my opinion, with due diligence commenced and prosecuted an action for infringement of his patent." Of course, the facts in this case differ from the facts in the one just cited, but I cannot find any principle in it which will assist me in the present case, for the judge relied on the fact that for fourteen months infringement had being going on to the knowledge of the party who took no proceedings. Here it is totally different.

I find great difficulty in fixing the time within which an action must be brought to be commenced with due diligence. For instance, a man may get a good and valuable patent in 1885, which is certain to be infringed. In 1886 he finds A. infringing, warns him by letter which, according to the cases, would be a threat. A. receives it, and submits unconditionally, and therefore no proceedings are taken. In 1887 the patentee finds B. infringing, and he is about to take proceedings against him, but B. dies insolvent before action. In 1888 he finds C. infringing, and C. submits. In 1889 D. infringes, and the patentee writes a warning letter to him. D. commences at once an action for threats, and the patentee immediately issues his writ for infringement. D. says you are too late, these threats having been going on for three years; for no less than three years you have known that that there were infringers, and you have brought no action." In such a case I cannot doubt for a moment that the action commenced against D. would be commenced in due time. This shows how impossible it is to attempt to fix any definite time within which such an action must be brought.

Now, the only case that I know of (except *Herrburger* v. *Squire*) in which anything is laid down upon the question of time is *Challender* v. *Royle*. Of course, the learned judges do not lay down any rule applicable to all cases, and I refer to their remarks by way of illustration. Cotton, L.J., says: "Was the action commenced with due diligence? Mr. Bousfield contended that the action must be commenced with due diligence from the time when the defendant first knew

that the plaintiff was doing what the defendant alleges to be an infringement. I cannot agree with that view. In my opinion, an action must be held to be commenced with due diligence if commenced within a reasonable time after the threats have been made, for the threats are the only matter complained of. Now, assuming the threats to have been made in March, the action against the Manchester Plumbing Co. was, in my opinion, commenced with due diligence after the time when the defendant first issued those threats; for I think that the interval between March and June is not an unreasonable time for a man to take to consider whether he should bring an action in respect of a supposed infringement of his patent." That is to say, three months is a reasonable time to take. Now, I do not apply that as deciding this case, but I give it as an illustration to show what Cotton, L.J., thought, under the circumstances, would be a reasonable time within which an action might be brought. If that were a test to be applied to the present case, I find this, that threats having been uttered on the 15th of September, the action was commenced on the 6th of December—that is, within three months; it is within the time Cotton, L.J., thought a reasonable time.

Again it is evident, and remarks have been made about it by judges from time to time, what the inconvenience is of having patent litigation doubled by having not only an action for infringement, but also another action for threats, before another judge perhaps in a different division. In this case, therefore, there was an action for threats, instituted on the 22nd of September, 1888, by Colley against Hart. An action for infringement may be brought within a reasonable time with due diligence. As a *primâ facie* rule applicable to most cases, I do not think it can be said that a man is guilty of undue delay if he waits for the purpose of seeing whether he cannot combine the two subjects of action in one action—in other words, if he waits a reasonable time to have a statement of claim delivered and bring his counter-action by way of a counter-claim. In this case an interlocutory order was made in the threats action on the 2nd of November. In my opinion the defendant was justified in refraining for some time in order to see whether he could bring his claim for infringement in that action instead of commencing a new one; or, in other words, he was justified in waiting for some time, at any rate, to see what the statement of claim was, to have that delivered, and to raise his answer as to infringement by counter-claim. I find here, although the action was commenced on the 22nd of September, 1888, it was not until the 8th of February, 1889, that the statement of claim by Mr. Colley was delivered. That was two months after the commencement of Mr. Hart's action. I cannot see, therefore, that there was any delay on the part of Hart in waiting for a time to see whether he could not defend by counter-claim. When I find that the statement of claim in the threats action was not itself delivered until two months after Hart had actually brought his action for infringement, I come to the conclusion that there was not want of due diligence in commencing this action. Then the proviso requires that an action is not only to be commenced with due diligence, but it is to be prosecuted with due diligence. As regards the prosecution, I must draw a line between what did and what did not happen before the date of the discontinuance, the 7th of November, 1889. Now during that time the action was going on. Is there anything to show that it was not being prosecuted with due diligence. The proceedings do take considerable time no doubt, but I find that Mr. Hart's statement of claim is delivered on the 13th of May, 1889, a long time after the issue of the writ. The defence was not put in till the 27th of May.

From then certain proceedings followed, which I do not find, down to the time of discontinuance, were in any way wanting in due diligence. It is, however, suggested that there was not due diligence in prosecuting the action from that time onward, because it was discontinued.

The action was not prosecuted after the 7th of November, because Mr. Hart discontinued it and paid the costs. Now was that discontinuance a want of due prosecution? Mr. Aston says that the proviso in section 32 means prosecuting an action down to a successful result. In the first place, the section does not say so, and I should find great difficulty in understanding it if it did. It is suggested that the section should read that he must, with due diligence, commence and prosecute and recover judgment in an action for infringement; but I do not find any words of that sort in the section. I do not believe that that was the intention, and I think it might produce a very unjust result if those words had been there.

Moreover, a failure to proceed in the action for infringement would not at all necessarily be a fair test as to whether he was justified in his threat or not. The patent might be perfectly good, and the action fail. His case might break down through infirmity of his witnesses. Or there might be serious questions whether what was done was really an infringement or not. Successive courts might hold it was, and the House of Lords, in the end, say it was not. It would be strange if the original right to utter threats is to be tested by such an action.

There are numerous cases in which a failure to succeed in an action would be a very unfair test as to whether he was justified, in an action for infringement, in making threats founded upon the fact of his having a good title. Therefore, not only do I not see my way to add such words to the section as to read it "with due diligence commence and prosecute and recover judgment in an action," but I can see that if I were to attempt to add such words to the section I might be doing something which would be a great injustice.

I hold, accordingly, that it is not essential for an action to come within the proviso that it should necessarily be prosecuted up to judgment, and, therefore, that a man may have commenced, and with due diligence prosecuted, an action within the proviso, although judgment is against him in it, and, being within the proviso, prevents there being any right of action existing under the earlier part of section 32. And notwithstanding the fact that, in the action for infringement, it had been found that the plaintiff was wrong, because there was no infringement, so that he failed in the action, in my opinion that would not the less be an action within the proviso, and prevent a cause of action for threats arising under section 32. He is exactly in the same position, by discontinuing a hopeless action before trial, as he would have been in if he had prosecuted it to trial and had then failed. As failure at the trial would not have prevented the action being one within the proviso, so, in my opinion, the discontinuance before trial does not put him in a worse position than if he had carried it to trial.

Action dismissed.

Solicitors, *Truefitt & Gane*; *Linklater & Co.*

Chan. Div. }
Stirling, J. } March 28; April 1.

MADAME TUSSAUD & SONS (LIMITED) *v.* TUSSAUD. (*a.*)

Trade name — Company — Registration—Injunction—Name calculated to deceive—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.

The plaintiff company carried on an old-established

(*a.*) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

business of waxwork exhibitors. The defendant, Louis Joseph Kenny Tussaud, had lately formed a company under the name of Louis Tussaud (Limited), to carry on a similar business within a short distance of the plaintiffs' exhibition. Apart from the proposed adoption of the name Louis Tussaud (Limited), there was no evidence of intention on the part of the defendant or the intended new company to deceive the public, and the prospectus of the new company stated that they had no connection with the plaintiffs. The defendant had never carried on any similar business on his own account. His only interest in the new company was that he was a large shareholder, and held a salaried post as manager and wax modeller.

Held, that the name of the new company so closely resembled that of the old company as to be calculated to deceive, and that an injunction must be granted to restrain the defendant from registering a company under that name.

This was an action for an injunction to restrain the defendant from registering a new company under the name of Louis Tussaud (Limited), or any other name so nearly resembling the name of the plaintiff company as to be calculated or likely to deceive the public into the belief that the new company was the same as the plaintiff company, and from issuing advertisements, circulars, or prospectuses representing that a company was to be incorporated under the name of Louis Tussaud (Limited) or any such other name as aforesaid, and from carrying on or commencing any business similar to the business of the plaintiff company under the name of Louis Tussaud (Limited) or any such other name as aforesaid.

The plaintiffs carried on the business of waxwork modellers and exhibitors, originally founded by Madame Tussaud in 1802. The business had been carried on by members of the Tussaud family until a few years ago, when it was sold to a Mr. Poyser, by whom it was subsequently transferred to the plaintiffs. There was not at the present time any member of the Tussaud family engaged in it.

The defendant, Louis Joseph Kenny Tussaud, was the son of one of the former proprietors of the exhibition, from whom he had learned the art of modelling in wax, but he had never carried on any business of the kind on his own account. He had recently arranged for the formation of a company, to be called Louis Tussaud (Limited), to carry on the business of waxwork exhibitors on a site to be acquired in Shaftesbury-avenue. The name of the defendant, given as Louis Tussaud, appeared on the front sheet of the prospectus as general manager. The defendant was also one of the signatories of the memorandum of association. Three contracts were entered into on the formation of the company. Two of them were dated the 6th of March, 1890, and were made between one Harry Smith and the defendant, and provided for the purchase by the defendant of the proposed site of the new exhibition and the erection of the buildings. The third contract was dated the 8th of March, 1890, and was made between the defendant and a trustee for the proposed new company, and it was thereby agreed that the company should purchase the benefit of the previous agreements for £7,500, of which £5,000 was to be paid in cash and £2,500 in fully paid-up £1 shares, to be issued to the defendant or his nominees. It was further agreed that the defendant should be the manager and wax modeller of the company for seven years at a salary of £200 per annum, and should also receive five per cent. of the profits, and that he should not model in wax for any other company.

It appeared from the evidence that the plaintiffs' exhibition, though usually known as Madame Tussaud's, was also very frequently spoken of as Tussaud's only.

It also appeared that, except so far as the adoption of the name "Louis Tussaud (Limited)" might imply an intention to mislead the public, neither the defendant nor any of the directors of the new company had done anything to mislead the public; and, indeed, the prospectus of the new company stated that it was "formed for the purpose of introducing to the West End of London a new exhibition, similar in many respects to, but having no connection with, the one so long and successfully carried on in Baker-street and Marylebone-road."

The plaintiffs now moved for an *interim* injunction.

Sir Horace Davey, Q.C., Buckley, Q.C., and *Wace*, for the plaintiffs.—The business proposed to be carried on by the new company is exactly similar to that carried on by the plaintiff company, and the name of the new company so closely resembles that of the plaintiff company as to be calculated to deceive. The plaintiff company are, therefore, entitled to an injunction both under section 20 of the Companies Act, 1862, and also under the general principles acted upon by the court in such cases.

They cited *Hendriks* v. *Montagu*, 30 W. R. 168, 17 Ch. D. 638; *Hoby* v. *Grosvenor Library Co.* (*Limited*), 28 W. R. 386; *Turton* v. *Turton*, *ante*, p. 22, 42 Ch. D. 128.

Hastings, Q.C., *A. à B. Terrell*, and *H. P. Wilkinson*, for the defendant.—The case falls within *Turton* v. *Turton* and not within *Hendriks* v. *Montagu*. *Hendriks* v. *Montagu* only applied where the business was to be carried on under a fancy name. Here the defendant proposes to make use of his own name. He might have carried on the business himself under that name, and he might have carried it on in partnership with others under that name, and it would make no difference that instead of doing so he formed a company to carry it on.

Sir H. Davey, Q.C., in reply.

Stirling, J., stated the facts, and continued:—It appears, from the contracts entered into on the formation of the company, that the interest of the defendant in the company is twofold—(1) he is to be the recipient of 2,500 fully paid-up shares, and (2) he is to act as manager and modeller of the company, being, in that respect, the paid servant of the company, whose orders he is bound to obey. Up to the present time, so far as appears, he has not carried on any exhibition business upon his own account, or any business in connection with the plaintiffs' exhibition, except that of modeller. It cannot be doubted, as it seems to me, that the name of "Tussaud" is well known and of high reputation in connection with waxworks, and that, if another exhibition of a similar nature to the plaintiffs' were to be established in London under the defendant's name, the one would, in the ordinary course of human affairs, be likely to be confounded with the other, and visitors from the country who had heard of the plaintiffs' establishment would be likely to be misled into going to the other. If persons not bearing the name of Tussaud, and deriving no title from anyone bearing that name, were to seek to establish, under the name of Louis Tussaud, a company such as is promoted by the defendant, I think that the natural result of their carrying on business under that name would be to mislead people who were desirous of visiting the plaintiffs' exhibition into going to theirs, and that the persons so doing ought, on the principles laid down in *Hendriks* v. *Montagu*, to be restrained by an injunction similar to that granted in that case.

The question which I have to decide is whether the defendant, bearing, as he does, the name of Tussaud, is equally liable to be so restrained.

The principles on which the court acts are laid down

in *Burgess* v. *Burgess*, 3 De G. M. & G. 896, 904, where Turner, L.J., says:—"No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." That statement of the law was acted on and approved of by the Court of Appeal in *Turton* v. *Turton*.

It follows from the decisions in those cases that the defendant is at perfect liberty to open on his own account and carry on in his own name an exhibition of waxworks. Further, he may take partners into his business, and carry it on under the name of Louis Tussaud & Co. Having commenced business on his own account, I apprehend that he might sell it, with the benefit of the goodwill, to third parties, and that these third parties might, if they thought fit, continue to carry on the business under the same name. They, again, might transfer the business and goodwill to a joint-stock company; and, though I do not express a final opinion to that effect, I am not prepared to say that that company might not be registered under the same name as had previously been used in connection with the business. On the other hand, I conceive it to be clear that the defendant could not, either for valuable consideration or otherwise, confer on another person the right to use the name of Tussaud in connection with a business which the defendant had never carried on and in which the defendant had no interest whatever.

Then comes the question, Can he confer this right on a person or company towards which he stands simply in the position of a paid servant? He can, no doubt, confer the right of saying that the business is under his management, but can he go to A. B. and say to him:—"I will become your servant as manager and modeller for seven years, and you shall carry on the business, which is not to be mine but yours, in my name"? Does it make any difference that, instead of going to a private individual, he invites the public to become proprietors of a business upon like terms? On this question there is some authority. In *Massam* v. *Thorley's Cattle Food Co.*, 28 W. R. 966, 14 Ch. D. 748, a person named Thorley manufactured cattle food according to a recipe which he had obtained, and sold it under the name of "Thorley's Food for Cattle." Upon his death the plaintiff succeeded to his business, and continued it, and shortly afterwards the defendant company was registered as a limited company. The articles provided that the directors were to enter into an arrangement with a brother of the plaintiff's predecessor in title, who had become acquainted with the secret of the manufacture, for the purchase of that secret and for his employment in the business of the company. The decision was not given on this simple state of facts, but James, L.J., observes on it as follows:—"The name of the company is, to my mind, a fiction. The meaning which the name of 'J. W. Thorley & Co. (Limited)' would convey to any person's mind, is that there had been a partnership of J. W. Thorley & Co., a real partnership, which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. But here J. W. Thorley was not a partner. J. W. Thorley was employed as an agent, as the manager, and J. W. Thorley's only connection with the company, *quâ* company, is that he had a first share in this company. To my mind that is the same thing as if somebody were to get up a brewery at Burton, finding somebody of the name of Bass, or somebody who would take the name of Bass (for there is no law to prevent a man from assuming any name he likes), and then get a company registered under the name of 'J. Bass & Co. (Limited)' or 'W. Bass & Co. (Limited),' and advertise Bass & Co.'s Pale Ale. I really can see no distinction between 'Bass & Co.'s Pale Ale,' as advertised by such a company, and 'Thorley's Food for Cattle,' advertised by the company now before us, which has procured a person of the name of Thorley to be connected with their company."

It seems to me that here, in like manner, the name of the company represents that which is not true in fact. There never has been any business carried on by Louis Tussaud under the name of Tussaud, of which he he has been the proprietor, and I think that, in accordance with the first of the two propositions laid down by Turner, L.J., it ought to be presumed, *primâ facie*, that the object of the defendant and the proposed company is to induce the world to believe that the business intended to be carried on is that of the plaintiffs, or a branch of it. It is said that the prospectus plainly states on the face of it that the new exhibition has no connection with the plaintiffs. That is true, and the statement would be a complete answer to a person who complained that he had been misled into taking shares in the new company on the faith that it was connected with the plaintiffs, but is it an answer to the plaintiffs' complaint, that the natural result of their intended acts will be to induce the public at large to suppose that their business is that of the plaintiffs? If the defendant had written to a Mr. Brown saying: "The business you propose to carry on will have no connection with that in the Marylebone-road," and Mr. Brown had replied, "Of course not," none the less would the defendant be liable to be restrained. I think, therefore, an injunction ought to be granted in similar terms to that in *Hendriks* v. *Montagu*—that is to say, to restrain the defendant until trial or further order from registering under the Companies Act any company to be incorporated under the name of "Louis Tussaud (Limited)," or any other name likely to mislead or deceive the public into the belief that the new company is the same as the plaintiff company, and to further restrain him in the terms of the present application.

Solicitors, *E. F. & H. Landon; Terrell, Atkinson, & Winstanley.*

Chan. Div. Kay, J. } Dec. 2.

WESTRUP *v.* GREAT YARMOUTH STEAM CARRYING CO. (*a.*)

Ship—Maritime lien—Towage.

There is no maritime lien for ordinary towage services rendered to a ship, either on the high seas or within the body of a county.

Adjourned summons.

This was a summons, taken out in the winding up of the Great Yarmouth Steam Carrying Co. by the owners of four steam tugs, creditors of the company, for a declaration that the applicants were entitled to lien for

(*a.*) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

towage services upon certain vessels of the company, and for an order that they might be paid their claims in full, and the costs of the application, out of the proceeds of sale of such vessels.

It was admitted that the services were in the nature of ordinary towage services rendered by the applicants in towing the vessels from time to time into and out of the harbour of Great Yarmouth, and the only question argued was whether or not such services were the subject of maritime lien so as to entitle the applicants to prove for their claims in full, as asked by the summons.

J. Gorell Barnes, Q.C., and *L. E. Pyke*, for the applicants.—Towage services give rise to a maritime lien. The case of *The Isabella*, 3 Hagg. Adm. 427, decided previously to the Act of 1840 (3 & 4 Vict. c. 65), must be taken as recognizing a maritime lien to arise out of towage services. In *The Constancia*, 10 Jur. 845, decided in 1846, claims for towage were allowed to rank along with wages and pilotage in priority to previous bottomry bonds; and in *The St. Lawrence*, 5 P. D. 250, 29 W. R. Dig. 199, the existence of a maritime lien for towage was admitted in argument. There are, no doubt *dicta*—but only *dicta*—to the contrary in the case of *The Heinrich Bjorn*, 33 W. R. 719, 34 W. R. Dig. 179, 10 P. D. 44, 11 App. Cas. 270. It is undisputed that a maritime lien has always existed for salvage, and towage is closely akin to salvage. The Court of Admiralty has often entertained claims for towage in actions of salvage: *The Isabella; The Princess Alice*, 3 W. Rob. 138. The object of the Act of 1840 was to extend the locality of the jurisdiction of the Court of Admiralty within the body of a county, and the Act dealt simply with jurisdiction, and not with maritime lien, though it extended the area of the lien by extending that of the jurisdiction. Because there is no maritime lien for necessaries, it does not follow that there is none for towage, which is of recent origin: *The Wataga*, 5 W. R. 155, Swabey, 165.

They referred also to *The General Palmer*, 2 Hagg. Adm. 176, as to the existence of a lien for pilotage.

Horton Smith, Q.C., and *D. L. Alexander*, for the official liquidator.—There is no authority in favour of the existence of the alleged lien, and principle is against it. There is a broad distinction between towage and salvage: *The Princess Alice*. Towage services arise out of contract, and in general out of a contract made on land. Previously to the Act of 1840 the Court of Admiralty had no jurisdiction in the case of a contract made on land or in the body of a county: *Greenway and Baker's case*, Godbolt, 275; *General Iron Screw Collier Co. v. Schurmanns*, 8 W. R. 732, 1 J. & H. 180; 15 Ric. 2, c. 3; 4 Co. Inst., p. 134; 1 Com. Dig., 5th ed., pp. 497, 504. Where there is no jurisdiction there can be no maritime lien. Therefore there could have been no maritime lien for towage before the Act of 1840; *The Isabella* was a case of salvage, and the Trinity Masters looked into the matter and thought that the services were in the nature of towage, and a sum was awarded as for towage. If the case had not been launched as one of salvage the claim could not have been entertained, *The Strathnaver*, 1 App. Cas. 58, 24 W. R. Dig. 281. The Act of 1840 did not create a maritime lien in a case where none existed before: *The Sara*, 35 W. R. 826, 12 P. D. 158; *The Alexander Larsen*, 1 W. Rob. 288; *The Ocean*, 2 W. Rob. 368, 9 Jur. 381. The cases of *The Constancia* and *The St. Lawrence* were decided at a time when it was supposed that the Act of 1840 did create a maritime lien. It is clear that the Court of Admiralty can exercise jurisdiction *in rem* although there is no maritime lien: *The Two Ellens*, 20 W. R. 592, L. R. 4 P. C. 161, 166; *The Sara*. The observations of the judges in *The Heinrich Bjorn* are not mere *dicta*, but form an essential part of the *ratio decidendi*.

Pyke replied.

KAY, J.—This is simply a question whether there is any authority for the proposition that there exists a maritime lien for services rendered to a ship, not in the nature of salvage, but in simply towing the ship. Of course, if it were towing for the purpose of salvage of the ship, nobody would hesitate to say that it must come within the principle applicable to salvage. But here it is admitted that there has been no service of that kind, but merely towage for the purpose of accelerating the speed of the ship either leaving or returning to the port.

Now, the authority bearing upon the subject is as follows:—In the case of *The Heinrich Bjorn*, Lord Bramwell discusses the meaning of section 6 of the statute 3 & 4 Vict. c. 65, which enacts "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for service rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made." That case was one in which necessaries were supplied, and the argument seems to have been that, because the Act I have just mentioned gave the High Court of Admiralty jurisdiction with respect to necessaries, therefore necessaries became the subject of maritime lien. Lord Bramwell, in answering that argument, said: "Jurisdiction is by the section given in the cases of 'towage,' and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was, indeed, said it was a sort of salvage, but it certainly is not. And the Admiralty Court, I take it, would have, under the statute, jurisdiction in a case of towage where the ship had been let, and the owner was not liable." Then later on he said, "Jurisdiction as to towage was not created by the statute. It existed before with no maritime lien." Now that case came first before Sir James Hannen, 32 W. R. 279, 8 P. D. 151, and went afterwards to the Court of Appeal, by whom his decision was reversed. The judgment in the Court of Appeal (constituted of Lord Esher, M.R., and Bowen and Fry, L.JJ.), was delivered by Fry, L.J., but in the part which I am about to read it was the judgment of them all, because, as has been pointed out, the Lord Justice (33 W. R., at p. 720) begins by saying: "This judgment is that of the Master of the Rolls, Bowen, L.J., and myself; but I should state that in that portion of it which decides that the agreement which I shall presently read is not a bottomry bond the Master of the Rolls concurs with difficulty, but he unhesitatingly agrees with the remainder of the judgment." Now, these are the words used by the whole court (p. 721), still commenting on the same 6th section of 3 & 4 Vict. c. 65: "It has been suggested that the way in which necessaries are associated with salvage and damage implies an intention to give in respect of necessaries the same lien as existed in respect of salvage, but the argument is not satisfactory, especially when it is observed that necessaries are more closely associated with towage, which gave no lien, than with salvage or damage." Therefore I have the considered opinion of Lord Esher and Bowen and Fry, L.JJ., confirmed by Lord Bramwell in the House of Lords, that towage on the high seas does not give a maritime lien. Now, it has been argued, and I agree with the argument, that this statement of the law is not

altogether extra-judicial, because it was a link in the chain of reasoning on which judgments were founded. The argument was this: "The statute does not give a maritime lien for necessaries in respect of which there was admittedly no maritime lien before the statute. It is said that it does give such a lien, because the word 'necessaries' is coupled with the word 'salvage,' but it is also coupled with the word 'towage,' in respect of which there is likewise no maritime lien." I quite agree that it is a legitimate argument that this was an essential part of the *ratio decidendi*, and, therefore, these observations are rather more than extra-judicial *dicta*.

Then what authority is there on the other side? No case has been cited in which the neat point has been argued and decided whether towage did give a maritime lien either on the high seas before the Act, or within the body of a county since the Act; but three cases have been cited in which towage has no doubt been treated as if it gave a maritime lien. They are *The Isabella*, *The Constancia*, and *The St. Lawrence*; but in not one of those cases was the point argued. Towage was treated as though there was a maritime lien in respect of it when coupled with other things, as to which, in some of the cases, there was undoubtedly a maritime lien. That may have been because it was not worth while to insist upon the distinction, or (except in the case of *The Isabella*) that the towage in question was towage in the nature of salvage. In the case of *The Isabella* it certainly was found that the towage was not in the nature of salvage. But there, again, I cannot find that there was any distinct argument or decision on the point that towage differed from necessaries supplied to a ship on account of its being the subject of a maritime lien. Accordingly I am bound to say that the weight of authority is against this application, and that it must be refused, with costs.

Solicitors, *Ingledew, Ince, & Colt*, for *Chamberlin & Leech*, Great Yarmouth; *H. Montagu*.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April 17.

In re A SOLICITOR.
Ex parte INCORPORATED LAW SOCIETY. (*a*.)

Solicitor—Striking off roll—Right to make the application—Applicant not a client of the solicitor's—Incriminating answers given in examination in bankruptcy—Admissibility—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), *ss.* 13, 15—*Rules, Part I., r.* 1; *Part VI., r.* 3; *Form V. in schedule—Bankruptcy Act* 1883 (46 & 47 *Vict. c.* 52), *s.* 17.

An application under the Solicitors Act, 1888, *s.* 13, *to strike the name of a solicitor off the rolls may be made by a person who has not employed the solicitor in a professional capacity. On the hearing of the application, answers given by the solicitor in the course of his public examination in bankruptcy may be used in evidence against him.*

This was the argument upon a preliminary report of the committee of the Incorporated Law Society which was presented to the court for the purpose of obtaining a decision upon certain objections which had been taken on behalf of the solicitor, to the proceedings at the first hearing before the committee.

The solicitor was a bankrupt, and the application to strike him off the roll of solicitors was made by the official receiver at the instance of the Board of Trade. No person who had been a client of the solicitor's joined in the application. The charges of misconduct made by the applicant were based upon answers which the solicitor had given in the course of his public examination in bankruptcy as to dealings by him with moneys of clients. It was proposed to adduce in evidence the notes of the public examination to prove the alleged misconduct. On the hearing before the committee it was objected by counsel on behalf of the solicitor, (a) that the Board of Trade, by whose direction the official receiver made the application, is not charged with the duty of punishing solicitors, nor has the Board authority to direct the official receiver to take proceedings with that object; (b) that the duties of the official receiver, as regards the investigation of the debtor's conduct, are defined by section 69 of the Bankruptcy Act, 1883, and do not include the making of an application to strike the debtor, if a solicitor, off the roll; and (c) that, as the debtor is bound to answer all such questions as the court may put or allow to be put to him in his public examination, his admissions cannot be used against him in a proceeding of a criminal nature not expressly authorized by the Act. The committee desired to have the opinion of the court upon these points before hearing the case. The following are the rules made under the Solicitors Act, 1888, which affect the case:—Part I., r. 1.—"An application to the committee to strike a solicitor off the roll of solicitors, or to require a solicitor to answer allegations contained in an affidavit, must be in writing under the hand of the applicant, and be sent to the registrar together with an affidavit by the applicant stating the matters of fact on which he relies in support of his application."

Form V. in the schedule to the rules, "Form of affidavit by applicant," paragraph 1.—"C. D. of ——— solicitor of the Supreme Court of Judicature in England has been employed by me in a professional capacity *for the last ten years* (or as the case may be)."

Part VI., r. 3.—"The forms in the schedule to these rules shall be used in all cases as far as practicable and shall be valid; but a deviation from those forms shall not by reason only of such deviation render any application, affidavit, or other document or proceedings invalid."

Hollams, for the Incorporated Law Society.

Winch, Q.C. (*Stock* with him), for the solicitor.—The official receiver has no *locus standi* in this matter; he is attempting to get the solicitor struck off the rolls on the ground of his misconduct towards another person. But the applicant must be the injured client. The official receiver cannot make the affidavit according to the form in the schedule to the rules; he cannot say, The solicitor "has been employed by me in a professional capacity." This form was made designedly; it was not intended that a mere stranger should be entitled to make the application: *In re Cheslyn Hall*, 4 W. R. 686. [Lord COLERIDGE, C.J.—Is it not competent for any person to inform the court that one of its officers has been convicted of felony?] Yes; but where the charge is misconduct not amounting to felony, only the person aggrieved can complain. These charges are founded on admissions made upon compulsion during the solicitor's examination in bankruptcy. These admissions cannot be used for any purpose outside the Bankruptcy Act or the Debtors Act.

They cited *R.* v. *Scott*, 4 W. R. 777; *Ex parte Cossens*, Buck 531.

Muir Mackenzie, for the official receiver.—The Act does not make any alteration as to the person who may apply; the words in section 13 are, "at the instance of the solicitor himself or any other person." Under the old practice before the Act a person not a client might apply. Frequently the society applied on the affidavit of its secretary: *In re Blake*, 3 E. & E. 34, 8 W. R. C. L.

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Dig. 6; *In re Garbett*, 18 C. B. 403, 5 W. R. C. L. Dig. 142. The form given in the schedule to the Act cannot take away rights which existed before, and are not affected by, the Act itself, and the forms are only to be followed "as far as practicable": Part VI., r. 3. The question of the admissibility of the answers given in the public examination is settled by section 17 of the Bankruptcy Act, 1883. The bankrupt's answers "may thereafter be used in evidence against him." That means in any proceeedings.

Winch, Q.C., replied.

Lord COLERIDGE, C.J.—In this case a solicitor became bankrupt, and in the course of his public examination made certain statements which were evidence against him of scandalous conduct, which, in the opinion of the official receiver would, if established, be ground for striking him off the roll of solicitors. The official receiver applied to the committee of the Incorporated Law Society in respect of the matter, and the committee, acting under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), proceeded to hear the case. Two objections to their doing so were raised on behalf of the solicitor. The first objection was that since the Act of 1888 the official receiver has no *locus standi* in the matter, as he does not stand in the relation of client to the solicitor, and no one, it is said, but a client can apply under the Act of 1888. I will deal with this objection first.

The Act of 1888 introduced a new practice in these cases. It constituted a committee of the Incorporated Law Society a kind of grand jury to inquire into the charge which had been preferred against the solicitor, and the court then treats the report of the committee as if it were a report of a master under the old practice.

Now the Act says (section 13), "An application to strike the name of a solicitor off the roll of solicitors, whether at the instance of the solicitor himself or of any other person, or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to, and shall be heard by, the committee in accordance with rules to be made under the authority of this Act: provided that any person who, but for this Act, would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor."

It is said that no one but a client can apply under this section. The early cases which were cited show that, according to the old practice, no such limitation existed. Any person might come before the court and affect it with notice of misconduct of one of its officers, and so set it in motion. That was undoubtedly the case originally; and that rule is not affected by the case of *In re Cheslyn Hall*, decided in 1856 by Stuart, V.C. There one of three co-trustees had grossly misconducted himself, and an application was made against him in his character of solicitor by his co-trustees. Objection was taken that the co-trustees were not his clients, and the Vice-Chancellor said that, if the persons who appeared to complain had no right to do so, the court would be bound to act accordingly. But it does not appear that that was a case in which a solicitor-trustee was acting as solicitor to the trust; the Vice-Chancellor only says: "The persons who complain are the co-trustees of Mr. Hall, and it can therefore hardly be said that they are unconcerned in the matter." That case, shows, therefore that persons other than clients could set the court in motion against the solicitor. That was the rule up to 1888. The Act of that year does not by section 13 limit the power to make applications; it speaks of an application at the instance of the solicitor himself or of any other person. Therefore the objection is not supported by the Act of Parliament. But an argument was based upon the rules made under section 15 of this Act. Part I., rule 1, was referred to, but in this case the application was made in the prescribed form. The application has to be accompanied by an affidavit, a form of which is given in the schedule to the rules. The form says: "C. D. of ——— solicitor of the Supreme Court of Judicature in England has been employed by me in a professional capacity." The argument is that, although up to the year 1888 any person could make this application, and although the Act of 1888 says it may be made by a solicitor or by "any other person," yet because in the skeleton form of the affidavit given in the schedule the words used are applicable to an affidavit by a client only, these words have cut down the power to make the application to clients only. If the rules did this I should undoubtedly hold them to be *ultrâ vires*. But they do not. By rule 3 of Part VI. the forms in the schedule are to be used "in all cases as far as practicable" and a deviation from them "shall not by reason only of such deviation render any application, affidavit, or other document or proceedings invalid." I think, therefore, that there is no ground for the first objection.

The second objection is that this gentleman has been obliged in his examination to make statements incriminating himself; that he ought not to have been asked to make these statements; and that when he had made them they ought not to have been used against him. It is, of course, familiar to all of us that answers which incriminate a person can in many cases be compelled to be given. In certain instances the effect of this is modified by provisions that answers compelled to be given in this way shall not be used against the persons giving them. But in *Ex parte Cossens* Lord Eldon draws a distinction between questions directed to ascertain other matters, and questions put with the direct purpose of finding out whether the witness has committed an offence. He says, in fact, that you must not ask a witness point blank—have you committed a crime? But what underlies the whole of his argument is that the answers can be used against the man. Therefore the great authority of Lord Eldon is invoked in vain in the present case.

In *Reg* v. *Scott* answers given in bankruptcy proceedings, which directly incriminated a man, were used in evidence against him at his trial on a criminal charge; he was convicted, and the conviction was upheld. But in the Bankruptcy Act, 1883, s. 17, this very point is settled by Act of Parliament. Sub-section (8) says, "the debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put, or allow to be put, to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to, and signed by, the debtor, and may thereafter be used in evidence against him." It was argued that the questions should be confined to matters immediately affecting the bankruptcy, but the Act says, section 17, sub-section (1), that the debtor is to be examined as to his "conduct, dealings, and property." Conduct there means his general conduct. It may well be that a man of good character may be dealt with in one way, and a man of bad character in another. It was intended, and rightly, that a man's general conduct should be inquired into in the course of his public examination. For these reasons I think the objections fail, and the case must go back to the committee for further hearing.

MATHEW, J.—I am of the same opinion, and for the same reasons, and have nothing to add.

Solicitor for the Incorporated Law Society, *E. W. Williamson*.

Solicitors for the respondent, *Long & Gardiner*.

Solicitor for the applicant, *Solicitor to the Board of Trade*.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) Dec. 19, 20, 1889. Jan. 13, 31.

In re SUNDERLAND 32ND AND 36TH UNIVERSAL BUILDING SOCIETIES.
RAWLINGS *v.* KING AND CORDNER.
SAME *v.* OLIVER.
SAME *v.* WILKINSON. (*a.*)

Building society—Insolvency—Notice of withdrawal after insolvency—Rights of withdrawing members as to interest—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-section* 4.

By the rules of certain building societies it was provided that "On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and, should more than one member give notice to withdraw at one time, the members so giving notice shall be paid in rotation according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society."

Notices of withdrawal having been given by certain subscribing and investing members after the insolvency of the society had become known, but before the winding up order had been made,

Held, that they were not entitled to be paid the amount of their subscriptions in priority to other shareholders in the winding up.

Held, also, that, in the absence of a determination by the committee under the above rule, no interest accrued in respect of the amount due to a withdrawing member.

Appeals from the orders of the county court judge at Sunderland made in the winding up of the 32nd and 36th Universal Building Societies.

The facts were as follows:—Upon the death of the secretary of both the societies, it appeared from the report of a firm of accountants in whose hands the books were placed that they were insolvent. This report was, in accordance with resolutions passed at a meeting of the 32nd society on the 16th of February, 1887, and at a meeting of the 36th society on the 17th of February, 1887, sent to each shareholder. After these dates no new members were admitted by either society, no money was borrowed, or advanced to any member on mortgage, nor was any withdrawing member repaid. As regards the 32nd society, however, a small sum appears to have been received in subscriptions, and about £47 paid by way of interest to paid-up shareholders. King and Cordner, subscription shareholders in the 36th society, gave notice of withdrawal on the 21st of February, 1887, and the 6th of May, 1887, respectively. Oliver, a holder of paid-up shares in the 32nd society, gave notice of withdrawal at the end of six months from the 8th of October, 1886. Wilkinson, a holder of paid-up shares in the 36th society, gave notice of withdrawal at the end of six months from the 6th of October, 1885.

The winding-up order was made on the 2nd of July, 1887.

The learned county court judge decided that the 36th society was declared to be insolvent on the 17th of February, 1887, and the 32nd society on the 3rd of May, 1887, and that therefore King and Cordner were, but Oliver was not, entitled to priority in the winding up. He further decided that Wilkinson, whose notice of withdrawal had matured before the society to which he belonged was known to be insolvent, was entitled to interest from the 6th of April, 1886 (the date on which his notice matured), until payment.

In King's and Cordner's cases the shareholders appealed and in Oliver's and Wilkinson's cases the liquidators appealed.

Cozens-Hardy, Q.C., and *H. W. Eve*, for King and Cordner.—The shareholders gave notice before the date of the winding-up order, and are therefore entitled to priority: *Brownlie* v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28; *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33; *In re Middlesborough and Redcar Permanent Building Society*, 53 L. T. N. S. 203, 34 W. R. Dig. 26.

Sir Horace Davey, Q.C., and *Haldane*, for the liquidators.—In *Tennent* v. *City of Glasgow Bank*, 27 W. R. 649, 4 App. Cas. 615, it was decided by the House of Lords that a shareholder was too late who brought an action to repudiate his shares before the winding up but after the insolvency. The principle decided in that case was applied in *Carrick* v. *North British Building Society*, 22 Scottish Law Reporter, 833, to notices of withdrawal given after a declaration of insolvency. The declaration of insolvency was in the present case made on the 17th of February, 1887, and the notices are therefore inoperative.

Cozens-Hardy, Q.C., replied.

R. T. Reid, Q.C., and *W. S. Robson*, for the liquidators in *Oliver's case*.

Cookson-Crackanthorpe, Q.C., and *Wurtzburg*, for Oliver.

Sir Horace Davey, Q.C., and *Haldane*, for the liquidators in *Wilkinson's case*.—After the notice of withdrawal has matured the shareholder ceases to be a shareholder and becomes a creditor of the society, and as such is not entitled to interest: *In re Sheffield and South Yorkshire Permanent Building Society*, 22 Q. B. D. 470, 37 W. R. Dig. 29; *In re Blackburn District Building Society*, W. N., 1886, p. 22.

Cozens-Hardy, Q.C., and *Eve*, for Wilkinson.—A withdrawing shareholder does not cease to be a shareholder until paid: *Walker* v. *General Mutual Society*, 36 Ch. D. 777, 36 W. R. Dig. 26. It appears to have been a practice with the society to allow interest in similar cases.

Cur. adv. vult.

Jan. 31—The judgment of the COURT was delivered by

MATHEW, J.—These were appeals from orders made by the county court judge of Sunderland, and raised the question whether the appellants King and Cordner, and the respondent Oliver, were entitled to rank as creditors of the societies in the winding-up proceedings, or whether they were still members.

They contended that they had withdrawn from membership in accordance with the rules of the societies before the winding-up order had been made, and had thus become creditors. The liquidators, on the other hand, contended that, before the notices to withdraw from membership had been given or had become effective, the insolvency of the societies had become notorious, and, therefore, that the notices were inoperative.

The learned county court judge decided in favour of the liquidators in the cases of King and Cordner, and against the liquidator in the case of Oliver.

The order to wind up was made on July 2, 1887. In the first case the appellant King had given notice of withdrawal on February 21, 1887, and the appellant Cordner on May 6, 1887. In the second case the respondent Oliver had given notice on October 8, 1886, of withdrawal at the end of six months.

The contention on their part was that until the wind-

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

ing-up order had been actually made they were entitled to withdraw, and so to constitute themselves creditors of the societies.

The liquidator insisted that the societies were known to be insolvent on February 17, 1887, and that the right which members would otherwise have had of quitting the societies was then at an end.

It appeared from the evidence that ten benefit building societies constituted in the usual way had been established in Sunderland, and that the management of them all had fallen into the hands of a person named Wayman. They were formed on what is called the terminating principle, and consisted of two classes of members, depositors and borrowers, or "advanced members."

Unfortunately for the members of the societies under Wayman's control, there had been gross mismanagement, and after Wayman's death, in August, 1886, it was discovered that a great part of the moneys of all the societies was not forthcoming. In the early part of 1887 a firm of accountants was employed to investigate the affairs of the different societies, and reports were prepared which showed that each of them was insolvent. These reports, with balance-sheets, were submitted to and practically adopted by an aggregate meeting of members of the societies on February 14, 1887. In pursuance of resolutions passed at the meeting, an effort was made to reconstruct the societies, and delegates were appointed to meet and consider what should be done. A scheme of reconstruction by amalgamating all into one was put forward by the delegates, but was found to be impracticable, and resolutions were finally come to that each of the societies should be wound up under the supervision of the court.

In support of the contention that at the date of the order King, Cordner, and Oliver were no longer members, they relied upon the rule as to withdrawal, which was in the following terms:—[his lordship here read the rule as set out above]. We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and therefore only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to show that before the times at which two of the notices were given and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shown from the scheme of reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists.

The case of *Brownlie* v. *Russell*, referred to by counsel for the appellants, is only material for the reasons given for the view that the right to withdraw does not survive a winding-up order. As appears from the judgment of the Lord Chancellor, a winding-up order takes away the right, because it necessarily put a close to the whole concern, terminates at the date the accounts of each shareholder, and cuts off all chance of profit which, if the thing had gone on, both classes of members might have had. But all these consequences were as clear and inevitable in the cases of these societies when the report of the accountant was published in February, 1887, as if a winding-up order had then been actually made.

The case of *Walton* v. *Edge* was relied upon by the learned counsel for the appellants as an authority for the proposition that members who gave effective notice before the date of the winding-up order were entitled to priority in payment to those members who had not given notice. But the question in that case was as to the rights of members "who gave notice, not only before the winding up, but when there was no information that any winding up was going to take place, and when nothing special was alleged to affect them with notice that the society was not to continue as a going concern."

The view we take is in accordance with the valuable judgment of Lord Shand in the case of *Carrick* v. *North British Building Society*. It is not the order to wind up, but the state of things which, to the knowledge of all concerned, renders liquidation inevitable, that, in such a case as this, puts an end to the right to withdraw.

An effort was made on behalf of the persons seeking to withdraw to make out that, after the condition of the societies had been ascertained and made public by the reports of the accountants, the societies were still kept going. Reliance was placed upon the fact that some payments were afterwards made and received by the societies' officers. But the fact that the business of the societies was not wholly suspended is explained by the efforts which were being made to effect re-construction, which turned out to be impracticable.

We, for these reasons, hold that the appellants King and Cordner, and the respondent Oliver, are not entitled to priority, and that they must rank in the winding-up with the other members of the societies. We dismiss the appeals in the cases of King and Cordner and reverse the judgment of the court below in the case of Oliver.

In the third (Wilkinson's) case the liquidators appealed against the judgment of the learned judge, who held that members who had given effective notices of withdrawal before the insolvency was disclosed, but had not received the amounts due to them, were entitled to interest until payment. It was not contended that at common law or under the statute of William IV. interest would be payable, but it was said that there was a course of dealing between the societies and their withdrawing members which was evidence of a contract to pay interest. After a further investigation of the facts, made at our request by the learned county court judge, a full statement of the evidence has been made to us by his honour. We are of opinion that any claim for interest could only arise under the terms of rule 40, and that apart from that rule there is no evidence of any contract express or implied to pay interest to members who had given notice to withdraw. That payments were made without the knowledge in the first instance of the committee is explained from the irregular way in which the business of the societies was conducted by Wayman. That such payments were ratified up to a certain date, when they were ordered by the committee to be suspended, is no proof that a liability under any contract existed or was admitted to exist. Any inference of an implied contract is repelled by the express provision in rule 40, that the interest, if any, should be such a sum as the committee might determine, and it was found by the judge that no determination within the meaning of the rule had been come to by the committee. The appeal in this case must therefore be allowed.

Orders accordingly.

Solicitors, *Maples, Teesdale, & Co.*, for *G. S. Lawson*, Sunderland; *Clarke, Rawlins, & Co.*, for *Moore, Longden, & Mann*, Sunderland; *Wright & Pilley*, for *Story*, Sunderland.

Prob. Div. & Adm. Div. Divorce. } April 1.

DE LOSSY v. DE LOSSY. (a.)

Divorce—Practice—Order for permanent alimony—Non-compliance—Application for attachment.

The court will not grant an attachment for disobedience of an order for permanent alimony, by non-payment.

Motion on behalf of the petitioner for a writ of attachment against the respondent on the ground of contempt in his not having paid five several sums of £50 arrears of maintenance.

On February 15, 1883, the petitioner obtained a decree *nisi* for a dissolution of her marriage with the respondent, and on the same date an order for payment to her by the respondent of permanent alimony of £200 payable quarterly in advance for the term of their joint lives.

The decree *nisi* was made absolute on the 13th day of November, 1883, and alimony was paid under the order till October, 1888, after which date the respondent had refused to continue such payment.

Inderwick, Q.C., in support of the motion, was stopped by the court from going into the merits by the preliminary objection that this was not the proper procedure to enforce a final order.

Deane, for the respondent—I ask that this motion may be dismissed with costs. Since the Debtors Act, 1869 (32 & 33 Vict c. 62), imprisonment for debt has been abolished (section 4) with certain exceptions contained in that section. The present case is not within these exceptions.

BUTT, J.—Where there is a final judgment of this or any other court for payment of money the proper course to take to enforce such judgment is by debtor's summons or its equivalent. No instance has been given me in answer to my question whether an attachment has ever issued for non-compliance with a final judgment for payment of money. I must dismiss the motion with costs.

Motion dismissed, with costs.

Solicitors for the petitioner, *Merrick & Co.*

Solicitors for the respondent, *Hasting, Son, & Ellis.*

Railway and Canal Commission.

Feb. 8.

WINSFORD LOCAL BOARD v. CHESHIRE LINES COMMITTEE. (b.)

Railway company—Railway and Canal Commission—Jurisdiction—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 1, 8.

This court has power, under sections 1, 2, *and* 3 *of the Railway and Canal Traffic Act*, 1854, *to make an order requiring a railway company to resume passenger traffic on a part of its line on which passenger traffic had been discontinued.*

This was an application by the Winsford Local Board for an order requiring the Cheshire Lines Committee to resume passenger traffic on their lines between Guddington and Over, pursuant to sections 1, 2, and 3 of the Railway and Canal Traffic Act, 1854. It appeared that this part of the defendants' lines had been used for some time for both passenger and goods traffic, but that, since November, 1888, passenger traffic had been discontinued upon it.

The defendants took a preliminary objection that the court had no jurisdiction to make the order applied for.

Littler, Q.C., and *C. A. Russell*, for the defendants.—The court has no jurisdiction to make this order. Section 2 of the Railway and Canal Traffic Act, 1854, imposes on railway companies the obligation of "affording all reasonable facilities for the receiving and forwarding and delivering of traffic," and by section 1 this term includes "passengers and their luggage." These sections are relied on by the plaintiffs, but their effect is discussed in *South-Eastern Railway Co.* v. *Railway Commissioners and the Corporation of Hastings*, 28 W. R. 464, 5 Q. B. D. 217. In that case Cockburn, C.J., had no doubt the order granted in that case was in excess of the jurisdiction. On appeal, however, the court held (6 Q. B. D. 586, 29 W. R. Dig. 108) that there was jurisdiction to make part of the order; but the judges in the Court of Appeal expressly say that the jurisdiction must be regarded as limited in the strictest way to cases which fall within the exact letter of the clause: *Dickson* v. *Great Northern Railway Co.*, 35 W. R. 202, 18 Q. B. D. 176, may be relied on by the plaintiffs, but had the Legislature intended that railway companies should no longer have a discretion as to how it will carry on its business, some provision to that effect would have been inserted in the Railway and Canal Traffic Act, 1888.

They further cited *Attorney-General* v. *Great Western Railway Co.*, 25 W. R. 330, 4 Ch. D. 735; *Lancaster and Carlisle Railway Co.* v. *London and North-Western Railway Co.*, 4 W. R. 220, 2 K. & J. 293; and *Hare* v. *London and North-Western Railway Co.*, 30 L. J. Ch. 817, 10 W. R. Ch. Dig. 60; *per* Wood, V.C.

Balfour Brown, Q.C., and *Darlington*, for the plaintiffs, were not called upon.

WILLS, J.—I have come to the conclusion that the court has jurisdiction to entertain this application. I have followed with the closest attention every part of the careful and elaborate argument which has been addressed to us by the learned counsel for the defendant company, and I do not doubt that they have laid before us every consideration which could at all influence our minds in forming an opinion. We have, as it seems to me, to consider in the first place the language of the statute, in the second place the effect of the decisions.

The material words of section 2 of the Railway and Canal Traffic Act, 1854, are—"every railway company, canal company, and railway and canal company shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." By the interpretation clause the word traffic is to include "passengers and their luggage." If there had been no decision upon these words of section 2, I scarcely think that the question need have presented any great difficulty. Taken by themselves they could scarcely be read otherwise than as imposing on a railway company the obligation of affording, according to its powers, all reasonable facilities for dealing with—an expression which I use as an abbreviation of the longer phraseology of the Act—passenger traffic over the whole extent of its system. I see nothing to limit its application to selected parts of the system.

But it is necessary to consider with great care what limitations, if any, have been imposed upon the meaning of this clause by decisions. In my own case this precau-

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

(b.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

tion is especially necessary, for I must own that *primâ facie* I was inclined to accede to the view which was put forward with so much ability by the defendants' counsel. It is, I think, essential to bear in mind that prior to the passing of the Railway and Canal Traffic Act, 1854, the theory had always been that a railway was in the nature of a highway which the public had a right to use on payment of tolls, and that a railway company had an absolute discretion as to whether they would or would not become carriers, and as to what, if they became carriers, they would carry. This is the ground of the decisions of Wood, V.C., which have been cited, and much of the earlier law on the subject is founded upon the same conception. If this state of things still existed, I have little doubt that the defendants would be right in their contention. But there is the authority of the Court of Appeal for holding, on the other hand, that the Act of 1854 made a most material difference in the legal position of railway companies. Notwithstanding all the criticism which has been expended upon *Dickson* v. *Great Northern Railway Co.*, I cannot doubt that the Court of Appeal in that case meant to lay down the broad proposition which I propose to apply in this case. The view which, as I understand, was there taken of the position of a railway company before and after the Act, was that before the Act a railway company, not being a common carrier, and therefore not being a common carrier of dogs, was not bound to carry those animals at all, and, therefore, if it did carry them, could do so upon any terms it chose to lay down, but that since the passing of the Act a railway company, at all events if it undertook the carriage of these animals, came under the 2nd section, and could only do this, subject to the obligation to afford "reasonable facilities" for this kind of traffic over the whole extent of its system. I purposely limit my observation to the case in which the carriage of the particular class of traffic has been undertaken. The path of decision in matters of railway traffic is so thorny, and the consequences of unnecessary deviation may be so far-reaching, that I think it more than usually desirable not to take one step outside the path that must be trodden in the particular case under consideration. But it is clear to my mind that if in that case the question before the Court of Appeal had related, not to animal, but to passenger traffic, and it had appeared that the company carried passengers, the decision would have been that it was bound under the 2nd section to afford "reasonable facilities" for passenger traffic, and that over the whole extent of its system.

This is, in my opinion, the plain effect of the judgments in *Dickson* v. *Great Northern Railway Co.* It has, however, been suggested that, though this may be their plain effect, it cannot be their true meaning, because the present Master of the Rolls, who was one of the judges who decided the case, was, with Lord Selborne, a member of the court which decided *South-Eastern Railway Co.* v. *Railway Commissioners and the Corporation of Hastings*, and Lord Selborne, in his judgment in that case, had spoken of the position of railway companies under the section in a manner alleged in argument to be impossible to reconcile with the judgments in *Dickson* v. *Great Northern Railway Co.* if they have the effect which I have attributed to them. If I thought this, I should undoubtedly pause and take time to consider whether the two cases can or cannot be reconciled.

But I cannot see a trace of any conflict between either the decisions or the observations made in the two cases. The short passage alluded to in Lord Selborne's judgment in the earlier case is to the following effect: "A company may carry, or not, upon its own line as it thinks fit, and if it does so may undertake that business, under various conditions and limitations. But if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford for that traffic the facilities required by the 2nd section of the Act." There is, in my opinion, nothing, either in this language or in the rest of Lord Selborne's judgment, which in any way indicates that he meant that a railway company can now undertake to carry passengers on any one part of its line, without becoming bound to carry them on its whole line. His plain meaning appears to me to be that if a railway company undertakes to carry passengers at all upon its line, it comes under the obligation to provide "reasonable facilities" for dealing with passenger traffic over its whole line. Certainly, it would be a startling proposition that, consistently with the law of the land, the London and North-Western Railway Co. could discontinue passenger traffic between London and Birmingham, or that a railway company which carries passengers to Manchester could stop all its passenger trains two miles outside Manchester in order to damage the traffic of another company. Mr. Russell did not attempt to shirk the conclusion—inevitable, as it seems to me, if his argument be sound—that such things might be done, and would be subject to no review.

The argument *ab inconvenienti* admits, I think, of the short but sufficient answer that credit must be given to the court for a desire—and for the intellectual competence—to make reasonable orders. If we are satisfied upon the hearing that the order which has been applied for would be unreasonable, we shall not make it. I find no difficulty in imagining a case in which no court would say that it was reasonable to compel a railway company to do that which is asked for by the present application. I am, however, clearly of opinion that under section 2 of the Railway and Canal Traffic Act, 1854, it is no longer competent for a railway company which has undertaken a particular description of traffic, to deny the jurisdiction of the court to take into consideration the legality of its conduct in respect of that kind of traffic upon some particular branch of its line. Our judgment must, therefore, be in favour of the applicants.

Sir F. Peel.—I am of the same opinion. If the court has not jurisdiction under the 2nd section of the Railway and Canal Traffic Act, 1854, to entertain this application the result will be that any railway company will be able to make this section practically a nullity. It will be competent to the railway company to afford limited facilities for a particular traffic for a time, and then, when the section is appealed to, to decline to give any facilities at all by discontinuing the traffic altogether. In such a case the court would have no jurisdiction to compel the company to resume the discontinued traffic under its special Act or the Railway Clauses Consolidation Act, which would be incorporated with it.

It has never been doubted that section 7 of the Railway and Canal Traffic Act, 1854, took away the power which railway companies previously had of limiting their liability for negligence by general or special conditions. I think it equally clear that the effect of section 2 is to deprive railway companies which have commenced a particular traffic, of the power which they previously had of continuing or discontinuing it at their own discretion on this or that branch of their lines. The case of *Dickson* v. *Great Northern Railway Co.* is, in my opinion, conclusive in favour of the applicants.

Mr. Commissioner Price concurred.

Solicitors for the applicants, *Busk & Co.*, for *John C. Coste*, Winsford.

Solicitors for the defendants, *Cunliffes & Davenport*, for *Lingards*, Manchester.

Court of Appeal.

From Chan. Div. March 3, 4.

FINCK v. LONDON AND SOUTH-WESTERN RAILWAY CO. (a.)

Railway company—Lands—Limits of deviation—Lands outside limits, reasonably required for purpose of construction of line within limits—Railways Clauses Act, 1845 (8 *Vict. c.* 20), *ss.* 13, 15—*Lands Clauses Act,* 1845 (8 *Vict. c.* 18), *ss.* 85, 92.

A railway company authorized by its special Act to take such of the lands shown on and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special Act has power to take lands outside the limits of deviation if such lands are reasonably required for the purpose of constructing the line of railway within the limits of deviation, provided such lands are properly shown and described in the deposited plans and books of reference.

Wrigley *v.* Lancashire and Yorkshire Railway Co., 4 *Giff.* 352, 9 *Jur. N. S.* 710, 11 *W. R. Ch. Dig.* 92, *explained.*

Dowling *v.* Pontypool, *&c.*, Railway Co., *L. R.* 18 *Eq.* 714, 23 *W. R. Dig.* 203, *approved.*

The deposited plans and books of reference showed two tenements (marked thereon as Nos. 122 *and* 123), *which consisted of two houses, with their respective curtilages. One of the two houses and part of the other house, as well as parts of the curtilages of both houses, were within the limits of deviation, and the remaining parts of the two tenements were outside those limits. The tenant of the house partly within and partly without the limits of deviation required the company to take the whole of his tenement, but the lessor refused to sell the whole of the two tenements to the company.*

Held, that, under such circumstances, it became reasonably necessary for the company to take the whole of the two tenements numbered 122 *and* 123, *and that, as the whole of these two tenements were shown and described in the deposited plans and books of reference, the company were entitled to take the whole.*

Pulling *v.* London, Chatham, and Dover Railway Co., 12 *W. R.* 969, 3 *De G. J. & S.* 661, *distinguished.*

Decision of Kay, J. (37 *W. R.* 375), *affirmed.*

Appeal from the decision of Kay, J. (reported 37 W. R. 375).

The action was brought by a landowner against a railway company, and the plaintiff claimed the restoration of a piece of land alleged to have been wrongfully taken by the company; a declaration that two notices to treat given by the company were invalid; and damages in respect of an alleged obstruction to a right of way claimed by the plaintiff.

Section 5 of the special Act, "The South-Western Railway (Various Powers) Act, 1883 (46 & 47 Vict. c. clxxxix.)," which incorporated the Railways Clauses Act, 1845, and the Lands Clauses Acts, 1845, 1860, and 1869, enacted that "the company may make the railway, deviations, improvements and widening of railways, and other works described" in sections 6, 7, 8, and 9 of the Act, "with all proper bridges, viaducts . . . and all other incidental works and conveniences connected with those railways and works, and all incidental works and conveniences, and may take and use such of the lands shown on the deposited plans and described in the deposited books of reference as may be required for those purposes."

The land in question in the action consisted of two houses with their curtilages (marked 122 and 123 on the deposited plans), which were held by tenants under leases from the plaintiff. One of these two houses, and part of the other house, as well as parts of the curtilages of both houses, were within the limits of deviation as delineated by a dotted line on the deposited plan. The rest of the two tenements or plots were outside the limits of deviation, but the whole of the two tenements or plots were described and specified in the books of reference and in the deposited plans.

On the 31st of May, 1885, the company gave notice to take such parts of the two tenements as were within the limits of deviation. The plaintiff thereupon gave notice to the company that he would not sell more than he was obliged to sell to the company under their compulsory powers, but the tenants, on the other hand, required the company to take the whole of the two tenements under section 92 of the Lands Clauses Act, 1845. On the 26th of January, 1886, the company issued a second notice to treat, which comprised the rest of the two tenements—*i.e.*, those parts of the tenements which were outside the limits of deviation. Subsequently the company, under section 85 of the Lands Clauses Act, 1845, and purporting to act under the powers of the above special Act, took possession of the whole of the two tenements, pulled down the two houses, and built a viaduct carrying the new line of rails, which viaduct at one point (referred to as the small triangular piece of land) went beyond the limits of deviation, but only did so to the extent of two feet ten inches at most.

At the trial before Kay, J., the plaintiff contended that, under no circumstances was the company authorized or justified in taking those parts of the tenements which were outside the limits of deviation, and the company contended that, if the *medium filum viæ* of the widening were to be placed on the dotted line marked on the plan, then that the lands taken would be within the limits of deviation.

Kay, J., held that though the company were wrong in their contention that in the case of widening a railway the *medium filum viæ* might be placed on the dotted line, yet that the plaintiff's action failed, as the taking of the lands outside the limits of deviation was rendered necessary for other reasons, and the plaintiff had, in fact, sustained no special damage thereby.

The plaintiff appealed.

Marten, Q.C., D. L. Alexander, and *Montague Lush,* for the appellant.—If the company exceeded their statutory powers in taking land which belonged to the plaintiff, it is not necessary he should show special damage. The company, in taking lands outside the limit of deviation, exceeded their statutory powers.

They referred to *Little* v. *Newport, Abergavenny, and Hereford Railway Co.*, 1 W.R. 81, 12 C.B. 752; *Attorney-General* v. *Tewkesbury and Malvern Railway Co.*, 1 De G. J. & Sm. 428, 11 W. R. Ch. Dig. 92; and section 13 of the Railways Clauses Act, 1845.

Beale, Q.C., and *Vaughan Hawkins,* for the respondent company.—It is well settled that a railway company may take lands lying outside the limits of deviation if required for the purposes of their works: *Doe d. Payne* v. *Bristol and Exeter Railway Co.*, 6 M. & W. 320, provided such lands be marked on the plans and described in the book of reference: *Doe d. Armitstead* v. *North Staffordshire Railway Co.*, 16 Q. B. 526. Lands required for accommodation are lands required for the purposes of the railway: *Dowling* v. *Pontypool, &c., Railway Co.*, L. R. 18 Eq. 714, 23 W. R. Dig. 203; *Wilkinson* v. *Hull, &c., Railway and Dock Co.*, 30 W. R. 617, 20 Ch. D. 323. It was reasonably necessary for the purposes of the company's works that the company should take the whole of the tenements numbered 122 and 123, as the tenant of one of the houses required the company to take the whole house. Section 13 of the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Railways Clauses Act, 1845, is amended by section 4 of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92).

Marten, Q.C., in reply.—The company in making the viaduct carrying their railway to extend beyond the limits of deviation, as they have done in the case of the triangular bit of land, have clearly exceeded their powers. *Watkins* v. *Great Northern Railway Co.*, 16 Q. B. 961, is distinguishable, as there the company were acting within their powers. The plaintiff is entitled to compensation for the "injurious affecting" thereby of the plaintiff's adjoining land: *Cowper-Essex* v. *Acton Local Board*, *ante*, p. 209, 14 App. Cas. 153. Where the company are acting beyond their powers it is not necessary for the plaintiff to show special damage. As regards the pulling down of the whole house, the buying out of the tenant does not affect the rights of the reversioner: *Pulling* v. *London, Chatham, and Dover Railway Co.*, 12 W. R. 969, 3 De G. J. & Sm. 661; and such pulling down is an "injurious affecting" of other lands. There is no evidence that it was reasonably necessary to pull down the whole house in order to construct the line within the limits of deviation, and even if it were so, that does not give the company the right to the soil on which the whole house stood.

COTTON, L.J.—This case is a complaint by a landowner against the railway company, that in proceeding under the special Act which gave them power to widen their railway they have exceeded their powers in various ways, and he claims to have re-conveyed to him some land which he says they took without any authority. I think the first point to be considered is this: whether the two notices to treat were, as he contends, illegal and inoperative. That contention is very much based on this, that the railway company have no right to take any land beyond the limits of deviation, and that they could not therefore take what they have taken. That really was the main point, and he carried it so far as to say that they could not even take the land which was included in the first notice, which was a notice to take the parts of the houses nearest to the railway, and that, *a fortiori*, they could not take the land which was comprised in the second notice. Now, I think that the railway company did not proceed exactly as they ought to have done, because, in my opinion, instead of giving the two notices, they ought to have given the notice once for all, including the whole of the property comprised in the two notices; but as they have now given notice, comprising the land contained in those two notices, I think we ought not to grant relief in this action on that ground. Why do I say they ought not to have given, or were not entitled to give, the two notices, but a notice once for all for the land comprised in those two notices? For this reason: I do not enter into the question of what the limits of deviation may be as regards the extension, but even if the railway company had confined their works within the limits of deviation, in my opinion they were entitled to give notice to treat for the whole of the land comprised in those two notices, and I think they ought to have given it in one notice.

I think there is a good deal of difficulty as to the powers of the company to extend their works beyond the limits of deviation in a case like this; but there is no question that they may take lands beyond the limits of deviation if they are required for the purpose of constructing the works which they are authorized to make by the Act of Parliament, and, therefore, in my opinion, their power to take land is not limited to land within the limits of deviation; it is limited to land which is described in the books of reference and in the Parliamentary plans.

Now, what was done here? Here were two houses: 122 and 123 marked in the plan affixed to the notices. They are entitled to take the whole of those plots if described in the book of reference and in the Parliamentary plans for the purposes of work which they are authorized to construct. Then, that being so, are 122 and 123 described in the book of reference and in the Parliamentary plan?

[His lordship then considered the book of reference and Parliamentary plans and said that, in his opinion, they comprised the whole of the plots in question.]

Then how have the railway company shown that this property is reasonably necessary for the purpose of constructing the railway? It is not necessary, in the sense that without it the railway could not have been constructed, that is not the meaning of it; but whatever is required reasonably, for the purpose of enabling a railway company to construct their railway, in my opinion, is, within the meaning of section 5 of the special Act, land which they require for the purpose of constructing their railway. This first notice would have cut in halves part of one of these houses, and, if the landlord and tenant had both been willing to enter into an arrangement to let the railway company pull down the whole, and then take back part of the land, I think the railway might have been reasonably made under those circumstances on the other part. But we find this: that the tenant said no, you shall not do that; you must pull down the house and take the whole, I will not have the house cut in halves, and have only half a house. The landlord says, I object to that, I will not sell an inch more ground than you can compulsorily take. That being the case, I think the railway company ought to have given a notice at once that they required to take the whole, because then it became reasonably necessary for the purpose of constructing their railway to take the whole, when the tenant refused to enable them to take one part only, and because the landlord and tenant could not agree together as to what they would sell to the railway company. Not that the termor, as a rule, can bind by a notice under the 92nd section of the Lands Clauses Act the freeholder, but that in the present case, in consequence of the course which the parties took, it became reasonably necessary, for the purpose of constructing the railway, to take the whole of that which was comprised in both the notices. I do not doubt that what is said by Turner, L.J., in the case of *Pulling* v. *London, Chatham, and Dover Railway Co.*, as a general rule, is right, but here it is, not because the landlord is bound by the option of his tenant, but because at the option of the tenant it became reasonably necessary to take the whole, and it being reasonably necessary to take the whole, in my opinion the railway company were entitled to give notice to take, and to take the whole. I think it is reasonably clear that in consequence of the landlord's objection they tried to see whether they could take only the actual portion which was comprised in the first notice. They were quite entitled to take the whole comprised in both notices,—if they had given one notice, as they ought to have done, at first, they could have taken the whole. Then, in consequence of the claim made, which was established to be correct, as to the right of way to the stable, it became necessary, to enable the way to be made which they have made, to take another portion of that land which was comprised in the second notice, and I do not doubt that where, in consequence of its being necessary to make a substituted road, the railway company must take land which they would not otherwise have taken, they are entitled to do so. That is land required for the purpose of constructing their works—that is for doing something which the construction of their works renders necessary.

Then one comes to this point. The railway company were entitled to take all the land which they covered by their viaduct, though part of it is beyond the limits of deviation; and I will assume that there was a departure from the power given them by the Act of Parliament in making their viaduct, but then as Kay, J., said,

how is the plaintiff injured by that? Unless he has suffered some special injury by their doing so, he individually cannot ask the court to interfere. The Attorney-General might, on the ground of its affecting the public, apply to the court, but that is not this case; it is not suggested here that there is any injury to the public, and the Attorney-General could not reasonably be put in motion; I therefore agree with Kay, J., in holding that, there being no special injury to the plaintiff in consequence of this departure from the authority given to the company by Parliament, the plaintiff cannot ask the court to interfere.

[His lordship then considered a complaint by the plaintiff as to a small triangular piece of land, beyond the limits of deviation, over which the defendants had carried their viaduct. With respect to this he said that he did not think the plaintiff had received any appreciable damage, and continued:—]

Then there is only one other point, and that is the substituted road. Has the plaintiff shown there is any substantial inconvenience by the substituted way? It is very true that till the action was brought, that substituted way was not given to him by the railway company, but it was given to him long before the trial of the action, and it was open still for the plaintiff to bring forward evidence to show how inconvenient (if it was so) this substituted way was. He has not done that. Kay, J., seems to have considered the case very fully, and was satisfied that the substituted way was equally convenient as that which had been taken away from the plaintiff, and I cannot differ from that. In my opinion, therefore, the appeal altogether fails.

LINDLEY, L.J.—This is a case of some nicety, and presents various features which are very seldom met with. I think the key of the whole thing is to be found in the erroneous view adopted by the plaintiff; and that erroneous view is this, that under no circumstances could the railway company justify taking land which was beyond the limits of deviation. That is at the root of the whole of this litigation; and that appears to me to be a mistake. The limit of deviation has reference to the line of rails, and if there are pieces of land outside the limit of deviation, but properly referred to in the book of reference and deposited plans, and if those pieces of land are *bonâ fide* wanted for the purpose of making the line within the limit of deviation, there is no authority I know of to show that such pieces of land cannot be properly taken by the railway company. There was a doubt thrown upon that by the case of *Wrigley* v. *Lancashire and Yorkshire Railway Co.*, 4 Giff. 352, 9 Jur. N. S. 710, which came before Stuart, V.C., and which was referred to and examined with his usual care by Hall, V.C., in *Dowling* v. *Pontypool, Cwerlson, and Newport Railway Co.* To understand the case of *Wrigley* v. *Lancashire and Yorkshire Railway Co.*, one must look at the report in the 9th *Jurist*. In the report in 4 Giffard the judgment of Stuart, V.C., runs in this way (p. 360):—"It is evident that no part of the field which is now in dispute, as described on the deposited plans of reference, constituted one close. If so, the company had no power to take the land comprised in their notice." On turning to the *Jurist* it is intelligible enough. "It is evident that no part of the field except that within the line of deviation was described in the deposited plans." That makes it plain and intelligible. With this explanation which Hall, V.C., had before him in *Dowling* v. *Pontypool, &c., Railway Co.*, the doubt raised by the report in *Wrigley's case* appears to me to disappear. *Dowling's case* is a clear authority, if authority is wanted, that if there are lands properly described in the books of reference and deposited plans which, though outside the limits of deviation, are *bonâ fide* wanted for the purpose of making the line within the limits of deviation, the company may take them; that is common sense, and in accordance with the Act.

Now I pass on to consider the rest of the case. It follows from that, that if the whole of the plots which are referred to as 122 and 123 were *bonâ fide* wanted for the purpose of making the line within the limits of deviation, they could be properly taken under those notices; and I am satisfied on the evidence that, under the very peculiar circumstances of this case—by which I mean that half the house was absolutely wanted, and that the other half must be pulled down or supported at an extravagant expense, which is utterly unreasonable—it is true in point of fact that in this case the whole of those plots were *bonâ fide* wanted for the purpose of making the line legitimately within the limits of deviation—and it appears to me to carry the point in substance as regards those plots; and, looking back, it appears to me it is to be regretted that the company did not give one notice to take the whole, and then this controversy would never have been dreamt of. Owing to reasons I am imperfectly acquainted with, they first gave notice to take half, and then to take the whole. I look upon that as nothing; the substance of the thing is: were they entitled to give notice to treat for this? I think they were; and whatever the plaintiff is entitled to under those notices under the compensation clauses he will get, if he has not got it already. [His lordship then referred to the complaint as to the small triangular piece of land, and said that, assuming that there was a cause of action against the company for throwing an arch of their viaduct over that piece of land, it was clearly only a case for nominal damages, and that the court would not grant an inquiry for such a trivial matter. He then considered the question of the substituted right of way, and continued:—] It is competent to the railway company to take land for the purpose of making a substituted way. That has been decided in years gone by; and it appears to me, as a matter of convenience, all that can be said is that the present way is in some places narrower than it was before; but if it is sufficiently wide for the purpose for which it exists—that is to say, to let a horse go to and from the stable, that is sufficient to satisfy the plaintiff's right. There is no absolute right to seven feet all the way along; and when you look at the section of the Act of Parliament (s. 53 of the Railways Clauses Act, 1845), it amounts to this: it is drawn in such a way that there is a certain latitude allowed in giving the substituted way. It is to be "as convenient as" the former, or as nearly so "as may be." The learned judge has found as a fact that this is a sufficiently convenient way, and I see no reason to differ from him on that ground. It might have been straighter or more convenient, but still it is a reasonable way, and as good as the company can give under the circumstances.

It appears to me, therefore, that upon the whole case, the appeal ought to be dismissed, and dismissed with costs.

LOPES, L.J.—If the company had given a notice for what is contained in both notices in the first instance, an entire notice, I mean, for the whole contained in the two notices, in my opinion we should never have heard anything of this case. It could not have been then said that any land was taken without Parliamentary authority. If some is outside the limits of deviation, it appears to me it is reasonably necessary for the purpose of the line, and of the line authorized by Parliament, and it is, moreover, properly described in the book of reference and in the Parliamentary plans.

Now, that being so, I do not feel inclined to assist the plaintiff because of a mistake on the part of the company in not giving a notice which comprised the whole of this land in the first instance, and I am the more unwilling to assist him because I feel that he is not sub-

stantially damaged. With regard to the bridge over the road, all I have to say about that is, that if any injury is caused to the plaintiff it is too insignificant to be entertained. With regard to the substituted way, I agree with what has been said by Kay, J. I think that, having regard to the purposes for which that way is required, it is sufficiently convenient and commodious, and I am very much struck by this, that the occupier was not called at the trial, nor was anybody else called, to say that it was not sufficient for the purposes for which it was required. Mr. Marten said that the reason of that was, that the way was given after action brought, that photographs were produced, and that there was no necessity of giving any such evidence. I cannot help thinking myself that if this road had been in any way insufficient or not sufficiently convenient, that the occupier or some other person to speak to the fact would have been called.

This is a very peculiar case, and it is peculiar in this way. It appears to me that both the plaintiff and defendants have mistaken their rights. The plaintiff took a wrong view when he contended that no land, in any circumstances, could be taken beyond the limits of deviation; the defendants, on the other hand, took a wrong view when they contended that the *medium filum* of the widening was to be placed on the dotted line. I quite agree with what has been said by the other members of the court, and I think that this appeal should be dismissed, and dismissed with costs.

Solicitors for the appellant, *W. H. Withall & Co.*

Solicitors for the respondents, *Birnham & Co.*

From Chan. Div. Feb. 7, 8, 10, 12.

In re EAST AND WEST INDIA DOCK CO. (*a.*)

Railway company—Dock company—Scheme of arrangement—Scheme opposed—Rights of unsecured creditors—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 6, 7, 17, 18.

A dock company, which was also a railway company within the Railway Companies Act, 1867, *being unable to meet its engagements with its creditors, a scheme of arrangement was prepared by its directors under section* 6 *of that Act. The scheme contained provisions for funding the interest accruing during a suspense period on the mortgages, charges, and debenture stock of the company; for preventing debts secured by mortgages or charges, the interest on which should be duly paid or funded, being called in before the expiration of a period of ten years; empowering the company to liquidate the debts of unsecured creditors incurred before a specified date, by the issue to them of deferred debenture stock charged on the undertaking of the company; and providing that one-half of any surplus proceeds of realizations of specific mortgages and charges, and of the proceeds of certain other realizations, should be applied in the purchase or redemption of the deferred debenture stock; and various other provisions, framed with the view of enabling the company eventually to discharge all its liabilities.*

The confirmation of the scheme being opposed by certain persons in the position of large unsecured creditors of the company,

Held (affirming the decision of Chitty, J.), *that the scheme, though it might indirectly affect them, did not infringe or take away any legal right of the unsecured creditors, or in any way exceed the powers given by the Act, but was an honest and reasonable scheme, affording a reasonable prospect of enabling the creditors to be paid, and intended to do, and apparently doing, the best that could be done for all the parties concerned, secured and unsecured creditors and shareholders alike; and that, accordingly, it ought to be confirmed.*

The directors ought to exercise the power, given by the scheme, of offering deferred debenture stock to the unsecured creditors, without favour or partiality, as between such creditors.

In re Cambrian Railways Co.'s Scheme, 16 *W. R.* 346, *L. R.* 3 *Ch. App.* 278, *and* In re Bristol and North Somerset Railway Co., 16 *W. R.* 1112, *L. R.* 6 *Eq.* 448, *distinguished.*

Appeal from Chitty, J.

The East and West India Dock Co., which, having been authorized to make a railway, had been held by the Court of Appeal (36 W. R. 849, 38 Ch. D. 576) to be also a railway company within the Railway Companies Act, 1867, being unable to meet their engagements with their creditors, prepared a scheme of arrangement with creditors under the provisions of section 6 of that Act.

This scheme, as amended, in substance provided, that the interest accruing on all mortgages, charges, and debenture stock of the company from December 31, 1887, to June 30, 1889, should be funded (clause 1); that mortgages or charges the interest on which should be duly paid or funded, should not be called in for a period of ten years (clauses 3 and 4); that half of any surplus proceeds of the realizations of specific mortgages and charges, and of the gross proceeds of certain other realizations, should be applied in the purchase or redemption of deferred debenture stock (clauses 4 and 5); and that the company should have power to liquidate the debts of unsecured creditors incurred prior to March 5, 1888, by the issue to them of deferred debenture stock charged on the undertaking of the company (clause 7).

Messrs. Kirk & Randall, contractors; Messrs. Lucas & Aird, contractors; and the London, Tilbury, and Southend Railway Co., all of whom were in the position of large unsecured outside creditors, opposed the scheme of arrangement, which came before Chitty, J., on petition for confirmation by the court.

Chitty, J., gave judgment confirming the scheme.

Of the opposing creditors, Messrs. Kirk & Randall alone appealed.

Moulton, Q.C., Byrne, Q.C., and *Farwell*, for the appellants.—This is not a scheme that ought to be confirmed against our opposition, inasmuch as it affects our rights without our consent. The company is empowered to borrow on mortgage to the extent of £320,000, and that has been done. No interest has been paid since the receiver was appointed. A scheme under this Act is not binding on outside creditors; *In re Cambrian Railways Co.'s Scheme*, 16 W. R. 346, L. R. 3 Ch. App. 278. Where, as here, the rights of outside creditors are affected by the scheme, their assent to it in writing is necessary: *In re Bristol and North Somerset Railway Co.*, 16 W. R. 1112, L. R. 6 Eq. 448. The court will not confirm a scheme of arrangement where the opposition to it by outside creditors is reasonable: *In re Somerset and Dorset Railway Co.*, 18 W. R. 332. The outside creditors, being persons in whose favour there are no charges, are the only creditors whose interests require to be looked after by the court, but the judge below seems to have looked at the case from the point of view of every class of creditors except the outside creditors. This scheme sweeps in everything. [LINDLEY, L.J., referred to *In re Hull, Barnsley, &c., Co.*, 37 W. R. 145, 40 Ch. D. 119.] At present the outside creditors stand on an equal footing with the rest, but under this scheme we are not likely to be treated as favoured creditors by having debenture stock offered to us, the dock company being very hostile to us. [They

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

also referred to *In re East and West Junction Railway Co.*, L. R. 8 Eq. 87, 17 W. R. Ch. Dig. 147. LINDLEY, L.J., referred to *In re Letterkenny Railway Co.*, Ir. Rep. 4, Eq. 538, 19 W. R. Ch. Dig. 95.]

Latham, Q.C., Pollard, and *Howard Wright,* for the respondents.—Everything which benefits the company must directly or indirectly benefit the outside creditors. The scheme really takes away nothing that could otherwise have benefited these creditors. [LINDLEY, L.J.—But they say that though the scheme itself does not withdraw anything, you will do so under it.] The scheme prevents the whole class of judgment creditors coming in before the appellants. It is settled law that outside creditors can get no express direct benefit under a scheme. Section 4 shows the position and rights of outside creditors. It has been held under that section that only one receiver can be appointed, and that no priority is gained: *In re Mersey Railway Co.*, 36 W. R. 372, 37 Ch. D. 610. The result is, therefore, that as long as there is a receivership order in force there is no priority amongst successive judgment creditors. *In re Bristol and North Somerset Railway Co.* is a clear decision that outside creditors are not bound without their own consent. Great care was exercised, in preparing the scheme, not to affect the rights of outside creditors, there being no power to do so. The "free assets" are the proceeds or surplus proceeds of the sale of the warehouses.

They also referred to *In re Somerset and Dorset Railway Co.; In re East and West Junction Railway Co.; Stevens* v. *Mid-Hants Railway Co.*, 21 W. R. 858, L. R. 8 Ch. App. 1064; *In re Hull, Barnsley, &c., Railway Co.;* and to sections 7, 10, 17, and 23 of the Railway Companies Act, 1867.

Byrne, Q.C., in reply.—The scheme cannot be altered without the consent of all the persons who originally approved of it. Section 17 only authorizes the court to confirm a scheme, but does not empower them to amend it. [COTTON, L.J.—We cannot amend.] The argument mainly relied on against us is that outside creditors are not affected, whether the scheme is confirmed or not. Upon the Act of Parliament, if the scheme purports to interfere with the rights of outside creditors, it must be rejected. Upon the cases, if the scheme purports to bind outside creditors, it must be assented to by them: *In re Bristol and North Somerset Railway Co. In re Somerset and Dorset Railway Co.* is a direct authority in our favour, and fully bears out our contention. The court must be satisfied that the rights of outside creditors are not interfered with.

Bowen v. *The Brecon, &c., Railway Co.*, 15 W. R. 482, L. R. 3 Eq. 541, and *In re The Potteries, &c., Railway Co.*, 18 W. R. 87, 155, L. R. 5 Ch. App. 67, were also referred to.

Cur. adv. vult.

Feb. 12.—COTTON, L.J.—This is an appeal against an order of Chitty, J., confirming a scheme proposed by the East and West India Dock Co. That company is a company which is authorized to make a railway, so as to bring it within the provisions of the Railway Companies Act of 1867; but I need hardly say that the principal part of its undertaking is its dock, and its work connected with that. There has been a scheme proposed under this Act which is necessarily prefaced by a declaration under the seal of the company, and by an affidavit, that the company is unable to pay its creditors. The scheme is opposed by the contractors, who were originally employed by the dock company to construct their new docks down at Tilbury. The contractors at present are in this position, that they are *primâ facie* creditors of the dock company, but are not in the position of having got any judgment as against the company, or having got any lien or charge on any property of the company.

What are the objections which are raised to this scheme? It is said (and that is the first point to be considered) that this scheme does that which, under the provisions of the Act of Parliament, a scheme has no power to do—that is to say, it is well established that a scheme under the Act cannot bind (I use that word first of all) outside creditors. By outside creditors I mean those classes of creditors who do not come within the provisions of the Act as regards this scheme, so as to make their consent to it necessary, though a certain consent by a majority of them is necessary in order to enable this scheme to be confirmed by the court. They are simply creditors.

Several cases have been referred to in the argument, but I shall only refer to two of them at present. The first case, *In re Cambrian Railway Co.'s Scheme*, came before Lord Cairns when Lord Justice. As I pointed out, that case does not directly bear on the question we have to consider, although it does lay down usefully the principles which have to be considered on the question which is now before us—the confirmation of the scheme—because that was an application under an earlier section of the Act—that is to say, section 7—which says that, after the filing of the scheme, it shall be lawful for the court to stay any action; and the question there was whether the court would, having regard to the scheme, stay the action. What Lord Cairns said was that the scheme there proposed to do, that which it could not do so as to bind the creditors; and he also said that it was not a scheme in face of which he would stay the action of a creditor, the creditor not being in any way bound by the provisions of that scheme. That scheme was this: It proposed to take away a right of the creditor—that is to say, to put him in a different position as regards his rights from that which he would have occupied before the scheme. Lord Cairns says: "Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies." That throws light and is a guide, I think, as to what we should look to when we come to decide this part of the case, as to whether the scheme does purport in any way to lay down that which would deprive a creditor of his rights. Then there was the case of *In re the Bristol and North Somerset Railway Co.*, which came before Giffard, L.J. He very much referred to the case before Lord Cairns, but there there were provisions which directly purported to alter the position of the creditors—that is to say, compelling them to give up their position as creditors and to take another and different position as persons who had taken, I think, in that case, debentures.

What is said in the present case is this: that this scheme—I will not read it, because it has been so much discussed, and is well known by all parties—provides a suspense period during which the creditors to whom money was owing for principal, and who could be bound, were not to pursue their remedies, and then it provided that what have been called the "free assets" should be dealt with in a particular way, partly to provide for this funded interest, and then half of it was to provide for the debentures which part of the scheme provided should be issued to creditors, not compelling in any way creditors to take the debenture stock, but enabling the company to issue this additional debenture stock to creditors.

Well, does that deprive creditors of any right within the sense that the scheme is not to bind creditors? In

my opinion it does not. It is very true it takes away from the creditors this money, in this sense, that the money so to be held by this scheme, which is a bargain binding on the company and on the persons who are named—the present debenture-holders—is not to be held by the company as their free assets. That is true. They are bound by the contract contained in this scheme to appropriate this partly in favour of the creditors whose rights are suspended for a time, and who are entitled to the benefit of this provision, and partly for these debentures, which are to be created under the scheme. But, in my opinion, that is not to deprive a creditor of any right. These outside creditors have no lien or charge at all upon any money. They are simply in the position of creditors of a company. Creditors of an individual, unless they have a mortgage or charge, cannot say that he deprives them of any right or interest which they have if he squanders his money. People may do that, and do that foolishly, but if the creditor has got anything in the nature of a lien or charge upon it, then, of course, that cannot be dealt with by a man who foolishly squanders his money. Here all that the scheme does is this—it enables (if confirmed by the court) the company and all the debenture-holders, if there is a sufficient majority to bind the whole, to enter into this bargain. But the company, if it was minded, might with any individual creditors whose actions might be suspended by the scheme, if it is confirmed, enter into a bargain to give them a charge, if they have not got it, on these surplus assets. As far as one sees there will be a considerable amount of assets, but I do not enter into that, because, to my mind, it does not come into the question which we have now to consider. But there are surplus assets. If those were not dealt with in this way, and if the company did not by a bargain (without any scheme) with any individual creditor agree to give a charge to that creditor on those assets, then if the opponents here established their right as creditors they would be enabled by ordinary process of law, whatever might be available, to get payment out of that. And, no doubt (and I think as to that Mr. Byrne was right), in consequence of this scheme these free assets do become bound, as between the company and the debenture-holders for whom the provision is made, to be applied, not as assets free from any obligation on the part of the company, but, as between the company and those who are bound by the scheme under this bargain and contract, these assets do become bound to be applied in the way provided by the scheme. But although that may affect the creditors—and one has to consider hereafter whether, on the whole, the scheme, having regard to all its provisions, is a fair one, and provides a reasonable prospect for payment of the creditors—yet, in my opinion, it does not deprive the creditors of any right which they have, taking "right" in this sense—anything which they have a right to enforce by legal process in consequence of any charge or lien or mortgage, which they have on any assets of the company. So that, in my opinion, the objection that this scheme is going beyond the powers given by the Act of Parliament cannot prevail. It is almost a necessity that there should be in a scheme like this, some dealing with the property of the company which was previously free—some property of the company to be attached or dealt with by the company as may be thought fit. It is almost a necessity that there should be some provision providing how that is to be dealt with, so as to take away that property from being subject to the ordinary power of the company, and to deal with it and appropriate it as may be thought right. But that cannot be done as against any legal interest or legal right, in the nature of a mortgage or lien, which there may be in a creditor. In my opinion the objection taken to the scheme, that it goes beyond the powers authorized by the Act, cannot prevail.

But then we have to consider something beyond that. What one has to consider is this, whether this is a scheme which, as against dissentient parties, the court ought to sanction and confirm. Let us see what, under the Act, we are required to do. The court is to hear directors and creditors and others, and if the court is satisfied that all the necessary assents have been given—which there is no question has been done here—and that no sufficient objection to the scheme has been established, it may confirm the scheme. That is what the court has to do. Of course, if it goes beyond the power given by the Act, the scheme is *ultra vires*, and the court never will sanction it, and there is an end of the matter. I think I ought to deal here with one objection that was raised on this point. It was said the creditors are not bound here, and there I think that Mr. Latham went too far, because I differ from him as regards what would be the effect of the scheme upon the free assets. He said:—"If that were so, if creditors might be interfered with in this way, why, in many of these cases, has the court refused to sanction a scheme? It did that which it had no power to do under such schemes." I think there are two objections. The court ought never to sanction and confirm a scheme which, though it purports to be made under an Act of Parliament, is in excess of the powers given by the Act of Parliament. It would be very wrong for it to do so. There is also this difficulty, which I shall have to refer to again:—If there is expressed in the scheme something which the court finds not only that it cannot sanction, but which there is no means of enforcing, it may be said that then those classes of creditors, and classes of shareholders, whose assent is required, are deceived; that they thought this scheme did contain a binding clause which now the court says there is no power at all to create, and that it is not binding in any way. Therefore, the scheme must be considered as not containing terms which the Act of Parliament does not enable to be put in there.

But then we come to the question whether there is any sufficient objection to the scheme. I have read a passage from Lord Cairns's judgment in the *Cambrian Railways case*, which I will not repeat, for the purpose of showing what we are to consider. I would also refer here to a passage in the judgment of James, L.J., in *East and West Junction Railway Co.'s case*. He says:—"If I thought that the scheme deprived any creditor of any reasonable prospect of being paid, I should have had much more hesitation in confirming it, but I cannot help seeing that, unless some scheme is resorted to, there is nothing for the company and nothing whatever for the outside creditors." Now, I will not go so far as that last part, but what one has to look and see is whether, having regard to what the scheme does, it does not afford a reasonable prospect of providing for the payment of creditors. I think it ought, because all these schemes are schemes for arrangement between companies and their creditors.

That is really the principal object of them. If the company say "we cannot pay our creditors," then a scheme must be prepared, and it will be binding as between the company and its shareholders and debenture-holders, but the object is to provide payment by using the scheme as a means of enabling the company to pay their creditors. Of course, the court considers also what is reasonable and what is for the benefit and interest, not only of the outside creditors, but those, for instance, who are interested in the company as debenture-holders and as shareholders—that is to say, in the company and the works of the company. Here there are now a very large number of creditors who have an actual right at present as against the company for payment, and there are large claims of £160,000 or £180,000, I think, in arrear before the beginning of the year for interest; there are large claims for capital

due. I think at present—I do not refer to the details—there is £300,000, and there will be about as much more before we get to the middle of the year. Well, these are very large claims indeed against the company by persons about whose claims there is no dispute whatever. What does this scheme do as regards them? Practically, for a period of ten years, it suspends the actions of those persons who are in the undoubted position of creditors entitled to immediate payment. We know, too, that the company, in consequence of legislation and in consequence of the action taken to unite together the docks, which were previously in opposition and ruining one another, is going on better, and, as far as one can learn, there is every prospect of considerable increase in the profits which this company is likely to make. If that is so, is not that an enormous benefit? It is true that, in order to enable it to do that, the free assets are dealt with, but dealt with in a way which, as far as I can see (and that was the view of Chitty, J.), is a reasonable way of providing for the better success and future prosperity of this company. That, of course, is a way of providing the means of paying its creditors. It does not give these outside creditors any direct charge on the property, but it does, as far as one can see, afford a reasonable prospect, and a reasonable mode (there may be others, but this is the one that has been selected) of providing for payment of the creditors. There is also this in the scheme, that it does provide for debenture stock to be given to the creditors, and then there is a provision to enable part of the present surplus assets to be applied in payment of that debenture stock. Upon that it was said: "There is no provision requiring the directors to give this debenture stock to all creditors who are willing to take it, and there is no provision made as to directing them to apply in any particular way the proceeds of that portion of the free assets to pay the particular creditors." Well, it was proposed on behalf of the company that they should give an undertaking to offer this debenture stock either to the particular creditors who are opposing this scheme or to all the creditors who are willing to take it, and that they should give an undertaking as regards applying the money in their hands for the purpose of redeeming that stock. But it was objected to that, and, I think, rightly objected, that it would not be proper for us to require that undertaking now to be given, because it would probably be looked upon as, and it probably would be making it, a condition of the scheme; and, therefore, I think that we cannot either ask the dock company to give that undertaking or take that undertaking when offered by them.

But I must express my opinion that the court trusts to those who are directors of the company to act in what they consider the proper and reasonable way in dealing with the powers here given them; and, in my opinion, it would not be a proper exercise of the powers given them if they used those powers capriciously or arbitrarily in favour of creditors whom they favoured, and against creditors with whom they had some quarrel or whom they disliked. As soon as this question is settled as to what the rights of the company are, the feeling of any grudge, or any feeling of that kind, should be at an end. People may fight very hard, but, when the matter is settled, they should see that the time for that is past. In my opinion (and I have no hesitation in saying it), the directors, or those who govern or manage this company with reference to this scheme, ought to exercise the powers thus given to them in a way which will prevent anyone saying that they have acted arbitrarily or because they had any particular feeling for or against particular creditors. Therefore, I think, so as not to have it suggested that we are imposing any new term or making an alteration in the scheme—which we cannot do—it will be better not to receive that undertaking, though offered; but I express my opinion now, so that there may be no doubt as to the way in which I think these powers ought to be exercised.

Then there is another matter to which I must refer. Two receivers and managers have been appointed. One of them was a receiver and manager appointed, I think, at the instance of a creditor, who was bound by the scheme, and that was a mere *interim* order for *interim* management. Of course if this scheme is confirmed, and the creditor who obtained that receivership is bound by the scheme, there will be an end of it, and that, I think, disposes of that point. But, as regards the other order—an order made under an earlier section of this Act (the 4th section)—in my opinion, the scheme in no way gets rid of that receivership order. Of course, as regards any creditor who is bound by the scheme, so far as the scheme interferes with any rights which he would otherwise have under that receivership order, he cannot insist upon them. But, as regards an outside creditor, and as regards anyone who is not bound by the scheme, or as against whom there is no objection, in consequence of the scheme, to his enforcing such rights as he has under the receivership order made under section 4, it still remains. And here those who were judgment creditors at the time that order was made—I will not say anything more than that—and persons who have rights under that order, will retain them, notwithstanding the scheme, and that I think Chitty, J., expressed in his judgment. That that is so I have no doubt; and, therefore, no objection on that ground can be taken to what has been done. The receivership order remains in force for those who are entitled to the benefit of it; but, of course, so far as the scheme binds those who would otherwise be entitled to the benefit of the order, they cannot insist upon it.

As regards those in the position of mere outside creditors, that receivership order still remains, and there will be a right in favour of judgment creditors who are entitled to the benefit of that order; but when all those judgment creditors are paid, then, under the powers given by section 4 of the Act, the court may, if it thinks right, discharge the receiver and put an end to the proceedings under that receivership order.

In my opinion the judgment of Chitty, J., was right, and the appeal fails.

LINDLEY, L.J.—In order to deal with this case it is necessary to consider a little the theory of schemes under the Railway Companies Act of 1867. The provisions of that Act come into force in the case of railway companies who are in difficulties. The first condition of the application of the Act is, that they shall not be able to pay their creditors. It is no part of the scheme to wind up the company in the sense in which a joint-stock company is wound up under the winding-up Acts. The theory rather is that the company is to be kept going, and schemes are to be prepared for the purpose of enabling the company to pay their way and pay off their creditors by means of a going concern. The whole theory of the scheme is clearly based upon that principle. Those who have prepared it see the difficulties, and very serious difficulties indeed they are. They cannot go on without arranging in some way with their creditors and gaining time. If they were wound up to-morrow, whether there would be twenty shillings in the pound for their creditors I do not know. Docks are not very saleable things unless there is a purchaser in the market, and one need not speculate on that. The scheme is based upon the principle that it is for the benefit of everybody—creditors, secured and unsecured, and shareholders and everybody else—that the company shall be kept going, and that opportunities shall be made of paying off creditors by degrees.

Now the first thing, having got that general view into

one's head, is to see what is the nature of the provisions of the Act. We are dealing with a scheme which has been assented to by the necessary majorities of those creditors whose assents are required by the Act of Parliament; but the scheme is objected to by unsecured creditors—gentlemen who are creditors for a very large amount. Unsecured creditors are not required by the Act to assent to the scheme, nor can any minority, however small, be bound by a majority, however large, of the same class of creditors as themselves. No majority of unsecured creditors can bind a single dissentient. More than that, although the unsecured creditors are not required to assent, they are entitled to be heard in opposition to the scheme, which involves that their objections to it must be fairly and properly considered by the tribunal before whom the scheme comes for approval. Therefore, although these gentlemen are not required to assent, their dissent, and the grounds of their dissent, require to be considered.

Now, it has been said, and said with truth, that dissentient unsecured creditors are not bound by the scheme; they are not bound by assents. They are not bound to take the benefits, if any, which are offered to them by the scheme. They are left to their legal remedies if they do not choose to come in under it. But although it is perfectly true that they are not bound by the scheme in any such sense as that, it would be a great mistake to suppose that the scheme is a matter of perfect indifference to them, and that it in no way, directly or indirectly, affects their rights. The effect of the scheme is declared by section 18 of the Act to be this: "A scheme when confirmed shall be enrolled, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company, and all parties assenting thereto or bound thereby"—that is, not the unsecured creditors—"have the like effect as if it had been enacted by Act of Parliament."

Now, what I wish to call attention to is this, that the scheme, if confirmed, is valid, and binds the company. That which binds the company binds the unsecured creditors of the company in this sense, that any disposition by the company of this property which binds the company will affect the unsecured creditors. Any trust validly created by the scheme and binding the company will affect unsecured creditors. Unsecured creditors having no lien or charge on the assets of the company, they have no greater right against the property or assets of the company than the company itself has. Whatever affects me affects my unsecured creditors. So far as my property is concerned, if I give it away, so much the worse for them; they cannot follow it; they can only come against me. If I create valid trusts which are enforceable against me, and which are not open to the charge of being fraudulent against my creditors, my unsecured creditors are bound, and they cannot attach that trust property. In that sense these schemes become very important indeed to unsecured creditors; and, although it is true in one sense they are not bound, yet in another sense it is quite true they are very seriously affected by them.

That being so, it becomes necessary and important to consider the objections which the unsecured creditors may have, and if a scheme were prepared—I do not say for the purpose of cheating the unsecured creditors, because that is too gross to require comment—but if a scheme were prepared which would have the effect of leaving them out in the cold and preferring other creditors to them, the court would be very slow indeed to confirm such a scheme as that. It is said by Mr. Byrne that that is really the effect of this scheme. If it were, I should think the scheme ought not to be confirmed; but let us look at it a little further. Let it be borne in mind that, unless such a scheme as this is confirmed, the position of unsecured creditors will be an uncommonly bad one—there will be immediately a competition and rush for priority, which will be extremely disastrous for everybody except those who are fortunate enough to get it. That is an evil which we, at all events, are quite able to appreciate.

The position of this company is such that by next July, what are called the free assets of the company would be, if not wholly swept away, to a very large extent swept away long before the opposing unsecured creditors would be in a position to put in force any judgment which they might get. They have not got judgment yet. It is not, so far as I can see, to their interest to prevent any scheme being carried out. It would not be to their advantage to leave this company to struggle with its creditors at the risk—and the imminent risk so far as they are concerned—of being left out in the cold by reason of other creditors getting priority in a rush for payment. Although the scheme, therefore, does affect the property of the company, and does therefore affect the unsecured creditors, we must look at the other side and see what the scheme does for them. The great feature of this scheme is that it prevents the rush and competition and struggle for priority to which I have alluded, and which would be perfectly fatal to the company, and fatal to everybody who was not first in the field. Those creditors, who are in a position to issue *fi. fa.*'s and execution against the company, suspend their rights for a good long time—for ten years—and other persons who will be in a position next July, if nothing is done, to execute judgments against the company, suspend their rights for the same period. That is an immense set off against any withdrawal of assets from persons like Messrs. Kirk & Randall.

Looking, therefore, at the thing as a whole, as I think we ought to do, and not looking at and deciding against the scheme simply because some unsecured creditor, however large, is affected by it, but looking at it as a whole, we must ask ourselves, in the language of section 17, whether any sufficient objection to the scheme has been established; and the conclusion at which I have arrived, after attending to Mr. Byrne's and Mr. Moulton's very able arguments on behalf of their clients, is that this is a thoroughly honest scheme and intended to do the best, and, so far as I can see, doing the best, for all concerned in the very unfortunate circumstances with which the company and the court have to deal and to grapple.

With reference to the point made, that under clause 7 of the scheme the company may give a preference to some of the unsecured creditors and issue deferred debenture stock to some and refuse to issue it to others, I do not think that we ought judicially to suppose that the company will be guilty of that which would be something very like unfair dealing. One sees why the power is framed in this way; it is because some of the unsecured creditors may prefer not to have deferred debenture stock—they may prefer to go without it, and exercise such rights as they may be entitled to exercise. But I am not prepared to suppose that if an unsecured creditor comes and asks for deferred debenture stock in pursuance of the scheme the company will say, "No; we had a quarrel with you; we shall not give it to you." It is not likely; it is not business-like; and I am not prepared to withhold my consent to the scheme because it is just possible that the power conferred by the scheme will be abused. I shall assume it will be acted upon in the spirit in which it is asked for, and with which, as far as I can judge, it is likely to be carried out.

Upon the whole, therefore, it appears to me that this is a scheme which we ought to confirm, and that the appeal ought to be dismissed.

LOPES, L.J.—I have only to say that I believe this scheme likely to be beneficial to all concerned, secured and unsecured creditors. It appears to me to be a reasonable scheme, and I can see no sufficient objection

that has been made against it which would justify this court in refusing to confirm it.

Appeal dismissed.

Solicitors for the appellants, *Mackrell, Maton, & Godlee.*

Solicitors for the respondents, *Freshfields & Williams.*

From Q. B. Div. May 3.

KNILL *v.* TOWER. (*a.*)

Election law—County council—Right to vote in more than one division—Registration—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 2, 75—*County Electors Act,* 1888 (51 *Vict. c.* 10), *s.* 7, *sub-section* 4—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 45, 51 (*sub-section* 2), 59.

Under the Local Government Act, 1888, *an elector is not entitled to vote at an election of county councillors in more than one electoral division of an administrative county, although duly registered under the County Electors Act,* 1888, *in more than one division of the same county.*

Judgment of the Queen's Bench Division (ante, *p.* 383, 24 *Q. B. D.* 186), *affirmed.*

Appeal from the judgment of the Queen's Bench Division, reported *ante*, p. 383, 24 Q. B. D. 186.

At the election of county councillors for the administrative County of London in January, 1889, the defendant acted as presiding officer at one of the polling-stations in the City of London electoral division of the county. The plaintiff was duly registered as an elector both in the Greenwich electoral division and in the City of London electoral division of the county. The plaintiff having voted in the Greenwich division, demanded a ballot paper at the polling-station where the defendant was presiding to enable him to vote in the City of London division. The defendant, upon being informed by the plaintiff that he had already voted in the Greenwich division, refused to supply him with a ballot paper, upon the ground that each elector was only entitled to vote in one division. The plaintiff having brought an action in the City of London Court to recover damages for such refusal, the judge gave judgment for the defendant. The Queen's Bench Division (Lord Coleridge, C.J., and Mathew, J.) affirmed this judgment.

The plaintiff appealed.

Russell Griffiths (*Finlay, Q.C.*, with him), for the plaintiff.

Hens Collins, Q.C. (*J. V. Austin* with him), for the defendant.

LORD EHER, M.R.—This action is admittedly brought to try the right of the plaintiff to vote at an election for county councillors in more than one division of the same county. Upon one side it is said that an elector may vote in each division in which he is registered; upon the other side it is said that, though registered in more than one division, he can only vote in one. The question depends upon the true construction of the Local Government Act, 1888, and the Acts incorporated in it. The first section that it is necessary to look at is section 2 of the Local Government Act, 1888, and by sub-section 1 it is enacted that the council of a county and the members thereof shall be constituted and elected in like manner as the council of a borough divided into wards. We must therefore see what is the mode of election in a borough divided into wards. Section 75 for this purpose incorporates part 3 of the Municipal Corporations Act, 1882, so far as the same is consistent with the provisions of the Act. Section 45 of the Municipal Corporations Act, 1882, which is contained in part 3, prescribes the mode of arriving at the electors in the different wards. The ward roll gives the name of every elector entitled to vote in that particular ward. The ward rolls taken together constitute the burgess roll. If I understand the procedure rightly, it is this: the burgess roll is laid before the revising barrister, and if the name of the same voter appears upon more than one of the ward rolls, the name is not struck out of each ward roll but one, but a note is placed against the name in those ward rolls in respect of which the voter has elected not to vote. Then section 51, sub-section 2, enacts that no person shall vote in more than one ward, and by section 59 the presiding officer is authorised to ask a person offering to vote whether he has already voted in that or any other ward. An elector, therefore, can only vote in one ward in a borough. All those sections of the Act of 1882 are contained in part 3, and are therefore incorporated in and made part of the Local Government Act, 1888, unless it can be shown that they or any of them are inconsistent with the provisions of the Act. The way it is sought to make out an inconsistency is this. Section 2, sub-section 4, of the Local Government Act, 1888, provides that the persons entitled to vote at the election of county councillors shall be the persons registered as county electors under the County Electors Act, 1888. Section 7 of the County Electors Act, 1888, deals with the register of county electors, and sub-section 4 provides that nothing in that section shall prevent a county elector from being registered in more than one division register. It is said that these sections give a person registered in more than one division the right to vote in each of those divisions, and are therefore inconsistent with section 51, sub-section 2, of the Municipal Corporations Act, 1882. I can see nothing inconsistent in allowing an elector to be registered in several divisions and in preventing him from voting in more than one. The same thing, it seems to me, might happen in the case of a borough. An elector, therefore, though registered in more than one division of the same county, can only vote at the same election in one of those divisions. The judgment of the Divisional Court was right, and must be affirmed.

FAY, L.J.—I am of the same opinion. The governing rule as to the election of county councillors is to be found in section 2 of the Local Government Act, 1888, and the material words are in sub-section 1: "The members shall be constituted and elected in like manner as the council of a borough divided into wards." The case of a borough divided into wards is set up as the model upon which the election of county councillors is to be moulded. In a borough divided into wards the electors can only vote in one ward. Therefore it would naturally follow that in a county the electors could only vote in one division. The sub-section, however, goes on: "Subject nevertheless to the provisions of this Act." By section 75 it is enacted that, for the purpose of the provisions of the Act with respect to county councils, part 3 of the Municipal Corporations Act, 1882, shall, so far as the same is consistent with the provisions of the Act, apply as if they were therein re-enacted. In the Municipal Corporations Act, 1882, I find two sections that are material. Section 51, sub-section 2, provides that no person shall vote in more than one ward. Applying that provision to a county council it must read, no person shall vote in more than one division. Then section 59 authorizes the presiding officer to ask an elector whether he has already voted in that or any other ward. The obvious intention of that

(*a*) Reported by W. F. BAILEY, Esq., Barrister-at-Law.

provision is that, if the elector answers in the affirmative, he shall not be allowed to vote again. So far the matter is free from doubt. The only remaining inquiry is whether there is any provision in the Local Government Act, 1888, inconsistent with those provisions of the Municipal Corporations Act, 1882. Section 2, sub-section 4, of the Local Government Act, 1888, enacts that the persons entitled to vote at an election of county councillors are to be the persons registered as county electors under the County Electors Act, 1888. By section 7, sub-section 4, of this latter Act it is provided that nothing in that Act shall prevent a county elector from being registered in more than one division register. The fact of being registered does not necessarily give the right to vote. I can see nothing inconsistent in saying a man may be registered in two or more divisions, and yet may only vote in one. Section 51, sub-section 2, of the Municipal Corporations Act, 1882, does not seem to me to be inconsistent with the provisions of the Local Government Act, 1888. The appeal, therefore, fails.

LOPES, L.J.—I am of the same opinion. Section 2 of the Local Government Act, 1888, prescribes those who are to be electors of county councillors, and section 75 of that Act incorporates part 3 of the Municipal Corporations Act, 1882. Among the sections so incorporated are sections 51 and 59. Section 51 is the important section, as it prohibits an elector voting in more than one ward. Those sections seem to me to conclude the case. It is urged, however, that they are inconsistent with the provisions of the Local Government Act, 1888, and section 7, sub-section 4, of the County Electors Act, 1888. I can see no inconsistency in saying that a voter may be registered in more than one division register of a county, and at the same time may not vote in more than one division at the same election. The scheme of the Local Government Act, 1888, seems to have been to assimilate the mode of election in the divisions of a county with the mode of election in the wards of a borough.

Appeal dismissed.

Solicitor for the plaintiff, *H. H. Crawford.*

Solicitors for the defendants, *Lowless & Co.*

From Prob. Div. and Adm. Div. Dec. 9, 10.

"THE BATAVIER." (a.)

Practice—Appeal—Costs.

It is a general rule in all cases that, in the absence of special circumstances, the successful party obtains the costs of an appeal and the unsuccessful party has to pay them.

Where, in an action for collision, the Court of Appeal (reversing the Admiralty Division) held that it was the result of inevitable accident,

Held, that this fell within the general rule, but that, having regard to the particular manner in which the case had been conducted, there were such special circumstances as to entitle the court to order that each party should pay their own costs in the court below.

Appeal from the decision of Butt, J., holding *The Batavier* to blame for a collision with the steamer *New Pelton.*

The Court of Appeal held the collision to be the result of inevitable accident, and allowed the appeal.

The appellants claimed the costs both of the appeal and in the court below.

Sir Walter Phillimore and *J. P. Aspinall*, for the appellants, cited *The Swansea*, 27 W. R. 748, 4 P. D. 115, and *The Naples*, 35 W. R. 59, 11 P. D. 124.

Barnes, Q.C., and *L. E. Pyke*, for the respondents, referred to *The Buckhurst*, 30 W. R. 232, 6 P. D. 152.

Lord ESHER, M.R.—It is the general rule in every case that, unless there are intervening special circumstances, the party who is successful is entitled to costs, while the party who fails has to pay them: *The Monkseaton*, 37 W. R. 523, 14 P. D. 51. In this case, however, I think there are such special circumstances. The defence of inevitable accident was not at first set up by *The Batavier*, but her crew told a false story and set up a false defence. This naturally affected the conduct of the plaintiffs, and under these circumstances I think that each party must pay their own costs in the court below, but the appellants will have the costs in the Court of Appeal.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors for the appellants, *Botterell & Roche.*

Solicitors for the respondents, *Gellatly & Warton.*

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Chitty, J. March 18, 19.

In re J. G. MORRIS.

MORRIS *v.* FOWLER. (a.)

Practice—Filing notice of motion for attachment—Service where no appearance—Rules of the Supreme Court, 1883, ord. 44, r. 2; ord. 67, r. 4.

The defendant, a trustee, had not entered an appearance, and the writ and statement of claim had been filed. An order that the defendant should pay money into court within seven days, had been served personally upon the defendant, and was not obeyed. Notice of motion for leave to issue a writ of attachment had been filed.

Held, that the filing of the notice was sufficient service.

Motion for leave to issue writ of attachment.

The defendant was executor and trustee of the will of J. G. Morris; he was alleged to have misappropriated a sum of £231 5s.

The defendant had not entered an appearance, and the writ and statement of claim had been filed under the provisions of ord. 67, r. 4.

On the 1st of March, 1890, on motion for judgment in default of defence, the defendant was ordered to pay the sum of £231 5s. into court within seven days after issue of the order.

On the 3rd of April the defendant was personally served with the order of the 1st of March, with which order he failed to comply, and on the 15th of April notice of motion for leave to issue a writ of attachment was filed with the proper officer, under ord. 67, r. 4.

E. Brydges, for the motion.—There is great difficulty in approaching the defendant, and the order of the 1st of March was served upon him with much trouble. No injustice can be done. It is not necessary to effect personal service of notice of motion for attachment: *Browning v. Sabin*, 5 Ch. D. 511, 25 W. R. Dig. 185. All the documents have been duly filed under ord. 67, r. 4. [CHITTY, J.—I want no authority on the point of personal service being unnecessary. *In re a Solicitor*,

(a.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

28 W. R. 529, 14 Ch. D. 152, explains *Browning* v. *Sabin*. The Master of the Rolls seems to have meant by notice, notice in the ordinary way.]

Chitty, J.—Notice of motion for a writ of attachment is well served by service on the solicitor where there is a solicitor in the action upon the record, and it is established that it is not necessary to serve it personally upon the person to be attached. Ord. 44, r. 2, provides that a writ of attachment shall be applied for on notice to the party against whom the attachment is to be issued. In the present case the defendant has not appeared, so ord. 67, r. 4, applies, which says that where no appearance has been entered, all writs, notices, orders, and other documents in respect of which personal service is not necessary may be served by filing them with the proper officer. The notice of motion has been filed. I have caused a search to be made in the office, but no precedent to the contrary has been found, so I hold that is good service, and make the order, with costs.

Solicitors, *Peacock & Goddard*, for *Brydges & Mellersh*, Cheltenham.

Chan. Div. }
Stirling, J. } Feb. 5, 12.

In re Rees.
Williams *v.* Davies. (a.)

Will—Construction—Gift to next of kin of person dead at date of will—Period for ascertaining class.

A testatrix bequeathed a sum of money "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving."

At the date of her death some of the persons entitled to her husband's estate under the statute were different from those entitled to it at his own death.

Held, that the clause must be read as if the words "at my husband's death" were inserted, so that the clause would read "To such person or persons as would, at my late husband's death, have become entitled," &c., and that the persons to take under the gift were, therefore, to be ascertained at the death of the husband.

Held, also (following In re Ham's Trust, 2 *Sim. N. S.* 106), *that there was a lapse as to the share of one of the husband's next of kin, who died in the lifetime of the testatrix.*

Adjourned summons.

This was an originating summons by one of the residuary legatees under the will of the testatrix, Mary Rees, for the determination of a question arising out of a bequest contained in the will.

The testatrix, who died on the 18th of October, 1888, by her will, dated the 20th of December, 1881, recited that she was entitled under the will of her late husband, the Rev. Josiah Rees, to a life interest in her said husband's personal estate, and was also absolutely entitled, as his widow, under the Statute of Distributions to one-half of the *corpus* of his said residuary personal estate; that her said husband died on the 18th of July, 1881; that his personal estate at the time of his death, after payment of debts, amounted to £12,000; and that she was anxious that the property of her late husband should return to his own family. She then gave and bequeathed £4,800 (which she stated was equivalent to the moiety of her husband's estate to which she was absolutely entitled after deducting therefrom the amount of an advance which she had made to him in his lifetime) and certain plate "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving." Then, after certain other dispositions, she gave her residuary real and personal estate unto and to the use of the plaintiff Elizabeth Williams and the defendant Thomas Rhys Saunders absolutely in equal shares, and she appointed the defendant H. Davies and another person who did not act, to be executors of her will.

By a codicil dated the 17th of September, 1885, the testatrix gave a pecuniary legacy, and in all other respects she ratified and confirmed her said will.

She afterwards made another codicil which is not material to be stated.

The statutory next of kin of the Rev. Josiah Rees at the time of his death were, exclusive of his widow, his sister, Mrs. Mary Saunders, and his niece, the defendant Rosannah Rees.

Mrs. Saunders died on the 16th of June, 1882, in the lifetime of the testatrix, though after the date of her will, a widow and intestate, leaving the defendants Thomas Rhys Saunders and Eliza Saunders, her only children, her surviving, and they, together with Rosannah Rees, were the sole statutory next of kin of him (Josiah Rees) at the time of the death of the testatrix.

The question was, whether the persons to take the legacy given by the testatrix's will, were the persons who were the next of kin of Josiah Rees at his death, or those who were his next of kin at the time of the death of the testatrix? The summons asked for a declaration that, upon the true construction of the will, and in the events which had happened (*i.e.*, the death of Mrs. Saunders in the lifetime of the testatrix), there was a lapse as regards one equal moiety of the £4,800 and plate, and that by reason of such lapse such one equal moiety fell into and became disposable as part of the residuary estate of the testatrix.

Graham Hastings, Q.C., and *Peck*, for the plaintiff.—The class to take must be ascertained at the death of Josiah Rees: *Bullock* v. *Downes*, 9 H. L. Cas. 1, 9 W. R. P. C. Dig. 18; *Mortimore* v. *Mortimore*, 27 W. R. 601, 4 App. Cas. 448. The share of Mrs. Saunders, who died in the lifetime of the testatrix, lapses: *In re Ham's Trusts*, 2 Sim. N. S. 106.

B. Eyre, for the executors and the defendant T. R. Saunders.

Phipson Beale, Q.C., and *Waggett*, for Rosannah Rees.—The case would come within *In re Ham's Trusts* were it not for the peculiar reference in the will to the statute. In the present case there is a clear intention that the next of kin are the persons to be benefited, and there is nothing to prevent Miss Rees from taking the whole fund.

They cited *Wharton* v. *Barker*, 6 W. R. 534, 4 K. & J. 483.

Buckley, Q.C., and *T. C. Wright*, for Eliza Saunders, submitted that the next of kin must be ascertained at the death of the testatrix, and referred to *Vaux* v. *Henderson*, 1 J. & W. 388; *Philps* v. *Evans*, 4 De G. & Sm. 188; *Wharton* v. *Barker*; *In re Philps' Will*, L. R. 7 Eq. 151, 17 W. R. Ch. Dig. 186.

Hastings, Q.C., in reply, cited *In re Ranking's Settlement Trusts*, L. R. 6 Eq. 601, 17 W. R. Ch. Dig. 155. [Stirling, J., referred to *Doody* v. *Higgins*, 4 W. R. 737, 2 K. & J. 729.]

Cur. adv. vult.

Feb. 12.—Stirling, J., stated the facts, and continued:—At the death of the widow some of the persons

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

entitled to the husband's estate under the Statute of Distributions were different from those entitled under the same statute at his own death, and the question is, whether the persons to take under the gift are to be ascertained at the death of the husband, or at the death of the widow? The rule applicable to this case is stated thus by Lord Hatherley, when V.C., in *Wharton* v. *Barker*: "According to *Philps* v. *Evans*, a bequest to the next of kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin as regards the period of ascertaining who are the persons intended, and if there is nothing in the context to make the words applicable to a class to be ascertained at any other time than at the testator's death, those who, at the testator's death, are the next of kin of the deceased person named in the will would naturally be the persons to take." This view of the law appears to be in accordance with the decision of Sir William Grant in *Vaux* v. *Henderson*, and of Lord Romilly in *In re Philps' Will*.

I have, then, to consider whether there is anything in the present case to take it out of the general rule, and it appears to me that the words "without leaving any widow him surviving" are sufficient to do so. One test appears to me to be conclusive. If the testatrix really contemplated that the class should be ascertained at her own death, it ought to be possible to insert in the gift words expressly defining this period without making the language of the testatrix inaccurate as regards the grammar, or repugnant or inconsistent as regards the meaning, and I invited counsel to do so. The first suggestion was to insert the words "at my death," so that the clause would run "to such persons as would, at my death, have become entitled to my said husband's personal estate under, or by virtue of, the Statute of Distributions, had he died intestate and without leaving any widow. Now this is not grammatically accurate; strictly it ought to run, "to such persons as would, at my death, become entitled," &c. A more serious objection, however, is this, that the words "without leaving any widow him surviving" become unmeaning; the testatrix was her husband's widow, and at her death there would be no widow entitled to share under the statute upon an intestacy. It was then suggested that the clause ought to be read thus: "to such persons as would have become entitled to my said husband's personal estate under, or by virtue of, the Statute of Distributions, had he died immediately before me, intestate, and without leaving any widow." This hardly mends the matter, for, in the first place, it appears to me to add something to the language of the testatrix, and, in the next place, to make it really inconsistent. The testatrix was her husband's wife at the time of his death, and what she is really thus made to say is, "had he died immediately before me, intestate, and without leaving me, his widow, him surviving." If the words "immediately after me" were inserted after "died," then, no doubt, the language would be consistent, but the words "without leaving any widow" would be superfluous, for it can hardly be supposed that the testatrix contemplated the possibility of her husband marrying in the brief interval between her own death and his.

On the other hand, if the words "at my husband's death" are inserted (so that the clause is read, "to such person or persons as would, at my late husband's death, have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without having any widow"), the language of the will becomes both grammatical and self-consistent, and every word has its natural force and meaning.

I am of opinion, therefore, that the persons to take are to be ascertained at the husband's death.

Now it is laid down in *Bullock* v. *Downes* that where there is a gift to persons entitled under the Statute of Distributions the statute regulates the interest taken as well as the parties to take, and, further, that that rule applies even where the persons to take are not all the next of kin according to the statute, but all entitled as being members of that class and entitled to property which the next of kin would have taken under the statute.

That case related to a gift to persons entitled under the Statute of Distributions to the personal estate of the testator, and no case has been cited in which it has been applied to a gift to the statutory next of kin of a person dead at the date of the will, but I can see no valid ground for drawing any distinction. In my opinion, therefore, the gift must be read, "to such persons as would at my husband's death have been entitled to his personal estate under the Statute of Distributions had he died intestate and without leaving any widow him surviving, in the shares and proportions in which they would have taken under that statute." I think, therefore, that (as was held in *In re Ham's Trusts*, and for the like reasons) there is an intestacy as regards the share of that one of the husband's next of kin who died in the lifetime of the testatrix.

It was, indeed, suggested that the first codicil revived the will or operated as a fresh gift in favour of the next of kin then living. Even if the language of the will admitted of such a construction (which I do not think it does), there is no evidence that the testatrix knew who her husband's next of kin were, or that any of them had died.

I make a declaration as asked by the summons. The costs of all parties to come out of the residuary estate, and, if the residuary legatees consent, as between solicitor and client.

Solicitors, *G. L. P. Eyre & Co.*, for *Morgan & Richardson*, Cardiff; *Clarke, Rawlins, & Co.*

Chan. Div. (Kekewich, J., for Kay, J.) April 18.

In re Thompson and Holt's Contract. (a.)

Vendor and purchaser—Mortgage to building society—Power of sale—"Due"—Three months' notice—Waiver—Title contracted for—Specific performance—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-section* 1; *s.* 20, *sub-sections* 1, 2—*Costs of parties concurring.*

By a building society's mortgage it was provided that, if default should be made in the performance of any of the covenants, then the total sum for which the mortgage should then be redeemable should be considered as actually due and payable, and the power of sale given to mortgagees by the Conveyancing Act, 1881, *should apply and be exercisable by the trustees of the society. The mortgagor neglected to pay one of the instalments, and the trustees contracted to sell the property.*

Held, that the statutory power of sale, whether applicable to a building society mortgage or not, was incorporated in the mortgage by the act of the parties; that the money had become due; and that the power was exercisable.

The contract for sale was dated within less than three months of default, and no notice of the proposed sale had been given to the mortgagor nor to a second mortgagee under section 20, *sub-section* 1. *The purchaser ascertained the want of notice, and required the concurrence of the mortgagor, which was agreed to, and the second*

(a.) Reported by H. C. Ryan, Esq., Barrister-at-Law.

mortgagee was ready to do the same. The conditions of sale stated that the property was being sold by mortgagees under a power of sale, and that the assignment was to be taken without the concurrence of other parties.

Held, that, if the mortgagor and second mortgagee had not waived the notice, they had waived the right to object to the want of it; that want of notice did not prevent the vendors from exercising their power of sale; that the purchaser would get the title he had contracted to take; and that the vendors must bear the costs occasioned by the concurrence of the mortgagor and second mortgagee.

Motion.

This was a motion by a purchaser to discharge an order made by the chief clerk on a vendor and purchaser summons, and to have it declared that a good title had not been shown, on the ground that the vendors had no power of sale, inasmuch as the power given by the Conveyancing Act could not apply to a building society's mortgage, and that, if it could, they had not given the statutory notice to the mortgagor; that the mortgagor had not waived the notice, that his concurrence would alter the title, and that the purchaser could not be compelled to take a title other than that which he had contracted for.

By a mortgage dated the 29th of March, 1889, and made between J. H. Brown, of the one part, and the trustees of the Second Equitable Permanent Benefit Building Society, of the other part, Brown, in consideration of £5,000 advanced to him as the ultimate value of his 100 shares therein, covenanted to pay all subscriptions, fines, &c., payable by him under the rules of the society in respect of his shares, and, as beneficial owner, conveyed to the trustees certain leasehold property, subject to a proviso for redemption on performance of the covenants. The mortgage contained a declaration that, if default should be made in the performance of any of the covenants, then the total sum for which the mortgage should then be redeemable, according to the rules, should be considered as actually due and payable, and the power of sale and other powers, rights, and remedies given to or conferred upon mortgagees by the Conveyancing Act, 1881, or any other statute should apply to the mortgage and vest in and be exercisable by the trustees accordingly.

By a deed-poll of the same date the mortgagor gave to other persons a charge on the mortgaged premises for moneys therein mentioned.

Rule 41 of the society's rules provided that every member of the society should pay a subscription of 12s. 6d. per share per quarter, and so in proportion for any fractional part of a share, until he should require an advance; and that, upon requiring an advance, he should pay an additional subscription of 12s. 6d. per share per quarter, and a further sum of 5d. per quarter on each 12s. 6d. to meet expenses of management. The shares were of the value of £50 each.

The first instalment was due in April, and this was paid by being deducted from the amount of the advance. On the 14th of June Brown was adjudicated a bankrupt, and the instalment due by him on the 4th of July was not paid.

The trustees of the society, on the 18th of July, with the consent of Brown's trustee and the second mortgagees, put up the mortgaged property for sale by auction, subject to conditions of sale. The property was not sold, and the trustees entered, without informing the mortgagor or the second mortgagees, into a contract, dated the 25th of September, to sell it to J. Holt for £4,250, subject to such of the conditions as were applicable, including the following:—"The vendors being mortgagees selling under a power of sale, the assignments shall be accepted from them under such power, without the concurrence of any other person or persons, and no covenants for title shall be required except the statutory covenant implied by expressing in the conveyance of the property to the purchaser that the vendors convey as mortgagees."

By his requisitions the purchaser, on learning that no notice had been given, required the concurrence of Brown's trustee in the conveyance, and this was agreed to, and a draft assignment was prepared and approved. The purchaser was subsequently taken ill, and endeavoured to avoid completion.

He took out a summons to have it declared that the vendors had not made a good title.

The vendors offered to procure the concurrence of the second mortgagees at the purchaser's expense, but this was declined, and the chief clerk decided in favour of the vendors, without costs.

H. Terrell, for the purchaser.—The mortgagees had no power of sale under section 19 of the Conveyancing Act. That power exists when "the mortgage money has become due," and the mortgage money never becomes due in a building society's mortgage, or, at all events, not till all the instalments are in arrear. The Act does not say "the money or any part of it." If it does apply, they ought to have given notice to the mortgagor under section 20, sub-section 1, of their intention to sell, and three months after service of that notice the power would have become operative. But three months had not elapsed between default and the contract for sale, and it is admitted that no notice was given. So there was no power in existence under the Conveyancing Act which they could exercise. We are affected by the want of notice, as we were informed of it by the answers to requisitions. There was no interest due so as to bring the case within section 20, sub-section 2. In a building society's mortgage the mortgagor does not pay interest, but he pays compensation for the advantage he obtains over the other members by the advance. We contracted for a title through the mortgagees only, and they cannot force us to take a different title: *In re Bryant and Barningham's Contract*, *ante*, p. 469; *Buckle* v. *Lordonney*, 35 W. R. 360.

Bowden, for the vendors.—Part of the instalment represented interest, so the power of sale became exercisable in two months. The power existed because money was due. The whole became due on default. We are making a title under the power of sale. It is not a new title. The want of notice is of no consequence, as the other parties will waive it and concur in the conveyance, and we agree that that should be done at our expense: *Selwyn* v. *Garfit*, 36 W. R. 513, 38 Ch. D. 273.

Terrell, in reply.—That is not waiver, but confirmation, and makes it a different title. The waiver ought to have been before the sale, otherwise the power was not exercisable. The change in the title will cause delay and expense, and it cannot be forced on us: *In re Bannister, Broad* v. *Munton*, 27 W. R. 826, 12 Ch. D. 131.

Kekewich, J.—Several points have been made on this motion, and one of them seems to be of some little importance. The purchaser insists that the power of sale in the Conveyancing Act does not apply to a building society's mortgage in the ordinary form, and that where the mortgage is in that form and there is no express power of sale, there is no power of sale by the mortgagee. That is a point I need not deal with, as there is an express proviso in this mortgage that the power of sale given by the statute shall arise in certain cases, one of which has happened; therefore, it is incorporated by the act of the parties, whether it was applicable by force of the statute or not; and it became exercisable in July on default being made in payment of the instalment. But it is said that, admitting that the power of sale is applicable, it is not properly exercisable until after three months from the date when the July instalment became due, and that as that period did not expire until after the date of the contract, the

power of sale could not be exercised at all. The *primâ facie* answer to that is that the restriction on the use of the power of sale is for the benefit of the mortgagor as between him and the mortgagee, and is not intended to prejudice the purchaser if a good title is made independently of the contract between the parties, whether by statute or by private arrangement.

But the purchaser had notice in this case that no notice had been given, so that answer is not very material.

Then arises the point to which I have referred as being of some importance. The mortgagor has become bankrupt and his trustee in bankruptcy has already agreed to be a party to the conveyance. In addition to the trustee, another party was required—second mortgagees—and they have also agreed to concur and confirm the sale. But Mr. Terrell says if he gets the concurrence of these two parties he will, it is true, get a good title, but not the title for which he contracted, and that he is entitled to that and no other. What he has contracted for is a title under the mortgage, and a conveyance from the mortgagees only, without any other parties. So far as that is concerned the difficulty may be got over by the second mortgagees and the trustee confirming the sale by an independent deed. But a more important matter is whether he will really get something different from what he has contracted to take. He says he will really get a conveyance by the mortgagees and the owners of the equity of redemption, and that that is not a conveyance by mortgagees with those covenants which mortgagees usually give. That proceeds on an incorrect notion of the function of a power of sale in a mortgage deed. These mortgagees will exercise the power of sale and convey as mortgagees and enter into the covenants usual for mortgagees. It will not make any substantial difference to that conveyance that other persons are also made parties in order to confirm the conveyance. If they convey their conveyance will pass what interest they have. If they confirm by an independent document they will confirm what the others have done. Anyhow, the conveyance will be by the mortgagees under their power of sale. Therefore it is the same title, and the objection falls to the ground.

Then it is said that there was no waiver of the notice. That is not a very accurate, though it is a convenient form of expression. In other words, the owners of the equity of redemption did not waive the right to receive the notice which the Conveyancing Act, s. 20, subsection 1, says shall be given to them. I am not sure that they did, in the sense in which the word "waiver" has been used. They were consulted as to the sale of the property by auction, but not as to the sale by private contract. However, I need not go into that. In *Selwyn* v. *Garfit* Bowen, L.J., says that waiver is consent to dispense with the notice; but what is waiver or equivalent to waiver may exist in other circumstances. I think in that sense there was a waiver. It is quite competent for the mortgagor to say after the sale, "True I did not get a notice, but I do not object to that; I accept the sale, and I shall not interfere to prevent the title being accepted." It is not strictly waiver of notice, but it is waiver of the right to object on the ground that notice was not given. The difference is only a difference of words. Here he comes afterwards and says, "I confirm this title." I think there is nothing in the point raised by the purchaser. He will get a good title with a confirmation by the mortgagor, and he will get it under the power of sale. If I had drawn up the order I should have inserted before the declaration of good title some words to show under what circumstances the case came before the court, but I have heard an affidavit read which states the facts, and is entered in the order, and the order proceeded on that affidavit. I have asked Mr. Rowden whether he is willing to procure the concurrence of the parties at his own cost, and he has admitted that he is bound to do so. If that concurrence is necessary to supply a defect in his title the defect must be remedied at his cost. If the purchaser requires to be convinced that the second mortgagees are second mortgagees, or any expense is incurred in tracing the devolution of the title, the vendors must pay the costs; but that must not be an excuse for throwing on the vendors costs which, fairly, they ought not to bear. I propose to refuse the motion, but to preface the order with the words, "It appearing that the second mortgagees and the trustee in bankruptcy of the mortgagor are willing to concur in the conveyance to the purchaser or otherwise to confirm the same, and that the vendors are ready to procure such concurrence and confirmation at their own costs."

Motion refused, with costs.

Solicitors, *Lumley & Lumley; Prideaux & Sons.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April 28.

MURTAGH v. BARRY. (*a.*)

County court—New trial—Power of judge to grant—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

A judge of a county court can only grant a new trial upon the grounds on which a new trial can be granted in the High Court, and he is bound by the principles laid down by the High Court as applicable to the granting of new trials, notwithstanding the terms of section 93 *of the County Courts Act*, 1888.

Appeal from his Honour Judge Stonor sitting at the Brompton County Court.

Upon an action brought in the county court for an alleged misrepresentation as to the value, on the sale of a medical practice, the jury found a verdict for the defendant, for whom judgment was entered. In an application for a new trial, upon the ground that the verdict was against the weight of evidence, the judge granted the application for the reasons as stated—viz.: "I granted the application on the ground mentioned in the application, and also under the absolute power to grant a new trial given to judges of county courts by section 93 of the County Courts Act, 1888."

The defendant now appealed against this order.

J. E. Fox, for the defendant.—The judge had no jurisdiction to make this order on such grounds as he has stated. The county court judges are bound by the same limitations as to granting new trials as the judges of the High Court.

A. W. Donald, for the plaintiff.—Section 93 of the Act of 1888 gives an absolute power to the judges of the county courts to grant a new trial upon any grounds which they may think fit. Section 93 of the County Courts Act, 1888, runs as follows: "The judge shall also in every case whatever, have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay proceedings."

Lord COLERIDGE, C.J.—This appeal must be allowed. A high duty is laid upon judges of the county court in granting new trials, and it is important, if there is any doubt as to their discharge of this duty, that that doubt should be set at rest. It seems to have been supposed by the learned judge in this case, that he had an absolutely unfettered discretion in the grant or refusal of a new trial. That is not the law. He, as all judges of the inferior courts, must be found to follow the law as laid

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

down in the superior courts and the House of Lords. It has been decided for forty years by overwhelming authority that a judge cannot grant a new trial merely on the ground that he is dissatisfied with the verdict of the jury. There is nothing in this section of the last County Courts Act to override the established authority of the courts on this matter, nor is it likely that the Legislature could have contemplated endowing the county courts with such unlimited freedom. The grounds on which new trials can alone be granted are well established, and the inferior courts, so long as they are subject to our control, must be bound as we are, by the principles laid down in the highest courts of the realm, limiting the granting of new trials to certain specific grounds.

MATHEW, J.—The judges of the county courts, like other people, must submit to the principles and rules of the common law, as long laid down by the High Court, and I see nothing in the recent Act which tends to elevate them to this supposed pinnacle of independence.

Appeal allowed.

Solicitor for the plaintiff, *S. Hopgood Hart.*

Solicitor for the defendant, *T. Blanco White.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Jan. 22.

ATTORNEY-GENERAL *v.* THEOBALD. (*a.*)

Inland revenue — Account stamp duty — Voluntary settlement — Retrospective operation of statute — Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38—*Customs and Inland Revenue Act,* 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

Section 11 *of the Customs and Inland Revenue Act* 1889, *is retrospective in its operation, and the words of sub-section* 2 *of section* 38 *of the Customs and Inland Revenue Act,* 1881, *are now to be construed as if the words of section* 11 *of the Act of* 1889 *were therein incorporated; and this construction is to be applied even though an information to recover an account stamp duty under the sub-section has been filed, and all the pleadings closed before the date of the passing of the Act of* 1889.

Information presented by the Attorney-General, praying for a declaration that certain trust funds and property included in a marriage settlement became chargeable with stamp duty under sub-section 2 (*c*) of section 38 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

Under a marriage settlement made in 1873 the property of the intended wife, being personalty, was settled upon trust to pay the income to the wife for her life, and after her death upon trust for such of her children as she should by deed or will appoint, and in default of such appointment for all her children in equal shares, and if there should be no children, then upon trust, if the wife should survive her husband, for her executors, administrators, and assigns absolutely, but if the husband should survive the wife, then upon trust for such person or persons as the wife should by will appoint, and in default of such appointment upon trust for the next of kin of the wife under the Statutes of Distribution.

In the events which happened the persons entitled under the Statutes of Distribution as the next of kin of the wife became, in 1885, entitled in possession to the trust funds comprised in the settlement, which were valued at upwards of £7,000.

The Commissioners of Inland Revenue claimed that these trust funds became liable to be included in an account chargeable with stamp duty under sub-section 2 (*c*) of section 38 of the Customs and Inland Revenue Act, 1881, and that the funds also became liable to succession duty.

The defendants, who were the trustees of the settlement, refused to pay the stamp duty or to deliver an account pursuant to section 38 of the Act of 1881, but they were ready and willing to pay, and did pay, the succession duty upon the trust property under the Succession Duty Act, 1853, and no question now arises as to the succession duty.

The demurrer and answer of the defendants in the case was filed on the 1st of May, 1889, and therefore the whole pleadings in the case were completed before the passing of the Customs and Inland Revenue Act, 1889, which was passed and came into operation on the 31st of May, 1889.

Section 38 of the Customs and Inland Revenue Act, 1881, provides:

(1) Stamp duties . . . shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof.

(2) The personal or movable property to be included in an account shall be property of the following descriptions:

(*c*) Any property passing under any past or future voluntary settlement . . . whereby an interest in such property for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

Section 11 of the Customs and Inland Revenue Act, 1889, provides:

"Sub-section 2 of section 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—

"The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person."

Henn Collins, Q.C. (*Levett* with him), for the defendants.—The next of kin take the property, and the Crown say that this is an event on which their right to this duty attaches, on the ground that the next of kin, who take under settlement, take as volunteers and may be described as volunteers. I submit that the settlement points wholly to a voluntary settlement in the ordinary sense of the word, where there has been no consideration, and where the husband has reserved to himself a life interest. A marriage settlement is a settlement for consideration, marriage being a valuable consideration, and those who take under such a settlement do not take as volunteers: *Crossman* v. *The Queen,* 35 W. R. 303, 18 Q. B. D. 256. The Act of 1889 does not affect the present case, as the pleadings were all completed before that Act came into force on the 31st of May, 1889.

Sir E. Clarke, S.G., and *Dicey,* for the Crown.—Section 11 of the Customs and Inland Revenue Act, 1889, is not an amendment of the provisions of the section in the Act of 1881; it is only a rule laid down with regard to construction, which is a declaratory rule throwing light upon the meaning of the Act of 1881, so that, in construing the Act of 1881, we are to do so as if the provisions in the 11th section of the Act of 1889 were incorporated in the Act of 1881.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

That is the construction which the court is now bound to put upon the section. The words in the section "shall be construed" mean shall be construed by any tribunal which has to construe it: *The Attorney-General* v. *The Marquis of Hertford*, 3 Ex. 670.

Levett, in reply.—The Act of 1889 is an amending Act and not a declaring Act. If it were a declaring Act I could not dispute the contention put forward by the Crown. When the Act was passed the Crown had not the right claimed. The section is not retrospective. Actions must be determined by the law at the time the cause of action accrued: *Hough* v. *Windus*, 32 W. R. 452, 12 Q. B. D. 224.

POLLOCK, B.—This is a matter of considerable importance, and the court should carefully consider the case, so as not in any way to infringe upon the rules laid down in *Hough* v. *Windus*. Each case must depend on the language used by the Legislature in the particular statute which is being construed, and that is a reason why I think that *Hough* v. *Windus* does not govern the present case. There is a strong authority in the Court of Exchequer, in the case of *The Attorney-General* v. *The Marquis of Hertford*, to show that if an Act is in its nature a declaratory Act, then the objection that it is taking away or giving a right which did not exist before, is not properly applicable, and I think that the present case is a stronger case in favour of the Crown than *The Attorney-General* v. *The Marquis of Hertford*, and for these reasons: that the Act of 1881, which provides what documents are to be stamped, describes the property to be included therein as "any property passing under any past or future voluntary settlement." The words "voluntary settlement" gave rise to some doubt, and the Legislature in 1889, although they commenced by saying that the earlier Act "shall be amended as follows," use the words set out in section 11 of the Act of 1889. The material part, however, of that section is that a voluntary settlement is to mean what it is stated to mean by that section, and therefore in reading sub-section 2 (*b*) of section 38 of the earlier Act we ought now to read it in this way, "any property passing under any past or future voluntary settlement, including therein any trust whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not between the settlor and any other person." That is the way in which the Act of 1881 is to be read. If that were all, the matter would be absolutely clear. A distinction has been pointed out which we ought to consider; we must see whether these words in sub-section 2 of section 11 do affect the question: "A return of stamp duty shall not be made under sub-section 3 of the said section 38 by reason of, or in relation to, any account delivered on or after the 1st day of June, 1889." Now that refers to the provisions made in the Act of 1881 for a return of stamp duty paid on an account delivered, comprising property passing under a voluntary settlement, upon which, however, at the time of the settlement, *ad valorem* duty had already been paid, and therefore where such stamp duty ought not to have been received. In the present case *quoad* the settlor and the parties to the marriage, the settlement is not voluntary, and therefore there could be no ground whatever for returning any stamp duty that might have been paid. If it is paid it is paid in respect of the whole deed, and therefore it seems to me upon the whole of this case, that there must be judgment for the Crown.

There is one other question. It certainly has been considered in many cases that where a person had commenced an action he had a vested right, and that any subsequent Act of Parliament ought not to be construed as retrospective so as to take away that right. That is not the view taken in all cases, but that was the view taken by Parke, B., for many years to my knowledge; however, the other view has been taken now in a good many modern cases, especially those affecting the question of costs, such as the cases of *Freeman* v. *Moyes*, 1 A. & E. 338; *Wright* v. *Hale*, 9 W. R. 157; *Kimbray* v. *Draper*, 16 W. R. 539, L. R. 3 Q. B. 160.

HAWKINS, J., concurred.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Bower, Cotton, & Bower.*

Prob. Div. & Adm. Div. Probate. } May 13.

In the Goods of CALLAWAY. (*a.*)

Probate—Two wills—Property in England and South Africa—Separate executors—Incorporation—English will allowed—Form of grant.

A domiciled Englishman made and duly executed in England two wills on the same day, one disposing of his African, the other of his English property, and named separate executors in each. Each will was distinct, and excluded the property dealt with in the other.

On the application of the executors of the English will, and with the consent of the persons entitled in the case of intestacy, the court granted probate of the English will alone, with a note that an authenticated copy of the African will had been deposited in the registry.

In the Goods of Astor, 24 *W. R.* 539, 1 *P. D.* 150, *followed.*

Application by the executors of the English will of the deceased for grant of probate of such will alone.

The Rt. Rev. Henry Callaway, late Bishop of St. John's, Caffraria, died at Woodcote, Ottery St. Mary, on March 26, 1890. On the 17th day of January, 1888, being then domiciled in England and having resigned his bishopric, he made two wills. By the first he disposed of all his property in South Africa and elsewhere, except property in the United Kingdom of Great Britain and Ireland, and appointed two persons resident in South Africa executors of that will. By the second will he disposed of all his real and personal property in the United Kingdom, and appointed executors of that will. Each will contained a clause in almost identical terms referring to the other. By the clause in the second will the testator stated "this to be my last will and testament so far only as respects my real and leasehold estate (if any) situate and being in the United Kingdom of Great Britain and Ireland, and my personal estate constituting *bona notabilia* within the said United Kingdom, and not intended in any way to operate as a disposition of my real and personal estate in South Africa or elsewhere than in the said United Kingdom, as to which I have made a separate and independent will dated the day of the date hereof and hereinafter called my African will," and the testator appointed Cornelius Hanbury and C. C. Moreland trustees and executors of this will. The African will was sent out to South Africa for probate immediately after the death of the testator. The executors of the English will applied in the registry for probate of the English will alone, but the registrar refused to grant probate unless the second will was brought in.

Deane, in support of the motion, stated that he appeared for all parties interested in obtaining probate

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

of the English will, and that all parties interested in an intestacy had consented. [He referred to *In the Goods of Coode*, L. R. 1 P. & D. 449, 16 W. R. Prob. Dig. 11, which he distinguished; *In the Goods of Smart*, 32 W. R. 724, 9 P. D. 64; and *In the Goods of Astor*, 24 W. R. 539, 1 P. D. 150.] His clients did not wish the African will incorporated in the English.

BUTT, J.—The only question in my mind is whether I should take the same course as in *In the Goods of Astor*. It is unnecessary to incorporate the African will, but an authenticated copy of it should be filed in the registry, verified by affidavit, and on that being done probate of the English will may go, the probate to contain a statement that the copy of the African will has been so filed, but the African will not to be incorporated in the probate.

Application granted.

Solicitors, *Corrie, Williams, & Williams.*

Lunacy.

May 7.

In re BROWN. (a.)

Railway company—Purchase-money of lands paid into court—Investment in Consols—Conversion of National Debt—Redemption—Petition for re-investment of redemption-money—"Cash under the control of the court"—Costs—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *ss.* 69, 80—*Law of Property Act*, 1860 (*Lord St. Leonards' Act*) (23 & 24 *Vict. c.* 38), *s.* 10—*R. S. C.*, 1883, *ord.* 22, *r.* 17.

The purchase-moneys of lands belonging to a lunatic and taken by a railway company had been paid into court and invested in Three per Cent. Consols. The committee not having assented to their conversion, the Consols were redeemed by the Government, and the redemption-money was paid into court to the account of the lunatic, ex parte the railway company.

On a petition by the committee that the redemption-money might be invested in railway preference stock,

Held, that the redemption-money was "cash under the control of the court" within the meaning of section 10 *of Lord St. Leonards' Act*, 1860, *and of R. S. C.*, 1883, *ord.* 22, *r.* 17, *and that there was accordingly power to direct its investment in the manner sought.*

Ex parte St. John Baptist College, Oxford, 31 *W. R.* 55, 22 *Ch. D.* 93, *followed.*

Held, also, that the railway company should pay the costs, as the re-investment was rendered reasonably necessary by the Act of the Legislature, and was not occasioned by the mere caprice of the holder.

Lunacy petition.

This was a petition presented by the committee of a lunatic, asking that a sum of cash standing in court to the account of the lunatic and *ex parte* the Midland Railway Co. might be invested in preference stock of the Great Northern Railway Co.

Part of the sum in question represented the purchase-money of land belonging to the lunatic compulsorily taken in 1884 by the Midland Railway Co., and which originally had been paid into court under section 69 of the Lands Clauses Act, 1845, and had been invested in Three per Cent. Consols. The committee had not assented to the conversion of the stock into the New Two and Three-quarter per Cent. Consols, and accordingly, on the passing of the National Debt Redemption Act, 1889, the stock then invested in the Three per Cent. Consols was redeemed by the Government, and the cash now in court to the above account represented the redemption-money.

The petition first came on for hearing before Lindley and Bowen, L.JJ., on April 23, when an order was made for an investment of the sum in court as asked for by the petition, the Midland Railway Co. to pay the costs of the application and of the investment, except so far as the costs of investment might be increased by the redemption-money being in excess of the amount of the purchase-money originally paid by the company; the latter part of this order as to costs, following the form laid down in the case of *Attorney-General* v. *Rochester* (*Mayor of*), 15 W. R. 765, and Seton, 4th ed., vol. 2, part 2, p. 1441.

Before the order was drawn up the petition was, by the direction of the court, restored to the paper for re-argument on the questions as to whether there was any power in the court to sanction the investment sought to be made, and also as to the liability of the railway company for costs. The petition was accordingly again set down, and came on for hearing on May 7.

Section 80 of the Lands Clauses Act, 1845, so far as material, provides: "In all cases of moneys deposited in the bank under the provisions of this or the special Act . . . it shall be lawful for the court . . . to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking—that is to say, the costs of the purchase of the lands . . . the costs of the investment of such moneys in Government or real securities, of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid . . . and for the payment out of court of the principal of such moneys . . . and of all proceedings relating thereto . . ."

D. Sturges, for the petitioner.—The redemption-moneys represent moneys originally paid into court under section 69 of the Lands Clauses Act, 1845; and money paid into court under the Lands Clauses Act is "cash under the control of the court" within the meaning of section 10 of 23 & 24 Vict. c. 38 (Lord St. Leonards' Act), and as such may be invested in any of the securities which have been sanctioned for investments by the Rules of Court: *Ex parte St. John Baptist College, Oxford*, 31 W. R. 55, 22 Ch. D. 93. R. S. C., 1883, ord. 22, r. 17, authorizes the investment of "cash under the control of the court" in preference stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares. The name of the Midland Co. is still on the account to which the redemption-money is standing, and under section 80 of the Lands Clauses Act, 1845, they are liable to pay the costs of this investment in accordance with the form given in *Attorney-General* v. *Rochester* (*Mayor of*). [COTTON, L.J.—The court has jurisdiction to order the company to pay the costs, but ought it to exercise its power to do so, under circumstances like the present, where, if you had not dissented from the conversion, these moneys would have been reinvested in New Consols?] The committee only acted for the benefit of the lunatic in refusing to accept the conversion.

C. H. Sargant, for the Midland Railway Co.—*Ex parte St. John Baptist College, Oxford*, was the case of an original investment, but this is not the case of an original investment, but it is a case of reinvestment. Section 80 does not say that the company are liable for the costs of every reinvestment; on the contrary, it says that it is only when the money is reinvested in the purchase of other lands that the company is liable, and the reason for allowing that, is that the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

name of the company is then taken off the account: *In re Bristol Free Grammar School*, 47 L. J. Ch. 317. [The Lord CHANCELLOR.—But this is cash under the control of the court; how, therefore, does the question of reinvestment arise?] It is the proceeds of an original investment.

Sturges, in reply.—Ever since the passing of the Lands Clauses Act, railway companies have always been made to pay the costs. As to *In re Bristol Free Grammar School*, there the fund was in the hands of the Official Trustee of Charitable Funds, who was treated as the absolute owner.

Lord HALSBURY, L.C.—I think the order made on the former occasion was a right order. The case is covered by authority. *Ex parte St. John Baptist College, Oxford*, is an express actual ruling of the Court of Appeal that money paid into court under the Lands Clauses Act is "cash under the control of the court," and capable of being invested as such.

On the point as to costs, if it were a case of capricious change of investment the question might arise as to whether we ought then to require the railway company to pay the costs; but that is not the case here, and, in my opinion, the railway company ought properly be required to pay the costs of this investment.

COTTON, L.J., concurred.

LINDLEY, L.J.—As I had some misgiving as to whether there might not have been some oversight in making the order made on the previous occasion, I will add a few words, though it is not usual to do so in these cases.

The case of *Ex parte St. John Baptist College, Oxford*, which has been cited to-day, satisfies me that there is power to make the investment sought.

Then as to the costs. The question in the present case is a small one, but it is likely to be very important as a precedent, on account of the number of persons who may be affected by the scheme for conversion of the Three per Cent. Consols. I now think that the view taken by Bowen, L.J., and myself on the previous occasion was right. Where the change of investment has been rendered reasonably necessary by the Act of the Government, and not by any caprice of the holder, I think it is right that the company should bear the costs. The order will bear date as of this day.

Petition allowed.

Solicitors for the petitioner, *Hamlin, Grammer, & Hamlin.*

Solicitors for the Midland Railway Co., *Bell, Brodrick & Gray.*

Court of Appeal.

From Chan. Div. Jan. 30, 31.

SMART *v.* TRANTER. (*a.*)

Married woman—Choses in action *of wife—Title of husband—Probate of will of married woman—Effect of grant in general form to executor of married woman—Probate Rules*, 1887, r. 15.

A married woman—married before the Married Women's Property Act, 1882—*possessing no separate estate, and no testamentary capacity by assent of her husband or otherwise, made a will, by which she appointed an executor and bequeathed all her property to persons other than her husband. She died in July*, 1887, *and probate of the will was granted to the executor in the ordinary general form, in pursuance of rule* 15 *of the Probate Rules of March*, 1887.

The husband brought an action in the Chancery Division against the executor to recover certain choses in action *to which the wife was entitled at the time of her death.*

Held, that the effect of the grant of probate in general form to the executor was to entitle the executor to get in all assets of the wife, including the choses in action *which the wife had no power to dispose of by will, but that the husband was beneficially entitled to these* choses in action, *and was therefore entitled to have them transferred to him by the executors, subject to the same deductions as they would have been subjected to if the husband had taken out administration under the old practice.*

Decision of Kay, J., 37 *W. R.* 213, 40 *Ch. D.* 165, *reversed.*

Appeal from the decision of Kay, J. (reported 37 W. R. 213, 40 Ch. D. 165).

The plaintiff in this action was married to his late wife in April, 1882, before the Married Women's Property Act, 1882, came into operation. His wife was entitled to a legacy of £50, payable on the death of her mother, who was still living, and also to a sum of £100 due to her from her brother, but which had not been reduced into possession by the plaintiff. No marriage settlement had been made.

The plaintiff's wife died in July, 1887, leaving a will, whereby she appointed executors, and gave all her property upon trust for her mother for life, with remainder to her brothers and sisters. The wife had no testamentary power of appointment and no separate estate, and her husband, the plaintiff, had not assented to her will.

The plaintiff entered a *caveat* against the proof of this will, but afterwards withdrew it, and on the 14th of November, 1887, administration of the personal estate of the deceased wife was granted in the Probate Division to the defendant Tranter, one of the executors named in the will, he "having been first sworn well and faithfully to administer the same."

By the present action, instituted in the Chancery Division, the husband claimed that the defendant, the executor, should assign and pay to the plaintiff the £100 and interest, and should transfer to the plaintiff the £50 legacy, and an injunction to restrain the defendant from otherwise dealing with those sums.

Kay, J., dismissed the action, on the ground that the husband, by suing the executor in the Chancery Division, had treated the will as valid, and had, therefore, mistaken his remedy, and that the proper course for him to have taken was to apply to the Probate Division to recall the probate and to grant him administration.

The plaintiff appealed.

Napier-Higgins, Q.C., and *Barnard*, for the appellant.—By rule 15 of the Probate Rules of March, 1887,* probate of the will of a married woman is now granted to the executor thereof in the ordinary form, without being limited to such property as the married woman had a right to dispose of: *In the Goods of Amelia Price*, 35 W. R. 596, 12 P. D. 137. The legal right, therefore, to these *choses in action* is vested in the defendant, but the defendant is in equity a trustee for the husband, who has the beneficial interest in the *choses in action* of his deceased wife.

They cited *Humphrey* v. *Bullen*, 1 Atk. 458; *Elliott* v. *Collier*, 3 Atk. 526; *Squib* v. *Wyn*, 1 P. Wms. 378; *In re Lambert's Estate*, 39 Ch. D. 626, 37 W. R. Dig. 88.

Whitehorne, Q.C., and *Eustace Smith*, for the respondent.—The will of this married woman either

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

* The rule is set out in 31 SOLICITORS' JOURNAL, at p. 409.

vested these *choses in action* in her executor, or it did not. If it did not, the action must fail, because there is then no legal personal representative in respect of those *choses in action: Betts* v. *Kimpton*, 2 B. & Ad. 273; if it did, then the will vested in the executor property which the married woman had no power to dispose of by will. The executor, if he takes the property, is bound to distribute it in due course of administration—*i.e.*, to pay in the first place the testamentary expenses, and any debts for which the married woman's estate is liable (such as debts contracted before her marriage). The new Probate Rule is only a rule of procedure, and it does not vest the right to these *choses in action* in the executor at all. The plaintiff must obtain a grant of administration to himself in order to have a right to claim these *choses in action*. *In re Lambert* was a case of a disposition by will of separate property.

They also referred to *In the Goods of Tharp*, 26 W. R. 770, 3 P. D. 76.

Napier-Higgins, Q.C., in reply.—I admit that these *choses in action* are liable for testamentary expenses, but that is all.

COTTON, L.J.—This is an appeal from the judgment of Kay, J., who decided that the plaintiff, the executors of whose deceased wife are defendants, was not entitled to any judgment or decree in his favour in this action, but that he must go to the Probate Court and get the general probate which has been granted to the defendants revoked, and get for himself a grant of administration in respect of any property which his wife could not dispose of by will. There has been a very learned and ingenious argument in the case, though the subject-matter is very small, the husband's claim being only to two *choses in action* of £100 and £50 which formed part of the wife's estate at the time of her death. She made a will naming two gentlemen her executors. The present practice of the Probate Court is not to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration *cæterorum* to the husband, which was the old practice, but to grant to the executors probate in general terms, and not to grant any administration to the husband. The Probate Court has in effect said: "The married woman had power to make a will which would pass separate estate and any estate that came to her after the passing of the Married Women's Property Act, 1882, so, without entering into the question whether there was property which she could not dispose of, and which would go to the husband, we grant general probate, giving the administration of all her personal estate to her executors." The husband claimed from the executors the personal estate which the wife had no power to dispose of. Kay, J., says to him: "You cannot claim anything from the executors; they assert their title to the whole personal estate, and if you are desirous of asserting your claim to these *choses in action* you must go to the Probate Court and get that court to revoke the general probate and grant limited probate to the executors, and administration *cæterorum* to yourself." That was on the ground that the husband, after the death of his wife, could only claim her *choses in action*, not reduced into possession, on taking out administration to her, which he had not done, and that by bringing an action against the executors he admitted the title of the executors to all the estate of the wife which the probate purported to grant them. I think there is a fallacy in that. How was it that the husband could not get the *choses in action* of his deceased wife except by taking out administration? Because the *choses in action* not reduced into possession were assets of the wife to which a legal title could only be acquired by a grant of administration to her estate by a proper court, and the husband, until he had obtained such grant, had no power to give a legal discharge for them. But, as the wife had no power to dispose of them, the husband was beneficially entitled, there being a clause in the Statute of Frauds which prevented the Statute of Distributions giving any right to the next of kin as against the right of the husband, which existed previously to the Statute of Distributions.

Then how is the husband deprived of his wife's estate as against the executors? This is part of the wife's estate which (subject to the question I shall have to consider hereafter as to the right of the executors to get it in) was not disposed of by her will. It was undisposed of personal estate of the wife. If there had not been a husband surviving, the next of kin would have taken it under the Statute of Distributions, but, there being a surviving husband, he is beneficially entitled to it. Under the old practice, if the husband died without having taken out administration to his wife, administration was granted to the next of kin, but the beneficial interest of the husband remained undivested, and devolved on his personal representatives. So here the husband, not having taken out administration, cannot sue the debtors for these *choses in action*, but he is beneficially entitled to them, and if the executors under the grant of probate are entitled to sue for them, he can sue the executors in respect of them as being their *cestui que trust*.

It was argued most ingeniously by Mr. Whitehorne that the plaintiff has no right here, but must go to the Probate Court, and Kay, J., has determined that he must, on the ground that the appointment of executors is a disposition, to some extent, of the property of the person who makes a will appointing executors; that here a married woman makes a will and appoints executors, and that the grant of general probate of that will has in effect given to her by the action of the Probate Court power to dispose by will of this property; that the executors taking the property must dispose of it according to their oath—that is to say, in paying the debts and performing the other duties imposed on them by the will—that is, payment of the legacies and handing over the residue to the residuary legatees. This is a fallacy. The granting of probate to the executors does not recognize the right of the testatrix to dispose by will of the beneficial interest in all the property which the executors got in by virtue of the probate; it enabled them to get in all the assets of the deceased, whether beneficially disposed of by the will or not, but does not alter the beneficial title to the property. The husband could not himself get in these *choses in action* without taking out administration, but if the right to get them in is granted by the Probate Court to another person, that person, when they are got in, holds them as trustee for the husband.

In my opinion the grant of probate in the general form did not recognize the right of the testatrix to dispose beneficially of these *choses in action*, nor the right of the executors to dispose of them according to the directions of the will, but only recognized the executors as the persons who would represent the deceased and get in all her assets. In my opinion that ingenious argument, by which Kay, J., seems to have been persuaded, fails.

I am of opinion, then, that the plaintiff is entitled to say, "I am beneficially entitled to these *choses in action* when got in by the executors," but he must take them subject to the same liabilities as if he had taken out administration. If he had taken out administration he would have had to pay the costs of administration, and any debts there might be of his deceased wife. There might be debts existing which were contracted by her before the marriage, and those would be payable out of this property. It is said here that there were debts, but are they debts payable out of her assets? I am

not dealing with liabilities contracted by her with reference to separate estate. Such liabilities are not her debts in the proper sense of the word — that is to say, they are not debts which must be paid by her administrator or executor out of her assets, but merely debts according to the peculiar doctrine of the courts of equity which enables a married woman (though not capable by law of contracting) to contract with reference to her separate estate so as to create liabilities payable out of it. Putting such liabilities aside, are there any debts of this married woman which are payable by her personal representative out of her assets? As far as the evidence goes, I think we ought to find that there are none. It is true that the husband, if he had taken out administration, might have had to pay something for his wife, for he is bound to pay for anything supplied to her in the way of proper provision for her, such as a nurse and medicine during her illness, and there are claims for matters of that kind, but those would have been his debts, not the debts of the wife, and he would not have paid them as her administrator.

Then there is a question as to the funeral expenses. Of course, the husband would be bound to bury his wife, but here, on the evidence, a portion of the funeral expenses has been paid by the husband, other portions, it is said, have been paid by the executors under the following circumstances:—A husband is not bound to pay unreasonable expenses in burying his wife, and there was an arrangement made between her mother and the husband that he should pay a certain portion of the expenses, and that the increase of expense occasioned by her being buried in some particular place in the country should be borne by the mother. If this extra expense is what the executors paid, and I understand such to be the case, they must look to the mother to repay them. Therefore, I think we ought to declare that the plaintiff is entitled to the disputed assets, subject to payment of probate and testamentary expenses properly incurred. We must, therefore, discharge the order of Kay, J., and we must order repayment to the plaintiff of those costs which, under that order, have been paid by him to the executors. Then we think that, as the defendants, no doubt by the ingenuity of the arguments put by them before Kay, J., persuaded him to make an order which we think erroneous, we cannot but give the plaintiff the costs of the appeal for setting that right.

[The Lord Justice then said that previously to the order of Kay, J., both parties were to blame in the course of conduct they pursued, and, consequently, that each party should bear his own costs below.]

LINDLEY, L.J.—This case unfortunately relates only to a small sum of money, but it has raised a discussion of considerable importance.

The action is brought by a husband against persons who have obtained probate in general form of the will of his wife. Part of the assets of the wife consists of *choses in action* which have never been reduced into possession. The husband says, in substance by his claim, hand those over to me. The defendants, the executors, oppose that, and they have contended very ingeniously as to the various aspects of their rights, but the last thing they thought of doing was to comply with the request of the husband. Kay, J., has taken the view that the husband has no *locus standi* at all in the Chancery Division, and that he cannot claim from the defendants these assets of his wife unless he can get the probate to them revoked, and get letters of administration granted to him of such parts of his wife's assets as she could not dispose of by will. It logically follows from that that the husband's action was dismissed, with costs. The plaintiff appeals from that decision, and, having considered the case and heard the argument, it appears to me that Kay, J., has taken an erroneous view of the husband's position.

The rights of the husband require for their elucidation some inquiry into old law. The position of the husband will be found explained accurately, I believe, and clearly by Williams, J., on Executors, 7th ed., vol. 2, p. 1,488. He says:—"It has been shown in a former part of this treatise that the husband is entitled to the grant of administration of his wife's effects, and, consequently, before the Statute of Distributions he was entitled, as all administrators were, to the exclusive enjoyment of the residue." As the law stood before that statute, the administrator took the residue for his own benefit. The Statute of Distributions was passed, altering that law as regards administrators generally, and there were some expressions in it which raised a doubt whether it had not altered the law as regards the husband. That doubt was set at rest by a clause introduced into the Statute of Frauds, which enacted that neither the Statute of Distributions nor anything therein contained "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of this Act." That left the husband where he was before. But that gave rise to another doubt, and that doubt was this. It is clear that since the Statute of Frauds, if the husband takes out administration, he can get the reversionary *choses in action* of the wife, but if he does not, the Statute of Frauds does not in terms apply. That doubt was raised and solved very early in the case of *Cart* v. *Rees*, which is stated in the following terms by Cowper, L.C., when giving judgment in *Squib* v. *Wyn*, 1 P. Wms. 378, 381:—"A wife died possessed of *choses in action*, and the husband survived and died without taking out letters of administration to his wife, after which the next of kin of the wife administered to her, and Lord Parker held that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's *choses in action* being, by the Statute of Distributions, vested in the husband as next of kin to the wife; and whereas there is a proviso in 29 Charles II., saying that the Statute of Distributions shall not extend to the estates of *feme coverts* that die intestate, but that their husbands may have administration of their personal estate as before the making of the Act, his lordship said, this clause was made in favour of the husband, and not to his prejudice; so that it was intended by the Parliament that the husband should be within the Statute of Distributions so as to take the wife's *choses in action* as to his benefit, but should not be within the same as to his prejudice; and that this was a new point but had been settled, and upon very good reason, for, were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute."

There are other cases which will be found in Williams, J.'s book at p. 1489 which are to the same effect, and there is now no doubt, as regards the *choses in action* of the wife not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity, but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in *Pere Williams*.

Now, pausing there for a moment, let us see how that affects the rights of the husband in this case. Until lately the practice in the Probate Court was to grant

administration of the estates of married women in what may be called in a popular sense a double form. If a married woman left a will the executors would take out probate as to some assets and the husband would take out administration as to the rest. After the passing of the Married Women's Property Act that was found to be extremely embarrassing in practice, which is obvious enough if we consider the effect on people who have to pay money to the wife's representatives. Supposing there were two legal personal representatives of the wife and I owe money to the wife, to whom am I to pay? In order to get rid of that difficulty, and perhaps also for other reasons, the practice of the Probate Court was altered in 1887, and that rule which has been read, and which I will not read again, was made, and in conformity with that rule when a woman dies leaving a will, the Probate Court grants probate of that will to the executors named in it, and it does not and will not, as I understand, grant partial probate to one person and letters of administration as to the rest of her property to another. But it is manifest that this alteration in the practice of the Probate Court cannot affect the rights of parties to property. It is mere matter of machinery. The defendants have obtained general probate of the wife's will. What is the consequence of that? The consequence is that they are the persons, and the only persons, entitled in this country to get in the personal assets of the wife. It does not matter whether she can dispose of them by will or not. They are the only persons entitled in this country to get them in.

The next point is, what are the executors to do with these *choses in action* when they have got them in? If we bear in mind that this marriage took place before the Married Women's Property Act of 1882, the mode of dealing with these particular assets of the wife, I apprehend, is clear enough. They are assets of the wife, they belong to her husband; she cannot give them away without his consent. They belong to him on the authority of the cases to which I have already alluded. It is, however, conceivable that at common law, without reference to separate estate, there might be debts of the wife properly payable out of these assets. That would be the case if she had contracted a debt before marriage which was unsatisfied. Such a debt would be payable out of her assets in the event of her dying before the husband. That is one instance, and there might be others. She might, for instance, be a sole trader. Now, if any debts contracted by her and payable at law out of her assets exist, they would come out of her assets in priority to anything else. But it is clear that there were no such debts here, and that there is no use in having an inquiry on the subject. The existence of such debts is a mere theoretical possibility, with which we need not concern ourselves. The result, therefore, is this, that, subject to the payment of the testamentary and probate expenses, these assets belong to the husband. I think, therefore, that his action should not have been dismissed, but that he is entitled to a declaration that, subject as I have said, these assets belong to him. [His lordship then said that he agreed with Cotton, L.J., as to the costs.]

LOPES, L.J.—The form in which probate is granted does not in any way alter the rights of beneficiaries. When that is borne in mind I do not think that this case is so difficult to deal with as it at first appears. I propose to say only very little with regard to it, and only very shortly to state what to my mind the result in the circumstances of this case is. It appears to me that the executors are the proper persons to get in these outstanding *choses in action* of the wife, and that the husband subsequently gets payment from the executor, subject to the same deductions as those *choses in action* would have been subjected to if the husband had taken out administration under the old practice. I agree with what has been said by the rest of the court in all respects, and also I agree with what has been said with regard to the proper mode of dealing with the costs in this case.

MINUTES OF ORDER.—Reverse the order. The court, being satisfied that there are no debts of the plaintiff's wife payable out of her assets claimed by the plaintiff, declare that, subject to the payment of the probate and testamentary expenses properly incurred by the defendant, other than the costs of this action, the plaintiff is entitled to those assets. Liberty to apply with respect to the probate and testamentary expenses and generally. The defendant to repay the costs paid by the plaintiff, and pay the costs of the appeal; each party to pay their own costs of the action.

Solicitors, *Collyer-Bristow, Withers, Russell, & Hill*, for *Wood & Awdry*, Chippenham; *Morse, Hewitt, & Farman*, for *A. W. Boodle*, New Swindon.

From Q. B. Div. May 14.

In re A SOLICITOR.

Ex parte OFFICIAL RECEIVER. (*a*.)

Solicitor—Striking off roll—Right to make application —Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), *ss.* 13, 15 —*Rules, Part I., r.* 1; *Part VI., r.* 3; *Form V.*

An application under section 13 *of the Solicitors Act*, 1888, *to strike the name of a solicitor off the rolls may be made by a person who has not employed the solicitor in a professional capacity.*

Decision of the Queen's Bench Division (ante, *p.* 507) *affirmed.*

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Mathew, J.), reported *ante*, p. 507, where the facts are fully stated.

A solicitor, having become bankrupt, was examined before the official receiver, and in the course of his examination he made certain statements which the official receiver laid before the Incorporated Law Society and on which the official receiver applied to strike the name of the solicitor off the rolls. Objection was taken that the official receiver had no *locus standi* to make the application, and a case was stated for the opinion of the Queen's Bench Division.

The Divisional Court held that the application might be made by the official receiver, and directed the case to proceed.

The solicitor appealed.

Winch, Q.C., and *Stock*, for the appellant.—The application to strike a solicitor off the rolls can only be made by a person who has been or is a client of the solicitor. This is shown by the form of affidavit given in the schedule to the rules of the 31st of January, 1889, made under the Solicitors Act, 1888: "I, A. B., of ———, make oath and say as follows:—(1) C. D., of ———, solicitor of the Supreme Court of Judicature in England, has been employed by me in a professional capacity for the last ten years (or as the case may be)."

Muir Mackenzie, for the official receiver, and *Hollams*, for the Incorporated Law Society, were not called upon to argue.

Lord ESHER, M.R.—The Act of Parliament under which the rules were made is perfectly clear. An application under it may be made by anyone to strike a solicitor off the rolls, and is not confined to clients

(*a*.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

of the solicitor. The rules are to the same effect. The appellant's counsel do not dispute this, but they say that both Act and rules are restricted by the form of affidavit given in the schedule. That form, no doubt, gives, as an instance, the case of an application by a client, but the words "or as the case may be" show that this is not the only instance. I do not think that the form in any way restricts the Act and rules, and if it does derogate from them, it is altogether void and *ultrà vires*, because the judges by whom it was made had no power to derogate from an Act of Parliament. Therefore, in my opinion, the judgment of the Divisional Court was perfectly right, and must be affirmed.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Long & Gardner.*

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

From Q. B. Div. [and Q. B. Div.] April 15; May 5.

COOK v. WHELLOCK. (a.)

Practice—Security for costs—Action against tenant for rent—Bankrupt plaintiff—Security for costs of action—Application to make trustee plaintiff.

The plaintiff having brought an action to recover rent of certain premises demised by him to the defendant, the defendant discovered that, at the time of the lease, the plaintiff was a bankrupt, and that his discharge had been made conditional upon his paying his creditors 5s. in the pound. This sum had not been paid. The defendant thereupon applied that the trustee in bankruptcy should be made plaintiff, or that the defendant should be ordered to give security for the costs of the action.

Held (affirming the judgment of the Queen's Bench Division), *that the defendant was estopped from denying the plaintiff's title and setting up the title of the trustee; that the mere fact of bankruptcy was not of itself sufficient ground for ordering security for costs; and that the plaintiff was not a mere nominal plaintiff suing on behalf of his trustee in bankruptcy, as he would gain a benefit if he succeeded in the action, and that he could not be required upon that ground to give security for costs.*

Rhodes *v.* Dawson, 34 *W. R.* 240, 16 *Q. B. D.* 548, *followed.*

Appeal from chambers.

In 1887 the defendant became tenant to the plaintiff of certain premises, and entered into possession. In 1889 the plaintiff brought an action to recover rent in arrear, and the defendant discovered that the plaintiff had been adjudicated bankrupt in 1885, and that his discharge had been made conditional upon his paying his creditors 5s. in the pound, which sum had not been paid. The defendant thereupon applied for security for the costs of the action, and the master made an order that the plaintiff should give security for the defendant's costs in the action in the sum of £60, and that in the meantime all further proceedings be stayed, unless within seven days the official receiver be made plaintiff in the action. The judge in chambers referred the matter to the court.

S. Lynch, for the plaintiff.

Yelverton, for the defendant.

VAUGHAN WILLIAMS, J.—The order of the master cannot be supported. Where a plaintiff is an undischarged bankrupt suing in respect of a cause of action arising subsequent to the bankruptcy, the plaintiff cannot be called upon to give security for costs, or to make the trustee plaintiff. Section 142 of the Common Law Procedure Act, 1852, only applied to a cause of action which had accrued before bankruptcy: *Stanton* v. *Collier*, 2 W. R. 197, 3 E. & B. 274. The plaintiff is not a nominal plaintiff if he sues in respect of a cause of action accrued pending the bankruptcy. *Herbert* v. *Sayer*, 5 Q. B. 965, decides that to plead the bankruptcy alone is not a good plea; and that, unless the trustee interferes, the bankrupt has a good cause of action, and is entitled to sue. In *Buchan* v. *Hill*, W. N., 1888, p. 233, 33 S. J. 92, North, J., held that an undischarged bankrupt could sue without his trustee, and that, unless there was some suggestion that the action was brought on behalf of the trustee, the undischarged bankrupt need not give security for costs. If the judgment of Lindley, L.J., in *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548, is looked at, it is clear that the rule as to security for costs only applies where the plaintiff is a mere nominal plaintiff. In a case like this, the bankrupt's position is much like that of an agent who has made himself liable for an undisclosed principal. He has a right to sue, subject to the right of the principal to intervene. The order made by the master must, therefore, be discharged.

LAWRANCE, J., concurred.

The defendant appealed.

Yelverton, for the defendant:

S. Lynch, for the plaintiff, was not called upon.

The arguments sufficiently appear from the judgments.

Sections 20 and 44 of the Bankruptcy Act, 1883; *Cowell* v. *Taylor*, 34 W. R. 24, 31 Ch. D. 34, 886; *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548, were cited.

Lord ESHER, M.R.—It seems to me that the judgment of Vaughan Williams, J., accurately states the law. The plaintiff granted a lease of certain premises to the defendant, and the defendant entered into possession. The plaintiff now sues for rent in arrear. The first point taken is that the plaintiff is not the right plaintiff, as he is an undischarged bankrupt, and that the trustee in bankruptcy ought to sue. The answer to that is that the plaintiff was a bankrupt when he granted the lease, and the defendant is therefore estopped from denying the plaintiff's title and setting up the title of the trustee in bankruptcy. It was next said that, the plaintiff being bankrupt, the defendant is entitled to security for the costs of the action. In my opinion the defendant at the trial would not be allowed to give evidence of the plaintiff's bankruptcy, as that fact would, under the circumstances, be wholly immaterial. Can he, then, be allowed upon a preliminary summons to show that the plaintiff is a bankrupt, so as to get an order for security for the costs of the action? If that were allowed it would be very strange, but it is not necessary to decide the point, because not only is mere poverty not sufficient ground for ordering security, but in *Rhodes* v. *Dawson* this court laid it down that bankruptcy of itself was not sufficient reason for such an order. It was then said that the plaintiff was a mere nominal plaintiff, not indeed in the usual sense as being put forward by some person behind him, but upon

(a.) Reported by SPENCER L. HOLLAND and W. F. BARRY, Esqs., Barristers-at-Law.

the ground that if he succeeded in the action he would hold the money for his trustee in bankruptcy—that is to say, he would be a trustee for his trustee. I do not think that the plaintiff would hold the money as a trustee for his trustee in bankruptcy, inasmuch as the latter could only get the money by an order of the Bankruptcy Court. But, even if the plaintiff were a trustee, it does not follow that he is a mere nominal plaintiff. If he succeeds in the action, he may be able to fulfil, or approach nearer the fulfilment of, the condition imposed upon the grant of his discharge by the Bankruptcy Court. Therefore if he succeeds he will obtain a benefit, though no doubt his creditors will also obtain a benefit. Accordingly he cannot be said to be a mere nominal plaintiff. Upon all grounds the appeal fails, and must be dismissed.

Fry, L.J.—I am of the same opinion.

Lopes, L.J.—I am of the same opinion. The first point taken was that the plaintiff was not the right plaintiff. The defendant, however, is estopped from denying the plaintiff's title. It was then said that the plaintiff is a bankrupt, and ought to give security for the costs of the action. In *Rhodes* v. *Dawson* the question of security for costs was fully gone into, and this passage from Chitty's Archbold, vol. 1, 14th ed., c. 33, p. 398, was cited in the judgment with approval:—"The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a *qui tam* action. And this rule applies where the plaintiff is trustee of a bankrupt and is suing for the benefit of the estate; or where the plaintiff is suing as executor for the benefit of the testator's estate." That seems to me to lay down the rule correctly, and covers the present case. As to the last point, that the plaintiff is a mere nominal plaintiff, I entirely agree with what has been said by the Master of the Rolls.

Appeal dismissed.

Solicitor for the plaintiff, *H. F. Oddy.*

Solicitor for the defendant, *G. A. Hall.*

High Court of Justice.

Chan. Div. North, J. — Jan. 21.

Stokes v. Ducroz. (a.)

Inland revenue—Legacy duty—Real estate in foreign country—Lex loci—*Partnership property—Conversion.*

A testator, who died in 1880, *and who at the time of his death was domiciled in England, had for many years previous to his death carried on the business of sheep-breeding in partnership with his brother, R. S., in New Zealand. Part of the partnership property consisted of a freehold estate in New Zealand, known as the Milbourne Estate. By articles of partnership dated the* 14*th of February,* 1879, *made between the testator and R. S., it was agreed that the Milbourne Estate should be forthwith sold in the manner which the parties should mutually agree upon, and the articles contained provisions for sale in case of no agreement and for carrying on the partnership. R. S. died in January,* 1880. *The testator was entitled to four-sevenths of the partnership property. No sale of the estate was made in the lifetime either of R. S. or of the testator. The testator by his will gave his four-sevenths in the Milbourne Estate to trustees upon trust to sell, with powers of management until sale, and subject to the payment of an annuity, and of the income of one-seventh to the widow of R. S. during her life, to divide the proceeds and produce until sale among thirteen charities. The Milbourne Estate had never been sold, but the income since the death of the testator had from time to time been paid into court in an action to administer the testator's estate which was commenced in* 1881. *Under an order made in the action in April,* 1888, *the funds then in court were divided, and legacy duty had been paid upon the moneys arising from the Milbourne Estate. The duty had been paid under an arrangement that it should be repaid if it was ultimately decided that it should not be payable.*

The Governors of the London Hospital, who had been appointed to represent the other charities, presented a petition asking for distribution of the fund which had accumulated in court, without payment of legacy duty, on the ground that, inasmuch as it represented proceeds of sale of real estate in New Zealand, it was not subject to English legacy duty.

Held, that, as the testator's interest in the property was personal estate, legacy duty was payable according to the law of the testator's domicil.

Forbes v. Steven, 18 *W. R.* 686, *L. R.* 10 *Eq.* 178, *followed.*

Petition.

The testator, J. M. Stokes, for many years previous to and at the time of his death carried on the business of sheep-breeding in New Zealand with his brother, Robert Stokes. Part of the partnership property consisted of a freehold estate, called the Milbourne Estate, in New Zealand, the legal estate of which was vested in the two brothers as tenants in common. The testator was entitled to four-sevenths of the partnership property, and Robert Stokes was entitled to the remainder. Prior to the year 1879 the partnership business was carried on without articles of partnership.

By articles of partnership dated the 14th of January, 1879, and made between the testator and Robert Stokes, it was agreed that the whole of the Milbourne Estate should be sold forthwith without any unnecessary delay in the manner which the parties should mutually agree upon, and the articles contained provisions for the case of the parties not coming to an agreement, and for carrying on the partnership until sale.

Robert Stokes died on the 20th of January, 1880. No sale had then been made of the Milbourne Estate. The testator by his will, dated the 11th of June, 1880, gave and devised to trustees therein named his four equal seventh shares, and all other, if any, the estate and interest which he might at the time of his death possess or have power to dispose of in the estate known as the Milbourne Estate, upon trust, as soon as conveniently might be after his decease, to sell the same, and he expressly authorized his trustees to concur with the owners or owner of any other shares or share in the said estate in any sale or contract for sale and division of the proceeds thereof, or to concur in, or to procure a partition of the said estate; and he directed his trustees, subject to the purchase of an annuity of £100, to divide the residue of the proceeds of sale among thirteen named charities, one in New Zealand, one in Scotland, and the remainder in England, and that until the sale the trustees should receive his share of the rents and profits of the said estate and the produce thereof, and after payment of the said annuity should invest and accummulate the residue and hold it upon the trusts aforesaid.

By a codicil, dated the 18th of September, 1880, the testator repeated the devise to his trustees of his share of the Milbourne Estate, including the sheep and stock thereon, and he gave his trustees full powers of management until sale; and he gave the income of one of his four-seventh shares, and the proceeds thereof, to the

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

widow of Robert Stokes for her life, and subject thereto confirmed the trusts of his will.

The testator died on the same 18th of September, 1880. He was domiciled in England at the date of his death.

In 1881 an action was commenced for the administration of the testator's estate, and the usual decree was made in March, 1881. By the order on further consideration made on the 30th of July, 1883, certain funds in court were distributed, and the trustees were ordered to pay into court from time to time the moneys received by them in respect of three-sevenths of the New Zealand estate until sale, and that the same should be invested and accumulated. By an order dated the 12th of April, 1888, it was ordered that a part of the Consols then in court, amounting to £7,597, should be applied in discharging a legacy, and that the legacy duty on the residue of the Consols should be paid, and the residue divided among the thirteen charities named in the will. This legacy duty was paid under an arrangement with the Treasury that it should be repaid if it was ultimately decided not to be payable. After the date of this order the trustees paid into court a further sum of £3,054, representing the income of the three-seventh shares belonging to the charities accrued since the former order.

This petition was presented by the London Hospital, who had been appointed to represent the other charities, asking that this sum might be divided among the charities without any deduction for legacy duty.

Rigby, Q.C., and *Morshead*, for the petitioner.—All property is not subject to legacy duty. Before the Act 36 Geo. 3, c. 52, legacy duty was payable on receipts. That Act, however, charged it on the property, but it still was charged only on mere personalty. The Act 45 Geo. 3, c. 28, s. 4, charges the duty upon any legacy charged upon real estate, and on the proceeds of any real estate directed by the will to be sold. It was originally thought that the question depended upon where the property was situate or was collected. The case of *Thomson* v. *The Advocate-General*, 12 Cl. & F. 1, however, established the rule that the question depends upon the testator's domicil, and that if he is domiciled in England, property collected abroad must pay duty, but the rule in such a case refers only to personal estate properly so called, and not to a legacy charged on land, in which case the *lex loci rei sitæ* prevails. The case of *Forbes* v. *Steven*, 18 W. R. 686, L. R. 10 Eq. 178, will be relied upon by the Crown, but that case only really decides that conversion for one purpose is conversion for all. That case does not apply to land outside the jurisdiction.

The following cases and text-books were referred to in the course of the argument:—*Chatfield* v. *Berchtoldt*, 20 W. R. 401, L. R. 7 Ch. 192; *Freeke* v. *Carberry*, 21 W. R. 835, L. R. 16 Eq. 461; *Duncan* v. *Lawson*, 37 W. R. 524, 41 Ch. D. 394; *Matson* v. *Swift*, 8 Beav. 368; *Attorney-General* v. *Lomas*, 22 W. R. 188, L. R. 9 Ex. 29; *Attorney-General* v. *Hubbuck*, 13 Q. B. D. 275, 32 W. R. Dig. 170; *Attorney-General* v. *The Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672; Hayes & Jarman Concise Forms of Wills, 5th ed., pp. 25, 26; Davidson's Precedents in Conveyancing, vol. 4, p. 264; Jarman on Wills, 3rd ed., vol. 1, p. 4.

Vernon Smith, for St. George's Hospital.

Rawlinson, for the plaintiff.

Vaughan Hawkins, for the Crown.—The case of *Forbes* v. *Steven* is indistinguishable from the present case. It has never been doubted, it has always been followed, and it is incontestably right in principle.

Rigby, Q.C., replied.

NORTH, J. (after stating the facts, continued:—)—In the course of the argument I suggested for consideration whether the conversion by the agreement was absolute, and whether the land was or was not part of the capital of the partnership. My own impression is that both those questions must be answered in the affirmative, but I thought they deserved some consideration. Mr. Rigby has, however, argued the case upon the footing that they ought both to be answered in the affirmative, having regard to the questions which are raised as to the incidence of duty in the present case. I do not stop, therefore, to consider those questions further, but I come to the conclusion that the estate is subject to a trust for conversion, whether by reason of the terms of the agreement to convert, or by reason of the provision that the estate is to be treated as part of the capital of the business.

Therefore, we have an estate belonging as to four-sevenths to the testator, and as to the other three-sevenths to Robert Stokes. Robert died shortly before the testator, and the testator died in 1880. During the lives of the brothers no sale of the estate had taken place, and, in fact, no sale has taken place down to the present time. The testator, by his will, deals with this property by a description which treats four-sevenths of it as being his own. He treats his interest as being four-sevenths of an existing estate, but, for the purpose of division among the several legatees, it is intended that a conversion shall take place after his death.

The question is, whether legacy duty is payable "on this" estate before it reaches the hands of the residuary legatees. The contention is, that it is immovable property abroad—real estate abroad. No question arises by reason of any distinction between what is known as real estate in our law, and what is known as immovable property in the civil law, but the question is, whether this estate is subject to legacy duty.

The question has been argued upon the basis that the law of New Zealand deals with the devolution of this estate, that the will cannot operate upon the estate, except so far as it is a New Zealand will, and that, if the law of New Zealand relating to wills were different from the law of England, the court must have regard to the requirements of the law of New Zealand as to the execution of wills, and a will must be bad there if it did not comply with the formalities imposed by the law of that country, although it satisfied the requirements of the law of England, and was perfectly good here. Looking at the words used in the will, it is necessary to see what the testator's interest in the property was, and, in my opinion, the interest to which he was entitled was a share in the proceeds of sale of the property to arise from a conversion. If, under the agreement to convert alone, it would be simply a share of four-sevenths of the proceeds of sale after the necessary expenses had been defrayed. If it was by reason of a conversion proceeding from the estate being treated as part of the capital of the partnership, then it would be a similar share in what was payable to him, or payable to his legatees after ascertaining what his share of the partnership adventure was, by satisfying all debts and liabilities and sums that he had received on account, and so on. But, whichever way it is taken, it seems to me the words of the will describe and operate to pass the testator's interest under the agreement that he had entered into with his brother, by virtue of which he was entitled to receive, not four-sevenths of the estate, or four-sevenths of the proceeds, but a share amounting to four-sevenths of the surplus, after making all the deductions that were necessary in respect of expenses, and also bringing into hotchpot any advances that either of the brothers had received which ought to be set against his share. The result is, that what he disposes of by his will is his interest in the estate.

Then what is his interest? In my opinion it is personalty. It is not a share in the estate, the interest of which would have to be arrived at by New Zealand law,

but it is a share in the sum available for distribution when the agreement between the partners, under which it is to be converted and the surplus divided, has been given effect to. Whether you call it personal estate or movable estate, it seems to me, I will not say a *chose in action*, because I do not think that is a very happy word to describe it, but it is the credit to which the testator is entitled in respect of the estate, which is, in my opinion, what passed by the will, and that credit is a right to receive a share of the proceeds of the estate, and also, if there was a partnership, the share of the partnership under the arrangement made with his brother. In my opinion that is not an interest in land, and it seems to me that *Forbes* v. *Steven* is conclusive upon that point.

Several arguments have been urged before me to show that the decision in *Forbes* v. *Steven* is wrong, and those arguments may be entitled to consideration; they are certainly entitled to consideration anywhere, but they may be more effectual before a court which has power to overrule *Forbes* v. *Steven* if it is wrong, but I have not that power at all, and all I can do is to give effect to the law laid down in that case if it applies to the present case. In my opinion it does apply.

The sole point for decision there was this, whether duty was, or was not, payable in respect of the proceeds of sale of certain land which was part of the property of a partnership in India. If, the land being in India, the proceeds of that land were an immovable, and to go accordingly, the duty ought not to be paid, but the court came to the conclusion that, although the land was in India, the land belonged to a partnership; it was subject to a trust to convert, and the interest of the testator in the property was in the proceeds of that conversion, and, that being so, that it was property subject to duty in this country. So in the same way that case, in my opinion, applies here. I must hold that, the interest of the testator in the case before me being in money arising after the sale of land actually directed to be converted, *Forbes* v. *Steven* is undistinguishable from the present case, and that case is binding upon me. Under those circumstances I have no course open to me but to follow that decision, and I must hold that the duty has been properly paid—that is the effect of it, I think—and that it cannot be recovered back.

Solicitors, *Hanbury, Hutton, & Whitting; Surman & Quekett; E. F. Henley; Palmer, Eland, & Nettleship.*

2 Ex. al 1901, 2 KB. 646.

Chan. Div. Stirling, J. — Jan. 28, 29; March 26.

In re WOLMERSHAUSEN.

WOLMERSHAUSEN *v.* WOLMERSHAUSEN. (*a.*)

Statute of Limitations—Acknowledgment—Payment by principal debtor—Principal and surety—Discharge.

Five directors of a company gave, in the years 1871 *and* 1874 *respectively, two joint and several promissory notes to secure an advance to the company. The advance was also secured by a mortgage by assignment by the company of certain leasehold collieries. The company was wound up, and at that date a considerable sum was due to the lenders. The collieries could not be profitably worked. One of the five directors afterwards became bankrupt, and the lenders proved against his estate for the balance due on the promissory notes. This proof was afterwards withdrawn, in pursuance of certain complicated arrangements which the lenders had entered into for the purpose of relieving themselves from the rents and covenants under the colliery leases to which they had become liable, and a general receipt had been given to the trustee in bankruptcy. The lenders now claimed to prove for the balance due on the promissory notes against the estate of another of the signatories which was being administered by the court. This claim was first made in* 1879.

Held, that the claim on the first promissory note was barred by the Statute of Limitations. The fact that the principal debtor, the company, had made payments in respect of the debt did not prevent the statute from running in favour of the surety, and an affidavit by the testator's representatives as to creditors' claims was not a sufficient acknowledgment to take it out of the statute. The receipt given to the trustee in bankruptcy could not release the other sureties, because, although a release to one of several joint debtors is a release to all, the liability became on the bankruptcy several only, and the release was, in consequence, given to one of a number of persons severally liable. Moreover, the receipt was not in fact intended to be a release of the whole liability, but merely a compromise of the claim against the bankrupt's estate.

Held, also, that the withdrawal by the creditors of their proof against the bankrupt's estate was a pro tanto *discharge to the co-sureties.*

The question in this case was as to the right of Messrs. Barclay, Bevan, & Co., bankers, to claim in the action, which was for the administration of the estate of the late Mr. George Michael Wolmershausen, as creditors for £6,000 and interest due on two joint and several promissory notes.

These notes, which were dated respectively the 29th of July, 1871, and the 21st of January, 1874, were given under the following circumstances.

In the month of July, 1871, Messrs. Barclay, Bevan, & Co. advanced £25,000 to the Original Hartlepool Collieries Co. (of which the testator in this action was one of the directors) on the security of a memorandum of charge, dated the 29th of July, 1871, and expressed to secure the sum of £25,000 and further advances up to £10,000, on two leasehold collieries known as the Wheatley Hill and Thornley Collieries, and the company thereby agreed to execute when required a legal mortgage.

At the time of this advance Mr. W. Ford, one of the directors of the company, held a mortgage on these two collieries which he agreed to postpone to Messrs. Barclay, Bevan, & Co.'s charge. Ford's mortgage also included a third leasehold colliery belonging to the company, known as the Ludworth Colliery, and the loose plant on the Wheatley Hill and Thornley Collieries.

The advance was further secured by the joint and several promissory note, payable twelve months after date, with interest at 6 per cent. per annum, of five of the directors of the company, including Ford and the testator. This was the note dated the 29th of July, 1871.

On the 17th of April, 1872, a mortgage by assignment of the Wheatley Hill and Thornley Collieries, was, in pursuance of the above-mentioned agreement, executed by the company in favour of Messrs. Barclay, Bevan, & Co. The mortgage did not include the loose plant and machinery.

A further advance of £10,000 was subsequently made by Messrs. Barclay, Bevan, & Co., which was also secured by a joint and several promissory note of the same directors. This was the note of the 21st of January, 1874.

In the beginning of the year 1877 a resolution to wind up the company was passed, and a supervision order was subsequently made. A liquidator was appointed on the 19th of January, 1877, with power to carry on the collieries, which he did until the end of June, 1881. Payments had from time to time been made by the company in respect of the advances, of

(*a.*) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

which the last was in 1875, and at the date of the winding up £5,500 remained due on the promissory note of the 29th of July, 1871, and £4,500 on the promissory note of the 21st of January, 1874. Two further sums of £2,000 were afterwards paid by Ford in repect of the note of the 29th of July, 1871.

The testator died on the 17th of July, 1879, leaving the defendant his executrix. On the 31st of July the present action for the administration of his estate was commenced, and judgment was pronounced on the 13th of August in the same year. Advertisements were issued for creditors, and in October, 1879, Messrs. Barclay, Bevan, & Co. made a claim against the estate for £6,000, the balance remaining due on the promissory notes, and interest.

The defendant, in an affidavit with regard to the claims of creditors, dated the 13th of March, 1880, said:—

"3. I have in the paper writing now produced and shown to me and marked A set forth a list of all claims the particulars of which have been sent in to me by persons claiming to be creditors of the said George Michael Wolmershausen, or which have otherwise come to my knowledge.

"4.—I have examined the particulars of the several claims mentioned in the paper writing now produced and shown to me marked A, and I have compared the same with the books, accounts, and documents of the said George Michael Wolmershausen in order to ascertain so far as I am able to which of such claims the estate of the said George Michael Wolmershausen is justly liable. From such examination I am of opinion, and verily believe, that the estate of the said George Michael Wolmershausen is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A, and to the best of my knowledge and belief such several amounts are justly due from the estate of the said George Michael Wolmershausen and proper to be allowed to the respective claimants in the said schedule."

The exhibit marked A contained the following particulars of Messrs. Barclay, Bevan, & Co.'s claim:—

Names of claimants.	Address.	Particulars of claim.	Amount claimed.
Barclay, Bevan, & Co.	54, Lombard-street.	Contingent claim in respect of mortgage executed by the Original Hartlepool Collieries Co. (Limited).	£6,000 and interest.

Amount further to be allowed uncertain.

On the 1st of July, 1881, Ford entered into possession of all the three collieries and he worked them until the 4th of April, 1884. On the 24th of June in that year a receiving order was made against him, and he was afterwards adjudicated bankrupt. Messrs. Barclay, Bevan, & Co. proved in his bankruptcy for £6,000. The rents of the collieries were then in arrear, and large claims were made by the lessors for breaches of covenant, and distresses were put in for rent, rates, taxes, and workmen's wages. Unsuccessful attempts to sell the collieries were made both before and after Ford's bankruptcy. On the 24th of October, 1884, an order was made in Ford's bankruptcy giving his trustee leave to disclaim the colliery leases, and on the 1st of November following, the trustee disclaimed them accordingly.

Messrs. Barclay, Bevan, & Co., being now liable for the rents of the Wheatley Hill and Thornley Collieries and the performance of the covenants in the leases, entered into arrangements with a company called the Weardale Coal and Iron Co. and with the lessors and the trustee in Ford's bankruptcy under which the lessors, in consideration of large payments by Messrs. Barclay, Bevan, & Co. were to accept surrenders of the leases of all the collieries (including the Ludworth Colliery), and to grant new leases of them to the Weardale Co., and the loose plant was to be purchased by Messrs. Barclay, Bevan, & Co. from the trustee in Ford's bankruptcy, in whom it was then vested, for a sum in cash and an undertaking by them to indemnify his estate against certain claims, and to be handed over free of charge to the Weardale Co. After these arrangements had been carried out the trustee required Messrs. Barclay, Bevan, & Co. to withdraw their proof against Ford's estate, which they ultimately agreed to do on condition of the trustee handing over to them certain further loose plant. These transactions were carried out without the knowledge of any of the other parties to the two promissory notes, and there was no express reservation of rights against them.

A dividend of 2¾d. in the pound was paid in Ford's bankruptcy.

The loose plant handed over to Messrs. Barclay, Bevan, & Co. realized a little over £11. A dividend of about 2s. 6d. in the pound was paid in the winding up of the Original Hartlepool Collieries Co. No proof in that winding up was made by Messrs. Barclay, Bevan, & Co.

In the meantime no decision had been come to with regard to Messrs. Barclay, Bevan, & Co.'s claim in the present action. Two summonses were accordingly taken out, one by the plaintiffs on the 8th of July, 1885, and one by Messrs. Barclay, Bevan, & Co. on the 20th of April, 1887. The plaintiffs' summons asked that all proceedings in the action in relation to Messrs. Barclay, Bevan, & Co.'s claim might be stayed until further order without prejudice to such claim, and that Messrs. Barclay, Bevan, & Co. might be at liberty to bring an independent action to establish it. Messrs. Barclay, Bevan, & Co.'s summons asked that their claim might be allowed without further evidence. Both summonses were adjourned into court for the purpose of enabling the questions arising upon the claim to be disposed of, and now came on for hearing.

Buckley, Q.C., and *Dickinson*, for Messrs. Barclay, Bevan, & Co.

Hastings, Q.C., and *R. J. Parker*, for the executrix.

Farwell, for the plaintiffs in the action.

All the points argued are noticed in the judgment.

The following cases were cited:—*Nicholson* v. *Revill*, 4 A. & E. 675; *Ex parte Gifford*, 6 Ves. 805; *Word* v. *National Bank of New Zealand*, 8 App. Cas. 755, 32 W. R. Dig. 170; *Webb* v. *Hewitt*, 3 K. & J. 438, 5 W. R. Ch. Dig. 20; *Watts* v. *Shuttleworth*, 5 H. & N. 235, 8 W. R. C. L. Dig. 32; *Wulff & Billing* v. *Jay*, L. R. 7 Q. B. 756; *Samuell* v. *Howarth*, 3 Mer. 272; *Rew* v. *Pettet*, 1 A. & E. 196; *Jones* v. *Hughes*, 5 Ex. 104; *In re Frisby, Allison* v. *Frisby*, *ante*, p. 65, 43 Ch. D. 106; *Cockrill* v. *Sparkes*, 11 W. R. 426, 1 H. & C. 699; *Kearsley* v. *Cole*, 16 M. & W. 128; *Ex parte Jacobs*, 23 W. R. 251, L. R. 10 Ch. App. 211; *Rainbow* v. *Juggins*, 28 W. R. 428, 5 Q. B. D. 422, 28 W. R. Dig. 184; *Carter* v. *White*, 32 W. R. 693, 25 Ch. D. 666.

March 26.—[Stirling, J., stated the facts, and continued:—] The first defence set up by the respondent is one which applies only to part of the claim—namely, the £1,500 remaining due on the note of the 29th of July, 1871. No payment having been made on this note by the testator or his representatives, the right to sue on it *primâ facie* became barred on the 2nd of August, 1878; and it is on the claimants to show that something

occurred to take it out of the Statute of Limitations (21 Jac. 1, c. 16). It was admitted that the testator himself did not make any payment or any acknowledgment in writing in respect of his liability under the promissory note. It was not contended—at all events, not very strenuously—that the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) had any application. That question was decided in the negative by Kay, J., in *In re Frisby, Allison* v. *Frisby*, but was left doubtful by the Court of Appeal. If it were necessary for me to express an opinion upon it, I should follow Kay, J.

It was, in the first instance, contended that the affidavit of the defendant of the 13th of March, 1880, was a sufficient acknowledgment in writing to take the case out of the statute. Such an acknowledgment must, however, be one from which a promise to pay can be implied, but when exhibit A to the affidavit is examined it seems impossible to infer from such acknowledgment as is contained in the affidavit a promise to pay the whole of the £6,000, or such part of that sum as was due on the promissory note of the 29th of July, 1871. In reply this argument was not insisted on.

It was next urged that the payments made by the company on account of the debt, the last of which was on the 1st of June, 1875, had the effect of preventing the statutory bar. The law as to the effect of payment as it stood prior to the passing of the Mercantile Law Amendment Act is thus stated in the 5th edition of Lindley on Partnership (p. 261) :—"It was held that if one of several joint debtors paid any money on account of the principal or interest due from them all, such payment was sufficient to take the debt out of the statute, not only as against the person making the payment, but as against all the others jointly liable with him (for this *Whitcomb* v. *Whiting*, 2 Doug. 652, 1 Smith's L. C. is cited). But even before the Mercantile Law Amendment Act payment by a surviving partner did not prejudice the estate of a deceased partner (for this *Atkins* v. *Tredgold*, 2 B. & C. 23, is cited) any more than a payment by the executors of the deceased prejudiced the partners who survived (for this *Slater* v. *Lawson*, 1 B. & Ad. 396, is cited), for the executors of a deceased partner are not jointly liable with the surviving partners." It thus appears to be the opinion of the learned author that the doctrine of *Whitcomb* v. *Whiting* only applies to cases in which a joint liability exists, and that is in accordance with the view expressed by Holroyd, J., in *Atkins* v. *Tredgold*. In no case, so far as I have been able to discover, has it been held that where the liability arises from several promises a payment by one of the parties so severally liable prevents the statute from running in favour of the others.

Under section 14 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), one co-debtor is not deprived of the benefit of the Statute of Limitations by a payment made by another co-debtor; and it was held in *Cockrill* v. *Sparkes* that where a principal and surety give a joint and several promissory note a payment by the principal debtor does not deprive the surety of the benefit of this enactment. If, then, the company had joined in the promissory notes the payments made by it would not have prevented the statute from running in favour of the sureties. But it did not join; it was liable neither jointly with the sureties nor jointly and severally, but severally only. It would be strange if, after the passing of the Mercantile Law Amendment Act, a payment by the principal debtor under those circumstances were held sufficient to prevent the statute from running in favour of a surety.

It was said, however, that it is a general rule of law that a payment by a principal—at all events, where the principal is a mortgagor of real estate—is sufficient to prevent a surety from obtaining the benefit of the statute. Of this rule in its more general form I can find no trace in such cases as *Perham* v. *Raynall*, 2 Bing. 306, and *Wyatt* v. *Hodson*, 8 Bing. 309, where the decision arrived at in *Whitcomb* v. *Whiting* was applied to the case of one of the co-contractors being a surety. In support of the proposition in its narrower form one authority, and one only, was cited. This was the concluding portion of the judgment of Fry, L.J., in *In re Frisby, Allison* v. *Frisby*, where he says :—"If we were to confine payment to a payment by the person against whom, or his representatives, the action is brought, I think we should be doing great injustice. It is usual for the mortgagor—not the surety—to pay the interest, and it would be contrary to good sense, to the common understanding of mankind, that while he is doing so the statute should run in favour of the surety, unless he makes a payment or gives an acknowledgment." In my opinion, however, Fry, L.J., did not in that passage lay down any general principle, but simply gave reasons why it might well be that, under section 8 of the Real Property Limitation Act, 1874, payment was not to be confined to a payment by the person against whom, or whose representatives, the action was brought.

It was further suggested that, as the testator continued to be a director of the company down to the time when the winding up commenced, he must be deemed to have authorized the company to make the payment on his behalf as well as its own; but, in my opinion, this is not a necessary inference from the fact relied on, and there is no evidence before me as to the circumstances under which the payments were, in fact, made by the company.

I am of opinion, therefore, that the claim on the promissory note of the 29th of July, 1871, is barred by the Statute of Limitations.

The claim on the note of the 21st of January, 1874, was resisted on entirely different grounds. It was first said that the dealings with the trustee in Ford's bankruptcy amounted to a complete release of his estate, and operated to discharge his co-sureties. Now, it is undoubtedly true that where several persons are liable jointly, or jointly and severally, a release of one is a release of all. This principle, which is entirely independent of any doctrine peculiar to the law of principal and surety, is stated by Lord Denman in *Nicholson* v. *Revill*, 4 Ad. & E., at pp. 682, 683. In each case, however, it has to be determined whether what has occurred amounts to a release, and where, as here, no formal release is given, but what is relied on is an agreement not under seal, then in determining the effect of that agreement the surrounding circumstances and the intention of the parties must be regarded. This is illustrated by the cases of *Watters* v. *Smith*, 2 B. & Ad. 889, and *Ex parte Good*, 25 W. R. 422, 5 Ch. D. 46. In the present case what is relied on is an agreement entered into, not with Ford himself, but with the trustee of his estate. Now, by the bankruptcy of Ford, followed by his order of discharge, the liability of Ford on the note was determined, and the liability of his estate was substituted. That liability was in the nature of a several liability, and there was no longer any joint liability with the other makers of the note. That circumstance alone would prevent the application of the rule followed in *Nicholson* v. *Revill* as to the effect of the release of one of several persons jointly, or jointly and severally, liable. But this further took place; the creditors, Messrs. Barclay, Bevan, & Co., were desirous of realizing their security to the best advantage, the trustee in Ford's bankruptcy was desirous of having a dividend, and Messrs. Barclay, Bevan, & Co., agreed to withdraw their proof against Ford's estate. What was compromised was a dispute as to the right of proof against that estate, and everything points to this, that the agreement was not intended to affect the whole claim on the note, but merely the claim against Ford's estate, the rights against third parties being intended to remain unaffected. The nature and circumstances of

the transaction appear to me to show that the benefit which the bankers received under the agreement with the trustee was not given by the trustee or taken by the bankers in discharge of their whole claim on the note, or with the intention of destroying their rights against the other parties to it. Consequently, upon the principles laid down in *Watters* v. *Smith* and *Ex parte Good*, the agreement did not operate to release the co-sureties. In my opinion, therefore, the decision in *Nicholson* v. *Revill* does not govern the present case.

This, however, does not conclude the matter. It still remains to be considered how the transaction is affected by the law of principal and surety. The question there is as to the effect of an agreement entered into, not between the creditor and the principal debtor, but between the creditor and one of several sureties. The cases appear to show that the creditor (1) must not act in a manner inconsistent with the contract or arrangements under which the obligation of suretyship was incurred; and (2) must not act so that the right of contribution between the co-sureties is destroyed or prejudiced. The case of *Ward* v. *National Bank of New Zealand* is an authority for this proposition. As an illustration of the first of the obligations I may refer to the case of *Bonser* v. *Cox*, 4 Beav. 379, and the second is laid down by Lord Eldon in *Mayhew* v. *Crickett*, 2 Swans. 185. In *Ex parte Giffard* the report, both of the facts and the judgment, is somewhat obscure. Lord Eldon seems to have held that, as was held in *Watters* v. *Smith* and *Ex parte Good*, a receipt given to one of several sureties who had jointly signed two promissory notes on payment by him of a certain dividend under a composition with his creditors, and expressed to be "for £191 and the two notes, which, when duly paid, will be in full of the said debt and all other demands," did not amount to a release to the other persons liable on the note. Although exception was taken in the cases of *Nicholson* v. *Revill* and *Webb* v. *Hewitt* to some part of the language made use of by Lord Eldon, the decision itself does not appear to have been overruled. The view I have taken of the decision is supported by the remarks of Parke, B., in *Kearsley* v. *Cole*, 16 M. & W., at p. 136. Lord Eldon also appears to have held that no relief could be given so long as the other co-debtors paid no more than the share of the debt for which they were liable—that is to say (as I understand it), that the co-surety was not discharged to any extent so long as his right of contribution was not taken away or injuriously affected.

In the present case, as I have said, the nature of the liability of Ford has been altered, yet that is the result of the law, not of any act of the creditor. The liability of Ford's estate was in the nature of a several liability. I have already said that the arrangement between the creditors and the trustee of Ford's estate was not intended to release or discharge the other parties to the promissory note, and the case of *Wyke* v. *Rogers*, 1 De G. M. & G. 408, shows that the law of principal and surety does not require that the reservation of rights against a surety should be the subject of express agreement, either written or verbal. I must, however, inquire whether any right of contribution on the part of the co-sureties has been taken away or injuriously affected by the transaction between Messrs. Barclay, Bevan, & Co. and the trustee. It was not contended that the right of the co-sureties to prove against Ford's estate has been entirely taken away; it was not disputed that, upon payment by them of what remains due on the note, they may still go in and prove against Ford's estate. The effect of the compromise, however, has been to prevent Messrs. Barclay, Bevan, & Co. from receiving the dividend which has been paid by that estate, and which would have gone in reduction of the claim against the co-trustees. To that extent the rights of the co-sureties are prejudiced.

It does not appear to me, however, that I ought to hold that the co-sureties are thereby wholly discharged. If by the act of the creditor a security, to the benefit of which a surety is entitled, is wholly or partially lost, the creditor is only discharged to the extent of the loss. This is illustrated by *Wulf and Billing* v. *Jay*, and is stated by Blackburn, J., in *Polak* v. *Everett*, 24 W. R. 365, 689, 1 Q. B. D., at p. 675.

It appears to me that the right of proof against Ford's estate was a security in the hands of Messrs. Barclay, Bevan, & Co. within this rule, that the extent of the loss caused to the co-sureties by the transactions entered into with the trustee is the amount of the dividends not received by Messrs. Barclay, Bevan, & Co., and that the co-sureties are only discharged to this extent by reason of the dealings which took place between Messrs. Barclay, Bevan, & Co. and the trustee of Ford's estate.

It was next contended that Messrs. Barclay, Bevan, & Co. could only recover on the terms of bringing into account sums received from the Weardale Co. for loose plant and otherwise without setting off what they paid to the lessors in respect of their liability under the covenants contained in the leases of which they were assignees, and it was said that the sureties ought not to prejudiced by the form in which the mortgage was taken. The memorandum of the 29th of July, 1871, expressly provides for the execution by the Hartlepool Collieries Co. of a legal mortgage in such form as Messrs. Barclay, Bevan, & Co. might direct, and the sureties must be taken to have been aware of that stipulation. The form of mortgage chosen by Messrs. Barclay, Bevan, & Co. is unusual, but is within the terms of the memorandum, and I think that the sureties cannot be heard to object to it. Even if this be not so, there is another answer to the claim in respect of the money received or allowed in account for the loose plant—viz., that according to the terms of the leases the lessees were only entitled to remove that plant if they had first paid and satisfied the rents reserved by the leases, and performed and observed all the covenants and agreements therein contained. To secure the right to reserve the plant, the mortgagees (even if they had taken a mortgage by demise) must have expended sums largely in excess of the value of the plant, and I think that this contention fails.

Lastly, it was contended that the sureties were relieved *pro tanto* by reason of the way in which Messrs. Barclay, Bevan, & Co. dealt with their security. These dealings took place during two periods, the first from the commencement of the winding up of the company down to the bankruptcy of Ford, the second subsequent to the last mentioned event.

During the greater part of the former period—viz., from July, 1881, to July, 1884, Ford was in possession—and it appears that the bankers from time to time pressed him to reduce the amount due on the security, and that he did so to a substantial extent. During this period, namely in 1883, Ford, under pressure from the liquidator, paid to him sums which have been applied in payment of a dividend of two shillings in the pound to the unsecured creditors. It should also be mentioned that attempts were made in 1879 and in 1884 to sell the collieries by auction, both of which proved unsuccessful. And apparently the collieries were worked at a loss by the liquidator and by Ford. Now it was open to Messrs. Barclay, Bevan, & Co., as secured creditors of the company, to take one of three courses—viz., (1) to realize the security themselves, and prove for the balance remaining due after deducting the net amount realized; (2) to surrender their security and prove for the whole debt; and (3) to value their security and prove for the difference between the amount of the debt and such value; and, further, they were entitled to exercise such option in the manner most advantageous to themselves.

For this *Rainbow* v. *Juggins* is an authority. Moreover, the case of *Carter* v. *White* shows that the burden of proving that any loss has accrued from the course taken lies on the sureties. That burden the representative of the testator has, in my opinion, failed to discharge. During the first of the two periods it is not made out, in my opinion, that the adoption of any other course than that actually taken would have been more beneficial to the sureties, or that Messrs. Barclay, Bevan, & Co. were guilty of *laches* or failed to make the most of their security; and as to the dealings after the bankruptcy of Ford, the evidence seems to me to show that what was done was really the best that could be done under the circumstances. Stress was laid in argument on the large value attributed by Mr. Marley (under whose advice the bankers acted) to the loose plant in his first valuation. The estimate was not realized. Mr. Marley has, however, made an affidavit, in which he states that in his judgment the mortgagees could not expect to get better terms than they actually got, and that if they had refused those terms they would have incurred a much heavier loss, and no attempt has been made either to shake this evidence by cross-examination or to rebut it by the testimony of other experts.

In my opinion the claim on the note of the 21st of January, 1874, ought to be admitted, subject only to the deduction of the amount of the dividends which might have been received from Ford's estate.

Solicitors, *Janson, Cobb, Pearson, & Co.; Davidson & Morriss; F. C. Mathews & Browne.*

Q. B. Div. (Grantham and Vaughan Williams, JJ.) May 8.

Bonner & Co. *v.* Lyon and Another. (*a.*)

Married woman—Wife's liability—Evidence of separate property—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

In an action by certain jewellers against a married woman for jewellery supplied, the jury found that she had purchased the goods "on her own credit for her own use as her separate estate." According to the evidence, the only separate estate existing at the time of the contract was certain other jewellery previously supplied by the plaintiffs and a wardrobe of dresses, furs, and jackets, and there was no evidence of any separate property being subsequently acquired other than these.

Held, upon a motion for judgment, that the plaintiffs were entitled to judgment, on the ground that such separate property was property in respect of which the married woman might reasonably be deemed to have contracted credit within the meaning of the Married Women's Property Act, 1882, *and that the words "unless the contrary be shown," in sub-section* 3 *of section* 1 *of that Act, only admit of evidence of the fact of there being no such separate property in respect of which a married woman could reasonably be deemed to have contracted, and not of any intention, or absence of intention, of the married woman so to contract, at the time of making the contract or getting credit.*

Leake *v.* Driffield, ante, *p.* 93, 24 *Q. B. D.* 98, *distinguished.*

Motion for judgment.

The plaintiffs, jewellers at Brighton, brought an action at Lewes Winter Assizes against a Captain Lyon for £144, the value of jewellery supplied to his wife. The plaintiffs had for some time supplied jewellery to the lady under the name of Mrs. Stanhope, which she bore previous to her marriage, and for which she had paid under that name, and they had continued to supply her subsequently to her marriage, of which they were at the time ignorant.

As against Lyon the action was dismissed upon the jury finding that the goods were not "necessaries." As against Mrs. Lyon the jury found that she, as Mrs. Stanhope, "purchased the goods on her own credit and for her own use on her separate estate."

The only separate estate as to the existence of which any evidence was adduced at the trial, was the jewellery previously supplied to her by the plaintiffs, to the value of £100, and her wardrobe of dresses, furs, and sealskin jackets, to the value of £175.

Denman, J., upon the finding of the jury, left the plaintiffs to move for judgment, on the ground that he doubted whether such separate property as alone had been shown to exist was of the kind contemplated by the Married Women's Property Act, 1882—*i.e.*, property upon which a woman could reasonably be presumed to have pledged her credit.

Willis, Q.C., and *Mackintosh*, for the plaintiffs.—This is not a motion to set aside the finding of the jury. That finding is sufficient upon which to base a judgment in favour of the plaintiffs. So long as there is evidence of some separate property of the wife upon which she might have pledged her credit that is sufficient, under the Married Women's Property Act, 1882, to make her liable for her own contracts, and judgment should be given against her in the form ordered in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120—viz., against "such separate estate of the wife not subject to any restraint on anticipation, unless, by reason of section 19 of the Married Women's Women's Property Act, 1882, such estate be liable to execution notwithstanding such restraint."

Blake-Odgers and *Marshall-Hall*, for the defendant, Mrs. Lyon.—The question is whether a woman could reasonably be presumed to have pledged her credit at the time of the contract upon the clothes she wore or the jewels she had previously bought at the same shop: *Leake* v. *Driffield, ante*, p. 93, 24 Q. B. D. 98. No evidence of separate estate acquired since the time of the contract was adduced. Jewellery is not necessarily separate estate: *Mercier* v. *Williams*, 30 W. R. 720, 9 Q. B. D. 337.

Gill appeared for Lyon, the other defendant.

Grantham, J.—I think there clearly must be a judgment entered here for the plaintiffs. The only ground alleged upon which the judge thought it best to leave them to move for judgment was that he had some doubt whether the separate property here shown was of the character contemplated by the Act. The Act of 1882 refers clearly to "any real or personal property" as capable of being held by a woman as her separate property, and *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519, has shown the extent of those words. But she cannot be held to have contracted on her own credit unless the plaintiffs show that she had some separate property in respect of which she might be deemed to have contracted at the time of entering into the contract. It is clear that there was some separate property in her possession. Of what character? Apparently jewellery and dresses, including several sealskin jackets and furs. We know that there are people of a certain class who do spend large sums of money on jewellery and furs and such like, knowing that they can raise money upon their exchange if need be, or with the idea of exchanging them for other jewels, &c., when they get tired of them. At any rate, here is evidence of property to the extent of some two hundred and odd pounds, and I do not think

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

we are bound by the decision of *Leake* v. *Driffield* to hold that such property was of such a nature that a married woman could not have intended to contract in respect of.

VAUGHAN WILLIAMS, J.—Whatever view may be taken of the decision in *Leake* v. *Driffield*, I think that there is nothing unreasonable in our presuming here that the lady in question might have contracted in reference to the separate property mentioned. I consider that the words in sub-section 3 of section 1 of the Married Women's Property Act, 1882, saying that "every contract of a married woman shall be deemed to be contracted by her in respect of her separate property, unless the contrary be shown," were not intended to let in evidence of the intention of the married woman at the time of entering into the contract, but only evidence of the fact of the existence or otherwise of any separate property. The Act provides that a married woman shall be capable of entering into, and so of being rendered liable for, contracts in respect of her separate property. Sub-section 3 of section 1 is a corollary to, and not a limitation of, such liability. The words "unless the contrary be shown," in reference to her separate property being bound by her contract, should be, in my opinion, interpreted as "unless the separate property be of such a nature that such presumption (the presumption set up by the Act) cannot arise." Sometimes there may be separate property which, though not fettered by any restraint against anticipation, is yet of such a nature as to be practically inalienable. That was instanced in *Harrison* v. *Harrison*, 36 W. R. 748, 13 P. D. 180, as cited by Mathew, J., in *Leake* v. *Driffield*. But I cannot think that evidence of the intention, in fact, of the married woman at the time of the contract was ever contemplated as admissible under either of these last-mentioned decisions, but only evidence showing the nature of the property—whether it is of such a nature in respect of which she could reasonably be presumed to have contracted. I think there is ample evidence of separate property here upon which she could and might have contracted credit; and, therefore, that judgment must be entered for the plaintiffs.

Judgment for plaintiffs, and order for inquiry as to defendant's separate property.

Solicitors for the plaintiffs, *Prince & Ayres*.

Solicitors for the defendant, Mrs. Lyon, *Eldred & Bignold*.

Solicitor for Lyon, *J. D. Dutton*.

Q. B. Div. (Denman and Wills, JJ.) } Feb. 10.

ROGERS & Co. v. LAMBERT & Co. (*a*.)

Bailment — Title of bailor — Determination of — Jus tertii — When bailee estopped from setting up — Interrogatories.

In an action by bailors against bailees for non-delivery of certain goods,

Held, that the bailees were estopped from setting up the title of third parties, under whose authority they did not claim to defend, and to whom they had not delivered the goods, although the property in the goods might, as a matter of fact, have passed to such third parties since the date of bailment.

Appeal from an order of Charles, J., allowing the defendants to administer certain interrogatories.

The plaintiffs had purchased from the defendants a certain quantity of copper, paid for it, and left it in the custody of the defendants as warehousemen. The latter subsequently refused to deliver up the copper. An action for wrongful detention having been brought, the defendants pleaded a denial of the plaintiffs' property in the goods, and for the purpose of supporting that contention sought to administer interrogatories as to whether the plaintiffs had not resold the copper to a firm of Morrison, Kekewich, & Co., and had been paid the price, and whether they had not indorsed and handed to Morrison, Kekewich, & Co. delivery orders in respect of the copper.

The defendants were defending the action for their own interests alone, and without authority from Morrison, Kekewich, & Co., although the latter had commenced an action against them claiming delivery of the copper.

Charles, J., allowed the interrogatories, and the plaintiffs appealed.

Cohen, Q.C., and *Mansel Jones*, for the plaintiffs.—The defendants, as bailees, cannot dispute the plaintiffs' title to the goods. The defence, therefore, which these interrogatories are intended to support is not a good one, and the interrogatories are irrelevant in consequence. It is not enough that a bailee has become aware of the title of a third person, or that an adverse claim is made upon him, to entitle him to set up a *jus tertii*. He must also have the authority of the *tertius* to defend: *Biddle* v. *Bond*, 13 W. R. 561.

J. V. Austin, for the defendants.—The rule laid down in *Biddle* v. *Bond* does not apply to the present case. In *Biddle* v. *Bond* the bailor's title was denied at the time of the bailment. The bailee is not estopped from showing that the bailee's title had, as in the present instance, subsequently determined.

Cohen, Q.C., replied.

DENMAN, J.—I am of opinion that this appeal must be allowed. The defence aimed at in the interrogatories is that the plaintiffs have ceased to have any property in the copper, having sold it to third parties, and having endorsed the delivery orders to such purchasers. But assuming those facts to be true, it appears to me that they would afford no defence, for the mere indorsement of the delivery orders would not free the plaintiffs from their responsibility to their purchasers, and consequently the defendants are not relieved from their responsibility towards the plaintiffs to deliver up the copper to them, and thereby to enable them to fulfil their contract with the third parties. The defendants seek to get these interrogatories answered with the view of making out that, the property in the copper having been transferred to such third parties, they (the defendants) would have no answer to an action at the suit of the transferees to recover the copper, and that under the circumstances the proper persons to sue them would be the transferees, and not the plaintiffs. I think, however, that there is nothing to distinguish this case from that of *Biddle* v. *Bond*, where it was established that a bailee was estopped from disputing his bailor's title unless he claimed to defend under the authority in whom he alleged the title to be. There is no suggestion that such was the case here. I think that the learned judge's order must be reversed, and the interrogatories disallowed.

WILLS, J.—I am of the same opinion. Although this is in form an application to administer interrogatories, the case raises a much more serious question than the mere right to interrogate. The plaintiffs being the bailors of the defendants, and having the defendants' acknowledgment that they held the copper to the plaintiffs' order, had, in the ordinary course of their business, sold the copper to Messrs. Morrison, Keke-

(*a*.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

wich, & Co., and indorsed to them the delivery orders which they had received from the defendants; and the question is whether, under those circumstances, the defendants are entitled to say that they will not deliver the copper to the plaintiffs.

No doubt if the defendants had delivered the copper to Morrison, Kekewich, & Co., in pursuance of the delivery order, that would have afforded a good defence to the present action, but no such excuse for the non-delivery of the copper to the plaintiffs is here set up.

The plaintiffs, through the conduct of the defendants, are exposed to an action at the suit of Morrison, Kekewich, & Co. for failure to satisfy their contract of sale to them. This liability of the plaintiffs to their vendees, in my judgment, leaves them a sufficient interest in the copper to enable them to maintain this action. The defence, therefore, to which the interrogatories are directed is no defence in law; and the interrogatories, consequently, not being relevant to any matter which would afford a good defence to the action, must be disallowed.

Appeal allowed.

Solicitors for the plaintiffs, *Druces & Attlee.*

Solicitors for the defendants, *Johnson, Budd, & Johnson.*

Prob. Div. & Adm. Div. Admiralty. } March 13.

"The Carisbrook." (a.)

Breach of contract of carriage—Transfer from county court having admiralty jurisdiction—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71, *s.* 8)—*Commencement of lay days where option of spot of discharge at port of arrival given to charterer — Demurrage — Practice — Delivery of pleadings.*

A vessel laden with a cargo of 1,855 *tons of coal was chartered to proceed to O., or so near thereto as she could safely get, and deliver the same to the freighters alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by receiver. Cargo to be discharged at the average rate of not less than* 300 *tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said working days at* 16*s.* 8*d. per hour, except in cases of strikes, lock outs, colliery holidays, strikes at mines where steamer is booked, detention by railway, stoppage of trains, accidents to machinery, or any other causes beyond the control of the charterers or receivers, or their respective agents delaying the due loading and unloading. Time for loading and unloading to commence when the steamer is ready and intimation has been given in writing. The vessel arrived in the harbour of O. on the* 16*th of November, and came to anchor there, but not in any usual discharging berth, and the same day the master gave the agents of the consignees of the cargo notice in writing of the ship's readiness to discharge. On the arrival of the ship, and up to the morning of the* 20*th of November, it was impossible for the ship to get alongside the quay at O. in any of the usual discharging berths for coal cargoes, which were all occupied, but the consignees, whilst such berths were all so occupied, ordered the ship alongside the quay, and at the same time informed the master that he would have to wait his turn. On the morning of the* 20*th of November the ship got alongside the quay and commenced to discharge. On the afternoon of the* 25*th of November the discharge was finished. The owners of the ship afterwards brought an action in the City of London Court against the consignees for demurrage under the charter-party, and the judge of the City of London Court, during the progress of the cause, ordered it to be transferred to this court. At the hearing of the transferred cause in this court it was admitted that the agents of the consignees knew, at the time when they ordered the ship alongside the quay, that all the berths there were occupied; that there was no other place for discharge of coal cargoes at O., and that there were no lighters available.*

Held, that the defendants were liable for the demurrage proceeded for.

Davies *v.* McVeagh, 28 *W. R.* 143, 4 *Ex. D.* 265, *followed.*

Semble, *that, the consignees' agents having exercised the option given them by the charter-party, and ordered the ship to a quay alongside which she could not get, the lay days began to run from the time when notice was given of the ship's readiness to discharge on the* 16*th of November.*

Where a case is transferred to this court under the 8*th section of the County Courts Admiralty Jurisdiction Act,* 1868, *pleadings must be entered into as in actions originally commenced in the Admiralty Division.*

This was an action for demurrage instituted on behalf or Messrs. John Foster & Co., the owners of the steamship *Carisbrook*, against Messrs. Smales, Eeles, & Co., merchants, the consignees of a cargo of 1,855 tons of coal laden on board *The Carisbrook* at Glasgow and discharged at Odessa. The action was originally commenced in the City of London Court, but during the progress was transferred to this court under the 8th section of the County Courts Admiralty Jurisdiction Act, 1868.

The action was now heard in this court before Mr. Justice Butt.

No pleadings had been delivered, and counsel, on behalf of both the plaintiffs and the defendants, submitted that the court should hear the cause on the evidence of the master of *The Carisbrook* which had been taken in the City of London Court and had been printed for the purposes of the hearing in this court; on certain documents put in in the City of London Court, and on admissions of facts agreed to between the plaintiffs and defendants for the trial of the action.

Butt, J.—I will hear this case as an exception without pleadings, but in future, in all cases transferred to this court under the 8th section of the County Courts Admiralty Jurisdiction Act, 1868, I shall require pleadings to be delivered as in actions originally commenced in this division.

The hearing of the action was then proceeded with on the evidence, documents, and admissions above mentioned.

The admissions in question were in the following terms:—

Admissions of Facts.

1. That the steamship *Carisbrook* was loaded by Messrs. Lietke & Co., at Glasgow, with 1,855 tons of coal pursuant to a charter-party dated the 11th of October, 1888, a copy of which is annexed hereto.

2. That the master by his agents signed a bill of lading for the said cargo of coals, a copy of which is annexed hereto.

3. That the said bill of lading of the said cargo was duly indorsed to the defendants, to whom the property in the coals passed by reason of such indorsement.

4. That due notice of the vessel having passed Constantinople was despatched on the 14th of November, 1888, and was received by the defendants or their agents at Odessa in due course.

5. That *The Carisbrook* arrived at Odessa laden with the said cargo at 9.15 a.m. on the 16th of November, and came to anchor within the Mole, but not in any usual discharging berth, and that at noon due notice of the

(a.) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

ship's readiness to discharge cargo was given to the defendants.

6. That the ship was ordered by the defendants to proceed alongside the wharf or quay to discharge, where she afterwards did discharge. The said wharf or quay was the usual place for the discharge of coal cargoes at Odessa.

7. That at 11 a.m. on the 20th of November *The Carisbrook* got alongside the said quay. It was impossible to get there earlier, as she had to wait her turn before the harbour officials permitted her to go to the quay. That the defendants knew when they gave such orders that all the berths of the said quay were occupied, but there was no other place for the discharge of coal cargoes at Odessa, and there were no lighters available.

8. That the cargo was all discharged at 3.30 p.m. on Sunday, the 25th of November, 1888.

"CHARTER-PARTY.

"It is this day mutually agreed between Messrs. John Foster & Co., owners of the good steamer called *The Carisbrook*, of Whitby, register measurement, 1,108 tons net, and 1,724 tons gross, ——— master, now on passage to Glasgow, and expected ready to load about 20th inst.; and Messrs. Lietke & Co., of Glasgow, merchants: That the said steamer, being tight, staunch, and strong, and every way fitted for the voyage, shall, after discharging of present cargo, if any, with all convenient speed, sail and proceed to a customary loading berth, as ordered, at Glasgow (general terminus), and there load coals in 84 running hours (from 6 p.m. Saturdays to 6 a.m. Mondays, and holidays excepted) from the agents of the said freighters a full and complete cargo of coals, about 1,900 tons, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to Odessa, or so near thereunto as she may safely get, and deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by receiver, on being paid freight at and after the rate of 7/7½, say seven shillings and seven pence halfpenny, British sterling, per ton of 20cwts. delivered or taken on board in charterers' option, same to be declared before the discharging begins. Cargo is to be discharged at the average rate of not less than 330 tons per working day, Sundays and holidays excepted, and ten days on demurrage, over and above the said lay days, at 16s. 8d. per hour, except in cases of strikes, lock outs, colliery holidays, strikes at mines where steamer is booked, detention by railway, stoppage of trains, accidents to machinery, or any other causes beyond the control of the charterers or receivers, or their respective agents delaying the due loading and unloading. Time for loading and unloading to commence from the time the steamer is ready and intimation has been given in writing. . . ."

"BILL OF LADING.

"Shipped, in good order and well-conditioned, by Lietke & Co., of Glasgow, but without their responsibility for freight and demurrage, being agents only, in and upon the good ship or vessel called *The Carisbrook*, s.s., whereof is master for the present voyage, Ebblewhite, and now lying in Glasgow, and bound for Odessa, eighteen hundred and fifty-five tons two hundredweights coal, being marked and numbered as in the margin, and are to be delivered in like good order and well-conditioned at the aforesaid port of Odessa (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted), unto order or assigns. Freight for said goods to be paid by the consignees at the rate of ———, and all other conditions as per charter-party.—11th October, 1888."

From the transcript of the evidence of the master of *The Carisbrook* it appeared that an agent of the consignees of the cargo had, at Odessa, written across the notice of the ship's readiness to load, "Not accepted till steamer in berth," and returned it to the master of *The Carisbrook*, and that such agent had told the master of *The Carisbrook* that he would have to wait his turn, and, as soon as there was a berth, get alongside the quay.

Robson, for the plaintiffs.—The plaintiffs rely on *Davis* v. *McVeagh*, 28 W. R. 143, 4 Ex. D. 265, and *Pyman* v. *Dreyfus*, *ante*, p. 447, 24 Q. B. D. 152, which decide that where a ship has proceeded to the place of destination named in the charter-party—in this case the port of Odessa—and the charterer has an option as to what spot in such place to order the ship, and delay is occasioned by the ship being ordered to a spot to which she cannot get, the lay days commence from the time when the ship is ready at the place of destination, prepared, as far as she is concerned, to go to any spot to which the charterers have the option to send her. It is the duty of the charterer, if he has an option as to the locality in the port of destination where the ship is to discharge, not to name a berth to which she cannot get to discharge within the lay days.

He also referred to *Nelson* v. *Dahl*, 28 W. R. 57, 12 Ch. D. 568.

Pyke, for the defendants.—Since the decision of the House of Lords in *Nelson* v. *Dahl*, 29 W. R. 543, 6 App. Cas. 38, doubts have been thrown on the correctness of the decision in *Davies* v. *McVeagh*. And in *Murphy* v. *Coffin*, 32 W. R. 616, 12 Q. B. D. 87, a case very like the present, it was held that, although the berth named by the charterer was occupied when the ship was ordered there, the lay days did not commence until the ship was moved alongside such berth.

BUTT, J.—I have no hesitation in this case in deciding that the charterer is liable for the demurrage claimed. The ship arrives at Odessa, and there is no doubt she was ready to deliver her cargo at any place in the port where she might have been properly unloaded by lighters. Instead of doing as he might have done, and arranging to unload her into lighters, the charterer chose to exercise the option he had of ordering her to a quay which was crowded with vessels, and to which she could not get. The charterer had a perfect right to do this, but he had also a liability to pay under the terms of the charter-party in the event of his so exercising that option, and ordering her to a berth to which she could not get. I think that this is what is really laid down by the Court of Appeal in *Davies* v. *McVeagh*, first of all by Brett, J., before the case went to the Court of Appeal, and afterwards, on appeal, by Bramwell, Baggallay, and Thesiger, L.JJ., and indeed I must say that the decision there come to is quite in accord with my own opinion of previous decisions.

I am asked, on the authority of *Murphy* v. *Coffin*, a decision of a divisional court of the High Court of Justice, to treat the conclusion come to by Brett, J., and the judges of the Court of Appeal in *Davies* v. *McVeagh* as of no value. The learned judges who decided the case of *Murphy* v. *Coffin* are not reported as saying that the principle of the decision in *Davies* v. *McVeagh* is not applicable to the case before them, but according to the report, they say boldly that they consider *Davies* v. *McVeagh* to have been wrongly decided because it is inconsistent with other cases and because the Court of Appeal's attention was not properly called to some of the facts in the case. With all deference to the Divisional Court who decided *Murphy* v. *Coffin*, I should be bound to prefer the judgment of the Court of Appeal even if I had no opinion of my own as to the correctness of the decision in *Davies* v. *McVeagh*. But I have a strong opinion that the Court of Appeal was perfectly

well aware of the real facts of the case when it decided the case of *Davies* v. *McVeagh*.

I give judgment for the plaintiffs.

Solicitors for the plaintiffs, *Turnbull, Tilly, & Mousir*.

Solicitors for the defendants, *Thomas Cooper & Co.*

Court of Appeal.

From Q. B. Div. May 9, 12.

COLQUHOUN *v.* HEDDON. (*a.*)

Inland Revenue—Income tax (schedule D.)—Life insurance—Deduction of premium from assessment—Foreign insurance companies—16 *&* 17 *Vict. c.* 91—16 *&* 17 *Vict. c.* 34, *s.* 54—7 *&* 8 *Vict. c.* 110.

The statute 16 *&* 17 *Vict. c.* 91, *provides that "any person who shall have made any such insurance or contracted for any such deferred annuity, as in the provision mentioned in* 16 *&* 17 *Vict. c.* 34, *s.* 54, *in or with any insurance company existing on the* 1*st day of November*, 1844, *or in or with any insurance company registered pursuant to the Act of* 7 *&* 8 *Vict. c.* 110, *shall be entitled to all the benefits and advantages which, by the said provision, are expressed to be given."*

The statute 16 *&* 17 *Vict. c.* 34, *s.* 54, *provides that "any person who shall have made an insurance on his life in or with any insurance company which should become registered under any Act to be passed in the present session for that purpose . . . should be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he should be liable to be assessed under schedule D." of the income tax.*

Held (Fry, L.J., dubitante), *that the words "any insurance company" only apply to companies in the United Kingdom existing at the date mentioned, and subject to the jurisdiction of Parliament, and not to foreign companies outside that jurisdiction at that date.*

This was a case stated by the Commissioners for General Purposes of the Income Tax Acts for the opinion of the Queen's Bench Division of the High Court of Justice.

1. At a meeting of the commissioners, William Frederick Heddon appealed against an assessment of £62, under schedule D. to the Act 16 & 17 Vict. c. 34, for the year ending the 5th of April, 1887, made upon him, and claimed that he should be allowed, by way of deduction from the said assessment, the sum of £6 4s. 2d., paid by way of premium on an insurance for £300 effected by him with the New York Life Insurance Co. under the following circumstances:—

2. By 16 & 17 Vict. c. 34, s. 54, any person who shall have made an insurance on his life in or with any insurance company which should become registered under any Act to be passed in the then present session of Parliament for that purpose, and which should comply with the requirements of such Act, should be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he should be liable to be assessed under schedule D. of the same Act, or to have any assessment which might be made upon him under the same schedule reduced or abated by the deduction of the amount of the said annual premium from the amount of the profits or gains on which such assessment has been made.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

3. By 16 & 17 Vict. c. 91, reciting the last-mentioned Act, and reciting that (as it might happen that an Act for the registration of insurance companies might not be passed in the then present session of Parliament) it was expedient that the benefit of the recited provision should for a limited time be extended to persons insuring or contracting with such insurance offices as thereinafter mentioned, it was enacted as follows:—

"Any person who shall have made any such insurance or contracted for any such deferred annuity, as in the said provision mentioned, in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act of the session holden in the seventh and eighth years of her Majesty, c. 110, "for the registration, incorporation, and regulation of joint-stock companies," shall be entitled to all the benefits and advantages which, by the said provision, are expressed to be given in respect of the like insurance or contract in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose."

The provisions of the said above stated Acts were in force on the 5th of April, 1886.

4. By the Customs and Inland Revenue Act, 1886, s. 5: "All such provisions contained in any Act relating to income tax as were in force on the 5th of April, 1886, shall have full force and effect with respect to the duties of the income tax granted by the Act so far as the same shall be consistent with the provisions of this Act."

5. In the year 1886 the said William Frederick Heddon paid to the New York Life Insurance Co. the sum of £6 4s. 2d., being one year's premium due to the said company in respect of a policy of insurance for £300 duly effected on the 5th of December, 1883.

6. The New York Life Insurance Co. was incorporated by special Act of the Legislature of New York dated the 21st of May, 1841, as a marine and fire insurance company, and extended by an Act of State dated the 18th of April, 1843, to life insurance.

7. It was contended by the surveyor of taxes on the above facts that the provisions of the various above-named Acts referred only to the insurance companies existing in the United Kingdom, and did not relate to the New York Life Insurance Co., and that Mr. Heddon was consequently not entitled to the reduction of the assessment claimed by him.

8. The commissioners, however, were of opinion that the New York Life Insurance Co. came within the provisions of the above-named Acts, and the said William Heddon was entitled to a reduction from the amount of his assessment of the sum of £6 4s. 2d. premium paid by him, and decided accordingly.

The Divisional Court (Pollock, B., and Hawkins, J.) held that the abatement provided for by 16 & 17 Vict. c. 34, s. 54, was only applicable to policies effected with insurance companies in the United Kingdom and within the cognizance of English law, that the New York Insurance Co. was not such a company, and that the appeal must be allowed.

Against this decision Heddon now appealed.

Finlay, Q.C., and *Bremner*, for the appellant.—The purpose of 16 & 17 Vict. c. 91 was to extend the benefits granted to registered companies to insurance companies generally, pending an Act intended to be passed for the registration of the latter companies. Such registration has been subsequently applied to insurance as to other companies, whether foreign or not, "carrying on business in the United Kingdom." The New York Life Insurance Co. has an office in London and does so carry on business. The abatement was for the purpose of encouraging thrift. It would have been contrary to the spirit of the legislation of that time and

subsequent years, and to the comity of nations, to restrict such benefit to English companies, and so to protect them against fair foreign competition for insurance business. The decision of the Divisional Court confines this benefit to English companies, to the exclusion of Scotch as well as of foreign insurance companies existing on November 1, 1844. A general word cannot be limited to English application unless expressly so limited—*e.g.*, the word "author" has been held to include foreign authors in the benefits of copyright: *Jeffrey* v. *Boosey*, 4 H. L. Cas. 815, 3 W. R. Dig. 155; *Routledge* v. *Low*, 16 W. R. 1081, L. R. 3 E. & I. App. 100. The registration of companies was for the purpose of insuring their *bona fides*, not for the purpose of regulating them, which admittedly is out of the power of the Legislature in respect of foreign companies. It is admitted that a foreign company not existing on November 1, 1844, is excluded by the terms of 16 & 17 Vict. c. 91, but that is owing to the postponement of the proposed legislation as to the registration of insurance companies.

Sir R. E. Webster, A.G., Dankwerts, and *Griffin*, for the respondents.—If the appellant is right the practice of the Inland Revenue collectors since 1852 would have to be altered. It has never yet been questioned. The object intended to be carried out in section 54 of 16 & 17 Vict. c. 34 was to encourage insurance companies to become registered, and so secure the benefit of this abatement for their customers. Registration was optional under 7 & 8 Vict. c. 110. The penalty for non-registration did not, as a consequence, take away corporeal rights from companies. The Act of 1844 (7 & 8 Vict. c. 110) and the Inland Revenue Act of 1853 (16 & 17 Vict. c. 34) admittedly only apply to companies within the United Kingdom, or only to foreign companies carrying on business in the United Kingdom. Scotch companies are expressly excepted from the Act of 1844, but are undoubtedly included under the Revenue Act of 1853, and so are entitled to the benefit given by 16 & 17 Vict. c. 91 so long as they are either registered companies or existing on November 1, 1844. That date can have no reference to foreign companies, but to companies affected by the Act of 1844 (7 & 8 Vict. c. 110) which came into existence on that date, and that Act is admittedly confined to companies in the United Kingdom with the express exception of Scotch companies. Afterwards, under 22 & 23 Vict. c. 18, s. 1, the criterion of companies, whether British or foreign, requiring registration is "the carrying on of business in the United Kingdom," but that test cannot be read back into the earlier Act. The subsequent legislation as to the registration of insurance companies only applies to companies within the United Kingdom. As to the encouragement of thrift argument, why should that encouragement be limited to foreign companies existing on November 1, 1844, and to no later companies? "Existing" companies means companies existing within the purview of English law.

Bremner, in reply.—Companies coming under the Act of 1844 (7 & 8 Vict. c. 110) were bound to be registered. Foreign insurance companies would not come under that Act. Hence the two classes of companies mentioned under 16 & 17 Vict. c. 91 as entitled to the benefit of this abatement—viz., those registered and those in existence on November 1, 1844.

Cur. adv. vult.

May 12.—Lord ESHER, M.R.—The appellant before us insists on his right to have a return made to him of a part of the income tax upon which he has been assessed, and has paid, on the ground that he had insured his life in an insurance company, and that he can, therefore, deduct from the assessment the amount of his annual premium paid to the company. The objection taken to his application by the Inland Revenue Office is that he has insured with a New York life insurance company, incorporated by an Act of the New York Legislature, which company, though having an office in England, is a foreign company; and that the privilege or right to such a reduction of a life insurance premium is confined to companies subject to the laws of this country. The Divisional Court held that this right to a deduction did not apply to a foreign company, such as this company is, although it may have been in existence on November 1, 1844.

Our decision, like that of the court below, must turn on the true construction of 16 & 17 Vict. c. 91, s. 1. That section confines the benefit of this reduction to insurers in "any company existing on the 1st day of November, 1844, or in or with any insurance companies registered pursuant to 7 & 8 Vict. c. 110." Obviously, this company here has not been registered pursuant to that Act. The only question is, then, does it come within the meaning of the words of "any company existing on the 1st day of November, 1844"? It admittedly did come into existence in New York in 1841, therefore, it is argued by the respondent, it comes within the very words cited. Suppose that part of the section stood alone, with nothing else to modify or explain it, is it, or is it not, right to say that such general words, if standing alone in an Act passed by the Queen's Parliament here in this country, would include all foreign companies wheresoever existing? Of course, if we are bound to consider, that Parliament, by the language it employs, explicitly determines that it intends in any Act to include within its purview foreign corporations or individuals not within its jurisdiction or control, whether such action be in opposition to or on the ground of the comity of nations or not, the courts must obey. But, if it has not so explicitly determined, I am of opinion that the proper construction of general words in the Acts of the Parliament of the United Kingdom should be taken to apply to, unless clearly expressed otherwise, and to deal with such things as, within the description there given, are properly under the jurisdiction of that Parliament.

It is said that such a rule may be true where Parliament is dealing with the constitution and regulation of the thing dealt with under the Act, but it seems to me that an Act, unless expressly so intended, ought not to be supposed to deal, either directly or indirectly, in any way with any person outside the jurisdiction of Parliament. I hold, then, that the general words, even if standing alone, must mean insurance companies with which Parliament has some jurisdiction to deal, either directly or indirectly. If so, the main difficulty in regard to Scotch companies advanced by the appellant's counsel ceases to exist, for Scotch companies are undoubtedly companies with which the Imperial Parliament might deal. It is true that some difficulty in regard to Scotch companies remains in that under the Registration of Companies Act, 1844 (7 & 8 Vict. c. 110), joint-stock companies in Scotland are expressly excepted from its operation, and therefore under the words "any company registered under the provisions of 7 & 8 Vict. c. 110," in the 2nd clause of section 1 of 16 & 17 Vict. c. 91, Scotch companies must be excluded, while under the same words in the 1st clause—namely, "any company existing on the 1st of November, 1844"—Scotch companies might, by the argument, be included. I, for my part, am inclined to doubt whether that part of the section does not now include Scotch companies as it stands. If so, the difficulty as to the Scotch insurance companies being excluded from the benefits of the section, by our holding that foreign insurance companies are so excluded, vanishes. At any rate, should any doubt remain after our decision in regard to Scotch companies, surely a very short Act ad-

mitting the Scotch companies to the benefits of the Act could be passed with little or no difficulty by the present Parliament in this session? What I have said applies to the words of the section if they stood alone—namely, that such general words, even if standing alone, should *primâ facie* be held only to apply to companies under the jurisdiction and subject to the control or direction of the Parliament of the United Kingdom—*i.e.*, companies under English and Irish or Scotch law. But there are the further words "existing on the 1st day of November, 1844," given as a description of the companies to be affected. Will not these words give us a clue as to what companies were contemplated by the Legislature to be included under the benefits of this Act? Looking at section 58 of 7 & 8 Vict. c. 110, we find companies (including insurance companies) similarly so described. Does not the description "existing on the 1st day of November, 1844," in the second Act (16 & 17 Vict. c. 91), taken in conjunction with the other part of the clause referring to companies registered under the provisions of the first Act (7 & 8 Vict. c. 110), amount to an allusion to insurance companies comprised in the first Act? In other words, the Act of 1853, by its descriptive terms, contemplates dealing simply with such insurance companies as were included under the provisions of the Act of 1844 (7 & 8 Vict. c. 110). If so, it is obvious that only companies of this kingdom, and not foreign companies, were intended to be dealt with under the Act of 1844. It is suggested that the words "any company" may include any company having offices or carrying on business in England, but that is to add something not in the Act to the description given. General words must be taken, as I said at the beginning, to apply to something within the description given by them. To adopt the suggestion made would be to add descriptive words.

But we must keep to the ordinary rule of construction where the words themselves are capable of a reasonable meaning without adding on words which would give them another special meaning. Another reason can be given in support of the opinion which I have already expressed as to the meaning of these general words "any company," even if standing alone. After the words "existing on the 1st day of November, 1844," there comes a copulative not a disjunctive "or," under which the benefit of the deduction of the premium from income tax assessment is extended to persons who have insured "in or with any insurance company registered pursuant to 7 & 8 Vict. c. 110." That description clearly points to insurance companies of the United Kingdom only. But, if the first description of companies "existing on the 1st of November, 1844," applies to foreign insurance companies, we should have to make this strange distinction between the meaning of the same words "any company" as applied to the two parts of the same section. These are some additional reasons why I think that the words ought to be construed in the way I have held they should be if they stood alone. The difficulty has arisen owing to the effect of section 54 of 16 & 17 Vict. c. 34 being left dependent on the passing of an Act for the registration of insurance companies during that same session. Clearly such an Act could only have contemplated companies of the United Kingdom. No compulsory registration could be enforced on foreign companies. Not having been able to pass this proposed legislation, and not wishing evidently to deprive insurance companies, which were to have been dealt with under the proposed Registration Act, of the benefit given by section 54 of 16 & 17 Vict. c. 34, in respect of such proposed registration, is it to be supposed that the Legislature in their subsequent Act of 16 & 17 Vict. c. 91, passed for this supposed temporary purpose, should have so altered and enlarged the purview of the temporary Act as to include all foreign insurance companies, whatsoever and wheresoever, when such companies could not have been within the scope of the proposed permanent Registration Act in respect of the postponement of which this temporary Act was passed?

Other anomalies suggest themselves so as to strengthen my view that the general words, even if standing alone, would apply only to insurance companies over which Parliament properly had jurisdiction. These general words joined with the descriptive words alluded to point still more clearly to the same conclusion that only such companies as are within the jurisdiction of the Parliament of the United Kingdom were in the contemplation of the Legislature. The anomaly of Scotch companies being excepted from the benefits of this statute, if it does exist, and as I said before I doubt if it does, is explained by their having been expressly excepted from the Registration Act, 7 & 8 Vict. c. 110, to which 16 & 17 Vict. c. 91 refers, and by which reference we have construed the meaning of section 1 in the latter statute: but certainly such an anomaly is a less startling one than that suggested, by which the same words are made to include foreign companies all over the world in one part of a section, and to be limited to English companies in another part of the same section. I think this appeal must be dismissed.

FRY, L.J.—After a careful study of the Acts bearing upon this section I feel bound to say I have not been able to come to any very certain conclusion. The statute 16 & 17 Vict. c. 91 provides for a certain exemption in income tax assessments. This exemption was to depend in the main upon a condition of registration, or proposed system of registration, for which the Legislature of 1853 had hoped to provide. It is possible that the Legislature would have given permissible registration to foreign insurance companies such as was given by 7 & 8 Vict. c. 110 to Scotch companies carrying on business in England, but it is more probable that such registration would be confined to insurance companies constituted in accordance with the laws of the United Kingdom. However, what we have to consider is the meaning and scope of an Act intended to be temporary, but, owing to the failure of the Legislature in 1853 to pass the proposed Registration Act in regard to insurance companies, must be construed as it stands without reference to what such proposed legislation might or must have contemplated. The benefits of this Act are confined to insurers in two classes of insurance companies—one, such companies as were "in existence on the 1st day of November, 1844," the other, such companies as were "registered pursuant to 7 & 8 Vict. c. 110."

Now all insurance companies existing in England and Ireland in 1844 were required by the Act of 1844 to be insured. It seems remarkable, therefore, that the statute of 1853 should expressly provide for the benefit of insurance companies which had broken the Registration Act of 1844 for nine years by neglecting to register themselves. On the other hand, if the words "existing on the 1st day of November, 1844," were intended to include foreign companies, it seems odd to confine the benefits of this reduction to foreign companies existing at that date and to exclude, as the words admittedly do, foreign companies constituted since that date. There is a difficulty in either construction. It is argued that the words "any existing company," if standing alone, would *primâ facie* be confined to companies of the United Kingdom. I do not follow the Master of the Rolls in his opinion on that rule of construction. I think we are bound, first, in construing general words, to look at the scope and object of the enactment. No doubt if the words as they stand might include foreign corporations, but if, as so read, they proposed to do anything which constituted a breach of the comity of nations, the words *primâ facie* would be held to be construable only in

reference to corporations constituted according to the law of the United Kingdom.

But we have nothing to do with such considerations here. There is no matter dealt with here which is confined to companies in the United Kingdom. The Act is not concerned with the construction of the companies referred to. But although I am not able to agree with the general rule laid down by the Master of the Rolls, I feel the pressure of the difficulty of any construction of the section in the opposite sense. It would be very anomalous if the benefit were confined to insurers only in foreign companies existing on the 1st of November, 1844, and not in those subsequently constructed. It is best to take words in their literal meaning, but as the Divisional Court and my learned brothers in this court have given valid reasons why a confined meaning should be placed upon their construction, and as I do not see my way to give any certain decision owing to the anomalies made apparent upon either construction of the words, I do not desire to express any conclusion different from my learned brothers.

LOPES, L.J.—I agree with the judgment of the Master of the Rolls, and had it not been for the doubts expressed by my brother Fry, I should have thought that the construction of this section in question was reasonably clear when once one had appreciated the purpose of the Act under review and the other Act to which it refers. The simple question for us is, Do the words "any insurance company" in 16 & 17 Vict. c. 91, s. 1, include foreign companies? It is clear that, even if they do, they can only contemplate foreign companies existing on the 1st of November, 1844; and on what principle could it be alleged that only those should be entitled to the benefits of the enactment, and others coming into existence after that date should be disentitled? But there is really a great signification in those words "existing on the 1st day of November, 1844," taken together with the sequence "or registered pursuant to 7 & 8 Vict. c. 110." This last-mentioned Act was declared to come into existence on the very date referred to, and was to apply to "every joint-stock company, as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except in Scotland."

This earlier Act clearly does not apply to foreign companies. The reasonable construction of the section in the latter Act, seeing that it gives the specific date of and directly refers to the earlier Act, is that the section had in contemplation solely those companies which were contemplated by the earlier Act, and the description might be read as "any companies which were in existence on the 1st of November, 1844, or have been registered pursuant to 7 & 8 Vict. c. 110." If that is not the meaning of the section a different construction must be put upon the words "any company" according as they apply to the first part of the section or to the second. In the first description they are to include, and in the second to exclude, foreign companies. Again, why should foreign companies constituted after that date be excluded from the purview if the object of the legislation is to encourage thrift? Or, why should foreign companies, though not registered, be included, and English companies, unless registered, be excluded, from this legislation? These are some anomalies which would follow if the appellant's argument is to prevail, and I do not think they have been explained away by my brother Fry. It is true, and I feel the force of the argument, that this construction may leave another anomaly, as to the Scotch companies being excluded, but that, if it does exist, is, at any rate, a less forcible anomaly than the others consequent on any other construction of the clause, and it is one which can be easily cured. I believe, therefore, that the Legislature only contemplated in this section of 16 & 17 Vict. c. 91 insurance companies amenable to the jurisdiction of the Parliament enacting it, that foreign companies were not intended to be included, and that this appeal must be dismissed.

Solicitors for the appellant, *Ashhurst, Crisp, & Morris.*

Solicitor for the respondent, *The Solicitor to the Inland Revenue.*

From Chan. Div. May 3, 5.

LISTER & CO. (LIMITED) v. STUBBS. (a.)

Principal and agent—Agent receiving commission moneys without the knowledge of principal—Investment of commission moneys by agent—Principal's claim to follow investments.

The plaintiffs employed the defendant as agent to buy goods for them. The defendant entered into a corrupt bargain with the vendor of the goods, whereby the defendant received, without the knowledge of the plaintiffs, sums of money by way of commission on the goods bought. The defendant had invested part of such commission moneys in the purchase of real estate.

Held (*affirming* Stirling, J.), *that neither the commission moneys nor the investments representing the same, could be treated as the property of the plaintiffs, and that, though the defendant was liable to account to the plaintiffs for the commission moneys, yet that the relation existing between the defendant and the plaintiffs in respect of such moneys was only that of debtor and creditor, not that of trustee and* cestui que trust; *and therefore that the plaintiff was not entitled, either to an injunction to restrain the defendant dealing with the investments in question, or to an order that the moneys should be paid into court pending the trial of an action which had been brought by the plaintiffs against the defendant to recover the moneys.*

Metropolitan Bank *v.* Heiron, 29 *W. R.* 370, 5 *Ex. D.* 319, *approved.*

Hay's case, 24 *W. R.* 191, *L. R.* 10 *Ch. App.* 593, *commented on.*

Appeal from the judgment of Stirling, J., on motion.

Samuel Cunliffe Lister carried on business for a long period as silk manufacturer and spinner at Manningham, Bradford. In February, 1889, he sold the business to a limited company, which carried it on under the name of Lister & Co. (Limited). The defendant had for many years been employed by Mr. Lister as foreman dyer, and he continued to hold the same position under the company. This post was one of much responsibility, and the defendant was intrusted for some years with the purchase of dyeing materials used in the business, such materials costing annually a large sum. He received at the commencement of these proceedings a salary of over £500 per annum. The defendant, it was discovered, had for some time dealt in the purchase of dyes with a firm of dryealters, Messrs. Varley & Co., and had entered into an arrangement with them by which he had received large sums from them as commission on the goods purchased.

The company commenced an action against the defendant to recover from him the money received by him as commission from Varley & Co.; the present motion was to restrain him from dealing with, selling, or disposing of certain houses and property purchased by him, as the plaintiffs alleged, with the moneys received by him as commission.

It appeared that the arrangement between the de-

(a.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

fendant and Messrs. Varley & Co. was to this effect: accounts were made up monthly of the goods delivered to the plaintiffs, which had been paid for during the preceding month, and the commission was ascertained at various rates and paid by Messrs. Varley & Co. to the defendant, through one of the partners in that firm.

Stirling, J., dismissed the plaintiffs' motion for an an injunction.

The plaintiffs appealed.

Crackanthorpe, Q.C., and *Ashton Cross* (*Graham Hastings, Q.C.*, with them), for the appellants.—Varley & Co. received excess money above the price of the goods supplied by them to the plaintiffs, which they paid to Stubbs; this was received by Varley & Co. as agents of Stubbs, the servant of the plaintiffs, who, as Varley & Co. knew, was defrauding the plaintiffs. If a man, knowing that a breach of trust is being committed, receives trust moneys, the court will call upon him to account. [COTTON, L.J.—Stubbs did not receive the money from you; can Varley & Co. be said to be his agents? LINDLEY, L.J.—You are confusing ownership with obligation.] Before Stirling, J., the defendant relied on the cases of *Metropolitan Bank* v. *Heiron*, 29 W. R. 370, 5 Ex. D. 319; *In re Canadian Oil Works Corporation, Hay's case*, 24 W. R. 191, L. R. 10 Ch. App. 593; and *Morrison* v. *Thompson*, 22 W. R. 859, L. R. 9 Q. B. 480, but these cases are distinguishable. This is a case for an account, and if the plaintiffs can show that a balance is manifestly due to them, where accounts must be taken, that money should be brought into court: *Jervis* v. *White*, 7 Ves. 413; *Freeman* v. *Cox*, 26 W. R. 689, 8 Ch. D. 148; *Porrett* v. *White*, 34 W. R. 65, 31 Ch. D. 52; *Dunn* v. *Campbell*, 27 Ch. D. 254n; *Wanklyn* v. *Wilson*, 35 W. R. 332, 35 Ch. D. 180.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the respondent, were not called upon.

COTTON, L.J.—This is a motion by way of appeal from Stirling, J., for an injunction to restrain the defendant from dealing with certain real property, and for an order to secure, by payment into court or otherwise, certain other property, partly a money balance, and partly money which is invested in some way or other. The defendant was in the confidential employment of the plaintiffs, and made a corrupt bargain with persons who supplied the plaintiffs' firm with dye stuffs. According to the statement, which was not answered, that was a most manifestly corrupt bargain. But does that make the sum which, in pursuance of that bargain the defendant received, the money of the plaintiffs? I think I took a correct view in the judgment which I gave—and which was referred to by Stirling, J.—in the case of the *Metropolitan Bank* v. *Heiron*, that this is not the money of the plaintiffs, so as to make the defendant a trustee of that money for them, but that it is money acquired in such a way that, according to all rules applicable to such a case, the plaintiffs, when they bring the action to a hearing, can get an order as against the defendant to pay that money to them. That is, that there is a debt in consequence of the action of the defendant, but it is not that the money which he has received in pursuance of that corrupt bargain is the money of the plaintiffs, treating that money as still the property of the plaintiffs which was handed over to the defendant by Varley & Co. for the purpose of paying a debt which was assumed to be due, and which was due on the contract from the plaintiffs, to Varley & Co. When the facts are found out, the plaintiffs will have the opportunity of setting aside that bargain altogether, and of returning the stuff, or I will not say they could not, setting aside the contract, have sued Varley & Co. for this sum which they fraudulently agreed to hand over, and did hand over, to the defendant. But, in my opinion, it cannot be said that this sum which, under the corrupt bargain, was paid by Varley & Co. to Stubbs, remains the money of the plaintiffs before any such judgment or decree has been made. I know of no case, where because it is highly probable if the action were brought to trial the plaintiff could establish there was a debt due to him by the defendant, the defendant has been ordered to give security, till that has been established by the judgment or decree. The plaintiffs might apply, if so advised, for an immediate order under order 14, and then, if the defendant applied to defend, he could only do so upon such terms as the judge might think reasonable. But that is not the course which has been taken. In my opinion we cannot hold, however corrupt the bargain was, that the money was the money of the plaintiffs.

Hay's case was very different. There Hay himself was a director of the plaintiff company, and he had drawn cheques which purported to be drawn in order to pay for certain property to be bought by the company, but in fact one of those cheques was not drawn for any such purpose. It was drawn for the purpose of being paid to Hay to enable him to pay for his shares. That is a very different thing. There Hay, the director of the company, had received this ostensibly for a particular purpose, but then he did apply it, and knew it was intended to be applied, to an entirely different purpose, which was, as against the plaintiff company, fraudulent. That being so, the judges were quite right in holding that that cheque was still to be considered the money of the company, and therefore that the mere payment of that cheque in discharge of the calls on the shares was nothing but merely paying the company with its own money the claim which the company had, and therefore that Hay was still liable to pay it. Therefore I think the first ground, and the main ground, cannot avail the plaintiffs.

Then there is said to be a second point—namely, that there is such an admission here that this sum of money is due by the defendant that we ought to order it into court. Why? As security for the debt which, *primâ facie*, the plaintiff will make out is due to him? As I say, there is no case at all for anything of that sort being done, unless it is done as a condition of allowing the debtor to defend. But that is not the case here.

Then there were a number of cases cited which were cases where a trustee was held liable to pay into court a sum of money which, *primâ facie*, was due from him as a trustee to the *cestui que trust*. But, if the first point is, as in my opinion it is, wrong, those cases will not in any way help the plaintiff here, because they all depend on the money being money held by a trustee for the plaintiff. The only question really discussed in those cases was whether there was a sufficient admission to enable the court to deal in that way with the trustee, and to order him, when it was established there was a sufficient admission, to pay the money into court. But here, if this is not the money of the plaintiff, we should be ordering the defendant to pay into court a sum of money which he has in his possession, simply because there is a *primâ facie* case against the defendant that at the hearing it will be established he owes the money to the plaintiffs. I will not go through the cases which have been cited to us by Mr. Cross, but it would be, in my opinion, introducing an entirely wrong principle, which we ought not to do, even though we think it would be highly just if we look to the circumstances of the case, were we to hold that the defendant should be ordered to give such security as the plaintiffs ask for.

In my opinion the appeal fails.

LINDLEY, L.J.—If we were to accede to this application, I do not think Stubbs could complain, but the question is whether we can do it properly having regard to the rules by which we are governed. I am clearly of

opinion that we cannot. It is a temptation to us to stretch the law to an extent which, if we did, would, in my judgment, entail very alarming consequences. What is the real state of the case as between Lister & Co., Varley & Co., and Stubbs? Lister & Co. buy goods of Varley & Co. at certain prices, and pay for them. The ownership of the goods, of course, is in Lister & Co. The ownership of the money is in Varley & Co. So far there is no difficulty about it. Varley & Co. enter into an agreement with Stubbs, who orders the goods, to give Stubbs a commission. That is what it comes to. What is the legal position between Varley & Co. and Stubbs? Varley & Co. owe Stubbs the money. Stubbs can recover it from Varley & Co., I suppose, by an action, but Mr. Cross has asked us to stretch that, and to say that Varley & Co. are Stubbs' agents in getting it. That appears to me to be an entire mistake. The relation between Varley & Co. and Stubbs is that of debtor and creditor—Varley & Co. pay Stubbs. Then comes the question, as between Lister & Co. and Stubbs, who is entitled—the question whether Stubbs can keep the money without accounting for it. Obviously not. I apprehend that he must account for that money, or is liable to account for it, the moment he gets it. It is an obligation to pay and account to the company, with or without interest, as the case may be. I say nothing at all about that. But it is a relation of debtor and creditor; it is not the relation of trustee and *cestui que trust*. We are asked to hold that it is the latter, which would involve consequences which I confess startle me. One consequence would, of course, be that, if Stubbs were to become bankrupt, this property, into which the money has gone, would be withdrawn from the mass of his creditors and handed over bodily to Lister & Co. Can that be right? Another consequence would be that if Mr. Crackanthorpe and Mr. Cross are right, this company can compel Stubbs to account to them, not only for the money with interest, but for all the profits which he had made by embarking in trade with it. Can that be right? It appears to me that those consequences show there is some flaw in the argument. If by logical reasoning from the premises you come to conclusions which shock you, I for one go back and look at the premises, and see if they are sound. I am satisfied that they are not sound in this case, the unsoundness consisting in confounding ownership with obligation. It appears to me, therefore, that the view taken of this case by Stirling, J., was correct, and that we should be doing what I conceive to be very great mischief if we were to stretch the principle which we are asked to extend, tempting as it is as between the plaintiffs and Stubbs. I think that the appeal ought to be dismissed.

BOWEN, L.J.—I am of the same opinion. I really do not think that I need add anything to what has been said.

Appeal dismissed, with costs.

Solicitors, *Speechley & Co.*, for *Mumford & Johnson*, Bradford; *W. & J. Flower & Nussey*, for *Berry & Co.*, Bradford.

From Q. B. Div. April 23; May 19.

JAY *v.* ROBINSON. (*a.*)

Married woman—Ante-nuptial debts—Debts contracted during former marriage—Restraint upon anticipation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 19.

Section 13 *of the Married Women's Property Act*, 1882, *by which a woman, after her marriage, is made liable in respect and to the extent of her separate property for all debts contracted by her before her marriage, and section* 19, *by which a restraint on anticipation imposed by a woman in a settlement of her own property is invalid against debts contracted by her before marriage, refer not only to debts contracted by her while a feme sole, but also to those contracted by her under the powers of the Act during a previous coverture.*

Appeal from the decision of a divisional court (Cave and A. L. Smith, JJ.)

Mr. and Mrs. Robinson were married in 1881, and in August, 1886, the plaintiff obtained judgment against Mrs. Robinson's separate property for £180 and costs. (The judgment was practically in the form settled by *Scott* v. *Morley*, 37 W. R. 67, 20 Q. B. D. 120). There was no application to set aside this judgment, and in June, 1888, a decree absolute for the dissolution of the marriage was pronounced, on the petition of Mrs. Robinson. On August 16, 1888, she presented a petition to the court for the variation of the trusts of the marriage settlement, and in February, 1889, she married a Mr. Caulfeild and executed a settlement in consideration of this marriage, whereby she settled to her own use without power of anticipation whatever sum might be ordered to be paid to her upon her petition for the variation of the trusts of her first marriage settlement. On July 15, 1889, an order was made upon that petition by Sir James Hannen directing that the sum of £5,000 should be paid over by the trustees of her first marriage settlement to the trustees of her second marriage settlement, to be held by them upon the trusts of that settlement. The plaintiff now sought to attach that sum for his judgment, and applied for the appointment of a receiver. The application was refused by Charles, J., and the Divisional Court.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Alexander Robertson*, for the plaintiff.—The plaintiff desires to take this sum in execution, and the proper method is by the appointment of a receiver: *Webb* v. *Stenton*, 11 Q. B. D. 518, 31 W. R. Dig. 8. By section 13 of the Married Women's Property Act, 1882, a woman after her marriage is liable for all debts contracted by her before her marriage, that includes not only debts contracted by her while a spinster or widow, but debts contracted during a previous coverture. By section 19 a restraint on anticipation imposed by a woman herself in a settlement of her own property is invalid against a debt contracted before marriage.

They cited *Axford* v. *Reid*, 37 W. R. 291, 22 Q. B. D. 548; *Holtby* v. *Hodgson*, *ante*, p. 68, 24 Q. B. D. 103.

Henn Collins, Q.C., and *Hugh F. Boyd*, for the defendant.—Section 13 applies only to debts contracted by a married woman while a *feme sole*. A woman while under coverture cannot contract debts. She has only a limited power of contracting given by the Act: section 1, sub-section 2; *Downe* v. *Fletcher*, 36 W. R. 694, 21 Q. B. D. 11; *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; *Beckett* v. *Tasker*, 19 Q. B. D. 7, 35 W. R. Dig. 96. The property was never the defendant's. It first belonged to her first husband, and then to the trustees of the first marriage settlement. Then by the order of the court it was transferred, not to her, but to the trustees of her second settlement.

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

May 19.—The following judgments were delivered.

Lord ESHER, M.R.—In this case the plaintiff obtained judgment against Mrs. Robinson while she was a married woman but before she was marrried to her present husband. The judgment was a valid judgment

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

against her separate estate, and was substantially in the form which has been settled by this court for judgments against the separate estate of married women. Since the judgment was obtained she has been divorced, and is now married to another husband, and the question is, whether the judgment is valid against the separate property which she brought into settlement on her second marriage? The whole matter really depends on the construction of the Married Women's Property Act, 1882, and more especially on sections 13 and 19. Do the words "before marriage" in those sections mean "before the existing marriage" or "before ever having been married?" A married woman after her marriage is to be liable in respect and to the extent of her separate property for all debts contracted by her before her marriage, and no restraint upon anticipation contained in any settlement by her of her own property is to be valid against debts contracted by her before marriage. In this case the question is whether her separate property is liable for debts contracted by her during a previous marriage, but the same question would arise if the debt had been contracted by her between her first and second marriages. The question is one of so much importance that we have taken time to consider it, and we have come to the conclusion that the words do not mean "before ever having been married" but "before the present existing marriage." It follows that the defendant's separate estate is liable for her debt to the plaintiff which was contracted before her present coverture, and that the restraint against anticipation imposed by her has no validity against such debt. Therefore we disagree with the Divisional Court, and we think that this appeal must be allowed and that a receiver ought to be appointed.

FRY, L.J.—I agree. The result of the facts (which his lordship stated) is, in my opinion, that at the date of her second marriage the defendant had a *chose in action* vested in her which, by the order of Sir James Hannen, was ultimately reduced into possession. There can be no doubt that it was her separate property, and that by section 1, sub-section 4, it was, therefore, liable for her debts unless there is something in the Act to the contrary. The contract of a married woman under the Act affects not only the separate property of which she may be possessed at the time, but also that which she may thereafter acquire.

The only question is whether section 19 has preserved the effect of that fetter. The material words of that section are, "No restriction against anticipation contained in any settlement . . . of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." The argument for the defendant was, first, that this was not her own property, and, secondly, that she, as a married woman, could not contract debts within the meaning of the section. As to the first point, as I have said, I think that her expectation under the petition for the variation of the trusts of her first marriage settlement was a *chose in action* which was ultimately reduced into possession after the second marriage. It follows, therefore, that it was her property. As to the second point, that a married woman is incapable of contracting debts, it becomes necessary to consider the whole scope of the Act. Section 1, sub-section 2, makes a married woman capable of entering into and rendering herself liable in respect and to the extent of her separate property, and that enables her to create something which is very like a common law debt. A strong light is thrown on her position by section 1, sub-section 5, which makes a married woman carrying on a trade separately from her husband subject to the bankruptcy laws in respect of her separate estate. People become subject to the bankruptcy laws only in respect of debts, and it follows, therefore, that she is considered able to contract debts. Section 11, which relates to policies of insurance, speaks in direct terms of her debts, and makes provision for the creditors of the insured—that is to say, of the married woman. Therefore, I think that the obligations which the Act enables a married woman to contract are debts within the meaning of sections 13 and 19, and her liability after marriage for debts contracted before marriage include both the debts contracted *dum sola* and those contracted during a previous coverture. Cases have been pressed upon us in which we held that the engagements contracted under this Act by a married woman were not debts in respect of which proceedings could be taken under the Debtors Act, 1869, but those cases were entirely different from this, and turned on the meaning of the word "debts" in that Act.

LOPES, L.J.—I entirely agree. I think that the plaintiff's debt was a debt for which the defendant was liable in respect and to the extent of her separate estate, just as for any other ante-nuptial debt. The words "before marriage" appear to me to relate to the existing marriage. The £5,000 was the defendant's property as a *chose in action* before the second marriage, and was reduced into possession by the order of the court. The restraint against anticipation is, therefore, invalid against the debt of the plaintiff, and the order for a receiver must go.

Appeal allowed.

Solicitors for the plaintiff, *Valpy, Chaplin, & Peckham.*

Solicitors for the defendant, *Taylor, Hoare, Taylor, & Box.*

From Q. B. Div. May 10.

COHEN v. MITCHELL. (*a*.)

Bankruptcy—Property acquired during the bankruptcy—Assignment by bankrupt of after-acquired property—Validity as against trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

All transactions entered into by a bankrupt after his bankruptcy with any person dealing bonâ fide *with him for value, before the trustee intervenes, with respect to his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.*

An undischarged bankrupt, having brought an action for the wrongful conversion of certain goods acquired by him during the bankruptcy, assigned the cause of action to the plaintiff (who knew that he was an undischarged bankrupt) for value. The bankrupt recovered a verdict, and before the money was paid over the plaintiff gave notice that he claimed the money under the assignment. The trustee in bankruptcy also claimed it.

Held, that the assignment, being bonâ fide *on the part of the plaintiff, and having been completed before the trustee intervened to claim the money, was valid as against the trustee.*

Appeal from the judgment of Mathew, J., at the trial without a jury of an interpleader issue.

The facts were shortly as follows:—Arthur Cohen, who was an undischarged bankrupt, carried on business without the consent or knowledge of his trustee in bankruptcy, the plaintiff making him various advances for the purposes of his business, knowing that he was an undischarged bankrupt. Arthur Cohen having brought an action against one Foale to recover damages for the wrongful conversion of certain goods purchased

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

by him for the purposes of his business since the commencement of the bankruptcy, the plaintiff made him a further advance to enable him to carry on the action, and, in consideration of this and the previous advances, Arthur Cohen assigned the cause of action to the plaintiff. Arthur Cohen subsequently recovered a verdict and judgment against Foale for £120, and before the money was paid over the plaintiff gave notice to Foale of the assignment, and that he claimed the money. The defendant also gave notice that he claimed the money as trustee in the bankruptcy of Arthur Cohen. An interpleader issue was directed to be tried.

Mathew, J., held that the assignment was *bonâ fide*, and that the plaintiff was entitled as against the trustee, and gave judgment accordingly. The defendant appealed.

Mattinson, for the defendant.

Muir Mackenzie and *Tillyard*, for the plaintiff.

Herbert v. *Sayer*, 5 Q. B. 965; *Ex parte Dewhurst*, 20 W. R. 172, L. R. 7 Ch. App. 185; *Meux* v. *Smith*, 11 Sim. 410; *Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145; *Ex parte Ford*, 24 W. R. 590, 1 Ch. D. 521; *Meggy* v. *Imperial Discount Co.*, 26 W. R. 342, 3 Q. B. D. 711; *Engelback* v. *Nixon*, L. R. 10 C. P. 645, 23 W. R. Dig. 20; Bankruptcy Act, 1883, ss. 44, 45, were referred to.

Lord ESHER, M.R.—The question in this case is, whether the plaintiff or the trustee in bankruptcy of Arthur Cohen is entitled to a sum of money, the proceeds of an action brought by Arthur Cohen against Foale. Arthur Cohen, an undischarged bankrupt, carried on business without the consent or knowledge of his trustee, and the plaintiff advanced him money for the purposes of his business, knowing that he was an undischarged bankrupt. After the action against Foale had been commenced, Arthur Cohen, by an instrument in writing, either mortgaged or assigned the cause of action to the plaintiff in consideration of the previous advances and of a further advance to enable him to carry on the action. Judgment was recovered in that action for £120, and thereupon the trustee in the bankruptcy of Arthur Cohen intervened for the first time and sought to intercept the money. It was not denied that the plaintiff entered into this transaction in good faith, and so the only question is whether the trustee has intervened in time.

Now it is said that the doctrine as to the time of the intervention of the trustee applies only to an assignment of money, and not to any other property acquired by the bankrupt during the bankruptcy. It is said on the one side that the doctrine applies to every *bonâ fide* completed transaction, and that an assignment, either absolute or by way of mortgage, of goods acquired during the bankruptcy is valid against the trustee in bankruptcy if the assignment is completed before the intervention of the trustee. Upon the other side it is said that the doctrine only applies where the thing dealt with is money acquired during the bankruptcy. The question to be considered is whether there is any real distinction between the two. I can see no distinction. Property of a bankrupt is divided into two classes—property belonging to him at the commencement of the bankruptcy, and property acquired by him during the bankruptcy. The first class of property belongs to and vests absolutely in his trustee. If the bankrupt were to bring an action in respect of that property the plea of bankruptcy would be a good plea, as the property would not belong to the bankrupt. As to the second class of property—namely, that acquired during the bankruptcy, the plea of bankruptcy has been held in several cases, and notably in *Herbert* v. *Sayer*, to be a bad plea unless the plea goes on to state that the trustee has interfered before the transaction has been completed. That shows that the bankrupt has a limited kind of property before the trustee interferes. In my opinion this principle ought not to be confined to money transactions. Every reasoning applicable to money is equally applicable to all other transactions. I am therefore prepared, with the concurrence of my learned brethren, to lay down this proposition which has been put into writing by Lopes, L.J.: until the trustee intervenes, all transactions entered into by a bankrupt after his bankruptcy with any person dealing *bonâ fide* with him and for value, with respect to his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. It will be seen from the wording of the proposition that the stress as to the *bona fides* is laid entirely upon the person dealing with the bankrupt, and if he has dealt in good faith the question of the bankrupt's good faith as regards his creditors is immaterial.

That being the principle, the only remaining question is whether there is any decision binding upon us which is to the contrary. It does not seem to me that the case of *Meggy* v. *Imperial Discount Co.* touches this question at all. The two cases which deal with it are *Herbert* v. *Sayer* and *Ex parte Dewhurst*. I do not intend to go through those cases, but I content myself with saying that, so far from being contrary to the proposition which I have enunciated, they seem to me to support it. It is true that *Ex parte Dewhurst* dealt only with money, but the law laid down in those cases cannot be confined to money transactions. Nor can it be said that *Wadling* v. *Oliphant* is against it. Therefore it comes to this, that though we are laying down a proposition wider in its terms than any before laid down, yet the proposition is really involved in those decisions and follows naturally from them.

In the present case the transaction was completed before the trustee intervened; it was a transaction which was valid as between the bankrupt and the plaintiff: it was an assignment of a cause of action with respect to after-acquired property; and it comes, therefore, within the proposition above laid down. The judgment, therefore, in favour of the plaintiff was right, and the appeal must fail.

FRY, L.J.—I am of the same opinion. Section 44 of the Bankruptcy Act, 1883, which vests the bankrupt's property in the trustee, includes both property belonging to the bankrupt at the commencement of the bankruptcy and property acquired by him before his discharge. Upon the mere wording of the section the reader might suppose that both kinds of property vested in the trustee in precisely the same manner. However, the inconvenience of such a reading struck the courts long ago, when dealing with former Bankruptcy Acts containing similar words. It was felt to be obviously right that while the property of the bankrupt at the commencement of the bankruptcy should vest absolutely in the trustee, yet, unless the bankrupt were to be the slave of the trustee, he must be allowed to acquire rights and property, and therefore the court could not hold that all after-acquired property vested absolutely in the trustee. That difficulty was met by establishing a distinction between the two classes of property, and it was held that after-acquired property did not vest in the trustee in such a manner that a plea of bankruptcy would be a good answer to an action by the bankrupt in respect thereof. The plea must allege, not only bankruptcy, but that the trustee has interfered. That distinction is plainly expressed in the judgment of the Exchequer Chamber in *Herbert* v. *Sayer*, delivered by Tindal, C.J., where (at p. 981) he says:—"The effect of the statutory enactments may be either to transfer immediately such property or contracts (that is, future property and contracts) from the bankrupt to the

assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only in the nature of an agent. The cases accord with the latter construction of the statute, and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The Legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt *bonâ fide* made or entered into without notice of the act of bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings, or transactions after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property and contracts for the assignees, who may, whenever they please, disaffirm his act, but until they do so his acts are all valid." I entirely adopt that with the exception of the phrase "disaffirm his act." I think the word "intervene" would be better, as the trustee cannot, by intervening, disaffirm what has been validly done in the bankruptcy.

Such being the nature of the distinction between the two classes of properties, it follows that the rights of the bankrupt with respect to after-acquired property must be different from his rights with respect to other property. It seems to me that all transactions with regard to any after-acquired property, not merely with regard to money, but with regard to all other property, fall within the same rule. I agree, therefore, with the rule laid down by the Master of the Rolls, and I think that that rule, though not laid down in any earlier case, flows naturally from the distinction between the two classes of property. The intervention, therefore, of the trustee in the present case could not invalidate the assignment to the plaintiff, which was effectual and valid at the time.

The conclusion I have come to is that all transactions entered into *bonâ fide* and for value are valid against the trustee, otherwise the law would have vested all after-acquired property in the trustee absolutely.

LOPES, L.J.—I am of the same opinion. The rule laid down by the Master of the Rolls seems to me to follow from the decisions in *Herbert* v. *Sayer* and *Ex parte Dewhurst*.

Appeal dismissed.

Solicitors for the plaintiff, *Prince & Ayres.*

Solicitors for the defendant, *Nicholson, Graham, & Graham.*

From Q. B. Div. April 15—17.

MACDOUGALL *v.* KNIGHT & SON. (*a.*)

Libel — Privilege — Publication of judgment alone — Second action for same libel — Action stayed as frivolous and vexatious.

The defendants published in the form of a pamphlet a report of a judgment delivered in a former action brought against them by the plaintiff. The pamphlet contained no separate report of the evidence. The plaintiff brought an action for libel in respect of the pamphlet, and specified certain passages in it as defamatory. A jury having found that the report was accurate and was published bonâ fide *and without malice, judgment was given for the defendants, and a new trial was refused by the Divisional Court, the Court of Appeal, and the House of Lords. The plaintiff then brought a second action in respect of the same pamphlet, specifying, however, other passages as defamatory, and raising as a point of law a question suggested as a doubt by* Lord Halsbury, L.C., *in the House of Lords* (ante, *p.* 44, 14 *App. Cas.* 194)—*namely, whether, if the report did not give reasonable opportunities to the reader to form his own judgment as to the conclusion to be drawn from the evidence given, it might be the subject of an action for libel and not be privileged.*

Held, that the action must be stayed, as being frivolous and vexatious.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Mathew, J.).

In June, 1884, a judgment was delivered by North, J., in an action of *MacDougall* v. *Knight*. The defendants published a pamphlet purporting to be a *verbatim* report of the judgment, and the plaintiff brought an action against them for libel in respect of such publication, specifying certain passages as defamatory. The action was tried before Huddleston, B., and a jury, and the jury found that the report was accurate, and was published *bonâ fide* and without malice. Upon this, judgment was entered for the defendants.

The Divisional Court and the Court of Appeal refused to grant a new trial (see 34 W. R. 727, 17 Q. B. D. 636), and their decision was upheld by the House of Lords (*ante*, p. 44, 14 App. Cas. 194); but a doubt was expressed by Lord Halsbury, C., whether, if the report of a judge's judgment or summing up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, such publication might not be the subject of an action for libel and not be privileged. The plaintiff then brought a fresh action on the same pamphlet, but specifying as defamatory other passages omitted in the former action, and raised the question suggested in the House of Lords. The defendants took out a summons to stay the action on the ground of its being frivolous and vexatious. An order was made at chambers staying the action, but the Divisional Court allowed it to proceed on the plaintiff's paying the costs of the first action.

The defendants appealed.

Sir Edward Clarke, S.G., and *Blake Odgers*, for the defendants.—This action raises the same points that were raised in the previous action. The libel complained of is the same, though different passages are picked out from those relied on in the former case. The plaintiff merely wishes to raise a point of law which he might have taken in the former action. Lord Coleridge, C.J., seemed to think that *Brunsden* v. *Humphrey*, 32 W. R. 944, 14 Q. B. D. 141, decided that a fresh action might be brought for each passage. That case, however, only decided that for each separate cause of action a separate action was maintainable, and the decision was approved in *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, at p. 144, 34 W. R. Dig. 108. It is not necessary to force the defendants to enter a plea *res judicata* where the cause of action is obviously the same, and where the defendants must succeed upon the plea if the action is allowed to continue. The court will prevent its process being abused, and will dismiss the action as vexatious: *Wills* v. *Lord Beauchamp*, 34 W. R. 357, 11 P. D. 59; *Lawrance* v. *Lord Norreys*, 39 Ch. D. 213, 37 W. R. Dig. 145; *Reichel* v. *Magrath*, 14 App. Cas. 665; *Goring* v. *Lloyd*, 3 Times L. R. 455; *Phosphate Sewage Co.* v. *Molleson*, 1 App. Cas. 780, at p. 784; *Marriott* v. *Hampton*, 2 Sm. L. C. (9th ed.) 441; *Hunter* v. *Stewart*, 10 W. R. 176. Secondly, the *dicta* of the Lord

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Chancellor and Lord Bramwell in *MacDougall* v. *Knight*, *ante*, p. 44, 14 App. Cas. 194, as to the report of the judgment not being privileged unless the jury found it to give a fair and accurate representation of the evidence, were erroneous. This point was decided in favour of the defendants by this court in the same case.

Oswald, for the plaintiff.—The question of law proposed to be raised is whether the report of the judgment of a judge published under the circumstances of this case is actionable, even though it was published honestly and without malice and was an accurate report. It is a question for the jury whether the publication is a fair and accurate report of the trial. That question was never raised at the first trial. It is contrary to the practice of the court to stop an action summarily where the defence is *res judicata*. That defence must be taken by plea: *Ross* v. *Jacques*, 8 M. & W. 135; *Pechell* v. *Layton*, 2 T. R. 512; *Carter* v. *James*, 13 M. & W. 137. The claim is not vexatious on its face. The practice is simply to stay proceedings until the costs of the former action are paid, as the Divisional Court have done: *In re Payne*, 31 W. R. 509, 23 Ch. D. 288; *Martin* v. *Lord Beauchamp*, 32 W. R. 17, 25 Ch. D. 12; and this court will not interfere with the discretion exercised by the Divisional Court. Further, this is not for the same cause of action, as the libellous passages complained of are different: *Brunsden* v. *Humphrey*; *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479; *Langmead* v. *Maple*, 13 W. R. 469, 18 C. B. N. S. 255; *Lord Townsend* v. *Hughes*, 2 Mod. 150.

Odgers, in reply, referred to *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against the defendants for libel, and the libel complained of is contained in a pamphlet published by the defendants. That pamphlet purports to be an accurate report of a judgment delivered by North, J., in a former action between the same parties which reflected on the conduct of the plaintiff. On the action being brought the defendants have taken out a summons to strike it out as frivolous and vexatious, because they say a previous action has been brought against them by the same plaintiff for the same libel, and that it is clear that a plea of *res judicata* if put in must be successful, and therefore that to allow the action to go on can obviously lead to no result but vexation and waste of time. If the action is vexatious and frivolous—that is to say, without any foundation—it is the duty of the court to stay it. But the defendants say further, that even if the plea of *res judicata* could not be maintained, the action is nevertheless vexatious, because in the previous action the plaintiff complained of certain specified portions of the judgment, and now he complains of other specified portions. That is to say, the plaintiff claims a right to bring and succeed in an action on certain portions of a libel, and then to bring separate actions in respect of other portions of the same publication which he omitted to specify in the first action. The defendants say that to do that is such an obvious abuse of the practice of the court that even if a plea of *res judicata* cannot be put in the court will interfere to stay the action.

I will first consider the case apart from the decision in the House of Lords. The action is brought in respect of the publication of the judgment of a judge at a trial before him. The pamphlet did not purport to give and did not give any part of the evidence on which that judgment was founded. It only purported to be a correct and accurate report of the judgment alone. Now, what questions were in issue before the court on the first trial. The law has been laid down in *Lewis* v. *Levy*, 6 W. R. 629, E. B. & E. 537, and other cases, and has been approved by this court in this very case. The publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication even although what was said or done would but for the privilege be libellous against an individual and actionable at his suit. This is true although what is thus published purports to be and is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report of that part and published without malice.

The questions, therefore, in issue were practically two. Firstly, was the report an accurate and honest report of the judgment? Secondly, was it published *bonâ fide* and without malice? In effect, those were the questions left to the jury. Of course, if the publication had been malicious the report, although accurate, would not have been privileged. It is impossible to give an exhaustive definition of malice, but there may be many things which will be strong evidence of it. A report of part, and part only, of a judicial proceeding may be some evidence of malice. A report, although accurate, published, not to inform the public, but in order to gratify anger and to injure some individual, would be evidence of malice. A publication of a judgment by a person who had no interest in the matter, such as a newspaper reporter would have, but as a private person to be distributed among his friends, might be evidence of malice. In these cases, even if the report was perfectly accurate, the publication might be held to be not privileged. The jury, however, found in favour of the defendant on both questions. Now what are the questions which are in issue and which must be left to the jury in the present action. Surely they are precisely the same as in the previous action. Was the report an accurate report? Was it published maliciously? How can it then be said that the subject-matter of this action is not identical with that of the previous action. It is contended that the cause of action is not the same, because the defamatory statements which are relied on in this action are different from those on which the first action was brought. But both are in the same pamphlet, which was before the jury at the first trial, and there is only one publication. The Divisional Court have, I think, misapprehended the decision in *Brunsden* v. *Humphrey*. That case did not decide that when a cause of action contains several items of damage separate actions may be brought in respect of each item. In that case two separate different legal rights of the plaintiff had been infringed by one act of the defendant, which had caused at the same time injury to his person and injury to his property. It was decided that the plaintiff might bring separate actions in respect of those rights, but that was because those rights were separate, and the rule of damages relating to those rights was different. But that case has no application when, as in the present case, a plaintiff seeks to bring separate actions for the infringement of the same right, and where one set of damages would be given by a jury for the whole infringement. It follows, therefore, that the plaintiff cannot select new passages from the judgment and bring a fresh action on them. The cause of action is the publication of the libel, and it is the same in both trials. Therefore, I think that if a plea of *res judicata* were put in it must inevitably succeed, and, that being the case, that it is our duty to stay this action.

That brings me, however, to the consideration of what has been said in the House of Lords. In the first place, I think it must be noted that the decision of this court in the previous case was not overruled in the House of Lords, and the law, therefore, laid down here must be taken to remain. Their lordships did not express a definite opinion on any point of law, but it is true that the Lord Chancellor and Lord Bramwell expressed what was not an opinion, but a doubt. I desire to speak with

the highest respect of the Lord Chancellor and Lord Bramwell, but I confess I have some difficulty in understanding the precise nature of that doubt. If, as it seems, they thought that when a report of a judgment was published, it might not be sufficient, in order to entitle it to privilege, to show that it was an accurate report and published without malice, but that it might also be necessary to show that it correctly represented the evidence and gave the reader the means of judging for himself whether that evidence was fairly summarized by it, then I can only say that I most earnestly trust that when the matter comes to be argued out before them that doubt may be set at rest. To call upon the reporter to justify the judgment of the judge which he has reported appears to me so contrary to the very basis of the privilege itself, so opposed to every decision and to the daily practice of the press of this country, so prejudicial to public policy in its most material aspect, that it violates the very decencies of justice. What plea is the reporter to put in? Is he to justify the judge? or to say that his judgment is correct and fair? That would be to put him in the position of a court of appeal. If that is the effect of the view taken in the House of Lords then no newspaper will venture, however long a trial may be, to publish a daily report of it, and the results will be so enormous that, even in spite of the doubts of such eminent men, I cannot depart from the view which I have always taken of the law. I adhere to every word that I said when this case was laid before this court. I therefore think that no purpose could be served by allowing the action to proceed, and that it is our duty to do what the Divisional Court ought to have done, and to direct the action to be stayed.

FRY, L.J.—I approach the decision of this case with unusual difficulty and anxiety. I am fearful lest we should not appear to pay due weight to the views entertained in the House of Lords. I fear lest we should unduly interfere with the discretion of the Divisional Court. I am most anxious lest we should shut the doors of litigation unduly on any litigant. But, notwithstanding all these anxieties, I concur in the conclusion at which the Master of the Rolls has arrived. This is an application to stay proceedings, either on the ground that the plea of *res judicata*, if put in, must of necessity be successful, or that the proceedings themselves are of such a vexatious and frivolous character that it is the duty of the court to interfere to prevent an abuse of its process. The question of *res judicata* turns on whether or not the present action is for the same cause as the previous action. In my opinion it is. I know that the present statement of claim selects passages from the judgment which were omitted in the former statement of claim, but the action is brought for one and the same publication, and the law cannot, in my opinion, allow separate actions to be brought for every statement contained in such a pamphlet. The whole pamphlet was before the jury on the first trial, and it would be impossible for separate damages to be assessed in respect of each statement. Therefore I think that the plea of *res judicata* would be successful, but, even if it would not, I hold the attempt to bring separate actions in respect of each part of the pamphlet to be so vexatious that, *quâcunque viâ*, I should think it the duty of the court to stay the action. There I might leave the case were it not for its great public importance. I adhere to every word of the decision of this court in the previous case of *MacDougall* v. *Knight*. I think we are bound by that decision in spite of the doubts thrown out by the Lord Chancellor and Lord Bramwell, and nothing has occurred to shake my belief in its correctness. The publication of a fair and accurate report of a proceeding, or any part of a proceeding, in a court of justice, so long as such publication is *bonâ fide* and without malice, is privileged. That was most clearly laid down by the court then, and is in accordance alike with the practice of the press, the usages of society, and the convenience of her Majesty's subjects. To hold that no judgment must be published unless it correctly summarized the evidence would be to impose an undue fetter upon the press. The judgment of a judge must be presumed to be fair and accurate, and to contain every material necessary for the decision of the case, and to compel the reporter to prove this would impose upon him a burden inconsistent with the best interests of the commonwealth. I therefore agree that the appeal must be allowed, and that this action must be stayed.

LOPES, L.J.—But for the importance of the case, I should add nothing to the judgments which have just been delivered, and in which I entirely concur. In my opinion, the law laid down here when the case was last before this court has been in no way impeached, and I entirely adhere to it. That being so, the plaintiff's second action is brought for the same cause of action as his first, and cannot be allowed to go on, since no possible benefit would result. I do not think that the plaintiff can be allowed to bring separate actions for every statement in the pamphlet which he considered libellous. Such conduct is not permitted by the decision in *Brunsden* v. *Humphrey*, and cannot be tolerated. I agree, therefore, that the action must be stayed.

Appeal allowed.

Solicitors for the appellants, *Torr, Janeways, & Co.*, for *Payne & Fuller*, Bath.

Solicitor for the respondent, *Walter Stocken*.

(1902) 1 Ch 930

High Court of Justice.

Chan. Div. } May 7.
Chitty, J. }

LAWRENCE v. HORTON. (a.)

Injunction—Mandatory injunction—Easement—Building complete before writ issued—Damages under Lord Cairns' Act (21 & 22 *Vict. c.* 27).

A mandatory injunction may be granted for the removal of a building obstructing ancient lights, although it was completed before the writ was issued.

The circumstances under which the court will grant such an injunction in lieu of damages under Lord Cairns' Act considered.

Trial of action.

This was a case of obstruction of ancient lights, and the sole point involved was the question whether the court would grant a mandatory injunction in the case of a building completed, or practically completed, before the writ was issued. The plaintiffs were the owners of a shop and premises, No. 25, Queen-street, Wolverhampton, with four cottages at the back. Several of the windows of the shop and cottages depended almost entirely for their illumination on the light passing over the roof of an adjoining warehouse belonging to the defendants, and the evidence showed that such windows were ancient lights.

In March, 1889, the defendants pulled down their warehouse and began building one of increased height. The plaintiffs first heard of their intention on the 23rd of May, 1889, and at once remonstrated, but, the defendants continuing their building

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

operations, a writ was issued on the 28th of May, 1889, and served on the 1st of June, with notice of motion for an injunction. The motion stood over by consent for a time, and on its coming on the defendants submitted to an injunction till trial. In the meantime, however, they had hurried on the new building so that it was completed and roofed in by the time the motion was heard.

The evidence showed that the effect of the increased height of the warehouse was to greatly darken the windows of the shop, which was let to a milliner, and to render the cottages almost uninhabitable.

The plaintiffs claimed a mandatory injunction ordering the defendants forthwith to remove so much of their new warehouse as exceeded the height of the old warehouse, and asked for damages and costs.

The defendants paid £50 into court.

Whitehorne, Q.C., and *Arthur Underhill*, for the plaintiffs.—We are entitled to a mandatory injunction, although the building was practically completed before the issue of the writ: *Smith* v. *Smith*, 23 W. R. 771, L. R. 20 Eq. 500.

Romer, Q.C., and *Wurtzburg*, for the defendants.—A mandatory order is never made when the building is completed before the writ is issued except under special circumstances, such as where the completion is accomplished by fraud or a trick, which is not alleged here, or unless very serious damage will ensue if relief is refused: *Durell* v. *Pritchard*, 14 W. R. 212, L. R. 1 Ch. 244; *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. 212; *Isenberg* v. *East India House Estate Co.*, 12 W. R. 450, 3 De G. J. & S. 263.

Whitehorne, Q.C., replied.

CHITTY, J.—The question is, What is the appropriate remedy to be applied to the wrong which the defendants have inflicted on the plaintiffs? The wrong is an obstruction of the plaintiffs' ancient lights. It is said on the part of the defendants that damages are sufficient compensation. By that is meant, not the damages from the date of the writ, as was formerly the case with common law damages, nor the damages from the date of the assessment, which is the present ordinary rule, but compensation in lieu of injunction, which the court can grant so as to relieve the defendants from any future actions on the part of the same plaintiffs and all those claiming under them. On the other hand, the plaintiffs say that in the circumstances of this case a mandatory injunction is the appropriate remedy.

Now, in granting mandatory injunctions, the court exercises its discretion with caution, as it does in all cases in which it grants injunctions, and in deciding whether that is or is not the appropriate remedy it has regard to all the circumstances of the case. It is not easy, nor do I attempt, to lay down any hard and fast rule, and I do not think it is for the benefit of the persons whose rights are taken away that there should be such a rule laid down; but I observe from the turn of this case that there seems to be an idea that if the builder can only run up his building before the writ is issued, he can, at least, maintain his building in the position it has attained at that time. That I deny altogether. I do not think it right to admit the existence of any such rule, which would encourage men, not by trickery, but by using despatch, to run up the wall nearest the plaintiff's premises, leaving the rest of the building behind much lower—that is to say, not building in the ordinary way. In regard to that side of the building it is material to consider, as one of the circumstances of the case, the condition it is in at the time the plaintiff first makes his complaint. If he finds the building is not then completed, and he makes his complaint and issues his writ before the building is completed, in my judgment the court is in a position, if the other circumstances justify it, to grant the mandatory injunction. It is not like the case of a building that is completed at the time in ignorance of the plaintiff's rights. Here, again, I lay down no hard and fast rule, but I say that the circumstance that the building is of a certain height when the plaintiff first complains does not enable the defendants, the wrongdoers, to say that at least it shall remain at that height, and that there shall be no mandatory injunction to pull it down below that height. As in most of these cases, the amount of actual damage is in dispute, but there is no doubt that serious damage to the milliner's workroom and showroom has resulted, and the cottage, No. 4, which has never been well lit, is now so dark as to be scarcely habitable. It is no defence to say that it is only a miserable cottage. The lights of a cottage are entitled to as much protection as those of a mansion. On the 23rd of May the plaintiffs heard of the proposed height of the new building, and on the same day they remonstrated. The defendants, however, chose to proceed after the objection was taken. Without inquiring whether the plaintiffs' windows were ancient lights they erected their building and took their chance. It is true they were away from home at the time of the first complaint, but that is, of course, no defence. It was their duty to stop the work as soon as they knew of the plaintiffs' objection, and it is impossible to allow them to obtain any advantage by running up their building before the plaintiffs could come to the court. There must be a mandatory order as in *Yates* v. *Jack*, 14 W. R. 618, L. R. 1 Ch. 295, with costs. Its operation may be suspended for three months. The £50 paid into court must be returned to the defendants.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *W. H. Underhill*, for *Underhill & Lawrence*, Wolverhampton.

Solicitors for the defendants, *Sharp, Parker, & Co.*, for *Horton & Redfern*, Birmingham.

Chan. Div. North, J. } May 10, 14.

In re ROBSON. (*a.*)

Solicitor—Remuneration—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order, schedule II.*

Where a lease is granted partly in consideration of a premium and partly in consideration of a rent, the solicitor is entitled, under the Solicitors' Remuneration Act, 1881, *and the General Orders made thereunder, to receive remuneration on a scale calculated both upon the premium and the rent.*

Summons.

This was a summons to review taxation, and it raised a question involving the construction of the Solicitors' Remuneration Act, 1881, and the General Order made under it—viz., to what remuneration is the lessor's solicitor entitled where a lease has been granted partly in consideration of a premium and partly in consideration of a rent.

Vernon Smith, for the summons.

Swinfen Eady, for the lessees liable to the costs.

NORTH, J.—The appellant in this case is Mr. Robson, a solicitor, who complains of the reduction by the taxing master of his bill of costs for work done by him as a solicitor for the lessor in respect of a lease to the respondents. The burden of the costs has to be borne by the lessees. The lease is for a term of ninety years

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

from September, 1883, in consideration of an annual rent of £50 and a premium of £4,400 payable by the lessees to the lessor. The solicitor delivered a bill for £59 10s., consisting of £3 10s. for disbursements and £56 for professional charges, calculated according to scale, made up of £14 in respect of the rent and £42 in respect of the premium, and the taxing master has allowed the £14 and struck out the £42. The taxing master has arrived at this conclusion as the result of the provision in the 2nd part of schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, which fixes two scales of charges, the first being that of charges payable to a lessor's solicitor for preparing, settling, and completing leases and counterpart in cases of lease or agreement for lease at rack rent (not including mining or building leases); and the second that of charges payable to a vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate or lease and counterpart in cases of conveyance in fee, or for any other freehold estates reserving rent, or building leases reserving rent, or other long leases not at rack rents (except mining leases); and it is the latter scale, if either, which applies in the present case. Then the 5th rule, which applies to part 2, provides, "where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." The taxing master has allowed the sum of £14 as the fee according to the scale on the rent, but has not allowed the £42, the scale fee claimed upon the premium. His view is that any such scale fee must be a sum equal to the remuneration on a purchase at a price equal to this premium—viz., in the present case £4,400; but that, as the solicitor would not, if this were a purchase at that sum, be entitled to any scale fee, because he has not negotiated or conducted the sale nor deduced any title to the property, he therefore does not come within the provisions of part 1 of the 1st schedule, and there is no scale fee applicable to the case. He has held, however, that, although the solicitor is not entitled to any scale fee on the premium, he is entitled, in addition to a scale fee on the rent, to the remuneration prescribed by the Act in respect of business the remuneration for which is not prescribed in schedule I.—viz., remuneration according to the old system as altered by schedule II.—and he gave the solicitor an opportunity of bringing in a bill of costs to be taxed upon that footing. The solicitor, however, has not adopted that course, but insists that he is entitled to be allowed the £42, the scale fee on the premium. In giving this option of bringing in a bill to the solicitor the taxing master was, in my opinion, clearly wrong. Supposing the solicitor had, as he was invited to do, brought in a proper bill under the old system, it would have contained full charges for all the work done, and the master must have allowed the whole of it, for he would have had no power, under the new or old or any system, to have allowed such sum only in respect of that bill as bore to the total amount of the bill the same proportion that £4,400 bore to the value of the whole consideration for the lease—*i.e.*, the premium plus the rent. In this case, therefore, the solicitor would have got his full bill of costs under the old system as altered by schedule II., and would have received, in addition, a scale fee calculated on the rent.

This view of the case seems to me clearly inadmissible. A solicitor must, in my opinion, be paid according to the scale, or independently of the scale according to the old system as altered by schedule II., and cannot, in respect of one and the same piece of business, be entitled to receive a compound remuneration made up in part of a scale charge and part of a bill of costs in addition for professional work as distinguished from disbursements. This is not authorized by the Act, or order, or rules, except expressly in one case hereinafter referred to, and it would be to some extent giving double remuneration for the same work. This was also the view Chitty, J., took in *In re Hickley and Steward*, 33 W. R. 320. The question, then, is whether the solicitor is to be paid (*a*) by a scale on the rent and on the premium, or (*b*) by a bill of costs according to the old system as altered by schedule II. The case falls exactly within rule 5, part 2, of the schedule—viz., the lease is partly in consideration of a rent and partly of a money payment or premium. That rule provides that "in addition to the remuneration hereby prescribed in respect of rent there shall be paid," not a bill of costs, but a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." It does not say that the vendor's or lessor's solicitor is to be remunerated as if, to this extent, the transaction were a purchase, but that he is to be remunerated in the case of a lease or conveyance reserving rent by a sum equal to the remuneration on the purchase, a sum to be ascertained by reference to something else in the Act, to which reference effect must be given if possible. As we are dealing with the case of vendor's or lessor's solicitor the rule would have been more happily expressed and more accurate if it had referred to remuneration on a sale instead of a purchase, but the meaning is obvious. Now to what is reference here made? The remuneration on sales is given by part 1 of schedule I. to vendor's solicitors for three things: — (1) Negotiating a sale by private contract; (2) conducting a sale by public auction; (3) deducing title to property, and perusing and completing conveyance. The first of these cannot be intended, for it is settled by *In re Field*, 33 W. R. 553, 29 Ch. D. 608, and later cases that no charge can be allowed for negotiations in business coming within part 2 of schedule I., nor can the second be meant, for there is very little connection between sales by auction and the matters dealt with in part 2. The reference must, therefore, be to the remuneration payable to a vendor's solicitor for deducing title and perusing and completing conveyance. And it is said that as the scale fee on a purchase (or sale) is not payable unless the title is deduced as well as the conveyance completed, *In re Lacey*, 32 W. R. 233, 25 Ch. D. 301; *Newbould* v. *Bailward*, 37 W. R. 401, 14 App. Cas. 1, so it cannot be allowed on a lease, where the business is completed without deducing title. But it is clear that the two cases are not assimilated for all purposes. For instance, on a sale under part 1 a solicitor who negotiates a sale, and deduces title, and prepares conveyance receives separate fees for each, while a solicitor who negotiates a conveyance or lease coming under part 2 receives no fee for negotiating. Again, the law is established that a lessee is not, in the absence of express contract to that effect, entitled to call for his lessor's title, and such title notoriously is scarcely ever required, and it would be rather absurd, I think, to hold that the reference in rule 5 to remuneration in respect of the premium had reference only to the very rare cases of leases on which the lessor had by special contract to deduce his title, and that far the larger number of cases in which leases are granted in consideration in part of a premium without any title being deduced are unprovided for by the rule. In fact it is clear that the framers of the rules applicable to part 2 of schedule I. had in mind that title is not ordinarily deduced on grants of leases, and that those rules are not confined to leases on the grant of which title is not deduced, for the first rule applicable to part 2 expressly provides that if a vendor or lessor furnishes an abstract of title, it is to be charged for according to the existing system as allowed by schedule II., and this is the one case in which the

order allows remuneration by a bill of cost in addition to scale fees. It is obvious that this charge is in addition to and not in lieu of a scale fee, for the rule hereby allows a separate charge for what is but a small part of the deducing of title, and it could not be intended that in cases where the title is deduced the solicitor should not receive any remuneration for deducing title except the charge for the abstract. The provisions of rules 5 and 6, that the solicitor is to have a scale fee on the premium, and if an abstract is furnished (which is part of the deducing of title) is to have something more, is, in my opinion, quite inconsistent with the contention that if title is not deduced—*i.e.*, if an abstract is not furnished—he is not to have even any scale fee on the premium or other remuneration in respect thereof. If that were so, in the not uncommon case of a lease at a nominal rent and a large premium, no title being deduced, a solicitor would receive only a very moderate and possibly inadequate remuneration for his work—a state of things scarcely contemplated by the framers of the Act, orders, and rules. In my opinion the language of rule 5, referring to a further sum equal to the remuneration on a purchase at a price equal to the premium, was intended to avoid the repetition of the table showing the rate or scale of remuneration, as though there had been reference to it, *mutatis mutandis*, and was not meant to narrow its application to cases precisely identical, or to exclude almost all leases at a premium from its operation. Under those circumstances I have come to the conclusion that the solicitor is entitled to the £56 he claims, and the matter must go back to the taxing master for revision, and the solicitor must have his costs of this application.

Solicitors, *Hasties & Crawfurd; Robson.*

Q. B. Div. (Pollock, B., and Wills, J.) } Jan. 17; Feb. 6.

SNOWDEN v. BAYNES. (*a.*)

Master and servant—Negligence—Conforming to order—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* (3).

A workman sought to recover compensation from his employer under section 1, *sub-section* (3), *of the Employers' Liability Act*, 1880, *for injury caused by reason of the negligence of a person in the service of his employer, to whose orders the plaintiff, at the time of the injury, was bound to conform, and did conform, it being alleged that the injury resulted from his having so conformed. It appeared that on a certain morning the plaintiff was ordered to do a piece of work by S., a carpenter in the service of the defendant. The plaintiff was bound to obey the orders of S. as to what work he should do, but S. had no authority to specify any particular place where the work should be done. In the evening the plaintiff was working overtime at the piece of work in a shed which was his usual place of work. S., in stacking timber in the same shed, negligently let fall a beam which injured the plaintiff.*

Held, that the injury did not result from the plaintiff having conformed to any order to do a particular piece of work, and that he was not entitled to recover.

This was an appeal from the Brompton County Court. The following statement of the facts is taken from the judgment of the Divisional Court.

The plaintiff sued the defendant in the Brompton County Court under the Employers' Liability Act for injuries received by him under the following circumstances:—

The plaintiff was a machinist in the employment of the defendant. He was accustomed to work at a particular machine in a particular shed. One Sellick, a carpenter, used to receive directions from the defendant or his foreman as to the work to be done, and to give orders to the plaintiff and to the other men as to the work each of them should do: these orders they were bound to obey. Sellick's duty and authority with respect to the plaintiff went no further, and in the performance by the plaintiff of the work which had been assigned to him, the plaintiff received no directions from Sellick, and was in no way under his control.

On the morning of the day on which the accident happened the plaintiff was told by Sellick what work he had to do, and according to the ordinary course of his work he went to the shed and to the machine abovementioned to do his day's work. There was evidence that the shed was not a safe place for two people to work in at once—in what respect unsafe it did not appear. The plaintiff's regular time for leaving off work was half past five, but on the evening in question he had elected to work till seven. Towards the end of the day, Sellick came in to do some work in the shed, and he and another man began to stack timber in the neighbourhood of the plaintiff. The plaintiff asserted that Sellick at that time directed him to go on with his work, although he himself was at work in the shed. But the jury found that this was not so. In the course of his operations in stacking the timber Sellick, by admitted negligence, caused a piece of timber to fall. It struck the plaintiff's right arm; the jerk threw the plaintiff's left hand into the machine, and he lost three fingers. The learned county court judge left to the jury, so far as is material to the present discussion, two questions—(1) Was Sellick a person to whose orders the plaintiff was bound to conform? To which the jury said "Yes." (2) Was the plaintiff at the time of the accident acting under Sellick's orders, and whether general or special? To which the answer was, "Under the general orders given that morning."

Upon these findings the county court judge directed a verdict for the plaintiff.

Ruegg, for the defendant.—There is no evidence to bring the plaintiff within section 1, sub-section (3) of the Act; the injury did not result from the plaintiff's having conformed to the orders of Sellick; he was working in his usual place of work, which did not depend on Sellick's orders.

Aspland, Q.C. (*Parkes Wilkinson* with him).—It is not necessary that the order should be a negligent one to bring the case within the sub-section. The plaintiff was working under Sellick's orders, and the accident happened through Sellick's negligence. That is enough. In *Millward* v. *Midland Railway Co.*, 33 W. R. 366, 14 Q. B. D. 68, there was no express order given at all.

He also cited *Dolan* v. *Anderson*, 22 Sc. Law Reporter, 529.

Ruegg, in reply.—At the time of the injury the plaintiff was not bound to conform to Sellick's orders, for both were working together.

He referred to *Kellard* v. *Rooke*, 36 W. R. 875, 21 Q. B. D. 367.

Cur. adv. vult.

Feb. 6.—The judgment of the COURT (POLLOCK, B., and WILLS, J.) was delivered by

WILLS, J., who, after stating the facts, said:—The learned counsel for the plaintiff contended that the case fell within the 3rd sub-section of section 1 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); that Sellick was a person to whose orders or directions the plaintiff at the time of the injury was bound to conform,

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

and did conform, and that the injury resulted from his having so conformed.

We think that Sellick was a person to whose orders as to what specific work he should do, but no further, the plaintiff was bound to conform. We think that the only order which affects the present case was the order given in the morning to do the work which the plaintiff did, and that, unless the injury can be said to have been the result of his having obeyed the order to do the particular piece of work selected for him, he cannot recover.

It seems to us that there is no connection between his doing that piece of work rather than any other, and the accident. Sellick had no authority to send him to any other place to work, or to exercise any discretion, or give any orders as to where he should go to do the work. Whatever work Sellick had told him to do he would have been in the same place, so that it was in no sense the exercise by Sellick of an authority vested in him, and exercised by him, that brought the plaintiff into what ultimately proved to be a place of danger. We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, "You shall do this bit of work or that bit of work," but not "You shall do it at this place or that place." The choice of place rested with someone else. So far as the evidence goes upon this point the shed in question was the plaintiff's regular place of work, and it has not been suggested that either he had any choice, or Sellick any control, in respect of the place where the work should be done.

There is another respect in which it is equally clear that the fact of the plaintiff being at the place of danger at the time when Sellick's negligence caused the accident was not due to any order of Sellick's. The accident took place shortly before seven. The plaintiff's own account is that his regular time was up at half-past five, that the timekeeper came round at three and asked him how long he would work, whereupon the plaintiff said he would work until seven. It was therefore his own doing, and not Sellick's, that he was there between half-past five and seven, and the jury negatived the suggestion arising from certain parts of the evidence, not necessary to set out, that the accident arose from a special order of Sellick's that the plaintiff should continue to work whilst Sellick was doing that which proved dangerous to the plaintiff.

We think that, for the reasons stated, the case of *Millward* v. *Midland Railway Co.*, which was much relied upon for the plaintiff, has no bearing upon the present discussion, and we think it better not to attempt to lay down any law which goes beyond this case. We think it right, however, to point out that, besides the broad distinction we have already dealt with, there is one obvious difference (whether affecting the right of action or not) between a case in which the circumstances of danger are brought about by the performance, on the part of the person injured, of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk, if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by acts of the person giving the order, is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a case could be within the Act. Each case, however, must be dealt with upon its own facts. In the present case the facts do not establish even the selection by Sellick, either as regards person or place, of the plaintiff to stand on the spot which proved to be one of danger, and we are clearly of opinion that the judgment of the learned county court judge must be reversed, and judgment entered for the defendant.

Judgment for the defendant.

Solicitors for the plaintiff, *Judge & Priestly.*

Solicitor for the defendant, *E. Hodgskin Peach.*

Q. B. Div. (Mathew, J.) Feb. 18, 24.

MACARTNEY v. GARBUTT. (*a.*)

International law — Ambassador — Privilege — British subject appointed ambassador by foreign Government — Liability to parochial rates.

A British subject who is appointed to the embassy of a foreign Power in England, and received without any special conditions by the British Government, has all the privileges of a foreign ambassador, and is not liable to pay parochial rates.

This was a case tried before Mathew, J., without a jury. The facts are given in the judgment.

Sir W. Phillimore and *McCarthy*, were for the plaintiff.

English Harrison, for the defendants.

Cur. adv. vult.

Feb. 24.—MATHEW, J.—In this case the plaintiff sought to recover £118 which he had paid under protest to get rid of a distress upon the furniture in his house levied by the defendants for parochial rates. The defendants contended that the distress was lawful, and that, therefore, the plaintiff was not entitled to recover.

The plaintiff, Sir Halliday Macartney, who was an English subject, had been appointed by the Chinese Government English secretary of the Chinese Embassy, and had been received in that capacity by the British Government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the embassy recognized without reservation or condition of any sort. He would therefore seem to be clearly entitled to the privileges of the *corps diplomatique*, and it would follow that his personal effects would be exempt from seizure. His rights in this respect appeared to be fully recognized by the local Act, 35 Geo. 3, c. 73, under which the rates were levied. Section 190 of that Act provides: "And be it further enacted, that every rate or assessment which shall be made, laid, or assessed by virtue of this Act, for or in respect of any land, ground, house, shop, warehouse, wharf, coach-house, stable, cellar, vault, building, tenement, or hereditament whatsoever which any ambassador, envoy, resident, agent or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or other public minister, or any other person not liable by law to pay such rate or assessment, now doth or hereafter shall inhabit, shall be paid by, and recoverable from, the landlord, owner, lessor, or proprietor of every such land, ground, house, shop, warehouse, wharf, coach-house, stable, cellar, vault, building, tenement, or hereditament respectively, who shall be liable and compellable to the payment thereof, and the same shall be recovered and applied as the other rates hereby made payable are to be recovered and applied."

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law

For the defendant it was conceded that the plaintiff, if he had been a foreigner, might be entitled to the exemption which he claimed, but it was argued that as a British subject he remained liable to the laws of his own country, and it was said that he was not within the description of persons exempt by the local Act, for the operation of the Act was limited by the words "or any other person not liable by law to pay such rate." In support of this contention reliance was placed on passages of chapter 11 of Bynkershoek De Foro Legatorum, which, it was said, showed that the minister of a foreign state accredited to his own country remained subject to the laws of the state to which he owed allegiance. But the view of the learned author would seem to be that the envoy would be entitled to exemption from the local jurisdiction in all that related to his public functions, and this would seem to be the opinion of later writers on the subject (see Wheaton's International Law, 2nd ed., edited by Lawrence, p. 189, and the authorities there referred to). If this be the rule, the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duty as a member of the embassy.

But there is another principle, which appears to afford the plaintiff the protection which he claims. Bynkershoek, in chapter 8, and all the later writers on the subject recognize the right of the state to impose such conditions as are thought proper upon the reception of a member of a foreign embassy. But it is said if the envoy be received without reservation the condition is to be tacitly implied that he fully enjoys the *jus legationis*. Bynkershoek points out that the only mode of escaping from the doctrine of exemption is to impose on the envoy when received a condition that he shall be subject to the local jurisdiction. This principle is, as it would seem, with much good sense extended by later writers to the case of the envoy accredited to his own Government. Thus Wheaton, International Law, p. 395, suggests that the privilege of the envoy to exemption from the civil jurisdiction of his own country is not lost where there has been no express condition to the contrary at the time when the member of the embassy is received by his own Government. Again, Calvo, Droit International, 2nd ed., vol. 1, book X., section 438, refers to the practice of some Governments to impose upon their own subjects, when received as envoys, the obligation to remain subject to the laws of their own country. He adds: "These conditions ought always to be expressly stated before or at the time that the member of the embassy is received." The rule is stated in similar terms in Phillimore's International Law, vol. 2, section 135. The learned author refers to many authorities in support of this position. In this case it appears from the correspondence which passed between the Home Office and the defendants that no such condition had been imposed upon the plaintiff. I am therefore of opinion that his goods were not liable to seizure, and that he is entitled to judgment for the amount claimed, and costs.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Harwood & Stephenson.*

Solicitors for the defendant, *Clarkson, Greenwell, & Co.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) — Feb. 12, 13.

Ex parte LOWE.
In re LOWE. (*a.*)

Bankruptcy—Act of bankruptcy—Tender of debt to one creditor—Refusal—Petition—Right of creditor to refuse payment after act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*g*).

After act of bankruptcy committed the debtor tendered to one creditor payment of his debt, but such creditor refused to receive it, and subsequently joined in a bankruptcy petition presented against the debtor, upon which a receiving order was made. The debtor appealed against the receiving order, on the ground that, by reason of the tender, there was no good petitioning creditor's debt.

Held, that, at the time when the tender was made, an act of bankruptcy having been committed by the debtor, of which the creditor had knowledge, he was justified in refusing to accept payment, and that the receiving order was rightly made.

Appeal from an order of the registrar of the county court at Nottingham making a receiving order against the debtor.

The case raised the question—whether a debtor, after an act of bankruptcy has been committed by him, can, by tendering payment of a debt to one creditor, prevent bankruptcy proceedings being taken against him founded in part upon the debt so tendered.

The debtor, Walter Lowe, formely traded under the style of Lorraine & Co. as a salesman at Nottingham, and on January 5, 1889, a writ was issued against him by Messrs. Hayes & Co. for goods supplied to the amount of about £21, judgment being allowed to go by default. On March 20, 1889, a bankruptcy notice under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, was served upon the debtor by Messrs. Cullen & Sons, another creditor, in respect of the sum of £9 due to them from the debtor.

On April 23, 1889, a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being non-compliance with the terms of the said bankruptcy notice, such petition being signed by five creditors whose debts amounted in the aggregate to £54, and including Messrs. Hayes & Co. and Messrs. Cullen & Sons. This petition was appointed to be heard on May 15, 1889, but before the hearing the debtor paid to one of the petitioning creditors named Clark his debt of £10 5s., and the petition was in consequence dismissed on the objection being taken that the petitioning creditors' debt did not amount to £50.

On May 22, 1889, a tender of their debt of £25 4s. was made by the debtor to Messrs. Hayes & Co. who refused to receive it, and on May 27, 1889, a second bankruptcy petition was presented against the debtor by Messrs. Hayes & Co. and a Mr. Bendit, the aggregate debts amounting to £50 8s. 10d., such petition being founded on the act of bankruptcy committed on March 20, in the failure of the debtor to comply with the terms of the bankruptcy notice.

Objection was taken by the debtor to this petition mainly on the ground that he had made a valid tender of their debt to Messrs. Hayes & Co. before the petition was presented, and that, therefore, there was no sufficient petitioning creditors' debt, but the county court registrar made a receiving order against the debtor, from which he now appealed.

Hewtall, for the debtor.—There was no good petitioning

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

creditors' debt, because there was a valid tender which brought it below £50. The attempt to settle was *bonâ fide*, and a debtor is entitled to pay his creditors piecemeal if he cannot pay in the aggregate.

He referred to *Ex parte Kibble, In re Onslow*, 23 W. R. 433, L. R. 10 Ch. App. 373; *In re Andrew*, 24 W. R. 197, 1 Ch. D. 358.

Herbert Reed, for the petitioning creditors—The real question is whether, when several persons are petitioning together, the debtor, after act of bankruptcy committed, can tender to one and so pay off the creditors in detail. He cannot do so, because after an act of bankruptcy the money tendered is not the debtor's money; but if there is a bankruptcy it is the money of the trustee. There are several authorities which show that where a petition has been presented the court will not compel the creditor to take his money, but will allow him to go on with his petition. The same principle applies after act of bankruptcy committed and before the presentation of the petition.

He referred to *Ex parte Boss, In re Whalley*, 22 W. R. 702, L. R. 18 Eq. 375; *Ex parte Brigstocke, In re Brigstocke*, 25 W. R. 262, 4 Ch. D. 348; *Mann* v. *Shepherd*, 6 T. R. 79; *Ex parte Miller & Bate*, Buck. 283.

Cave, J.—This appeal must be dismissed. I think not only that the registrar was right in making the receiving order, but that he would have done very wrong if he had not made it. It is quite obvious that the debtor was a person of a slippery nature, who would not pay his debts if he could avoid it. An act of bankruptcy was committed upon a small debt of £9; and the failure of the debtor to pay or secure that debt shows the position of the man. The creditors determine to take advantage of that act of bankruptcy, and some of them whose debts amounted to £50 agree to join for that purpose, and thereupon this man goes to one and pays him in full and so defeats the bankruptcy proceedings. Another combination is formed, composed of one creditor to the former petition and another who agrees to join him, and thereupon the debtor tries the same thing over again. He approaches one creditor and tenders his debt, and that was very properly refused. It is obvious that it was done solely for the purpose of preventing the proceedings being gone on with, and with the object of escaping payment of his debts at little cost. I am clearly of opinion that the creditor in this case was justified in refusing to accept the money, even admitting that it was duly tendered. Several cases have been cited the principle of which applies to this case, and those cases are founded on the principle that at the time payment was offered the man had committed an act of bankruptcy, and it might be that the money was not his to tender at all, and if there was a bankruptcy within three months the creditor might have to pay the money back again. I have had occasion, more than once, to tell people that they ought not to take money from a man who has committed an act of bankruptcy until the three months during which a petition may be presented have elapsed. We have frequently before us the case of a trustee under a deed of arrangement who has meddled with the bankrupt's estate after the act of bankruptcy and before the three months have elapsed during which time a petition may be presented, and when a petition has been presented and a receiving order made such persons who have dealt with the property have in vain applied to us for consideration. No matter what such trustee has said, he invariably has had to restore any money so received and pay the costs. To my mind it is perfectly clear that the creditor had a right—not to say that it was his duty—to refuse an offer made under these circumstances. The respondent was perfectly justified in the course he took, and no objection to the receiving order can be allowed on that ground.

A. L. Smith, J.—I am entirely of the same opinion

Appeal dismissed.

Solicitors for the debtor, *Page & Scorer*, for *P. R. Truman*, Nottingham.

Solicitors for the petitioning creditors, *Clinton & Buckley*, for *Green & Williams*, Nottingham.

Court of Appeal.

From Chan. Div. June 3.

In re North Australian Territory Co. (*a.*)

Company—Winding up—Person summoned for examination in the winding up—Discretion of the court—Pending action by company in liquidation—Order made in action refusing immediate discovery—Attempt to obtain discovery for the purposes of the action by means of examination in the winding up—Locus standi *of examinee to appeal—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 115, 117.

A liquidator is not entitled as of right to an order for examination of a person, under section 115 *of the Companies Act*, 1862; *it is in the discretion of the court to grant or refuse such an order. There is no hard and fast rule as to when it would be proper and when improper to make such an order; but the pendency of an action by the liquidating company, and the fact of discovery in such action having been ordered or refused, are material considerations.*

A company, after the passing of a resolution for voluntary winding up under the supervision of the court, had instituted an action against another company, and had made an application in that action that the defendant company should give immediate discovery, which application had been refused by the judge, on the ground of its being premature. The liquidator of the plaintiff company then obtained an order in the winding up under section 115 *for examination of a person who was the secretary of the defendant company, and in the course of examination put a question to the secretary for the purpose of obtaining the discovery sought in the action, but the secretary refused to answer. The liquidator then applied for and obtained from the judge in the winding up, an order that the secretary should attend at his own expense and answer the question. On appeal by the secretary from such last-mentioned order,*

Held, that the order should be discharged, on the ground that the question had been put in aid of the discovery for the purposes of the action which had been refused by the judge in the action, and that the information sought to be elicited by the question was not, in the existing circumstances, wanted for the purposes of the winding up.

Semble, *a person who is summoned to attend for examination by an order under section* 115 *has a* locus standi *to appeal from such order.*

Observations of Jessel, M.R., *in* In re Gold Co., 27 *W. R.* 757, 12 *Ch. D.* 77, *doubted.*

In re Metropolitan Bank, Heiron's case, 15 *Ch. D.* 139, 29 *W. R. Dig.* 45, *approved.*

Appeal from an order of Kekewich, J., sitting for Kay, J.

The North Australian Territory Co. was an English company registered in England, and formed for the purpose of purchasing an estate in Australia. The purchase was made from a Mr. Fisher and his mortgagees,

(*a.*) Reported by M. J. Blake, Esq., Barrister-at-Law.

Goldsbrough, Mort, & Co., under an agreement whereby the North Australian Co. were to give debentures in their company to Goldsbrough, Mort, & Co., in part payment of the purchase-money.

On August 9, 1889, the North Australian Co. passed resolutions for a voluntary winding up in England, and a supervision order was shortly afterwards made.

On November 7, 1889, the North Australian Co., through its liquidator, instituted an action in England against Goldsbrough, Mort, & Co., who were a company registered in Australia, but having an office in England with an English board of directors, claiming rescission of the above-mentioned agreement, repayment of the cash paid under it, and damages for misrepresentation. The plaintiff company, through its liquidator, made an application in that action that the defendant company, through their secretary, H. B. Hervey, might be ordered to make an affidavit of documents in their possession relating to the matters in question in the action, and to produce such documents for inspection, and also that he might be ordered to answer interrogatories which the liquidator desired to put.

Kay, J., on March, 7, 1890, made an order requiring Hervey to make an affidavit of documents, but refused to make an immediate order for production, and also refused to allow interrogatories to be delivered at that stage of the action, or until after a statement of defence had been delivered. The time for delivering the defence had not yet expired. The plaintiff company had not appealed from this refusal of Kay, J., to allow interrogatories to be then delivered, or to require immediate production of documents.

Subsequently, however, the liquidator applied for and obtained an order under section 115 of the Companies Act, 1862, that Hervey (who was also a shareholder in the liquidating company) should be examined under that section, and Hervey, accordingly, presented himself for examination before an examiner appointed by the court, when, having admitted that letters had passed between the head office of the defendant company in Australia and the London branch with reference to the purchase of Fisher's property, a question was put as to whether "communications passed in the same way with reference to the formation of the company to purchase Fisher's property"? This question Hervey refused to answer, and the examiner having referred the matter to the judge, Kekewich, J., sitting for Kay, J., on April 25, 1890, made the order now appealed from—viz., that Hervey should attend, at his own expense, before the examiner, and answer the question.

Section 115 of the Companies Act, 1862, provides that "the court may, after it has made an order for winding up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade dealings, estate, or effects of the company . . ."

Section 117 provides that "the court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid, concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same."

Hervey appealed from the order of Kekewich, J.

Latham, Q.C., and *Pollard*, for the appellant.—The question which the appellant refused to answer is one referring to the very communications and documents in respect of which the North Australian Co. had founded and brought their action for rescission of the agreement on the ground of misrepresentation, and the liquidator of that company is now seeking, by means of section 115, to get the discovery which Kay, J., on the application for discovery made in that action, refused to order at that stage of the action, as being premature. The question is not put to obtain information as to the estate or dealings of the company in liquidation. In the case of *In re Metropolitan Bank, Heiron's case*, 15 Ch. D. 139, 29 W. R. Dig. 45, the court refused an application under this section by the liquidator for examination of a defendant in a pending action. [FRY, L.J.—But you have not appealed from the order made under section 115 for the examination of Hervey.] No, because Hervey could not then know what questions would be put to him on examination, and he would have been bound to answer questions properly put (*e.g.*, relating to the assets of the company): *Massey v. Allen*, 26 W. R. 908, 9 Ch. D. 164. Besides, it is doubtful whether Hervey would have any *locus standi* to appeal from that order, having regard to the observations of Jessel, M.R., in *In re Gold Co.*, 27 W. R. 757, 12 Ch. D. 77, at p. 82, and *In re Silkstone, &c., Iron Co.*, 30 W. R. 33, 19 Ch. D. 118. [COTTON, L.J.—Examination of a person under section 115 is not an examination of such person *as a witness* in the ordinary sense.] Hervey is not an official of the company in liquidation, but he is the secretary of the defendant company in the action instituted by the liquidating company, and this is, therefore, an attempt to get from the opposing litigant the discovery in that action which Kay, J., refused to order at the present stage. The case of *In re Metropolitan Electric Light and Power Co., Ex parte Leaver*, 51 L. T. N. S. 817, is distinguishable, as there the person ordered to be examined was an officer of the company in liquidation. Though there may be no hard and fast rule that the pendency of an action is a bar to an order for examination under section 115, yet in the particular circumstances of this case Hervey ought not to be required to answer this question.

Renshaw, Q.C., and *C. E. E. Jenkins*, for the liquidator, the respondent.—Section 115 is perfectly general in its scope, and enables the liquidator, with the sanction of the court, to examine any person, and the judge below has decided that this question is a proper one, and ought to be answered by Hervey. The pendency of an action is no ground for staying an examination under section 115: *In re Contract Corporation Co., Ex parte Bateman*, 15 W. R. 118; that case shows that it has been the practice of the court to allow an actual litigant to be examined under section 115. The appellant has mistaken his remedy; he ought, when the order for examination under section 115 was made, have applied to have that order discharged, limited, or at least postponed, until after the trial of the action then pending: *In re Imperial Continental Water Corporation*, 33 Ch. D. 314, 35 W. R. Dig. 46. [BOWEN, L.J.—That objection was not taken by you before Kekewich, J.] We admit that the question has been put to obtain information in the pending action; but an action has also been brought by Goldsbrough, Mort, & Co. in Australia against the North Australian Co., and the question may be material as to that action.

COTTON, L.J.—This is an appeal from an order directing the secretary of the defendant company to attend at his own expense and to answer the question which has been put to him and which he declined at answer.

Is that order right? We have not now to decide whether a person summoned under section 115 has or has not any *locus standi* to appeal against an order made under that section. I do not, however, express any opinion at all favourable to the view that he cannot in a proper case appeal, because it seems to me that it will be wrong to say that when a person is examined, not as a witness in an action, and not for the purpose

of giving evidence in the cause or action, but for the purpose of giving information to a liquidator of a company, he cannot appeal to ascertain whether the order has been properly made or not.

But that is not the question we have to decide now. Mr. Hervey, having been summoned to be examined under section 115, has refused to answer a particular question, and the judge has made an order compelling him to attend at his own expense and answer the question.

I think sufficient regard has not been paid to the words of the section, which are "the court *may* after it has made an order for winding up the company, summon before it any officer of the company" or any other person to attend and be examined and give any information he can with reference to the company which is being wound up; that shows, as I pointed out in a case which has been referred to (*Heiron's case*), that it is a matter in the discretion of the court, and not a matter of right in any person.

In the present case a question has been put, which is admittedly a question put simply for the purpose of obtaining information in the action which has been brought by the liquidator against the defendant company, whose secretary Mr. Hervey is.

It is very true that Mr. Hervey could not at first know what questions would be put, and, in my opinion, if questions are put under the powers given by this section which ought not in the opinion of this court to be put, we ought, under the circumstances of the present case, to interfere. As a general rule, where liberty is given—not to the liquidator—but to a creditor or contributory to examine under this section, the court does direct what questions shall be put in examination; but in the case of the liquidator the court does not generally direct what questions shall be put, but it trusts the liquidator. I should certainly do the same, unless I considered that questions were being put which, in the particular circumstances of the case, ought not to be put by the liquidator, even although trusting him to put only such questions as were necessary in the interests of the company. I do not say that the questions put in the present case are in no way in the interests of the company; they are no doubt put in the interests of the company with reference to the action which has been brought by the liquidator, but except with the view of enabling the company in liquidation to get judgment in that action, the questions put do not in any way tend to assist the interests of the company in liquidation.

In that action an order has been obtained by the liquidator as against the defendant company requiring the secretary of that company to make an affidavit of documents, but the judge held that it was permature at that stage of the action to make an order for production of those documents, and also that it would be premature until the further progress of the action to require the defendant company—by its secretary it may possibly be—to answer interrogatories which the plaintiff company desired to put.

As was pointed out by Bowen, L.J., in the course of the argument, the present proceeding is really an attempt to act contrary to that order, to get round it, and by a side wind as it were, by means of section 115, to do what the judge refused by that order to do. That order has not been appealed from, and we must take it to be a right order, and in my opinion it would be wrong in the present case to allow the liquidator, by means of section 115, to get discovery and inspection which the judge by that order has held it would be premature to give.

I do not at all say that circumstances may not occur when it may be right for the liquidator to put this question; the only question, however, which we have now to decide, is whether Kekewich, J., was right in requiring the secretary to attend and answer this question. I think he was wrong in that, and although the only order we make is that the order made by him be discharged, yet I express my opinion that under the existing circumstances it will not be right to put to Mr. Hervey, who is being examined, any question relating to the matters in question in that action.

We have nothing properly before us to show that this question can in any way benefit the interests of the company in liquidation, except by assisting them to get a judgment in that action.

BOWEN, L.J.—I am of the same opinion. The section put in motion in the examination of a person under such circumstances is a section which places the decision as to examination and as to its limits within the discretion of the court. That being so, I do not think that we ought to attempt beforehand to classify all the occasions upon which it may be proper to make such an order, nor to classify or categorize all the occasions on which it may be unwise to make such an order. We ought not to fetter the discretion of the court in the future. But it does not follow from that that nothing can be said on the subject which may not be worthy the attention of those who have to put in motion this section.

In the first place it is to be observed that the section is an extraordinary section. It is an extraordinary power, a power of an inquisitorial kind, which enables the court to direct the examination (not merely before itself, but before the examiner appointed by the court) of some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a time when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person, who is called upon to appear and give information.

Having regard to those characteristics of this section, I should certainly be reluctant to conclude that the witness—if I may call him a witness—the examinee, the person who is to be examined, and against or on whom the order has been served—has not a *locus standi* to complain that that order is oppressive or hard upon him; and though it is not necessary to decide it one way or other in this case, it seems to me that the point ought to be left open, notwithstanding the language of the late Master of the Rolls in the case of *In re Gold Co.*, which seems to me at the first blush to go too far, and, indeed, to be contrary to the decision in *Heiron's case*. But I desire to leave the point perfectly open now, as it is not necessary now to decide it, and it is much better not to fetter ourselves in the future by deciding what is now unnecessary. For the same reason I abstain, like Cotton, L.J., from attempting to lay down any hard and fast categories as to what ought to be the character of the occasions on which judicial discretion should be exercised to make an order for the examination of a witness under this section. I do not, as far as I am concerned, lay down as a hard and fast line that the concurrence of an action is a necessary bar to the exercise of the discretion of the court under this section, though one cannot but see that the concurrence of an action begun by the liquidator is a matter which ought to be carefully considered by the court in exercising its discretion on the subject.

It is sufficient in this case to say (and it is on this ground that I decide this case) that at this stage this order to answer cannot properly be wanted for the purpose of the winding up. The question put, it is admitted (and it could not be denied), simply goes in

aid of the discovery which would be given in the action which the liquidator has begun. There is an order for an affidavit of documents which has to be complied with on the 7th of June next, and the production of documents is ordered to stand over. A summons for interrogatories has been postponed— and rightly postponed, I doubt not—on the ground that it was premature; that the issues in the action had not been sufficiently defined for interrogatories, and that it would be time enough for interrogatories to be delivered when the defence had been put in. The court, therefore, in this very matter has thought that complete discovery was not wanted at this moment for the purposes of the action even. *A fortiori*, one would think, it cannot be wanted for the purpose of the winding up, it being admitted that the question which is sought to be enforced goes simply in aid of the discovery which would be wanted in the action. It is impossible, therefore, to resist the inference that this question is simply sought to be pressed in order to give the go-by to the decision of the court as to the postponement of the interrogatories and the non-immediate production of the documents; and it is really an attempt to get discovery for the purpose of that action at a moment when the court says it would be premature to insist upon it. Counsel for the respondent ask us to infer that the liquidator had some mysterious and excellent reasons, other than this, for insisting upon an answer to the question, but none have been shown; and, although it is, doubtless, not to be presumed that liquidators, who are officers of the court and have a duty to perform, will perform their duty recklessly, unless the court see some reason to think they will, as they do sometimes, yet there is such a thing as over-zeal in officers; and, having regard to the facts of the case which we do know, I do not hesitate myself to draw the inference I have mentioned. If so, it would be an abuse and an oppression to allow a witness to be forced. He will give such discovery in time as it is wanted in the action, and I say nothing as to any case which can be made either in aid of the action or otherwise as to employing this section should it be wanted for the purpose of the winding up. I am clear that at this stage this machinery is not wanted, and that it would be premature to use it in the way in which it is sought to use it, and that it would be an oppression.

I believe that, under the 19 & 20 Vict. c. 113, and under the Bankruptcy Act of 1869, it will be found that appeals have been successfully maintained against orders of this nature.*

FRY, L.J.—I entirely agree with what has been said as to the nature of this section. The section gives a power to the court to summon a person before it, and the examination is taken, not under section 115, but under section 117, which enables the court to examine upon oath, either by word of mouth or by written interrogatory, the person. The whole of the proceeding, therefore, is a proceeding by the court, and the liquidator, the contributory, or the other person whom the court allows to intervene and to be active in the proceedings, only does so by leave of the court, because he is a person supposed to have the means of addressing inquiries to the witness; that is an entirely different proceeding to that in which a litigant summonses a witness and examines that witness before the court. The liquidator, therefore, in insisting, as he seems to have done in the argument addressed to us, upon the right to the question, has, I think, entirely mistaken his position. Each question is put by the liquidator only by the leave of the court and on behalf of the court.

The whole of the question comes, therefore, to be this; whether, if I, as a judge constituting a court, were sitting and examining this witness with the information which has been given us on both sides, I should put this question to the witness and require him to make the discovery which would be involved in the answer to this question? What are the circumstances under which this person is brought before the court? [The Lord Justice stated the facts as above set out, relating to the action brought by the company in liquidation against Goldsbrough, Mort, & Co., and the orders with respect to discovery made therein, and continued:—]. That is the way in which the learned judge, in the action instituted by the liquidator, has exercised his discretion. Should I, as a judge in the winding up, sitting with Mr. Hervey before me, put a question which, instead of exercising the discretion in the same way, exercises it in a totally different way, and instead of requiring an affidavit to be made at a future time giving full discovery, requires Hervey to state then and there whether there had been this correspondence. I should not have put that question to him, and I cannot help seeing that the liquidator has been endeavouring to induce Kekewich, J., to exercise his discretion in a manner entirely at variance with the exercise of a like discretion by Kay, J., in the action.

I have spoken throughout as if Hervey were the same person as Goldsbrough, Mort, & Co., and I do so because he is the secretary in England of the English board of directors of that company. Of course it is manifest that he is examined in that character, and the questions put were—as was very fairly admitted by the respondent's counsel—put with a view to elicit the same information which was not to be obtained in the action until a later date.

Like my brethren I desire entirely to abstain from laying down any proposition to fetter the discretion of the court from time to time to be exercised under sections 115 and 117. I have no right to fetter the discretion of the court in these cases; but one can see this plainly, that the question whether a man may be twice vexed with the same question may often be material; and the question whether the putting to him the interrogatory under section 115 would be inconsistent with the order which had been previously made in the litigation between the same parties may again be material; and therefore in this case I think that the right discretion would be not to allow the question to be put. The witness having refused to answer it, he ought not to be directed to attend and answer.

Though, no doubt, this court is unwilling generally to review and interfere with the exercise of discretion by the judge below—and we feel that in this case—yet in the present case it appears to me that Kekewich, J., has proceeded upon some notion of the right of a liquidator to obtain discovery under this section. No such right, in my judgment, exists. The right is that of the court, and that of the court only.

The decision of Kekewich, J., must be reversed, and the summons dismissed, with costs, both here and below.

Appeal allowed.

Solicitors for the appellant, *Freshfields & Williams.*

Solicitors for the respondent, *Saunders, Hawksford, Bennett, & Co.*

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* See *Ex parte Reynolds*, 30 W. R. 651, 20 Ch. D. 294, and *In re Scharrer, Ex parte Tilly*, 36 W. R. 388, 20 Q. B. D. 518, as to such appeals under the Bankruptcy Acts.

From Q. B. Div. April 29; May 19.

MITCHELL v. SIMPSON. (a.)

Attachment—Judgment debtor—"Attachment for debt"—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 14, *sub-section* 1 (c).

A judgment debtor, against whom a committal order has been made under section 5 *of the Debtors Act*, 1869, *is not entitled, on his arrest, to claim to be taken to a safe and convenient dwelling-house for twenty-four hours before being taken to prison, since such a committal order is not an "attachment for debt" within the meaning of section* 14, *sub-section* 1 (c), *of the Sheriffs Act*, 1887.

Decision of the Queen's Bench Division (37 *W. R.* 798, 23 *Q. B. D.* 373) *affirmed.*

Appeal from the decision of a divisional court (Denman and Charles, JJ.), reported 37 W. R. 798, 23 Q. B. D. 373.

A judgment having been obtained against the plaintiff in the Salford Hundred Court, an application was made for his committal under the Debtors Act, 1869, and on February 7, 1888, the judge, being satisfied that he had means of paying the debt and wilfully neglected to do so, committed him to prison for twenty-one days, or until he should pay the debt. On June 18 the defendant, the high bailiff of the court, arrested the plaintiff in London. The plaintiff asked to be taken to an hotel for the night, but the defendant refused, and took him first to a police-station, and thence by train to Manchester, where he was lodged in gaol.

The plaintiff brought the present action for damages for a violation of the Sheriffs Act, 1887, s. 14, sub-section 1 (c). Manisty, J., nonsuited the plaintiff, and the Divisional Court declined to grant a new trial, on the ground that the committal order was not an "attachment for debt" within the meaning of the sub-section.

The plaintiff appealed.

By section 14 of the Sheriffs Act, 1887, "Where an officer, being a sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer whatsoever, arrests, or has in custody, any person by virtue of any action, writ, or attachment for debt, such officer shall not . . . (c) take such person to any prison within twenty-four hours of the time of his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested, or, if he was not arrested within a borough or town, then within three miles of the place and in the county or franchise in which he was arrested."

Channell, Q.C., and *J. D. O'Flynn*, for the plaintiff.—The section is a re-enactment of 32 Geo. 2, c. 28, s. 1. That spoke of "action, writ, process, or attachment." The words "attachment for debt" are, therefore, new, and refer to committal orders such as this. The Act of Geo. 2 had reference only to mesne process: *Evans* v. *Atkins*, 4 T. R. 555; and now that mesne process has been abolished by 1 & 2 Vict. c. 110 and by the Debtors Act, 1869, there is nothing but committal orders to which the words "attachment for debt" can apply.

Ambrose, Q.C., and *A. J. David*.—The Sheriffs Act, 1887, merely consolidates the law, and does not alter or amend it. Mesne process was not entirely abolished by 1 & 2 Vict. c. 110, and therefore the section still applies to arrests on mesne process, and not to committal orders.

They cited and referred to *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338; *Holroyde* v. *Garnett*, 30 W. R. 604, 20 Ch. D. 532; *In re Freston*, 31 W. R. 804, 11 Q. B. D. 545; *In re Gent Davis*, 37 W. R. 151, 40 Ch. D. 190; *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. App. 152; and *Swan* v. *Dakins*, 3 W. R. 369, 16 C. B. 77.

Channell, Q.C., replied.

Cur. adv. vult.

May 19.—The following judgments were delivered:—

Lord ESHER, M.R.—In this case the plaintiff brings an action against the high bailiff of the Salford Hundred Court because, under an order made by the judge of that court directing the high bailiff to arrest the plaintiff, the high bailiff did not allow him when arrested to to to an hotel for twenty-four hours before going to gaol. The judge's order was made under section 5 of the Debtors Act, 1869, and the jurisdiction given by that section is only to be exercised when it is proved that the person against whom the order is to be made might have had or has the means to pay his debt and has refused or wilfully neglected to pay it. It must, therefore, be assumed, and it is not disputed, that the plaintiff had the means to pay the debt for which judgment had gone against him, and that he had refused or neglected to pay. Now he brings an action under section 14 of the Sheriffs Act because the high bailiff did not take him to an hotel. He would have had to pay for his own food and drink while there, so that it is plain that when he asked to be taken there he had some money upon him. Can it be conceived that, under these circumstances, even if he were entitled to succeed, any jury would give him one farthing damages? However, he has raised a point of principle which is undoubtedly of importance. If he is right in his contention, then in every case, and they are very numerous, where a man is arrested under an order for committal he must be taken to an hotel or some such place for twenty-four hours, where he will, nevertheless, be in the custody of the sheriff's officer. The difficulties of carrying out such a provision are obviously very great; but, nevertheless, if the contention is right we must say so, and leave it to the Legislature to cure the flaw in the Act. But is the arrest under an order for committal an "attachment for debt" within the meaning of the section? I do not think it is. A man is not now arrested for debt. He is arrested for the offence of contumaciously refusing to obey the court and to pay his debt when he has the means to do so. The Sheriffs Act, 1887, is a consolidating Act, and the particular section follows very nearly the words of 32 Geo. 2, c. 28. Now, what were the circumstances to which that Act applied? At that time a man who was in debt before any action brought against him might be arrested by his creditor on mesne process. Then he was taken to a sponging house, where enormities and extortions of which we have all read were practised against him. The Act was passed to do away with that state of things. The Act recites that:—"Whereas many persons suffer in the execution of process for debt and the exaction of jaylers to whom such debtors are committed," and goes on to enact that henceforward any person arrested "by virtue or colour of any action, writ, process, or attachment" shall be taken to a dwelling-house of his own nomination for twenty-four hours. "Process" there, of course, means process for debt. The Sheriffs Act speaks of "any action, writ, or attachment for debt." It is, therefore, not an exact repetition of the Act of Geo. 2, but really the two sections are identical. On the other hand, what a difference there is between the arrest on mesne process for debt and the arrest for an offence against the court in contumaciously disobeying its order. The things are absolutely different in their nature, their legal cause and effect, and, quite apart from any other

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

consideration, I should be prepared to say that neither the Act of Geo. 2 nor section 14 of the Sheriffs Act were applicable to an arrest under an order for committal. But the Act of Geo. 2 applied only to arrest on mesne process, and section 14 of the Sheriffs Act, being substantially a re-enactment of that Act, applies, therefore, also only to mesne process if there is in existence any mesne process to which it can apply.

It was argued that mesne process had been altogether abolished, but after long discussion we have come to the conclusion that it was not altogether abolished, but that it still exists in a restricted form for certain purposes. That being so, section 14 applies to mesne process only, and does not apply to an arrest under an order for committal. Therefore, the plaintiff's point fails, and he was rightly nonsuited, and this appeal must be dismissed.

FRY, L.J.—The question turns on section 14 of the Sheriffs Act, 1887, and we have to decide whether a committal under the Debtors Act, 1869, is an attachment for debt within the meaning of that section. The Sheriffs Act, 1887, is a consolidating Act, and does not purport to alter or amend the existing law. It ought, therefore, to have the same, and no larger, effect than the Acts which it supersede. But it is said that whereas when the Act of Geo. 2 was passed arrest on mesne process existed, to which alone that Act was applicable, now mesne process has been entirely abolished, and that, therefore, there is nothing to which the words "attachment for debt" can apply but committals under the Debtors Act. No doubt the words must have some application, and no doubt in *Evans* v. *Atkins* Lord Kenyon said that the Act of Geo. 2 applied only to persons arrested on mesne process, and added, "Such, indeed, has always been the opinion in Westminster Hall since the passing of this Act." That case was decided in 1792, and the learning and industry of counsel have not been able to supply us with any case to the contrary, so that there seems to have been a uniform construction of the Act as applying only to arrest on mesne process. In 1838 the Act 1 & 2 Vict. c. 110 was passed, which it is contended abolished mesne process. That argument is, I think, erroneous. It was provided by section 1 that no person should be arrested on mesne process after the commencement of the Act, except in certain specified cases, but power was reserved to arrest on mesne process in those cases. The Act, therefore, only restricted and modified, but did not entirely abolish, arrest on mesne process. A nice question which it is not now material to decide may arise as to whether the Crown may not still proceed by mesne process, for though the more usual procedure is by writ of extent, nevertheless it has the right to make use of any procedure which is available to a subject. It is sufficient for the present purpose if any mesne process exists to which the section can apply. As I have said, I think that, although restricted, mesne process has not been abolished. Therefore, there is something to which the words "attachment for debt" can apply, and the construction uniformly put upon the Act of Geo. 2 must also be given to section 14 of the consolidating Act. The plaintiff's contention accordingly fails, and the appeal must be dismissed.

LOPES, L.J.—The Sheriffs Act, 1887, is a consolidating, and not an amending, Act. In my opinion, section 14 is only a re-enactment of section 1 of 32 Geo. 2, c. 28. That Act only applied to arrest on mesne process, and I think section 14 has no further application, and does not apply to an arrest under an order of committal. It is said that mesne process has been abolished, and that there is nothing to which the section can apply. Even if that were so I should still think that it did not apply to such an arrest as in the present case. But I think there are still cases of arrest on mesne process to which it might apply, such, for instance, as Crown debts and the writ of *ne exeat regno*. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Paterson & Sons.*

Solicitor for the defendant, *W. H. Herbert*, for *J. E. Simpson*, Manchester.

From Q. B. Div. May 14.

GEBRÜDER NÄF v. PLOTON. (a.)

Practice—Lien—Payment into court—Ord. 50, r. 8.

Under ord. 50, r. 8, where an action is brought to recover specific property, and the defendant does not dispute the plaintiff's title, but claims to retain the property by virtue of a lien upon it, the court has power, on the application of the plaintiff, to order the property to be given up to him upon payment into court of the amount in respect of which the lien is claimed.

Held, that, in order that the property should be given up to the plaintiff, the whole amount for which the lien is claimed must be paid into court, even though such amount exceed the value of the property.

Appeal from the decision of a divisional court (Huddleston, B., and Grantham, J.).

The action was brought to recover goods consigned by the plaintiffs to the defendant as their agent.

The defendant admitted the plaintiffs' title to the goods, but claimed a lien upon them in respect of commission for £942 3s. 7d.

The plaintiffs took out a summons under ord. 50, r. 8, for liberty to pay into court the sum of £329 7s. 10d., which they admitted to be due from them to the defendant, and such further sum as the judge might order, and that upon such payment the goods should be given up to them. It was admitted that the value of the goods was about £600.

Lawrance, J., at chambers, ordered the plaintiffs to pay into court the whole amount of £942 3s. 7d. claimed by the defendant by way of commission, which was accordingly done, and the goods were given up. The Divisional Court upheld the order of Lawrance, J.

The plaintiffs appealed, and asked that the order should be varied by directing that upon payment into court by the plaintiffs of £329 7s. 10d. the goods should be given up by the defendant or that the sum of £612 15s. 9d. should be paid out of court to the plaintiffs.

By ord. 50, r. 8, "Where an action is brought to recover . . . specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the court or a judge may . . . order that the party claiming to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such court or judge may direct, and that upon such payment into court being made the property claimed be given up to the party claiming it."

Henn Collins, Q.C., and *Pelle*, for the plaintiffs.—The judge was wrong in making the order. He did not exercise his discretion. The value of the goods is less

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

than the amount for which a lien is claimed, and at the most all that the plaintiffs should be ordered to pay should be the value of the goods. It is a hardship to order them to pay the full amount for which a lien is claimed, and an unreasonable or fraudulent claim for lien might utterly defeat the intention of the rule.

Robert Wallace, for the defendant.—The defendant has given up the goods on which he had a lien on the payment into court of the amount which he claimed.

Lord ESHER, M.R.—This rule must, I think, be construed in accordance with the ordinary rules of construction—that is to say, according to the ordinary grammatical meaning of the language used. Where an action is brought to recover specific property other than land, and the defendant admits the plaintiff's title, but claims to retain the property in virtue of a lien, the court may order that the party claiming to recover the property be at liberty to pay into court, to abide the event of the action, "the amount of money in respect of which the lien is claimed." What can that mean but the amount for which the lien is claimed? The plaintiffs claim the property, the defendant claims the money in respect of which he holds a lien on the property. There is nothing in the rule as to an order to pay the amount of the property into court. The words of the section are perfectly plain, and it is no answer to those plain words to say that they give rise to hardship. The order can only, I think, be made to pay the amount for which a lien is claimed. If, however, a fraudulent or unreasonable claim for lien is made for the purpose of defeating the rule, which, however, is not alleged to be the case here, the court will have to consider the question.

FRY, L.J.—I am of the same opinion. The order gives liberty to pay into court a sum of money in respect of which a lien is claimed, and on that payment to receive the goods claimed. That must mean the sum of money for which the lien is claimed. Mr. Collins invites us to read into the rule "or the value of the goods, whichever shall happen to be the smallest." I can see no authority for doing so. Things are to be taken as they stand, and the goods are to be given up on the payment into court of the amount for which a lien upon them is claimed. No doubt an unreasonable claim for lien might defeat the operation of the rule, but nevertheless the intention of the rule is obvious. The decision of the court is not invited on any litigated matter. The claims of plaintiffs and defendant are to be taken as they are, and on them the order is to be made.

LOPES, L.J.—In my opinion this rule gives an indulgence to a plaintiff. It is in his favour, for he gets what he could not get before. According to the ordinary meaning of language he must pay into court the amount for which the lien is claimed. In this case it is not alleged that there is not a *bonâ fide* and reasonable claim. That is, in my opinion, the true construction of the rule, and I think that the appeal therefore fails.

Appeal dismissed.

Solicitor for the plaintiffs, *Francis Hoare.*

Solicitors for the defendant, *Peckham, Maitland, & Peckham.*

From Q. B. Div. May 13.

In re WATSON.

Ex parte OFFICIAL RECEIVER. (*a.*)

Bill of sale—Pretended sale of goods—Hiring agreement—Power of court to go behind form of document—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

A transaction purported to be a sale by delivery of certain goods for value, followed by an agreement in writing, under which the goods were let on hire by the alleged purchaser to the alleged vendor, with power to the alleged purchaser to retake possession on the happening of certain events. The real nature of the transaction was one of loan upon the security of the goods, and not a bonâ fide *sale and hiring.*

Held, that the court was not precluded by the form of the document from inquiring into the real nature of the transaction, and that the alleged hiring agreement was a bill of sale, it being a "licence to take possession of personal chattels as security for a debt" within section 4 *of the Bills of Sale Act*, 1878.

In re Yarrow, ante, *p.* 175, *not followed.*

Appeal from the judgment of the Divisional Court (Cave and Lawrance, JJ.), affirming the decision of the judge of the Liverpool County Court, upon an application for an order declaring that certain furniture, which had been seized by one Love, was the property of the official receiver as trustee in the bankruptcy of Mary Watson.

It appeared that Mary Watson, being in want of money, and not wishing to execute a bill of sale over her furniture, applied to Love, and he agreed to advance her £150. An inventory with a valuation of the furniture was made, and at an interview which took place between them, Mary Watson handed a chair to Love on behalf of all the furniture, stating that she sold him her furniture, and he paid her £150. She then signed a hiring agreement, to which the inventory was attached. In this hiring agreement Love was described as the owner and Mary Watson as the hirer of the furniture, and it stated that the owner agreed to let and the hirer agreed to take on hire the furniture, the hirer paying to the owner a rent of £40 every four months; the furniture to become the property of the hirer when £200 should have been paid in rent by her, but until then it was to remain the absolute property of the owner; with power to her during the hire to purchase the furniture by payment in cash of a sum which with any amounts already paid should make up the sum of £200. The owner had power upon the happening of certain events to terminate the hiring and retake possession of the furniture. This document was not registered under the Bills of Sale Acts.

Subsequently Mary Watson filed her petition in bankruptcy in the Liverpool County Court, and shortly before this Love took possession of the furniture under the hiring agreement. The official receiver applied for an order declaring the furniture to be his property, and that the hiring agreement was a bill of sale and void as against him under the Bills of Sale Acts. The county court judge found upon the evidence that there was no *bonâ fide* sale of the furniture by the bankrupt to Love; that in reality the transaction was one of loan upon the security of the furniture, the terms of the security being contained in the hiring agreement; but he held that he was bound by the decision in *United £40 Loan Club* v. *Bexton* (not reported), to hold that the document was not a bill of sale, and he accordingly dismissed the application.

The Divisional Court considered themselves precluded by the judgment of Cave, J., in *In re Yarrow, ante,*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

p. 175, from going behind the form of the document, and dismissed the appeal.

The official receiver appealed.

Sir Edward Clarke, S.G. (*Muir Mackenzie* with him), for the appellant.—The county court judge considered himself bound by the judgment of Fry, L.J., and Mathew, J., sitting as a divisional court, in *United £40 Loan Club* v. *Bexton* (not reported) to hold that as a matter of law this document was not a bill of sale. In that case, however, the court found as a fact that there had been a *bonâ fide* sale anterior to the hiring agreement, while here the judge has found that there was not. Here the hiring agreement is the security, and it is either a "licence to take possession of the personal chattels as security for a debt," or it is an "assurance of personal chattels," within section 4 of the Bills of Sale Act, 1878. The judgment of Cave, J., in *In re Yarrow*, where he criticized the previous decisions in the Court of Appeal as being inconsistent, cannot be supported. The decisions upon the point all show that the real nature of the transaction must be inquired into. If there has been a *bonâ fide* sale and a subsequent hiring agreement, then the hiring agreement cannot be a bill of sale. If, however, there has been no real sale, but only a loan on security, then the hiring agreement, which contains the terms of the security, is a bill of sale. [He referred to *Yorkshire Railway Wagon Co.* v. *Maclure*, 30 W. R. 761, 21 Ch. D. 309; *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co*, 35 W. R. 443, 35 Ch. D. 191; and in the House of Lords, 37 W. R. 305, 13 App. Cas. 554; *Gapp* v. *Bond*, 35 W. R. 683, 19 Q. B. D. 200.] The decision of Kay, J., in *Redhead* v. *Westwood*, 59 L. T. N. S. 293, seems to show that the form of the document alone must be looked at, but that case cannot be supported.

He also referred to *Phillips* v. *Gibbons*, 5 W. R. 527.

A. J. Allen, for the respondent, Love.—In the present case the title to the furniture was transferred for value by delivery of a chair on behalf of all, prior to the hiring agreement. That document did not give Love any title to the furniture; his title was complete before the document was signed. The legal estate passed to Love by delivery for value, that being the intention of the parties; and Love, having the legal estate in him, was in a position to let the furniture on hire. Whether the transaction prior to the hiring agreement was a sale or a mortgage, the legal estate passed to Love at that time. The hiring agreement therefore was not an "assurance;" nor was it a "licence to take possession," because those words only refer to a licence to take possession of the goods of the borrower, and here the goods belonged to Love.

He referred to *Meyerstein* v. *Barber*, 15 W. R. 173, L. R. 2 C. P. 38, at p. 51.

Sir Edward Clarke, S.G., did not reply.

Lord ESHER, M.R.—In this case the learned county court judge first decided certain questions of fact, and upon those findings of fact arrived at a certain conclusion of law. The case was thereupon taken to the Divisional Court, and that court merely gave a formal judgment dismissing the appeal, feeling itself bound by a judgment of Cave, J., in *In re Yarrow*. Upon the suggestion that the decisions of this court are inconsistent with each other, and in consequence of that suggestion, the case has been heard before the full Court of Appeal. The question of law which we have to decide upon the facts as found by the county court judge seems to me to be this: Is the court precluded from going into the true nature of the transaction and deciding the case according to the facts because the parties have chosen to disguise the nature of the transaction by putting it into a form other than that of a bill of sale? The county court judge thought himself bound by authority so to hold.

Now the county court judge has found that the bankrupt did not intend to sell her furniture. She intended to borrow money on the security of it. Love never intended to buy the furniture; he intended to lend the money, taking as security a right over the furniture. He lent £150 and was to be repaid £200 by instalments. Then followed the handing over of the chair to Love in the name of all the furniture, which the judge found to be a sham, and not a delivery under a contract of purchase and sale. Then the hiring agreement, with the inventory attached, was signed, which document was the security for the loan, Love being thereby authorised to take possession of the furniture and sell it in certain contingencies. That document was the evidence of his security, and without it he could have no right to seize and sell the furniture. At the very least the document was a "licence to take possession of personal chattels as security for a debt." If, however, the property in the furniture did pass under this document, the transaction was a mortgage, and the document was an assurance of personal chattels. I cannot doubt that in either case it comes within the definition of a bill of sale given in section 4 of the Bills of Sale Act, 1878. I do not understand that the county court judge says that it is not, but he considered that he was precluded by authority from getting at the truth. Unless, therefore, the court is precluded from getting at the truth, this document must be held to be void as a bill of sale.

The question accordingly remains whether the court can go through the document to get at the truth. If I can possibly help it I never will be a party to allowing any document to stand in the way of the court getting at the truth. Is there any authority binding upon us which compels us to hold that we are bound by the form of the document? The county court judge thought that the case of *United £40 Loan Club* v. *Bexton*, before Fry, L.J., and Mathew, J., was a decision to that effect. It seems to me that the learned judge misconceived that decision. There were three questions raised in that case. The first question was whether the transaction was entered into with intent to defeat and defraud creditors. The court held that it was not. The second question was whether the property passed, and the court came to the conclusion, as a matter of fact, that it was the intention of the parties that the property should pass, and that it did pass prior to the hiring agreement. The third question was whether the document, which was a hiring agreement, required registration under the Bills of Sale Acts. The court came to the conclusion, upon the facts, that there was a *bonâ fide* sale followed by a *bonâ fide* contract of hiring. That case is merely an instance of the proposition that, if the court comes to that conclusion, the hiring agreement is not a bill of sale. It is nowhere said that, if the transaction is put into the form of a hiring agreement by the alleged owner, and there is no *bonâ fide* sale and hiring at all, but the hiring agreement is in truth merely a licence to take possession, the court cannot get at the truth of the transaction. That case, therefore, does not support the conclusion of the county court judge. Then, with regard to the judgment of Cave, J., in *In re Yarrow*, having carefully considered the strictures that he has passed upon the various decisions, chiefly of this court, I can find no contradiction between those decisions. The first case is *The Yorkshire Railway Wagon Co.* v. *Maclure*, which was heard before Sir George Jessel and Lindley and Holker, L.JJ. Each of those learned judges does exactly what I have said the court ought to do. The documents put before them could, upon their face, admit of only one meaning. The court, however, inquired into the real facts of the case, and decided the case upon the true facts, and not upon the form of the documents. Lindley, L.J., says: "I understand the

view of the learned judge was this, that this transaction of hire was a mere device or cloak to conceal a loan. If that had been the view I took of the facts, I should have come, of course, to the same conclusion. I should disregard or throw aside the cloak and look at the real transaction alone. But, for reasons I will give presently, I am satisfied that the purchase and hire transaction was the real transaction, in this sense, that the parties meant it to operate according to its tenor as comprised in the deeds. It was not intended by them as a mere blind or cloak for something behind, it was a transaction substituted for another, but *bonâ fide* substituted, and intended to be acted upon according to its purport and apparent effect." Therefore the court in that case did not stop at the documents, but inquired into the facts, and they found the documents to be in accordance with the truth, and that the transaction was a real sale and hiring, and that, consequently, the Bills of Sale Acts did not apply. Of course the court must take the form of the document into consideration as an element in arriving at the truth. *Primâ facie* the form is against those who allege that the document is a bill of sale. But if the evidence shows that the form is not in accordance with the real nature of the transaction, then the court will throw aside the form. The next case is *The North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, and Cave, J., attributes to Cotton, L.J., a view inconsistent with what I have been stating. There Cotton, L.J., says: "Of course the hiring and letting agreement cannot in itself be a bill of sale, but it may be looked at to see what the nature of the transaction was as regards the second part of the transaction." He then goes into the facts of the case, and continues: "Here, upon the evidence, I think it is made clear that there was a perfect transaction of purchase and sale on the 18th of February independently of and before these two documents, and before the first of the documents was in any way asked for." There the court did inquire into the facts and act accordingly. Nor can I see that the opinion of Lord Macnaghten in the same case in the House of Lords lends any colour to the criticisms of Cave, J. Then, with reference to *Redhead* v. *Westwood*, Kay, J., in that case certainly does seem to make some observations that are contrary to the view I am expressing. I do not say that that case was wrongly decided, as I do not quite know how far the learned judge intended to go. If the learned judge inquired into the facts and came to a conclusion upon them, I agree with that process. If, however, he intended to say that he was precluded by the form of the documents from getting at the truth, then I do not agree with him. The next case is *Gapp* v. *Bond*, though prior in point of date, and there admittedly the same view that I have expressed was taken. Having thus gone through the authorities, it seems to me that the criticisms of Cave, J., are completely displaced, and are shown to be misconceived. All the cases seem to me to be consistent. If people try to evade an Act by putting forward documents which contain a false description of the transaction, the court will always go through the documents to get at the truth. If the transaction is, in truth, a loan with a security given by a document over goods, and the parties try to cloak the transaction by putting the document into the form of a hiring agreement following a pretended sale of the goods, then the document is a bill of sale; but if the sale and hiring is *bonâ fide*, then the document cannot be a bill of sale.

In the present case there was no sale of the furniture. There was nothing but a loan upon the security of the furniture, the terms being contained in a hiring agreement. The document is, at the least, a licence to take possession as security for the loan, and is, therefore, a bill of sale, and consequently void under the Bills of Sale Acts. The lender, therefore, cannot rely upon it. The judgment of the county court judge and of the Divisional Court must accordingly be reversed.

COTTON, L.J.—After the elaborate judgment of the Master of the Rolls, I need only express my opinion shortly. The findings of the county court judge, in my opinion, dispose of the case. The case seems to me to depend upon whether the transaction was a real transaction. If there was a real sale of the furniture, accompanied by the delivery of a chair on behalf of all, then there would be no difficulty in upholding the transaction. But the judge has found that it was a sham, and that the real transaction was one of loan secured on the furniture. The hiring agreement, in which the lender was represented as the owner of the furniture, was false, and, accordingly, the furniture remained the property of Mrs. Watson, and the hiring agreement was only a licence to take possession of personal chattels as security for a debt. The county court judge must be taken to have found that the lender had no security beyond the hiring agreement, and that the document came within the definition given of a bill of sale in section 4 of the Bills of Sale Act, 1878, unless he was precluded from inquiring into the truth of the transaction, and was bound by the form of the document. In my opinion there is no case which even suggests that the court is bound by the form of the document. The judge thought himself bound by the form of the document. Lindley, L.J., has well expressed the true view in *Yorkshire Railway Wagon Co.* v. *Maclure*, where he says that if the transaction of hire was a mere device or cloak to conceal a loan, he would disregard or throw aside the cloak and look at the real transaction alone. Cave, J., in *In re Yarrow*, seems to have thought that I took a different view in the case of the *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* In that case I, as well as the rest of the court, held that the transaction was a *bonâ fide* transaction of sale and hiring. In the present case the county court judge has held the transaction not to be a *bonâ fide* sale and hiring, but a loan upon the security of the furniture, and that the hiring agreement was the evidence of the lender's title. That being so, the hiring agreement is either an assurance of personal chattels within section 4 of the Bills of Sale Act, 1878, or, as I am disposed to think, a licence to take possession of the furniture as security for a debt within that section.

LINDLEY, L.J.—I am of the same opinion. I cannot quite see why the learned county court judge came to the conclusion that he was bound to decide according to the form of the documents, when he found as a fact that the transaction was one of loan with security—a mortgage, and not a sale with a right of repurchase—and that it was intended that the hiring agreement with the inventory attached should be the record of the transaction and of Love's title. If the authorities are looked at carefully, they will be found to be perfectly consistent, the only apparent inconsistency arising from the difference of the facts in each case. If the hiring agreement is a real letting out of furniture, then the transaction does not come within the Bills of Sale Acts. But if that is not the real nature of the transaction, the question arises, what is the true nature of the document? In the present case it seems to me that it is a licence to take possession of the goods of the borrower. In that view it comes within the definition of a bill of sale in section 4 of the Bills of Sale Act, 1878. If, however, the lender relies upon the document as showing title in him by way of estoppel against the borrower, then the document becomes an assurance of personal chattels within the definition of a bill of sale given in that section. The true view, however, is that it is a licence to take possession of personal chattels as security for a debt. In all the cases that have been cited to us, where the

document was held not to be a bill of sale, the court came to the conclusion that the person who let the goods was the real owner of them. When once it is established that the person professing to let the goods is not the real owner, then the transaction becomes a bill of sale.

Fry, L.J.—I have come to the same conclusion. I agree with Lindley, L.J., that this hiring agreement is either a licence to take possession of the goods of the borrower, or if it operates as an assurance of personal chattels it does so by way of estoppel. The only other observations I desire to make are with regard to the case of *United £40 Loan Club* v. *Bexton*. That was an interpleader issue. Bexton had been the owner of the goods, and the transaction in question was a sale of the goods by Bexton to Miller, the claimant, and a hiring back by Miller to Bexton. The plaintiffs were attacking Miller's title, and three points were taken on their behalf. It was first of all said that the transaction was void under 13 Eliz. c. 5 as having been entered into with intent to defeat and defraud creditors. We disposed of that point, holding that the transaction was not void upon that ground. Secondly, it was said that under the alleged sale prior to the hiring agreement no property was intended to pass. We arrived at the conclusion that the property was intended to pass, and that disposed of that point. Lastly, it was said that the hiring agreement required registration as a bill of sale. When once we had come to the conclusion, upon the facts before us, that there was a *bonâ fide* sale of the goods prior to the hiring agreement, that contention fell to the ground, and the document could not possibly be a bill of sale. That was all that that case decided, and it affords no ground for the conclusion of law arrived at by the county court judge in the present case.

Lopes, L.J.—I am of the same opinion. It seems to me that the findings of the county court judge conclude the case, and I entirely agree with those findings. I should describe the document as a licence to take possession of personal chattels as security for the loan. It comes, therefore, within the Bills of Sale Acts. I cannot help thinking that Cave, J., has misapprehended the various decisions, and upon closer examination he will find them all consistent with our present decision.

Appeal allowed.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Solicitor for the respondent, *J. R. Hall*, for *J. C. White*, Southport.

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2 Smith (1893) 2 Ch 5

High Court of Justice.

Chan. Div. }
Kekewich, J. } May 16.

In re Simes.
Simes *v.* Newbery. (*a.*)

Attachment—Trustee—Breach of trust—Non-compliance with order to pay cash into court as trustee—Bankruptcy of trustee—Jurisdiction—Debtors Act, 1869 (32 & 33 *Vict.* c. 62), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 9.

By an order made on the 5th of April, 1889, *the defendant was directed as trustee to pay two sums of cash into court on or before the 6th of May. He did not comply with the order. On the 13th of May*, 1889, *a receiving order was made against him on his own petition, and he had not yet obtained his discharge. The plaintiffs now moved for liberty to issue a writ of attachment against him, the notice of motion being dated the 22nd of April*, 1890.

Held, that the property and person of the debtor were protected by section 9 of the Bankruptcy Act, 1883, *and the court had no jurisdiction to direct a writ of attachment to issue against him.*

Motion.

This case raised the question whether the court had jurisdiction to direct an attachment to issue against an undischarged bankrupt who had not complied with an order made upon him as trustee to pay money into court.

The order was made on the 5th of April, 1889, and, after stating that certain affidavits had been read, proceeded as follows:—This court doth order that the defendant, Frederick Newbery, as trustee of the will of the above-named testatrix, Maria Simes, do, on or before the 6th of May, 1889, or subsequently within seven days after service of this order, pay into court, as directed in schedule 1 hereto, the sum of £703 6s. 2d. And it is further ordered that the defendant, Frederick Newbery, as trustee of the above-mentioned indentures of settlement, dated the 11th of February, 1887, do, within the like period, pay into court, as directed in schedule 2 hereto, the sum of £473 9s. 4d." In the schedules these sums were described as cash, and were directed to be invested and accumulated in New Consols.

A receiving order was made against the defendant on his own petition on the 13th of May, 1889, and he had not yet obtained his discharge.

The plaintiffs served notice of motion, dated the 22nd of April, 1890, that "the defendant, Frederick Newbery, do stand committed to prison, or otherwise that the plaintiffs be at liberty to issue a writ or writs of attachment against the said defendant for his contempt in not having paid into court, pursuant to the order of his lordship Mr. Justice Kay made in this action on the 5th of April, 1889," the sums above-mentioned.

Waggett, for the motion.

Oswald, for the defendant.—I take the preliminary objection that the defendant is an undischarged bankrupt, and that the plaintiff cannot enforce any remedies against his person or property; he can only prove for the debt: *Cobham* v. *Dalton*, 23 W. R. 865, L. R. 10 Ch. 655; *In re Ryley, Ex parte The Official Receiver*, 33 W. R. 656, 15 Q. B. D. 329. The defendant cannot pay till he gets his discharge. The motion should be refused, with costs, as they must have known the circumstances.

Waggett.—The result of that would be that if any fraudulent trustee got himself made a bankrupt he would never get his discharge and could not be punished. The court has power to punish non-compliance with orders: *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338. This is a case of fraud. [Kekewich, J.—The jurisdiction depends on the order, not on the basis on which the order was made. The grounds on which the order was made, whether fraud or not, do not affect the jurisdiction. It is a debt provable in bankruptcy, and you can have no remedy against the person of the debtor.] The plaintiffs could prove for it, but that is not their only remedy. The court can enforce the order. Certain affidavits are entered in the order as read. The defendant is ordered to pay the money in the character of trustee, and the money must have been in his hands or the order would not have been made. [Kekewich, J.—The order does not say so, and it makes all the difference. The order directs him to pay into court as trustee, but a breach of trust may constitute a

(*a.*) Reported by H. C. Roper, Esq., Barrister-at-Law.

debt.] The order at least shows that it was not his money. There is evidence of his admission that the money was in his hands.

KEKEWICH, J.—I think that any order I may make must be based on Kay, J.'s order. I do not say that I may not look at the affidavits which are entered in the order as read in order to explain the order, but when once I understand the order I must be guided by the order, and not look beyond it in considering whether I have jurisdiction to direct the issue of an attachment against this trustee or not. The order directs him, as trustee of the will of Maria Simes, as to one part, and as trustee of the settlement as regards the other part, to pay into court by a certain date two sums of money. It is specified that the order is made against him as trustee, and that gives the court jurisdiction to enforce it against him, and to direct an attachment to issue for non-compliance. But, in the meantime, bankruptcy supervenes before this motion is brought, and so he comes within the proviso in section 9 of the Act of 1883, that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court, and on such terms as the court may impose." This is clearly a debt provable in the bankruptcy. The money was payable by the bankrupt as a trustee, but whether it was payable in that respect or as a debt claimable by virtue of the order, it is a debt which he can be called upon to pay—that is, it is provable in his bankruptcy. Therefore, the remedy against the person or the property of the debtor is for the moment suspended. Mr. Waggett suggests that it must be money in his hands, or the order would not have been made; but, even if so, it would still be merely a debt. It would be quite different if it were a sum in Consols, or money on deposit at a bank, or anything of that kind, for then, being a fund that he was trustee of, it would not be the property of the debtor at all, and in that case there might be a remedy against his person. But there is nothing of that kind here, so the application is wrong, under the 9th section of the Bankruptcy Act, 1883. Mr. Waggett points out that the result of this will be that a fraudulent trustee who becomes a fraudulent bankrupt, and by reason of his own conduct does not get his discharge, may by that fact acquire his freedom. That fact is to be deplored, but I have nothing to do with it now. The words of the Act seem to me to be plain, and besides them I have the two cases cited by Mr. Oswald: *Cobham* v. *Dalton*, under the Act of 1869, and *In re Ryley, Ex parte The Official Receiver*, under the present Act. So I have two cases giving effect to the plain language of the Act, and, in my opinion, I have no jurisdiction to make the order, and must refuse the application. Mr. Oswald has asked for costs on the ground that the plaintiffs' solicitor must have known all the circumstances, but I do not care to give costs to a defaulting trustee.

Motion refused. No order as to costs.

Solicitors, *E. S. Sydney; Emanuel, Round, & Nathan.*

Chan. Div. Stirling, J. } Feb. 18, 19, 20; March 27.

In re CARDIFF SAVINGS BANK. DAVIES' CASE. (*a.*)

Company—Savings bank—Winding up—Trustees and managers—Omission—Neglect—Misfeasance—Contributory—Savings Banks Acts Amendment Act, 1863 (26 *&* 27 *Vict. c.* 87)—*Trustee Savings Bank Act,* 1887 (50 *&* 51 *Vict. c.* 47)—*Companies Act,* 1862, *ss.* 165, 200.

By section 11 *of the Savings Banks Acts Amendment Act,* 1863, *trustees or managers of savings banks are exempted from personal liability, except* (inter alia) *for neglect or omission in complying with the rules and regulations required by the Act to be adopted for the maintenance of checks and the audit and examination of accounts.*

D., a former manager and trustee of a savings bank omitted to observe the requirements of the section, and frauds were committed by the actuary which necessitated the winding up of the bank.

Held, that the section relieved a trustee or manager from liability to contribute under section 200 *of the Companies Act,* 1862, *and that D.'s name ought not, therefore, to be settled on the list of contributories.*

Held, also, that the omission or neglect to observe the rules and regulations, although it did not render a trustee liable as a contributory, constituted a misfeasance or breach of trust within the meaning of section 165 *of the Companies Act,* 1862, *and that D. must, therefore, contribute an adequate sum to the assets of the bank by way of compensation.*

Adjourned summons.

Two summonses were issued by the official liquidator of the Cardiff Savings Bank, by the first of which he sought to have Mr. Peter Davies settled on the list of contributories; and, by the second, he asked that Davies as being a contributor, or otherwise under the provisions of section 165 of the Companies Act, 1862, and having regard to section 11 of the Savings Banks Acts Amendment Act, 1863, might be declared liable in respect of certain acts and omissions which fell, as it was alleged, within the exceptions from the protective powers of that section.

The Cardiff Savings Bank was originally formed so far back as 1819, but it was reconstituted after the passing of the Act of 1863, and the rules under which it thenceforth carried on business were certified by Mr. Tidd Pratt on the 19th of November, 1863. Its affairs were conducted by a president, seventeen trustees, and thirty-seven managers. Peter Davies, the respondent, became a manager in 1868, and a trustee in 1882. He carried on business as a draper at No. 10, Duke-street, Cardiff, the street in which the offices of the bank were situated, and he appeared to have taken an active part in the management of the affairs of the bank from the date of his appointment as manager down to the time when the bank ceased to carry on business. From 1850 down to the time of his death (the 26th of March, 1886) the actuary and paid officer of the bank was James Emerson Williams, who appeared throughout his life to have enjoyed the respect and complete confidence of the trustees and managers of the bank, as well as of his fellow-citizens at Cardiff, where he held various public offices. Upon his death, however, it was ascertained that he had been guilty of fraud, and had abstracted very large sums of money which ought to have been found in the coffers of the bank, whose assets were insufficient to meet the claims against it by

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

many thousands of pounds. Under these circumstances the bank suspended payment in April, 1886. Subsequently, in or about September of the same year, arrangements were made by the trustees and managers under which a large number of the depositors accepted payment of 17s. 6d. in the pound in some cases, and in others of 17s. in the pound, in satisfaction of their claims. A certain number of the depositors, however, refused to accept these terms, and the affairs of the bank were investigated by a commissioner (Mr. Lyulph Stanley) appointed under the Trustee Savings Bank Act, 1887 (50 & 51 Vict. c. 47), and ultimately, upon the petition of the Commissioners for the Reduction of the National Debt, presented under section 3 of the last-named Act, an order was made for the winding up of the bank as an unregistered company under the provisions of the Companies Act, 1862, and the Acts amending the same.

The charge against Davies of misfeasance and breach of trust in relation to the bank was in respect of various matters which may be grouped under the following heads — (*a*) neglecting or omitting to comply with the rules and regulations required by the Act of 1863 with reference to transactions of deposit and repayment; (*b*) neglecting or omitting to comply with such rules and regulations with reference to the audit and examination of accounts; (*c*) permitting deposits to be received which were illegal or irregular by reason of their exceeding in amount the limits imposed by the Act, or by reason of the depositor being entitled to the same benefit from other funds in the bank, or from funds in another savings bank; (*d*) misapplication of the funds of the bank after it suspended payment in connection with the arrangements for effecting compositions with the depositors. The rules and regulations required in the case of every savings bank by the Act of 1863 which Davies was charged with neglecting to observe were those comprised in sections 2, 3, 6, 10, 11, 21, 38, 39, and 55; and of these those comprised in section 6 were the principal. Shortly stated, the chief requirements of section 6 are that (2) not less than two persons, being either trustees, managers, or paid officers, one of whom is to be a trustee or manager, are to be present on all occasions of public business, and to be parties to every transaction of deposit and repayment, so as to form a double check on every transaction with depositors; (3) the depositors' pass books are to be compared with the ledger on every repayment; (5) no money is to be received from or paid to depositors except at the office and during the usual hours for public business; the other requirements are sufficiently referred to hereinafter.

Section 11 is as follows:—"No trustee or manager of any savings bank (subject to the provisions hereinafter contained in respect of savings banks in Ireland) shall be personally liable, except—

1. For moneys actually received by him on account of or for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank.

2. For neglect or omission in complying with the rules and regulations required by this Act to be adopted as hereinbefore is provided in the maintenance of checks, the audit and examination of accounts, the holding of meetings, and keeping minutes of proceedings thereat.

3. And also for neglect or omission in taking security from officers as is hereinbefore provided."

The rules of the Cardiff Savings Bank provided (rule 2) that "the savings bank shall be open for receipts and payments on every Saturday throughout the year, between 10 and 2 o'clock, or on such day or days in every week as the trustees and managers for the time being shall in general or special meeting determine; and for the receipt of deposits only, on every Monday and Saturday evenings, from 7 till 8.30 p.m." No other days than those specified in the rules for receipts or payments were ever appointed. The rules embodied in most cases, in the very language of the statute, the requirements of section 6 of the Act of 1863. If they had been duly observed, then (1) no money could have been received or paid from or to depositors except at the office of the bank, and during the usual hours for public business; (2) one trustee or manager ought, in addition to the actuary, who was a paid officer of the bank, to have been present on all occasions of public business, and to have been a party to every transaction of deposit and repayment; (3) the depositor's pass book should have been compared with the ledger on every transaction of deposit and repayment; (4) an extracted list of depositors' balances should have been examined by the auditor once in every year; and (5) a book containing such list, checked and certified by the auditors, should have been open at any time during the hours of public business for the inspection of every depositor as respects his own account.

It was alleged by the liquidator, and in the view of the court was established by the evidence, that to the knowledge of Davies these requirements were not complied with. It appeared that the actuary was in the habit of receiving deposits and making repayments on days other than Saturdays and Mondays, and in the absence of a trustee or manager. The sums received or paid were entered in the depositor's pass book, and also in the cash book kept by the actuary, and this latter book was signed by the depositors. Afterwards, in many cases, the entries in the actuary's cash book were copied into a cash book kept by the trustees, and the transaction thus appeared to have taken place at a time when the bank was open for public business. The result of this mode of conducting the affairs of the bank was, as the court held, that the actuary falsified his cash book, and represented that he had made greater payments than he actually had made, and had received smaller sums than had actually come to his hands. In each case he retained the difference and thus committed frauds to a very large extent.

Sir R. E. Webster, A.G., *Fischer, Q.C.*, and *Ingle Joyce*, for the liquidator, referred to *Crisp* v. *Bunbury*, 8 Bing. 394; *Clough* v. *Bond*, 3 My. & Cr. 490; *Ghost* v. *Waller*, 9 Beav. 497; *Bostock* v. *Floyer*, 14 W. R. 120, L. R. 1 Eq. 26; *In re Oxford Benefit Building and Investment Society*, 35 W. R. 116, 35 Ch. D. 502; Companies Act, 1862, ss. 62, 74, 165, 199, 200; Savings Banks Acts Amendment Act, 1863, ss. 11, 39, 48, 55.

Buckley, Q.C., and *Upjohn*, for Davies, cited *Swan* v. *North British Australian Co.*, 11 W. R. 862, 2 H. & C. 175: *In re United Service Co., Johnston's claim*, 19 W. R. 457, L. R. 6 Ch. 212.

Sir R. E. Webster, A.G., in reply, referred to *In re Royal Victoria Theatre Syndicate, Moore and De la Torre's case*, 22 W. R. 873, L. R. 18 Eq. 661; *In re Shields Marine Insurance Association, Lee and Moor's case*, 16 W. R. 685, L. R. 5 Eq. 368; *In re Hoylake Railway Co., Ex parte Littledale*, 22 W. R. 443, L. R. 9 Ch. 257; *In re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association*, 27 W. R. 88, 8 Ch. D. 679.

Cur. adv. vult.

March 27.—Stirling, J., after stating the facts of the case, as they appeared from the evidence, as to the mode in which the affairs of the bank were conducted, continued:—It appears to me, therefore, that the rules and regulations required by the Act of 1863 to be adopted as regards the maintenance of checks and the examination of accounts were to the knowledge of the respondent

Davies not complied with: and the question arises, What is his liability in respect thereof? Now apart from the statute, if the president, trustees, and managers had carried on the business of the savings bank, and had received by themselves or their agents sums of money from depositors, I apprehend that they would have become indebted to the depositors for the sums so received, and would have each been liable to the last farthing of his fortune for the debts so incurred; and the circumstance that the business was carried on from benevolent or public spirited motives would not have served to exonerate any one of them from the fulfilment of such liability. The Legislature has, however, thought fit to intervene, and, regarding the promotion of thrift among persons of small means as a matter of great public importance, it has enacted, by the Act to consolidate and amend the laws relating to savings banks, 26 & 27 Vict. c. 87, s. 11, that the liabilities of the trustees and managers of savings banks are to be limited in the following manner. [His lordship read the section of the Act, and continued:—] On this occasion I have not dealt with any liability under sub-section 1, for although attention was directed to it in argument it was ultimately admitted that the summons before me was not framed with reference to that sub-section, and any liability of the respondent will be unaffected by my decision on the present occasion. What I have now to deal with is the liability of Davies arising from his neglect or omission to comply with the rules and regulations referred to in sub-section 2.

It was contended that, under section 200 of the Companies Act, 1862, Davies was liable as a contributory. The material part of that section is as follows:—"In the event of an unregistered company" (which this bank is to be treated as being) "being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of . . . any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company. . . ."

Now this section has been the subject of judicial construction in several cases, and in particular by the Court of Appeal in *Ex parte British Nation Life Assurance Association*. James, L.J., there says (27 W. R., at p. 93, 8 Ch. D., at p. 708):—"It is said that under the 200th section of the Act of 1862 all persons legally or equitably liable to contribute to the assets are contributories, and may be put on the list as such. It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute, but that does not make him a contributory as between him and the company. The company may get at him as it has in several instances through and in the name of the trustees. But, still, the equitable liability is to the trustee only, and there is no privity or direct right of any kind as between the company and the *cestui que trust*. If an officer of the company has misappropriated assets"—that is a very material point—"he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory. The plain meaning of the Act is a legal or equitable liability to contribute in the character of a partner."

By that exposition of the meaning of the enactment I am bound; and I therefore hold that the liability referred to in section 200 is the legal or equitable liability to contribute in the character of a partner. Is, then, this the nature of Davies's liability? In my opinion it is not. I think that section 11 of the Act of 1863 relieves him of such a liability, but as the price of such exemption imposes another—namely, the liability for neglect or omission in complying with the rules and regulations; and that this liability does not make him a contributory any more than does the liability of an officer of a company to refund to the liquidator assets of the company which he has misappropriated. It was said, however, that even if Davies were not liable to pay or contribute to the payment of any debt or liability of the bank, he was, at all events, liable to pay or contribute to the payment of the costs, charges, and expenses of the winding up. In my opinion this is not so. The liability to contribute to the costs of winding up must, like the liability to contribute to debts, be a legal or equitable liability in the character of a partner. If, without any default on the part of the trustees or managers, the assets had proved insufficient for the satisfaction of the liabilities of the bank, and it had become necessary to have recourse to the process of winding up merely in order that the liabilities might be duly ascertained and the assets properly distributed, I cannot see how, in the face of section 11 of the Savings Bank Act, it would be possible to hold the trustees or managers liable for any part of the costs of such a winding up. The liability in respect of these costs, if such there be, and it is not necessary for me on this occasion to say whether there is or is not, must be attributable to the neglect or omission specified in that section.

In my opinion, therefore, Davies cannot be placed on the list of contributories. Is he, then, liable under section 165 of the Companies Act, 1862? That section provides:—[His lordship read the section, and continued:—] The Legislature has relieved the trustees and managers of savings banks from personal liability, except for neglect or omission to comply with certain rules and regulations. Those rules and regulations have, to the knowledge of Davies, not been complied with; and under these circumstances he has been guilty certainly of omission, if not also of neglect, within the meaning of section 11 of the statute. That omission or neglect appears to me to constitute a misfeasance or breach of trust within the meaning of section 165, and, I think, by reason of it there is sufficient *primâ facie* evidence to satisfy me that the assets of the bank are less than they ought to have been, and that claims which those assets are insufficient to meet may be established in the winding up. That being so, Mr. Davies may, in my opinion, be properly compelled to contribute an adequate sum to the assets of the company by way of compensation. It was said on behalf of the respondent that the actuary was a man of high respectability, who enjoyed the confidence, not only of the trustees and managers, but of all his fellow townsmen in Cardiff. That appears to me to be no defence whatever. The Legislature has imposed on the trustees and managers this obligation—that not less than two persons shall be present on all occasions of public business for the purpose of watching and checking all transactions of deposit and repayment. That duty, to the knowledge of Davies, was omitted to be performed. What was the object of the double check, for the maintenance of which, provision is so anxiously made by the statute? Surely to prevent the bank from being defrauded. How, then, can it be any excuse for the omission that the transaction of business was intrusted to a single person to all appearance worthy of trust?

Such persons, as experience shows, not unfrequently yield to such temptations as were offered in the present case to the actuary; and the possibility of such an event was an evil against which the Legislature, in my opinion, desired to guard. Such frauds constitute one of the very mischiefs which it was the aim of the

statute to prevent. These observations appear to me to answer another objection urged on behalf of the respondent—namely, that the damage occasioned by the acts of the actuary was too remote. Again, it was said that other trustees and managers were not less responsible than Davies for the non-observance of the statutory requirements, and that an order ought to be made against them as well as against him. The evidence certainly appears to indicate that other trustees and managers may or ought to have been aware of the disregard of the regulations, and it is quite possible that at some future period they may be held liable for the neglect or omission which I hold to be established against Davies. If so, it may be desirable that the amount to be contributed by each of them to the assets of the company by way of compensation should be ascertained at one and the same time; but this appears to me to afford no reason why I should abstain from now making a declaration of the liability of Davies. It is expressly laid down in *In re British Guardian Life Assurance Co.*, 28 W. R. 945, 14 Ch. D. 335, that there is nothing in section 165 which points to the necessity of having everyone concerned before the court upon an application under it. On one matter which was much pressed upon me I must say a few words, although I do not regard it as at present ripe for decision. It was strenuously contended that the actuary had no authority on behalf of the bank to receive any sums of money out of the usual hours for public business; and that there could be no liability on the part of Davies for any such receipts which did not come to the actual possession of the bank. It is to be remembered, however, that the true receipts were entered in the pass books of the depositors and in the ledgers of the bank, and that in many cases the depositors were compromised with, on the footing of the assets of the bank being liable to make good these receipts; and, without expressing a final opinion on the matter, I am of opinion that there is a case for further investigation in respect of which it may ultimately prove that Davies is under some liability. Subject to any observations which may be made on the form of the order (to which I shall be most willing to give attention), I think I am bound to declare that Davies is liable, in the words of the statute, for neglect or omission in complying with the rules and regulations of the statute 26 & 27 Vict. c. 87, to be adopted in the maintenance of checks and the examination of accounts; and to direct an inquiry what sums of money ought to be contributed by him to the assets of the company in respect of such neglect or omission.

With the remaining questions raised by the summons I propose to deal briefly, for they also appear to be at present not ripe for decision. The evidence shows that sections 38 and 39 of the Act of 1863 have been violated, and that deposits were received by the bank which were totally or partially improper to be received, either by reason of the deposit exceeding in amount the limits imposed by statute or by reason of the depositor being entitled to some benefit from the funds of the bank or some other savings bank. In 1884 and 1885 the attention of the directors was called to this by the auditor in those reports to which I have already referred. [His lordship then read passages from the auditor's reports for 1884 and 1885, and continued:—] The result of this is that the National Debt Commissioners have paid interest on deposits of larger amount than the statute authorizes, and they have made a claim in the winding up to be repaid the interest on such deposits so far as they exceeded the legal limit. Until that claim has been dealt with and its validity established, it would seem to me premature to express an opinion on the liability of Davies in respect of these excessive deposits. Lastly, the trustees and managers are alleged to have misapplied the funds of the bank after the suspension of payment in stamping the documents by which certain of the depositors purported to release the trustees and managers from liability in providing for the costs and expenses of and connected with the preparation and execution of such documents and otherwise, and in payments to a Mr. Roberts for services in connection with what is termed "the unauthorized winding up of the bank," and otherwise. Questions are likely, as I understand, to arise in the present winding up with reference to these releases and the proceedings of the trustees and managers after the suspension of the bank; and, until these have been dealt with or disposed of, I do not see how the claims of the liquidator can be effectually dealt with. It seems to me best that these portions of the summons should stand over for the present; but I am quite willing to consider the propriety of directing any inquiries the prosecution of which will lead to any useful result.

Solicitors, *Hare & Co.; Bell, Brodrick, & Gray*, for *H. Cousins*, Cardiff.

Chan. Div. Kekewich, J. — April 19, 26.

In re Bristol Joint-Stock Bank. (a.)

Company—Winding up—Reserve fund—Shareholder's petition—Impossibility of carrying on business—Just and equitable cause for winding up—Majority of shareholders opposing petition—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 79, 80—*Companies Act*, 1879 (42 & 43 *Vict.* c. 76), *s.* 5.

The capital of a company was divided into £10 shares, of which £5 per share was not to be called up except in the event of a winding up. The company never made any profits during the six years of its existence; it was now doing no business, and all the paid-up capital had been lost, except enough to show a balance of £337 of assets over liabilities. It still had offices. 2,400 shares out of 100,000 had been issued. There were no debts, except directors' fees, which would not be claimed except in a winding up. On a winding-up petition by a contributory, supported by a minority of the shareholders,

Held, that the court had power, where the substratum of a company had gone, to order a winding up, even against the wishes of the majority of the shareholders, where there were no debts, and on a shareholder's petition; that the shareholders had a right to refuse to have the business continued at the cost of the reserve fund, which they had contracted to subscribe to only in the event of a winding up; that the subject-matter of the company had failed; and that the winding-up order must be made.

Petition.

This was a winding-up petition by a shareholder, involving a question as to the effect upon the position of the company of the possession of reserve capital.

The company was originally registered on the 21st of May, 1884, without articles of association, and with a share capital of £2,000, but by a special resolution of the 12th of June, 1884, confirmed on the 30th, articles of association were adopted in substitution for Table A of the Companies Act, 1862, and the share capital was increased by the addition of £998,000 divided into 99,800 shares of £10 each.

By the memorandum of association it was provided that not more than £5 per share should be called up except in accordance with the provisions of the Companies Act, 1879.

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

2,400 shares were allotted, and on these £5 per share had been paid.

The company commenced business as bankers in Bristol shortly after the date of the registration, but their operations resulted in a loss, and in 1888 they surrendered the lease of their premises and retired to a small office in a side street, where the business was carried on by the chairman of the directors with one clerk and an office boy. There were two other directors, but they lived at a distance.

The balance-sheet of the 7th of December, 1889, showed total liabilities £889 15s. 8d. against assets £1,226 17s. 5d., leaving a surplus of £337 1s. 9d., but the whole of the called-up capital of £12,000 had disappeared in preliminary expenses and business losses. The directors, however, insisted that the bad debts had been valued at too low a figure. The auditor's report also stated that there might be a further liability to the directors in respect of remuneration and travelling expenses, which were not included in the balance-sheet. The directors' fees were in arrear to the extent of about £1,000, but it was stated that they did not intend to ask for payment of any part of this unless the company were wound up. There were no other outside creditors. Two winding-up petitions had been previously presented, but unsuccessfully.

Negotiations for the formation of a new bank having its head office in London and for the fusion of the company in that undertaking were in progress, but no definite proposal had as yet been made.

The petition was presented on the 8th of March, 1890.

Thereupon a meeting of shareholders was called, when twenty-seven attended, representing £3,275, and passed a resolution unanimously requesting the directors to oppose the petition.

Under the articles of association five shareholders were the number requisite to form a quorum at general meetings, and motions, except in certain cases, were to be decided by a simple majority of votes given thereon, and in the first instance by a show of hands. Article 125 provided for a declaration of dissolution at a special meeting when three-quarters of the paid-up capital should have been exhausted; and by article 126 the company might at any time pass a resolution for a voluntary winding up by a majority of at least three-quarters in number and value, present in person or by proxy.

The shares of the company had been returned to the Inland Revenue as valueless, and some of them had been sold for 2s. 6d. each.

Bigby, Q.C., and *Farwell*, for the petition.

Benshaw, Q.C., and *Farwell*, for forty shareholders holding 1,019 shares, supported the petition.

Marten, Q.C., and *E. Ford*, for the company.—There are no debts except the directors' fees, and they will not claim them except in the event of a winding up. There has been no demand for payment of debts; *Ex parte Spackman*, 1 Mac. & G. 170; *In re European Life Assurance Society*, 18 W. R. 9, L. R. 9 Eq. 122. The substratum of the company has not gone: *Baring* v. *Dix*, 1 Cox. 213; *In re Suburban Hotel Co.*, 15 W. R. 1096, L. R. 2 Ch. 737. The court will not order a winding up where, as here, a majority of the shareholders are opposed to it: *In re Langham Skating Rink Co.*, 5 Ch. D. 669, 25 W. R. Dig. 65; *In re Middlesborough Assembly Rooms Co.*, 28 W. R. 868, 14 Ch. D. 104.

Haldane, Q.C., and *Oswald*, for twenty-five shareholders holding 605 shares.—The court will not interfere with the domestic affairs of the company, and the shareholders have agreed that the majority shall bind the minority. No order to wind up a company possessing reserve capital has ever been made except on a creditor's petition. The company is not unable to pay its debts within sections 79 and 80 of the Companies Act, 1862. The assets are greater than the liabilities, so this is only a domestic question, and gives a shareholder no right to invoke the protection of the court. The company is a going concern, negotiations are on foot to transfer the business to another company. The right it possesses to issue capital is valuable, since duty was charged on nominal capital by the Customs and Inland Revenue Act, 1888, s. 11: *In re Haven Gold Mining Co.*, 30 W. R. 389, 20 Ch. D. 151; *In re German Date Coffee Co.*, 30 W. R. 717, 20 Ch. D. 169.

No reply was called for.

Kekewich, J.—I think a winding-up order must be made. This is a petition presented by a shareholder and supported by other shareholders, and none of the creditors appear, at least in that character. The shareholders do not all appear, but of those who do appear more support than oppose the petition. It must not be assumed from that that a majority of the whole of the shareholders support the petition; far from it. If the shareholders desiring a winding up were in a majority they would, no doubt, obtain it in a different way, and not by petition. But I must take it that those who do not appear here either in support or opposition are not sufficiently careful about the result to express any opinion. Probably some are unable to be present, but the substantial result is as I have stated. In all cases where a contributory petitions for a winding up the court has regard to two matters which must, from first to last, be kept in view—first, the unwillingness of the court to interfere with shareholders in the management of their affairs, including the question whether the business ought to be continued or not, and whether the winding up should be voluntary or by the court. There are cases in which no question as to a voluntary winding up arises, and then the only question is whether there should be a winding up by the court or a continuance of the business. That is the case here. The opposition say that the business ought to be continued. The second point is, that there is jurisdiction in extreme cases to wind up a company at the instance of a contributory, notwithstanding that, as in this case, he is not supported by a majority of the shareholders. The court has expressed considerable reluctance to exercise this jurisdiction, and has cautiously expressed the terms of its exercise; yet that right has been sufficiently asserted. The jurisdiction was asserted more than once by Lord Cairns in *In re The Suburban Hotel Co.*, and also by James, V.C., in *In re The European Life Assurance Society*. In the former case and in several others the ground of the decision has generally been the impossibility to continue the business. Lord Cairns says, at page 745:—"That case (*Jennings* v. *Baddeley*) therefore established this proposition, and this only, that, if there be a complete impossibility of pursuing the partnership business which was contemplated at the time the partnership was made, the court, in the case of an ordinary partnership, would dissolve it even without consent"; and he says that that would refer to a joint-stock company. It is not very easy to say what is meant by the expression "impossibility to carry on business," but several cases have come before the court. I will take three as illustrations. The *Suburban Hotel Co.*, in which it was held that the impossibility did not exist; *In re Haven Gold Mining Co.*, and *In re German Date Coffee Co.* In *In re Haven Gold Mining Co.* the mines had no existence, or could not be possessed by the company, so the physical substratum was altogether gone. In the *German Date Coffee Co.* there was a patent for making coffee out of dates, but the court came to the conclusion that the company was formed to work a German patent which had never existed, and that, therefore, the subject-matter of the

business failed. So we have two instances where the physical substratum of the company was non-existent and the company was ordered to be wound up. But it is to be observed that in these cases reference was made to *Baring* v. *Dix*, an older case of ordinary partnership, as stating the rules on which the court proceeds, and there, notwithstanding the use of the word "invalid" by Lord Cairns, I collect from the report in Cox that the patent did exist, but the invention totally failed, and was entirely given up; and it was held that the substratum of the partnership had failed, and the court directed a reference to the master to see whether the business could be carried on according to the articles of partnership, with an intimation that, if it could not, the partnership must be dissolved. So failure of the substratum was treated as ground for a dissolution. I take it, therefore, that, where the subject-matter of a company is gone, the court will make a winding-up order, not because the shareholders wish it, but because what the company was formed for cannot be done, and that the court has jurisdiction to order a winding up. Before considering that point with reference to this case I must revert to Mr. Haldane's contention, which was also mentioned by Mr. Rigby in his opening. This case is different from any other case which has been presented to the court. I am not aware of any petition by a contributory asking the court to wind up a company possessing reserve capital. The chartered companies, which were formed on the principle of there being a certain amount of the original subscription available in the event of liquidation, were wound up sometimes by the court, but always on a creditor's petition.

The Act of 1879 has not long been in existence, and I have no knowledge of any case in which a contributory has come to the court and said, "I decline to allow my credit to be further pledged as regards the amount which I am bound to subscribe to in the event of a winding up, but in no other event."

The books are full of cases distinguishing between the winding up of companies limited and unlimited, but there appear to be none on this point. A contributory is bound to contribute to the full extent for which he has contracted, to enable the business to go on, and he cannot be heard to say that, because he would rather not pay up his shares in full, the amount which he has agreed to contribute shall not be contributed to enable those who wish to continue the business to do so. He has contracted to contribute as long as the business is continued, and he cannot refuse to do so. As regards unlimited companies, other considerations are allowed to intervene. I need not dwell upon those.

Here the case is different. A shareholder is bound to pay £5 per share, and another £5 if the company is ordered to be wound up. I must inquire what is the contract between the petitioner and the other partners who are concerned in the petition. The question of the shareholder's contract was discussed by Lord Cairns in *In re the Suburban Hotel Co.*, where he considered the question as regards the position of a limited shareholder, and it was also discussed in *In re the European Life Assurance Society*. The question there was the contract on a policy—that is, with a creditor, not between shareholders *inter se*. I understand that the contract between shareholders is that the trade shall be conducted with a certain amount of capital, of which the shareholder contributes a portion, and on the faith of the credit attaching to his liability to contribute more in case of a winding up. But it is said that the trade must be carried on notwithstanding that the capital is exhausted, and so as to bring on the shareholder this contingent liability. That seems to me to be putting the reserve capital on precisely the same footing as the original capital, and saying that the trade must be continued, and he must be made liable for this contribution, not to pay the debts of the company, but in order to enable the directors to incur debts. That is not the contract into which he has entered.

Mr. Marten referred to article 126 in opposition to that view, but that refers to the dissolution of the company in certain events, and it does not seem to me to exclude the jurisdiction of the court if the case is made to fall within the Act of 1862. If the contract is what I hold it to be, the shareholders may invoke the protection of the court, notwithstanding the articles, under which they cannot insist on a winding up except in the events mentioned in article 126. Here events justify me in making a winding-up order, and compel me to do so. I take the affidavits and the balance-sheets and I find it suggested that the state of affairs is not truly set out in the latter, and that the assets are really more valuable than they are represented to be. It is extremely dangerous to make statements as to what was the real position of affairs, but there is a more satisfactory answer than that. I have heard no statement or evidence that one single penny of bad debts has been recovered since last year. So I think that the statement in the balance-sheet as to the bad debts is true. Then as to the other assets, the only point is the preliminary expenses. Under the articles the directors are empowered to distribute the payment of preliminary expenses over several years. That is reasonable. The expenses might be large, and it might be unfair to set them against capital or against the income of any one year, and it might be fairer to spread them over several years. But the money is no less gone because it is distributed over several years. Preliminary expenses have no less been incurred because they are paid for during several years.

The result is that there is a surplus of £337 1s. 9d. on paper. Part of that consists of office furniture and part of cash in the hands of agents of the company. But, putting it at its best, there was a surplus of £337 1s. 9d. Till this morning I had put against that the debt to the directors, but I am now told that they do not wish to insist upon that except in the event of a winding up. Previously it was stated to me in the alternative, or unless the company is successful, which, of course, was the only other chance of their getting it. Now they say they will take their fees only in the event of a winding up. The result of that is that there is no debt of the kind payable, so I pass over the subject of debts with this remark, that I do not agree that inability to pay debts means debts not only demandable but demanded. There is not a word in James, V.C.'s judgment to that effect. So there is a surplus of £337 1s. 9d. as assets with which to continue the business, but they have made no profits at all.

It is suggested that they made £80 one year, but it cannot be said that they ever really made a profit. The company has been in existence six years, and on the average amount of expenditure this surplus will be gone in less than one-third of a year, if it be not already gone. But I am told that there are two or three reasons why the company should not be treated as in a hopeless state of insolvency. There is hope of a transfer to another bank. It is hardly conceivable that any bank would give anything for this business, although it is said that negotiations are in progress. So I pass over that. Then I am told that they may carry on a better business in future; that they have reduced their expenses and changed their offices, and are working in the most economical way. No doubt it is. Those offices are in a back street, with only a manager and an office boy to do the work. The company is said to have a large capacity for issuing capital, that a large part of the capital has not been issued, and that the power to issue it is valuable. It is drawing largely on the imagination to suppose that the business of a bank which has exhausted all its paid-up capital, and has not yet made a profit so as to pay a dividend, and whose shares have been returned

to the Inland Revenue as valueless, and are said to have been sold for 2s. 6d. a share, can have any capital to issue in a practical way. Does that bring the case within the principle to which I have referred? Has the substratum gone? Has the subject-matter of the company gone? I am perfectly well aware that in answering this question in the affirmative I am going beyond the decisions in the *Haven Gold Mining Co.* and the *German Date Coffee Co.*, but I think I shall be deciding in accordance with the views expressed by Lord Cairns in the *Suburban Hotel Co.*, and by James, V.C., in the *European Life Assurance Society*, and with the principle embodied in *Baring* v. *Dix*. I must not forget that this is a bank or the essentials for carrying on a banking business. It is impossible that this company can continue this business successfully, because it has not that without which a banking business cannot be carried on. Several shareholders oppose the petition, and the court is reluctant to interfere, but I think that this is a peculiar case, and a peculiar contract by the shareholder—a contract not going to the extent urged by the opponents of the petition. The petitioner is entitled—certainly he is if supported by several other shareholders—to say, I will not have the business carried on in order that at some future time, if the business is not successful, the reserve capital may be called up and used in assisting a business which I have not contracted so to assist. The order must go, and the usual order as to costs.

Solicitors, *Mackrell, Maton, & Godlee*, for *H. C. Trapnell*, Bristol; *Meredith, Roberts, & Mills*, for *W. H. Brown*, Bristol; *Herbert F. Oddy*.

House of Lords.

From C. A. (England). } May 2, 3, 13; Dec. 9, 1889.

MIDLAND RAILWAY CO. v. ROBINSON. (a.)

Railway company—Mines and minerals — Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77—79 —*Limestone—Open working.*

Beds of ironstone and limestone are "mines of ironstone and other minerals" within section 77 *of the Railways Clauses Act*, 1845, *and this is so although, according to the custom of the district, they are got by surface workings.*

So held by Lords Herschell *and* Watson (Lord Macnaghten *dissenting*).

It is sufficient, under section 78, *if the owner have a* bonâ fide *intention of working by his lessees or licensees.*

Decision of the Court of Appeal (36 *W. R.* 650, 37 *Ch. D.* 386) *affirmed*, Lord Macnaghten *dissenting.*

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) (36 W. R. 650, 37 Ch. D. 386).

The respondent was owner of lands in Northamptonshire through which about a mile and a half of the Kettering, Thrapstone, and Huntingdon Railway passed. In the conveyance to the railway company there were no special provisions relating to mines and minerals, the Railway Clauses Act, 1845, being incorporated in the special Act. The Midland Railway afterwards acquired statutory powers to work the railway. The respondent was the owner in possession of the minerals under the railway, and of the minerals under a portion of the land adjoining the railway; other portions of the lands adjoining had been leased by the respondent to a coal and iron company and worked by them. There was evidence that the respondent *bonâ fide* intended to work by his lessees or licensees, and it was the custom in that district to work by surface operations.

In January, 1886, the respondent gave notice, under section 78 of the Railway Clauses Consolidation Act, 1845, that he intended to work the mines and minerals under portions of the railway and adjoining land as shown in a plan. Under the portions of the railway and adjoining lands referred to in the notice, were beds of ironstone and limestone, at depths varying from six to thirty-six feet. Negotiations followed, but eventually the appellants brought this action for an injunction to restrain the respondent, his servants, agents, and workmen, from working the mines and minerals described in the notice so as to injure the railway and works.

Chitty, J., dismissed the action, and the Court of Appeal affirmed his decision.

Rigby, Q.C., and *Sir A. Watson* (*Beale, Q.C.*, and *W. Baker* with them), for the appellants.

Sir Horace Davey, Q.C., and *Romer, Q.C.* (*Gye* and *William Radcliffe* with them), for the respondent.

Lord Provost of Glasgow v. *Farie*, 37 W. R. 627, 13 App. Cas. 657; *Darvill* v. *Roper*, 3 W. R. 467, 3 Dr. 294; *Bell* v. *Wilson*, 14 W. R. 493, L. R. 1 Ch. 303; *Midland Railway Co.* v. *Haunchwood Co.*, 30 W. R. 640, 20 Ch. D. 552; *Smith* v. *Great Western Railway Co.*, 26 W. R. 130, 3 App. Cas. 165, 178; *Dixon* v. *Caledonian Railway Co.*, 29 W. R. 249, 5 App. 820; *Great Western Railway Co.* v. *Bennett*, 15 W. R. 647, L. R. 2 H. L. 27, 40; and *Errington* v. *Metropolitan District Railway Co.*, 30 W. R. 663, 19 Ch. D. 559, were referred to.

Dec. 9.—Lord HERSCHELL.—The main question in this case is whether certain beds of ironstone and limestone lying under and near the railway of the appellants are their property or the property of the respondent.

The appellant company, the Kettering, Thrapstone, and Huntingdon Railway Co., whose railway and undertaking are now, under statutory powers, worked by the other appellants, the Midland Railway Co., purchased from the respondent's father and predecessor in title, in the year 1865, certain land on which a portion of their railway has been constructed.

The purchase was made by virtue of the company's Act passed in 1862, which incorporated the Railway Clauses Consolidation Act, 1845. The grant of the land contained no special provisions relating to the mines and minerals under the same. This being so, section 78 of the incorporated Act operated to except from the grant any "mines of coal, ironstone, slate, or other minerals, except such parts thereof as were necessary to be dug or carried away or used in the construction of the works." It is admitted that there lay beneath the lands purchased at depths varying from six to thirty-six feet, beds of ironstone and limestone, and it is not disputed that these are "minerals" within the meaning of the enactment just referred to. The principal question for your lordships' determination is whether these beds of ironstone and limestone are "mines of" ironstone and other minerals, according to the true interpretation of that enactment, and therefore excepted from the conveyance to the company.

I say this because, although considerable difference of opinion existed amongst those of your lordships who were parties to the judgment in the case of *The Provost of Glasgow* v. *Farie*, I think all were agreed that the words "mines of" had relation, not only to the word "coal," but to "ironstone, slate, or other minerals" also. The turning-point, therefore, of the decision upon this part of the case must be the interpretation to be put upon the

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

word "mines" in section 77 of the Railway Clauses Consolidation Act.

It is contended on behalf of the appellants that the word "mines" is to be construed as applying only to those minerals which, according to the custom of that part of the country where they are situate, would ordinarily be won by underground workings, and that it does not comprehend minerals which, according to such custom, would be got by surface operations. It is contended, on the other hand, that the word comprehends all beds or strata of minerals without any reference to the method of working them.

I have already, in *Farie's case*, expressed my opinion as to the construction to be put upon the same words in a very similar enactment contained in the Waterworks Clauses Act. After carefully considering the able arguments addressed to your lordships in the present case, I have seen no reason to alter the conclusion I then arrived at. I desire only to say that when I stated that, in my opinion, the reservation extended "to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value independent of the surface of the land," I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not. I used them in order to emphasize the fact that it was not every scattered piece of mineral lying under the land that could be called a "mine," but only mineral substances lying in seams, or beds, or strata.

In dealing with this case it must be remembered that all that your lordships have to do is to interpret the words of this enactment, and not to lay down (even if it were possible) any general rule as to the interpretation of the word "mines."

I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under section 77 of the Railway Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate.

The object of the 77th and following clauses was considered and explained in *Bennett* v. *The Great Western Railway Co.* Lord Cranworth said:—"It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine owners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface."

The effect of this legislation was obviously very advantageous to the railway companies, and inflicted no wrong upon the owner of the minerals. The company, in the first instance, paid only for the surface of the land, and for such minerals as had to be taken in the making of the railway. They enjoyed the support of the underlying minerals for an indefinite term without paying for it. The mineral owner, as I have said, suffered no wrong. He still retained the ownership of the minerals and the right to work them, which was all that he possessed before. The only burden imposed upon him, if it can be so called, was that, when desirous of working the mines, mines he should give the company an opportunity of purchasing them. It appears to me that these considerations point to the intention of the Legislature having been to use the word "mines" in the widest sense that can properly be given to it. Why should the Legislature have reserved and exempted the company from the necessity of purchasing beds of minerals lying at such a depth below the surface, or with superincumbent strata of such a character that the minerals would ordinarily be worked by underground operations, and compelled the company at once to purchase and pay for beds of minerals which would, in ordinary course, be won by surface operations? It is urged that in the latter case the working of the minerals would remove the very thing which the company had bought, and directly interfere with the existence of the railway. But it must be remembered that the surface might be rendered just as unfit for railway purposes by subterranean workings as it would be by operations from the surface. The learned counsel for the appellants asked what the company could be said to have acquired by the purchase of the land, if its very surface could be directly interfered with by mining operations? I fully feel the force of this question and the difficulty which it involves. If this difficulty were altogether got rid of by the construction contended for by the appellants, I admit that a strong ground would be shown for yielding to their contention. But it was properly conceded by the learned counsel for the appellants that this was not the case. Where a "mine" within the meaning attributed to that word by them, cropped out at or near the surface on a part of the railway, the same difficulty would arise. For it was not denied that this would be part of the mine, and, therefore, within the reservation. So, too, although a seam of minerals may lie at such a depth beneath the surface of the land purchased that it would ordinarily be got by underground workings, yet, owing to the works necessary for making the railway, be it a cutting or tunnel, the minerals may come to form the surface on which the railway rests. Such a seam would be a "mine" within the construction suggested, and, therefore, reserved to the landowner, together with the right to work it, and yet the same question might be asked. Can it have been intended that such owner should have the right to take away the surface upon which the rails are laid?

It seems to me too, that the appellants' construction, if adopted, would of itself give rise to serious difficulties and inconveniences. When land was to be taken for the purposes of a railway, it would be necessary to ascertain what minerals lay beneath the land which would not according to the usual manner of working in the district be got by underground workings. For these would become the property of the railway company, and their value must of course be taken into account in fixing the price to be paid for the land purchased. And further, the question what minerals were reserved, and therefore whose the property in them was, might have to be determined many years after the purchase, by an inquiry what was the usual mode of working in the district at the time of the conveyance, which perhaps might not have been the same as at the time when the controversy arose. And there are some cases where it might be almost impossible to say what minerals were, and what were not reserved. Beds of slate I believe exist which have been worked both by surface workings at the face

and by levels driven underground. How much of such seams of slate would be reserved, and how much fall to be purchased by the company, would, I think, on the contention of the appellants, be a question almost impossible of solution.

But besides this, under section 78 the owner of mines not under the railway, but within the prescribed distance from it, is bound to give notice before working, so that the company may have the option of purchasing. If the word "mines" bear the meaning I have attributed to it the company need not concern themselves about the existence of minerals whether near the surface or not, within the prescribed distance. But if it is to have the more limited construction contended for by the appellants, it would be necessary for the company not only to ascertain what minerals lie under the lands adjoining any embankments or other works which would be injured by the working of what I will call surface minerals, but often to purchase these minerals, and the land under which they lie, for the protection of their works from subsidence.

Seeing, then, that the difficulties pointed out by the appellants are not avoided by adopting their view, and that its adoption would give rise to the difficulties and inconveniences I have pointed out, I think your lordships will do well to construe the language used with the aid of the light that is thrown upon it by the intention of the Legislature as manifested in the provisions relating to mines and minerals lying under and near the railway. And the considerations upon which I have dwelt point to the conclusion I have already indicated, that the widest construction ought to be given to the word "mines" which is possible, without improperly straining the language used.

Is there anything in the terms of the enactment compelling the narrower construction for which the appellants contend? I think not. Applying myself to the consideration of the word "mines," apart from the document or context in which it is found, I cannot think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working. If aid is sought from the lexicon, and the definitions there given are reviewed, I do not think that they afford support to such a construction. Dr. Johnson, I may observe, defines a "quarry" as a "stone mine." I see no reason to doubt the soundness of the view I expressed in *Farie's case*, that in ordinary parlance the word "mines" is not used to describe unwrought beds of minerals. I think it is ordinarily applied only to beds of minerals which are being or have been wrought; but in the enactment with which we are dealing it is obviously impossible so to interpret the word. I have already pointed out why I think the meaning attributed to the word by the courts, when contracts between individuals have been under consideration, does not afford a guide for construing this enactment.

These are my reasons for adhering to the construction which I put upon the words "mines of coal, ironstone, slate, or other minerals," in *Farie's case*.

So far I have dealt with the case apart from authority, but it is not unworthy of consideration that the decided cases support the view adopted by the court below. In the case of the *Great Western Railway Co.* v. *Bennett* Lord Chelmsford said: "That this section reserves to the mine-owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of 'the parts necessary to be dug, or carried, or used, in the construction of the company's works, as these will, of course, be the minerals lying nearest to the surface." I admit the force of the criticism of the appellants' counsel, that the words quoted by Lord Chelmsford do not necessarily lead to the inference he drew from them, inasmuch as in making the railway it might be necessary in cuttings or tunnels to carry away or use minerals lying far below the surface. But the fact remains that the noble and learned lord intimated the opinion that all the minerals, however near they might be to the surface, were reserved. And the other learned lords who took part in the judgment not only do not dissent from Lord Chelmsford's view, but use language which I think shows that they shared it. An opinion thus expressed ought not to be lightly departed from. It is impossible to say how many transactions in the last twenty years may have been carried through on this view of the law. There has been no judicial expression of a contrary opinion that I am aware of until quite recently in *Farie's case*, whilst both in this country and in Scotland the point has been actually decided in accordance with the view taken by the learned judges in the present case. Indeed, in the case of the *Caledonian Railway Co.* v. *Dixon*, where the point was decided against the company by the Court of Session (7 Court Sess. Cas., 4th ser., 216), although the case was brought to your lordships' House by way of appeal upon another point, the railway company did not seek for a review of the decision of the Court of Session on the question now in controversy.

It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he has no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with the court below that this objection cannot, upon the true construction of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase the minerals. I quite concur with what Cotton, L.J., said, that "there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the court would not allow that to be acted upon." But in the present case the learned judge who tried the action, and the Court of Appeal, have come to the conclusion that there was a real and *bonâ fide* desire to work. After considering the arguments insisted upon by the learned counsel for the appellants I find myself unable upon this point to differ from the courts below. I am not a little influenced by the fact that the minerals on either side of the railway in the immediate neighbourhood of those now in question have actually been gotten by lessees of the respondent. It is urged that the minerals under the railway were left unworked because the respondent thought he had no no right to them. This matters not as regards the point I am now concerned with. Indeed, it seems to me to make the case of the respondent stronger.

For the reasons I have submitted to your lordships I think the judgment appealed from should be affirmed, and the appeal dismissed.

LORD WATSON.—I also am of opinion that both courts below have come to a right conclusion in this case, and that the judgment of the Court of Appeal sustaining the decision of Chitty, J., ought to be affirmed.

Questions of nicety have arisen, and may yet arise, as to the particular substances meant to be included in the general words "or other minerals," as these occur in section 77 of the English, and section 70 of the Scotch, Railway Clauses Act of 1845. I do not think that any substantial question of that kind is presented in this case. The substances to which the argument at the bar has been confined are "ironstone," which is one of the minerals specially excepted in these clauses, and "limestone," which appears to me to be so much *ejusdem generis* with the minerals enumerated that it

must necessarily be held to come within the description of "other minerals."

The real point of difficulty which this case presents, is due to the circumstance that the statutory exception is not of "minerals" but of "mines of minerals." It is mutually conceded that the ironstone and limestone below the appellants' railway, which the respondent has notified his intention to excavate, can only be worked, and, according to the custom of the district, would be properly worked, by open cast. But the appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being "mined," using that term in its strictest sense as signifying operations conducted wholly underground, and not open to the light of day.

That is a proposition which your lordships had recently occasion to consider in *Provost of Glasgow* v. *Farie*. In that case I came to the conclusion that every substance, being a mineral within the meaning of these clauses, is reserved to the owner irrespective of the method by which it may be wrought. I there said that, in the enactments of section 18 of the Waterworks Clauses Act, 1847 (which are in the same terms with sections 77 and 70 of the Railways Clauses Acts of 1845), the word "mines" must be taken to signify "all excavations by which the excepted minerals may be legitimately worked and got." I do not think it is necessary to say more than that I adhere to the views which I adopted in *Provost of Glasgow* v. *Farie*. But, on consideration, I think it is more accurate to say that the expression "mines of coal, &c.," is used by the Legislature to denote the minerals *in situ*, and has no reference to the manner in which they can be worked. The result is the same, and rests upon the same considerations. I concur in the reasons which have just been assigned for his judgment by Lord Herschell. After all, this is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines. The general policy of the Railway Clauses Acts and their special provisions alike appear to me to point to the result at which the noble and learned lord has arrived.

In my opinion, the appellants have failed to substantiate their averment that the respondent does not entertain a real and *bonâ fide* intention of working the minerals in question; and I therefore concur in the judgment which has been moved.

Lord Macnaghten.—The principal question, if not the only question, in this case is, what is the meaning of the word "mines," as used in section 77 of the Railway Clauses Consolidation Act, 1845, and in the heading to that part of the Act. On this question I have the misfortune to differ from your lordships. I abide by the views I expressed in *Farie's case*. I continue to think that the word was used both in the heading and in the section in the sense which, if I am not mistaken, every English judge who had occasion to consider the meaning of the word, before *Farie's case* was decided, took to be its ordinary signification. It seems to me that on such a point the opinions of such judges as Kindersley, V.C., Turner, L.J., and Jessel, M.R., are probably a safer guide than any definitions or illustrations to be found in dictionaries. Kindersley, V.C., was clear on the point, so was Turner, L.J., who agreed with the Vice-Chancellor on that question in *Bell* v. *Wilson*, and dealing with an exception of "mines within and under the lands whether opened or unopened," observed that those are "words which are ordinarily used with reference to underground workings." In *Errington* v. *Metropolitan District Railway Co.*, where, contrary to the view thrown out by some of the noble and learned lords in *Great Western Railway Co.* v. *Bennett*, it was held that railway companies could acquire mines compulsorily, Jessel, M.R., remarks: "There are no mines in the ordinary sense under these lands—at least, it is not shown there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament, are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface."

If that be the ordinary meaning of the word, if it was really the intention of Parliament that all minerals, however worked, should be deemed to be excepted from conveyances to railway companies unless expressly mentioned therein, I cannot conceive why the word "minerals" is not to be found in the heading to this part of the Act, or why the word "minerals" was not used in section 77 instead of the expression "mines of coal, ironstone, slate, or other minerals," or why the Legislature, in the heading and in that section, avoided the use of the common, obvious, and well-understood expression "mines and minerals."

Whether the view of the appellants or that of the respondent be accepted, some difficulties and inconveniences unquestionably may present themselves. But I think the appellants were right in saying that the difficulties which attend their construction, however formidable they may appear in argument, are not really practical difficulties, and that those difficulties are reduced to a minimum since it has been decided that railway companies are not disabled from purchasing mines compulsorily if they think fit to do so.

It was said in argument that, if the appellants' construction were adopted, railway companies might be exposed to danger by the working of surface minerals on adjacent lands. But, in answer, it was pointed out that, if surface minerals are not within the enactment with respect to "mines lying under or near the railway," the ordinary rule as to adjacent support, so far as regards surface minerals, would be applicable.

Some reliance was placed on certain expressions in Lord Chelmsford's judgment in *The Great Western Railway Co.* v. *Bennett* which seem to show that, in his lordship's opinion, all minerals, of whatever kind and however near the surface, were reserved by the Act to the landowner. But it is to be observed that the question which has arisen in the present case could not possibly have arisen in that case, because the exception in the conveyance under consideration in that case did not follow the words of the Act. It excepted in terms both minerals and mines. The point, therefore, possibly was not present to his lordship's mind. On the other hand, Lord Westbury's opinion seems to favour the appellant's construction.

That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's case*. But I do not think that it necessarily follows from that circumstance that a mine owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him, is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface.

For these reasons and the reasons I have expressed in *Farie's case*, I should, but for your lordships' opinion, be disposed to reverse the judgment under appeal.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Beale & Co.*

Solicitors for the respondent, *Capel Cure & Ball*, for *Lamb & Stringer*, Kettering.

From C. A. (England). Nov. 21, 22, 1889.

NOUVION *v.* FREEMAN. (*a.*)

Judgment—Action on foreign judgment—Final judgment—Res judicata.

In order that an action may be brought in this country on a foreign judgment, such judgment must be final and unalterable in the court which pronounced it.

Decision of the Court of Appeal (37 *Ch. D.* 244) *affirmed.*

This was an appeal from the decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), reported 37 Ch. D. 244, 36 W. R. Dig. 79.

The facts and the whole course of the proceedings are given in Lord Herschell's judgment.

Napier Higgins, Q.C., and *Finlay, Q.C.* (*Yate Lee* with them), for the appellant, referred to *Scott* v. *Pilkington*, 2 B. & S. 11, 38, 41; *Williams* v. *Jones*, 13 M. & W. 628, 633; *Russell* v. *Smyth*, 9 M. & W. 810.

Rigby, Q.C., Kenelm E. Digby, and *J. D. Davenport*, for the respondents, were not heard.

Nov. 22.—Lord HERSCHELL.—This appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found his claim to an order for the administration of that estate it became necessary for him to show that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. The court ordered under these circumstances that there should be first tried the issue: "whether the judgment or decree" upon which he relied, one pronounced on the 5th of April, 1878, "and the other judgments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments upon which the claim of the plaintiff in this action or some and what part of it can be sustained."

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville, of the plaintiff, Mr. Nouvion, and that the deeds by which these properties were conveyed contain an obligation to make certain payments, and were registered in the registry of the district of San Roman; and that where deeds of that description are so registered, according to the law of Spain the person who is entitled to payment under such deeds can obtain what is called an "executive" judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded or show that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid, and in the first instance did create the obligation. He may show that there has been a waiver, or that he has discharged the obligation by payment, but substantially, I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same court in another form of action which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish courts and that the other is a special procedure allowed in particular cases. In such a plenary action, which is open to either of the parties, every defence which may be available is open, as well as every consideration establishing the ground of action; and such a plenary action may be instituted by either of the parties to the executive action; that is to say, the party against whom the decision has been pronounced in the executive action, be he either plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action the fact that a judgment has been delivered in an executive action cannot be set up as at all affecting the rights of the parties either in the way of proof or of title to succeed in the plenary action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, even in the court in which it was pronounced and in which afterwards the plenary action may be pending, to the judgment in the executive action as being *res judicata* and final and as concluding the rights of the parties upon any point whatever.

In the present case the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: "Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales, 60 centimos, and also for the amount of the legal interests therein from the date of default being made by not meeting" certain drafts which are there mentioned.

It appears that owing to the absence of Mr. Henderson from Spain it became necessary, in accordance with the procedure of the Spanish courts, to send letters requisitorial to this country, that is to say to Scotland, where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of discharging, the liability which was declared by the judgment. Thereupon, Mr. Henderson having intervened and having alleged that the debt was not due by reason of a promise of the plaintiff not to sue him, and that having been decided against him, a decree was made, which I think may properly be termed a final decree in that action, that the distraint be carried into effect, "and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executing plaintiff of the amount of the principal demanded" with interest.

The plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue; and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, there can be no doubt that in the courts of this country effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon *dicta* of Parke and Alderson, BB., in the case of *Williams* v. *Jones*, where the law is thus stated: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained."

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to and absolutely concludes that particular action—about that there can be no manner of doubt—in that sense it is final and conlusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which was in question in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action in the courts of this country may be maintained, when such judgment has been pronounced by a foreign court.

I think that, in order to establish that such a judgment has been pronounced, it must be shown that in the court by which it was pronounced it conclusively and finally and for ever settled the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to become *res judicata* between the parties. If in the same court which pronounced it, it is not conclusive, so that notwithstanding such a judgment the existence of the debt may, between the same parties, be afterwards contested in the same court, and if, upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt.

The principle upon which I think our enforcement of foreign judgments must proceed is this—that in a court of competent jurisdiction where, according to its established procedure, the whole merits of the case were open—at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights—a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal—in such a case it may well be said that, giving credit to the courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by that tribunal that there is no obligation and no debt, it appears to me that the very foundation upon which the courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an "executive" action may be regarded as analogous to a judgment obtained in a common law action in the times prior to the Judicature Act, the execution of which might be restrained by a court of equity, and you might have prevented the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be, it appears to me that it would afford very little assistance to your lordships unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect is given to foreign judgments as in given by the courts of this country. Upon that point we have had no information whatsoever.

Then it is said that such a judgment would be analogous to a judgment which has been obtained, upon which a suit may be instituted in the courts of this country even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal has been given whereby a superior court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and conclusively establishes the existence of the debt which is sought to be recovered in this country. That appears to me to be in altogether a different position from that which exists in the present case, where the judgment is a "*remate*" judgment, and where the very court which pronounced the "*remate*" judgment (not the court of appeal) may determine, if proper proceedings are taken, that the debt for which this "*remate*" judgment is sought to be used as conclusive evidence, has no existence at all.

The plaintiff in such a suit, an executive suit, is not really, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course, it may happen that in this particular case such a suit is barred by lapse of time, but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions arising, upon which depend the rights of the parties, and by which must be determined ultimately the obligation to pay, would be open to consideration, and could be dealt with by the courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and for ever between the parties establish the existence of a debt in that court, cannot be looked upon as sufficient evidence of it in the courts of this country.

Very ingenious arguments have been urged upon your lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon, and that justice might be done by staying proceedings as might be done in the case of an English judgment sued upon, which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on behalf of the appellant, that such an action upon such a judgment as this could be maintained, and I certainly cannot advise your lordships to make such a precedent, because it appears to me, after giving due weight to all the arguments of the learned counsel for the appellant, that on the whole the result would, as a general rule, be likely to be mischievous and to work injustice rather than justice between the parties.

For these reasons I move your lordships that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

Lord Watson.—This case has been very ably argued for the appellant. But the reasons assigned for the judgment of the Court of Appeal are, to my mind, so satisfactory that I agree with your lordships in thinking it ought not to be disturbed.

That the court of Seville had jurisdiction to determine all questions competently raised between these parties,

when duly convened before it, in relation either to the constitution or subsistence of the contract upon which the appellant relies, and also that the courts of England would recognize and give full effect to any final and conclusive judgment of the Spanish court upon these questions, are propositions neither disputed by the respondents nor controverted in the opinions delivered by the learned judges of the Appeal Court. The only question which the facts of this case present for decision is, whether the decree of the 5th of April, 1878, obtained by the plaintiff in what is termed an "executive" proceeding, comes within the principle established by decisions comparatively recent, of which *Godard* v. *Gray*, 19 W. R. 348, L. R. 6 Q. B. 139, and *Schibsby* v. *Westenholz*, 19 W. R. 587, L. R. 6 Q. B. 155, are leading examples.

The decree of the 5th of April, 1878, appears to me to be deficient in certain particulars which are necessary in order to bring it within that principle. It is not necessarily a decision which exhausts the merits of the controversy between the parties, because in "executive" proceedings the court can entertain no plea stated by the defendant which does not go to payment, satisfaction, or waiver of the plaintiff's claim. What, in my opinion, constitutes a still graver defect is the fact that the same court which issued the "executive" decree has jurisdiction in an "ordinary" or "plenary" action to entertain and dispose of any and every plea which the original defendant may think fit to urge against his liability, and in that action can re-try those pleas which have already been put forward and repelled in the "executive" suit. If the decision of the court in the "plenary" differs, in whole or in part, from that pronounced by it in the "executive" suit, the latter is, to the extent of that difference, superseded or nullified.

The English cases to which I have already referred establish a more liberal rule in regard to the enforcement of foreign judgments than is to be found in the older authorities; but no decision has been cited to the effect that an English court is bound to give effect to a foreign decree, which is liable to be abrogated or varied by the same court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causâ cognitâ*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. The decree need not be final in the sense that it cannot be made the subject of appeal to a higher court, but it must be final and unalterable in the court which pronounced it; and, if appealable, the English court will only enforce it subject to conditions which will save the interests of those who have the right of appeal. The case of *Patrick* v. *Shedden*, 2 E. & Bl. 14, appears to me to be very much akin to the present. There the executive decree of the Court of Session for costs was final in this sense, that it was not appealable, and that it was enforceable in Scotland; but the Court of Queen's Bench refused to recognize it as a final and conclusive judgment, mainly on the ground that it might be at any time recalled or modified by the Court of Session on just cause shown. In my opinion there is no real difference in principle between a court retaining the power to alter its own decree by an order in the same suit, and its retaining the power to defeat its operation by an order pronounced in another suit relating to the same debt.

I accordingly concur in the judgment proposed.

Lord BRAMWELL.—I think this judgment should be affirmed. I think the proceeding in the Spanish court which is relied on was final, and I think, also, that it was a personal judgment, as far as such a judgment could be personal; but I think I am right in reading it, not as a judgment that a debt is due, but as an order that execution do issue. Then we know that this is, what I may call, for want of a better expression, a defeasible judgment—that is to say, the defendants, who are subject to the order that execution may issue, may take proceedings which would have the effect of defeating or nullifying or making an end of the judgment or order which has been pronounced that execution may issue. It seems to me that that is not such a judgment as can be (to use the old fashioned expression which Parke, B., used) the subject of an action of debt—that is to say, now that we have got rid of the forms of action, the subject of an action in a court in this country. Whether what is called the comity of nations had anything to do with the matter, I do not know, nor do I think it material; but Parke, B., in the judgment he pronounced, does not refer to the comity of nations as a reason, but he speaks of foreign judgments, and of colonial judgments, and of judgments of inferior courts; and he seems to consider—I believe he says so, but at all events if he does not say so directly he says that from which I infer that his opinion was—that where the judgment of a competent court had been given, it showed that there was a debt, and that, that being so, there was a legal obligation, and I am somewhat inclined to think he was of opinion there was a moral obligation on the part of the person against whom it was decreed or adjudged that there was a debt, to pay it. But how is that applicable to a case of this description? How can it be said that there is a legal obligation on the part of a man to pay a debt, who has a right to say, "I owe none, and no judgment has established against me that I do." I cannot see. On that short ground it seems to me that this judgment ought to be affirmed.

There are, however, one or two other observations I should like to make. It was said that my argument, or such an argument as I am now using (for it is not my argument in particular) would equally apply to all cases where there was a possibility of error being brought. Not so. There is no presumption that error may exist in the proceedings; the presumption is the other way; the presumption is, that a court of competent jurisdiction has given a right judgment. But there is no such presumption here; on the contrary, we learn that it is perfectly possible, not merely that what was decided in the court may be reversed, but that there may be questions raised between the parties which could not be decided in that proceeding. There is an essential difference, therefore, between the case where a court of competent jurisdiction has entertained the controversy between the parties, and come to a conclusion, which is to be presumed to be accurate, and this case, where there is no ground for saying that all the controversies between the parties have been decided.

Then another argument that was urged was this. It was said, "Why if this argument is a good one, there never was a judgment in an English court upon which an action ought to have been maintainable, because it was always possible that it might be set aside by proceedings in equity." Really I do not think any argument can be founded upon, what I may take the liberty now of calling, the preposterous condition of things that existed in England before the Judicature Act, where one court gave a final judgment finding a debt due, or damages due, or what not, and another court said, "Well, that is all very well; we find no fault with the judgment being right in point of law, it was perfectly right in point of law; but if you, the plaintiff, in whose favour it was given, enforce it, we will put you in prison." Really, I think that some twenty or thirty years hence, when the present generation of lawyers has ceased to exist and there is another one, it will scarcely be believed that such a state of things did exist in a civilized country. I do not say this for the purpose of finding fault with the

state of things which is now, happily, at an end, and was brought about, I dare say, by persons who had very sincere desires to improve the jurisprudence of the country; but I say it for this purpose, that I do not think you can found any argument upon such a condition of things as then existed.

Then there was a matter brought forward prominently by Lord Ashbourne which I think is entitled to good consideration; and that was, that if we should give judgment for this plaintiff here he would be better off than he would be if there were a mere affirmance of the judgment with all its consequences in Spain, because in Spain the judgment that he has got is liable, as I have said before, to be defeated, but, if judgment were given for him here, there would not be that liability to be defeated by proceedings being taken here analogous to the plenary proceedings in Spain. Well, I think that is a cogent argument. It occurred to me that perhaps it might be met in this way, that if a judgment in a foreign court or in an English court were reversed upon error, and an action upon the judgment had been brought in an English court and judgment given in that action on the judgment, then afterwards when the original judgment was reversed upon error, I suppose there would, in such a case as that, be some remedy for the defendant who had got rid of the first judgment against him. By *auditâ querelâ* I should think he would be entitled to get rid of the second judgment against him. It is not worth while going into it minutely. The remedy of *auditâ querelâ* is now abolished, but there is a rule which says that the court may give relief (I should suppose that that would mean that they must give relief) where the original defendant would have got relief upon *auditâ querelâ*. But it is not the same thing. He would have a judgment against him which he would have to get rid of; so that, in the first instance, he would have to get rid of judgment in the Spanish court, and then he would have to come to England to get rid of the judgment by proceedings in the nature of the old-fashioned *auditâ querelâ*. I think, therefore, he would be worse off if judgment were given against him, as is prayed in this action, than he is at present by the proceedings in Spain. It perhaps is not of any very great consequence; but I cannot help thinking that it is worth mentioning, at all events for the purpose of showing that we are not dealing with a judgment like a judgment in proceedings where all the questions can be gone into, which is presumably right, and has decided all the possible controversies that the parties have thought fit to bring before the court.

Upon these grounds I think this judgment should be affirmed.

Lord Ashbourne.—I also am of opinion that the judgment under appeal is correct and should be affirmed. The reasons which have led me to that conclusion have already been expressed by such of your lordships as have spoken.

It is conceded, there is no controversy that a foreign judgment will not be upheld in this country and made the foundation of relief here, unless it is final and conclusive. There is no question about that. That has been treated as axiomatic in the arguments on both sides in the courts below, and in the argument addressed to us on behalf of the appellant, and in the judgment of North, J., and in all the judgments of the learned judges who sat in the Court of Appeal. The sole controversy in law before us, and before those tribunals was—is this a judgment which can be regarded as coming within the definition of a final and conclusive judgment?

I entirely concur that in a sense this must be regarded as a final judgment, but only in a limited and narrow sense. It is a summary judgment, it is an executive judgment, it is a remote judgment. In its terms there is nothing to contradict the fact that there has been a final judgment; but then it is a judgment which could only be encountered by a certain limited number of pleas of a certain prescribed and definite character. It was not a judgment upon a claim which could be met by pleas upon the merits, going exhaustively into all the topics upon which the defendant was entitled to rely if he had the wide scope open to him, which in any plenary suit a litigant would have, for he would be entitled to have the whole merits discussed before a judgment was given against him. Therefore in no sense can this be regarded as an adjudication in a cause where the merits were, or where they could be tried; and I am not aware of a single case where a foreign judgment has been given effect to in this country where the adjudication was had in a case where the merits could *ex necessitate rei* not have been discussed. No such case has been suggested in the course of the argument, and none was suggested in the courts below. This is a peculiar judgment. There is no analogy to it that I know of in our law; none has been stated. A couple of cases were mentioned as approximations to an analogy; but no judgment known to our law or to the law of Scotland has been suggested which is at all really analogous to this peculiar form of *remate* judgment, which may be nullified, which may be paralysed, which may be reduced to a state of absolutely worthless paper by a proceeding in which the merits can be gone into. In other words we are asked to say that this *remate* judgment shall be accepted by our laws as final and conclusive, when the laws of Spain itself which produced this *remate* judgment say that it is one which may be absolutely swept away when proceedings come before the court in which the merits can be gone into.

It would be, I venture to think, a very startling result if in this country we should hold this executive summary *remate* judgment to be final and conclusive, while in the municipal institutions of the country which has sent out this judgment it would not even be regarded as *res judicata*. That is a point referred to with force and persuasiveness in the arguments addressed to the court below, and most powerfully in the judgment of Lindley, L.J., and I adopt everything that he said. It strikes my mind as being to the last degree surprising to listen to a suggestion that when the laws of Spain do not regard this judgment as of such a binding character that it can be relied upon in any proceeding as *res judicata*, the very minute the intervention of a foreign country is invoked it becomes so *sacrosanct* that it is to be regarded by us as final and conclusive. It appears to me to be almost a contradiction in terms to make the suggestion.

For these reasons I entirely concur in the decision at which your lordships have arrived.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, *Ewbank & Partington.*

Solicitors for the respondents, *Freeman & Bothamley.*

Court of Appeal.

From Chan. Div. April 23.

In re Davies.

Issard *v.* Lambert. (*a.*)

Practice—Evidence on inquiries in chambers after trial—Time for closing the evidence—Order for cross-examination—Discretion of judge—R. S. C., ord. 38, r. 18.

Though no hard and fast rule can be laid down that,

(*a.*) Reported by M. J. Blake, Esq., Barrister-at-Law.

in proceedings in chambers after judgment, no fresh evidence can be adduced after cross-examination—that being a matter in the discretion of the judge—yet there is nothing reprehensible in the practice which has grown up in chambers, and is well known to practitioners there, that liberty to cross-examine is, in the absence of special circumstances, only accorded on the footing that all the evidence will be completed before cross-examination. In ordinary cases, and under ordinary circumstances, this practice is a good and convenient one.

Appeal from Chitty, J.

The action had been brought to set aside a promissory note, and to have an account taken. The plaintiff was the executor and surviving trustee of the will of the testator, Davies, and the defendants were the executors of a residuary legatee under that will, and they had counter-claimed for payment of the sum due on the note, which had been given by the plaintiff to the defendants' testator for the amount shown to be due on an account stated.

At the trial of the action judgment had been given directing accounts and inquiries. The plaintiff, on October 24, 1889, brought in accounts in chambers, and on November 26, the defendants, without having filed any evidence themselves, issued a summons for leave to cross-examine the plaintiff on the accounts; the summons was heard by the chief clerk on November 30, and on the hearing the plaintiff's solicitor intimated to the defendants' solicitor that if the defendants cross-examined they would not be entitled to file evidence. The chief clerk made the order for cross-examination, but fixed no time for the defendants to file their evidence. The plaintiff filed further evidence as to the accounts on February 17, 1890; and on February 18, the cross-examination of plaintiff by the defendants was commenced.

On February 28, after the cross-examination had closed, the defendants applied for leave to file evidence as to the accounts, but the chief clerk refused the application, on the ground that the defendants should have filed their evidence before cross-examining the plaintiff on the accounts. The defendants then moved before Chitty, J., to have it declared that they were entitled to file evidence in answer to the inquiries and accounts delivered by the plaintiff, or in the alternative for a declaration that they were entitled to file evidence generally, notwithstanding the fact that the cross-examination of plaintiff on the accounts had closed.

Chitty, J., dismissed the application, on the ground that, in the exercise of his discretion, he would not depart from what was the ordinary practice in chambers, though no hard and fast rule existed—viz., not to allow an order for cross-examination to go until the evidence was complete. (See the report, 34, SOLICITORS' JOURNAL, 399.)

From this refusal the defendants appealed.

Swinfen Eady, for the appellants.—In the case of cross-examination of an accounting party on the accounts it would be unfair to require the other party to put in all his evidence before the cross-examination. He could not be expected to file his evidence without seeing how far the accounting party's case has broken down on cross-examination. Where no time has been fixed by the chief clerk for the defendants' to file their evidence, they are entitled to do so at any time before the matter comes before the judge: *In re Chifferiel, Chifferiel* v. *Watson*, 36 W. R. 806. When the chief clerk gave the defendants leave to cross-examine he did not, as part of his order, fix any time for the defendants to file their evidence. There is no rule of court that all the evidence must be completed before cross-examination, and the judge cannot make a practice for himself. The rules on which Chitty, J., relied by way of analogy —viz., ord. 37, r. 21, and ord. 38, rr. 25—28—relate to the times for filing affidavit evidence before trial, and have really no application to filing evidence after trial with reference to inquiries and accounts. The defendants have a right to cross-examine the plaintiff as an accounting party: *In re Lord's Estate, Lord* v. *Lord*, L. R. 2 Eq. 605, 27 W. R. Ch. Dig. 103; and when a right exists it cannot be limited or conditions put on it by the action of the udge. In proceeding on an account it has never been the practice to put the non-accounting party under a condition to complete his evidence before cross-examining the accounting party.

He also referred to *Muir* v. *Kirby*, 32 SOLICITORS' JOURNAL, 139; *Concha* v. *Concha*, 35 W. R. 477, 11 App. Cas. 541.

Romer, Q.C., and *McSwinney*, for the respondent, were not called on.

LINDLEY, L.J.—I wish to say at once that anything which may fall from me now is without prejudice to any application which the defendants may make in the court below for further time to file affidavits on any special grounds.

The appeal has been argued on the wide ground that the order of Chitty, J., is wrong as not being warranted by the Rules of Court and as being contrary to the general practice.

Now there is no rule expressly dealing with this matter; but rule 18 of order 38 has been construed by North, J., in *In re Chifferiel* as empowering the chief clerk to fix a time in chambers for the closing of the evidence. Independently of that, however, there is no special rule expressly applicable. It has, however, been found convenient, as a matter of practice in chambers, to require that a party wishing to cross-examine a party verifying accounts, should first file all his evidence and afterwards cross-examine. There is no general hard and fast rule, but that practice has been found to work well, and there is no reason why we should discourage it; the practice is well known, and everyone who is familiar with the practice in chambers knows that he cannot get an order to cross-examine at all, except on the understanding that all the evidence has been put in. In the present case Mr. Eady's client was warned by the plaintiff's solicitors that if he obtained an order to cross-examine he would not afterwards be allowed to put in further evidence, and the whole matter proceeded on that footing, and it was with that understanding that the chief clerk made the order.

We are now asked to condemn that practice. If a hard and fast rule had been laid down I should condemn it, but that is not so, and I think the ordinary practice, which has been found to work well, is a good one. Chitty, J., considered that he had a discretion, and as no special grounds were alleged why he should depart from the ordinary practice he refused to do so, and I am of opinion he exercised his discretion rightly.

BOWEN, L.J.—I am of the same opinion. I am impressed with the fact that Mr. Eady asks us to set him at large to file evidence *generally*, without showing any special circumstances upon which he might be entitled to the indulgence of the court. The rules are silent as to this matter. It is, therefore, left to the chief clerk acting for the judge, in the exercise of his discretion, to fix the time within which the cross-examination of a particular witness is to take place in each case. The practice which has grown up, that liberty to cross-examine will not be accorded, in the absence of special circumstances, until all the evidence is complete, and that after cross-examination no fresh evidence can be adduced, is obviously for the convenience of business, and there is nothing reprehensible in it. This is not a hard and fast rule, as in the circumstances of some cases it would clearly work inevitable injustice to close the mouth of a party. It may, therefore, be necessary that Mr. Eady's

client should have leave hereafter to adduce evidence on the ground of some special circumstances. It has always been accepted by the Court of Appeal that a judge who has a discretion reposed in him as to a particular matter shall have liberty to indicate to the practitioners coming before him on what lines his discretion will run in ordinary cases and under ordinary circumstances, and it is only by that means that the time for cross-examination is fixed in chambers at all.

I have no doubt that this practice was well understood in the present case both by the chief clerk and by the clerks of the solicitors in the case; the attention of the defendants' solicitor was called to it by the plaintiff's solicitor, and the chief clerk and all the solicitors' clerks engaged in the case must have understood that each was aware that that was the usual practice in chambers. Mr. Eady, therefore, cannot claim as a matter of right to be emancipated from that, the order having been taken on the implied understanding of both parties that the usual practice would be followed.

Appeal dismissed.

Solicitors for the appellants, *Minshall, Parry-Jones, Woosnam, & Smith*, for *Martin Woosnam*, Newtown, Montgomeryshire.

Solicitors for the respondent, *Talbot & Quayle*, for *Talbot & Wood*, Newtown, Montgomeryshire.

From Q. B. Div. May 12.

Guardians of Headington Union (*Appellants*) *v.* Guardians of Ipswich Union (*Respondents*). (*a.*)

Poor law—Settlement—Illegitimate child under sixteen—Birth settlement—Settlement of mother—Onus of proof—4 & 5 Will. 4, c. 76, s. 71.

Upon the hearing of an appeal against an order of removal of an illegitimate child under sixteen to the place of its birth settlement, it was proved that the mother was alive, but no evidence as to her settlement was given.

Held (*affirming the judgment of the* Queen's Bench Division), *that the onus of proving that the mother had a settlement lay upon the appellants, and that, in the absence of such proof, the order adjudging the child to be settled in the place of its birth was right.*

Reg. *v.* St. Paul's, Covent Garden, *L. R.* 7 *Q. B.* 232, *discussed.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by the court of quarter sessions for the borough of Ipswich on appeal against an order of removal (24 Q. B. D. 414).

The pauper, Alice Mary Beckley, was the illegitimate daughter of Alice Beckley, who was still alive. The pauper was born on the 14th of August, 1880, at Headington Workhouse, and the order of removal adjudged that the place of the last legal settlement of the pauper was in the parish of Headington, in the appellants' union. The notice of chargeability and grounds of removal sent to the appellants set forth the following as the particulars of the pauper's settlement in the Headington Union:—"The said Alice Mary Beckley was the illegitimate daughter of Alice Beckley, and was born on the 14th day of August, 1880, at Headington Workhouse, in the parish of Headington, in your union above named." Upon the hearing of the appeal against the order of removal, it was admitted by the respondents that the mother of the pauper was still alive, but no evidence was given to show that the mother had any settlement at all. No evidence was given to show that there had been any failure by the respondents to make inquiries.

(*a.*) Reported by W. F. Barry, Esq., Barrister-at-Law.

The appellants contended that in the case of an illegitimate child under the age of sixteen, with a mother still living, there was no presumption that the place of its birth was its place of settlement, and that before such child could be adjudged to be settled in the place of its birth there must be an inquiry into the settlement of the mother.

The respondents contended that the place of the birth of such a child was to be taken as its place of settlement until the contrary was proved, and that the burden of such proof lay upon the appellants.

The recorder held that the contention of the respondents was right, and affirmed the order. The Queen's Bench Division (Pollock, B., and Hawkins, J.) having affirmed this order, the guardians of the Headington Union appealed.

Jelf, Q.C., and *Shortt*, for the appellants.—By 4 & 5 Will. 4, c. 76, s. 71, illegitimate children are to take the settlement of their mother until they attain the age of sixteen or acquire a settlement in their own right. Therefore, since that statute, there is no presumption in favour of the birth settlement of an illegitimate child, and in this respect it differs from a legitimate child. The settlement of the mother must be disposed of before the birth settlement can be relied upon. The *onus*, therefore, of showing that the mother had no settlement to which the child could be removed lay upon the respondents, and until they discharged that *onus* the child could not be removed to its birth settlement.

They referred to *Reg.* v. *St. Paul's, Covent Garden*, L. R. 7 Q. B. 232.

R. C. Glen and *J. F. P. Rawlinson*, for the respondents, were not called upon.

Lord Esher, M.R.—It is admitted that, unless the case of *Reg.* v. *St. Paul's, Covent Garden*, covers the appellants' contention, they cannot succeed. That case seems to me to decide this, that a parish which gives a notice of removal to another parish must state in the notice the settlement which it alleges the pauper has in that other parish. In that case the parish did not specify the settlement relied upon, and the court held that the notice was bad upon the ground that it did not state, and therefore the court could not say, what settlement was intended to be relied upon. That case, therefore, does not substantiate the contention put forward on behalf of the appellants. In the present case the parish, in their notice of chargeability and grounds of removal, do state the settlement in the other parish upon which they intend to rely. The parish which gives the notice has a right to rely upon any alleged settlement in the other parish. If they fail to prove the settlement which they state in their notice that they rely upon, they fail altogether. If another and a superior settlement is proved, they likewise fail. In the present case an illegitimate child is ordered to be removed to its birth settlement in the appellants' union. That is the settlement relied upon in the notice given by the respondents. The appellants might have set up another and a superior settlement, and, according to the ordinary rule of law, if they meant to rely upon it they must have proved it. It is admitted that that is the law as to legitimate children, but it is said not to be applicable to illegitimate children since the statute 4 & 5 Will. 4, c. 76, s. 71. I can see nothing in that Act which has any such effect. It leaves the case of a birth settlement untouched until a superior settlement—that is, the settlement of the mother—is proved. Those who rely upon a superior settlement for the purpose of displacing the birth settlement must prove it. In my opinion the law is the same in this respect both with regard to legitimate and illegitimate children. I think, therefore, that the judgment of the Divisional Court is right, and I entirely agree with the reasons given for that judgment by the learned judges.

FRY, L.J.—I am of the same opinion.

LOPES, L.J.—I also agree with the judgment delivered by the Master of the Rolls, and with the reasons given by the learned judges in the Divisional Court.

Appeal dismissed.

Solicitors for the appellants, *Philpot & Son*, for *Hawkins, Ward, & Higgs*, Woodstock.

Solicitors for the respondents, *Rexworthy*, for *Vulliamy*, Ipswich.

From Q. B. Div. May 9.

COCHRANE *v.* ENTWISTLE. (*a.*)

Bill of sale—Validity—Chattels real included in security—Statutory form—Bills of Sale Amendment Act, 1882 (45 & 46 *Vict. c.* 43).

A bill of sale had been drawn mainly in the form set out in the schedule of the Bills of Sale Amendment Act, 1882, *but to "all and singular the several chattels and things specifically described in the schedule" there had been added the words "together with all tenant-right, valuation, and goodwill, tillages, and interest of the mortgagor" in a certain farm, and these interests were further specified in the schedule, together with various personal chattels.*

Held, that the document was void as a bill of sale, on the ground that it was not drawn in the statutory form, nor had the same legal effect, since it included chattels real in the security, whereas the Bills of Sale Acts only contemplate advances on the security of chattels personal.

In re Burdett, Ex parte Byrne, 36 *W. R.* 128, 20 *Q. B. D.* 310, *distinguished.*

Appeal from a judgment of MANISTY, J., directing a nonsuit.

The plaintiff, the grantee of a bill of sale, had brought an action against the sheriff for the seizure and sale at the instance of an execution creditor of the grantor of the bill, of goods comprised in the bill of sale. The bill of sale ran mainly in the statutory form, but included in the descriptive clause chattels real as well as personal. The clause in question ran as follows:—"All and singular the several chattels and things specifically described in the schedule, together with all tenant-right, valuation, goodwill, tillages, and interest of the mortgagor in the farms, land, and premises." The schedule specified, in addition to the personal chattels, the interest of the mortgagor in a particular farm, and added the said words as to tenant-right, valuation, &c. Manisty, J., held that the document was void as a bill of sale by including chattels real, and withdrew the case from the jury. Against this decision, on the point of law, the plaintiff now appealed.

Kisch and *Horace Kent*, for the appellant.—A bill of sale is divisible in regard to the security, and may be good as to part of the security, though bad as to another part: *In re Burdett, Ex parte Byrne*, 36 W. R. 128, 20 Q. B. D. 310. This bill is good as to personal chattels, and the plaintiff is entitled to the growing crops seized and sold by the sheriff. The document is exactly in accordance with the wording of the statutory form, and merely fills in the blanks in that form in a manner allowable by implication: *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506.

J. V. Austen, for the respondent.—The document is invalid as a bill of sale through not being in statutory form. There was no seizure of growing crops.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Lord ESHER, M.R.—A creditor of the defendant, the mortgagor of the security in question, has seized and sold the goods comprised in this security. No growing crops were capable of being seized at the time, so that point of the plaintiff's case is disposed of. The action is brought against the sheriff for the proceeds of the sale of the goods claimed by the plaintiff under this mortgage, which he maintains to be a valid bill of sale. Was this bill of sale valid as against an execution creditor? The document has been registered. It is said, however, to be void because it is not in the statutory form. Is it in the statutory form? or so nearly in that form as, according to a previous decision of this court, to be equivalent to that form? The bill of sale is to secure the lender of £50 with interest. It is a security of the goods mentioned in the schedule. But it contains as security, in addition to the personal chattels described in the schedule, certain chattels real. All the chattels real and personal are specifically mentioned, and the security is a mixed real and personal one. At the trial the plaintiff said he was entitled to the personal chattels under this bill of sale, though he admitted he might not be to the chattels real. Is a bill of sale so drawn, exactly like the form given in the Act of 1882? It is like that form, with some other things filled in in a way, as is alleged, admitted by the form. But what are these things? They are chattels real. But it is clear that the Act only deals with personal chattels as security. It cannot be said, then, to be drawn in the statutory form. But is it in such a similar or equivalent form as to come within our decision in *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259? Is it so substantially in the same form as to have the same legal effect? The only way to judge that, is to see whether the same document in the statutory form would have the same legal effect? Obviously it would not, since it includes things which could not be included in the statutory form. But it is said that, even if so, a bill of sale, under the decision of *In re Burdett*, is divisible, so that it may be held valid as to one part of the security, the personal chattels, and that the part dealing with the chattels real may be struck out. In my opinion *In re Burdett* is not an authority for any such an argument. In that case the dispute was as to whether certain real chattels were within the Act at all. If the document in that case was one dealing with chattels real not mentioned in the Act it was outside the Bills of Sale Act altogether, and did not require registration. When the conveyance is one of chattels real its form is immaterial so far as the statute is concerned, and it is not fettered by section 9 of the Act. That case was rightly decided, and is not applicable to cases where the dispute is as to the validity of a document comprising chattels real as well as things admittedly within the Act.

This appeal must be dismissed.

FRY, L.J.—The question whether a bill of sale containing a clause including "the tenant-right, valuation, goodwill, tillages, and interest of the mortgagor" among the chattels specified as securities for the loan is within the statutory form? The rule laid down in *Ex parte Stanford* is that you must first take the form in the statute and the instrument in question and consider whether they differ in any substantial respect? Has the one a greater or less legal effect than the other? If they differ in legal effect they are not similar. Has this instrument here the same legal effect as the statutory form? Plainly it has not. The form in the Act only deals with personal chattels. This instrument deals with chattels real as well as personal. It is, therefore, void as a bill of sale through not being in or equivalent to the statutory form.

LOPES, L.J.—There is little real difficulty in this case. Section 9 of the Act of 1882 enacted that a "bill of sale

should be void unless made in accordance with the form in the schedule." The words in that form "all and singular the several chattels and things" related to personal chattels and nothing more. The schedule to this bill of sale specified chattels real as well as personal. Clearly such a document could not be said to have the same legal effect as the statutory form when it deals with things altogether outside the purview of the statute.

Lord ESHER, M.R.—I should like to add that if the argument raised in this case were tenable the protection of ignorant or careless borrowers against money lenders, which was intended to be secured by the Bills of Sale Acts, would practically be done away with.

Solicitors for the appellant, *Cooper & Co.*

Solicitors for the respondent, *Crowders & Vizard*, for *Owston*, Leicester.

From Q. B. Div. Jan. 15, 16, 18, 20; April 28.

COCHRANE *v.* MOORE. (*a.*)

Gift—Delivery—Chattel—Gift of chattel by word of mouth without delivery.

A verbal gift of chattels capable of delivery, although assented to by the donee, if unaccompanied with delivery of possession, passes no property to the donee.

Irons *v.* Smallpiece, 2 *B. & Ald.* 551, *upheld.*

Danby *v.* Tucker, 31 *W. R.* 578, *and* In re Ridgway, 34 *W. R.* 80, 15 *Q. B. D.* 447, *overruled.*

Appeal from the decision of Lopes, L.J., sitting at *nisi prius* without a jury.

The facts are fully set out in the judgment of Fry, L.J.

In June, 1888, Mr. Ernest Benzon was the owner of a racehorse named Kilworth, which, on the 8th of that month, was ridden by the defendant Moore, who was a gentleman rider, in a steeplechase. The same day, the horse being then at the stables of a trainer named Yates, Benzon gave by word of mouth to Moore an undivided fourth share in the horse, which was accepted by Moore. A few days afterwards Benzon wrote to Yates, telling him of the gift to Moore, but did not inform Moore that he had done so.

In July Benzon executed a bill of sale to the plaintiff Cochrane for £10,000, in the schedule to which the horse Kilworth was included. At the time of the execution of the bill of sale, Moore's interest in the horse was mentioned, and Cochrane undertook that it should be all right. The horse having been sold by Messrs. Tattersall, an interpleader issue was directed to try the right to the sum of £156, representing the fourth part of the price received for the horse.

Lopes, L.J., held that the gift was valid, and also that the bill of sale was void, and gave judgment for the defendant.

The plaintiff appealed.

Addison, Q.C., Henn Collins, Q.C., and *Kisch*, for the appellant.—A present gift of a chattel by word of mouth, although accepted then and there, is not sufficient to pass the property without delivery. This was laid down in *Irons* v. *Smallpiece*, 2 B. & Ald. 551, by the court of Queen's Bench, in *Shower* v. *Pilck*, 4 Ex. 478, by the Court of Exchequer, and in *Bourne* v. *Fosbrooke*, 13 W. R. 497, 18 C. B. N. S. 515, by the Court of Common Pleas. Those decisions were in accordance with the old law. [BOWEN, L.J., referred to Benjamin on Sales, 4th ed., p. 3.] No doubt those cases have been doubted in *Lunn* v. *Thornton*, 1 C. B. 379; *Ward* v. *Audland*, 16 M. & W. 862; and in a note by Serjeant Manning to *London, Brighton, and South Coast Railway Co.* v. *Fairclough*, 2 M. & Gr. 674, at p. 691, but the older authorities required that the gift should be at least attested by sufficient evidence, of which delivery was the strongest and most essential: Blackstone's Commentaries, 7th ed. (1775), c. XXX., p. 441; Comyn's Digest, tit. Biens (D. 2); *Smith* v. *Smith*, 2 Str. 954; Year Book M. 7 Ed. IV., p. 20, pl. 21; *Hudson* v. *Hudson*, Latch. 214; *Wortes* v. *Clifton*, Rolles' Rep. 61; 2 Wm. Saunders, 47 *b.*, note D.; Shepherd's Touchstone, 7th ed., L., p. 227; Jenkin's Third Century, Case IX., p. 109; *Hooper* v. *Goodwin*, 1 Swanst. 485. Delivery was held to be necessary for a valid *donatio mortis causâ* (see a note to *Walter* v. *Hodge*, 2 Swans., at p. 101; Williams on Executors, 8th ed., vol. I., p. 786; *Ward* v. *Turner*, 2 Ves. sen. 431; *Tate* v. *Hilbert*, 2 Ves. jun. 111; *Lampleigh* v. *Braithwaite*, 1 Smith L. C., 9th ed., 153; *Reeves* v. *Capper*, 5 Bing. N. C. 136. The American decisions are to the same effect: *Young* v. *Young*, 80 N. Y. 422. The modern cases which have departed from the doctrine of *Irons* v. *Smallpiece* are wrong: *Winter* v. *Winter*, 9 W. R. 747; *In re Ridgway*, 34 W. R. 80, 15 Q. B. D. 447; and *Danby* v. *Tucker*, 31 W. R. 578. A gift without delivery is revocable, and the bill of sale operated as a revocation. Even if it was not intended to operate as a bill of sale, it stands as security for the advance: *Urquhart* v. *Macpherson*, 3 App. Cas. 831, 26 W. R. Dig. 58; *Tyler* v. *Yates*, 19 W. R. 909, L. R. 6 Ch. App. 665; *Earl of Aylesford* v. *Morris*, 21 W. R. 424, L. R. 8 Ch. App. 484.

Pollard and *Hugh Mitchell*, for the respondent.—At common law a gift by word of mouth of a chattel, if accepted by the donee, vests the property in the chattel in him without delivery. None of the cases cited are cases of acceptance. *Irons* v. *Smallpiece* has always been doubted. A difference always existed between things that lay in livery and things that lay in grant: Perkins' Profitable Book, ed. 1827, p. 13.

They also cited 2 Rolles' Abridgement, 62 Graunts (F); *Flory* v. *Denny*, 7 Ex. 581; *Douglas* v. *Douglas*, 22 L. T. N. S. 127, 18 W. R. C. L. Dig. 46; Bracton, Book II., cap. XVII., XVIII., cap. IV., fol. 10 B.

Henn Collins, Q.C., replied.

Cur. adv. vult.

April 28.—The following judgments were delivered.

FRY, L.J.—The judgment I am about to read is that of Bowen, L.J., and myself.

The question in this interpleader issue arises in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claims the money under a bill of sale executed by one Benzon, comprising this and other horses. The defendant claims it under an earlier gift of one-fourth of the horse to him by Benzon.

The relevant facts, as they appear in the judgment of Lopes, L.J., and in that part of the evidence to which he attached credence, are shortly as follows:—

The horse was in June, 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeplechase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse.

A few days subsequently Benzon wrote to Yates, in whose stables the horse was, and told him of the gift to

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Moore. But he did not inform Moore, nor did Moore know of any communication to Yates of the fact of the gift.

On July 9, 1888, Cochrane advanced £3,000 by way of loan to Benzon, and took from him a promissory note for £3,500, payable on August 9 following.

On July 16 of the same year Cochrane advanced to Benzon a further sum of £4,000, and took a promissory note for £4,800, payable on September 16.

On July 26 Cochrane advanced to Benzon two sums of money:—One, £1,680 10s. 11d. (to be paid to one Sherrard, a trainer), and £745; making together £2,425 10s. 11d. And on the same day Benzon executed a bill of sale for £10,000, under which Cochrane claims. Kilworth and other horses were included in the schedule to this instrument.

It is proved by the evidence of the witnesses, whom the learned judge believed, that before the execution of the bill of sale Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon.

On these facts it was argued that there was no delivery and receipt of the one-fourth of the horse, and, consequently, that no property in it passed by the gift. The learned judge has, however, held that delivery is not indispensable to the validity of the gift.

The proposition on which the Lord Justice proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made *per verba de præsenti* by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We therefore feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination.

The proposition adopted by the Lord Justice is in direct contradiction to the decision of the Court of King's Bench in the year 1819 in *Irons* v. *Smallpiece*. That case did not proceed upon the character of the words used, or upon the difference between *verba de præsenti* and *verba de futuro*, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a court consisting of Lord Tenterden, C.J., and Best and Holroyd, JJ., refused a rule *nisi*, and all held delivery to be necessary. The Chief Justice said: "I am of opinion that, by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee," and he went on to refer to the case of *Bunn* v. *Markham*, 2 Marsh. 532, as a strong authority.

These observations of the Chief Justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in error; but if, in speaking of the transfer of property by gift, he included gifts by will as well as gifts *inter vivos*, then by instrument he meant testamentary instrument, and his language was correct.

Holroyd, J., was equally clear on the principal point: "In order to charge the property by a gift of this description" (by which we understand him to mean a gift *inter vivos*) "there must be a change of possession."

The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority.

Thus in *Reeves* v. *Capper* the Court of Common Pleas under Tindal, C.J., referred to *Irons* v. *Smallpiece*, and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee" as being good law and without the expression of any doubt.

In 1849, in the case of *Shower* v. *Pilck*, the same question came before the Court of Exchequer, and the court without hesitation affirmed the ruling of Lord Truro, then Wilde, C.J., at *nisi prius*, and adopted the rule of *Irons* v. *Smallpiece*. The alleged gift in question was *per verba de futuro*, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. "To pass the property," said Alderson, B., "there must be both a gift and a delivery; here there is hardly a gift." "There must be a delivery to make the gift valid," said Lord Cranworth, then Rolfe, B., "here there is a mere statement that the goods which the defendant has in her possession the owner will give her."

Again (in 1865), in *Bourne* v. *Fosbrooke*, Erle, C.J., adopted the rule in *Irons* v. *Smallpiece* as undoubted law; and in 1870, in *Douglas* v. *Douglas*, the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favour.

In Ireland, in like manner, the doctrine has been asserted, Lord Plunkett, as Lord Chancellor, holding delivery to be the only admissible evidence of the gift of a personal chattel: *Patterson* v. *Williams*, L. & G. temp. Plunkett, 95.

We have thus a great body of authority in favour of the necessity of delivery; but, on the other hand, there are several authorities which require consideration.

The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of the case of *Irons* v. *Smallpiece*, by Serjeant Manning in a note on the case of the *London and Brighton Railway Co.* v. *Fairclough*, in which he impugned the accuracy of *Irons* v. *Smallpiece*, and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider.

In 1845, in *Lunn* v. *Thornton*, Maule, J., interlocutorily observed that he had always thought Lord Tenterden's opinion in *Irons* v. *Smallpiece* very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case Serjeant Manning appended a note similar to that in the second volume of Manning and Granger.

Two years afterwards (1847) Lord Wensleydale, in *Ward* v. *Audland*, quoted the passage from Lord Tenterden's judgment already cited, and observed, "that is not correct." To which counsel replied by referring to the criticism of Maule, J., and the learned judge made no further observation. The criticism of the two learned judges was probably directed to the same point—namely, the use of the expression, deed or instrument. Lord Cranworth was present as a Baron of the Exchequer during the argument in *Ward* v. *Audland*, and, as we have seen, two years afterwards unhesitatingly adopted *Irons* v. *Smallpiece*, and that without note or comment—a course which he would hardly have pursued if he knew that Lord Wensleydale considered the case itself bad law.

In 1852, in the case of *Flory* v. *Denny*, where the authorities lastly cited were mentioned, Lord Wensleydale referred to the two notes of Serjeant Manning, and read a portion of the later, but expressed no opinion as to the correctness or incorrectness of the conclusion.

In 1861 the case of *Winter* v. *Winter* came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his

son as his servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own, and paid the wages of the crew. Wightman, J., upheld the title of the son on the ground of a change in the possession consequent on the gift. Crompton, J., on the ground that actual delivery of the chattel is not necessary to a gift *inter vivos*, and that it was sufficient that the conduct of the parties showed that the ownership had been changed. Lord Blackburn, then Blackburn, J., simply concurred. What, however, is most to our present point, Crompton, J., said that, although *Irons* v. *Smallpiece* and *Shower* v. *Pilck* had not been overruled, they had been hit hard by the subsequent cases.

In 1883 the case of *Danby* v. *Tucker* came before Pollock, B., sitting as a judge of the Chancery Division, and he declined to follow the decision of *Irons* v. *Smallpiece*, saying that he "certainly could not accede to the proposition generally that the actual delivery of a chattel is necessary to create a good gift *inter vivos*." "The question to be determined," he said, "is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon, such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a court of common law, and, of course, the same result would follow in a court of equity."

Lastly (in 1885) Cave, J., in the case of *In re Ridgway*, expressed his opinion "that it is going too far to say that the retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention."

These two latter authorities have been followed by Lopes, L.J., in the case now before us, feeling that when sitting as a judge of the first instance he could not rightly depart from them.

There is thus some difference of judicial opinion as to the rule stated in *Irons* v. *Smallpiece*. We cannot think that the few recent decisions to which we have referred are enough to overrule the authority of that decision, and the cases which have followed it, but they make it desirable to inquire whether the law as declared before 1819 was in accordance with that decision or with the judgment of Pollock, B., in *Danby* v. *Tucker*.

This inquiry into the old law on the point is one of some difficulty, for it leads into rarely-trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested.

The law enunciated by Bracton in his book "*de acquirendo rerum dominio*," seems clear to the effect that no gift was complete without tradition of the subject of the gift. "Item oportet," he says (vol. i., p. 128), "quod donationem sequatur rei traditio, etiam in vita donatoris et donatorii; alioquin dicetur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (p. 300): "Item non sufficit chartam esse factam & signatam nisi probetur donationem esse perfectam, & quod omnia, quæ donationem faciunt, ritè præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quòd charta ritè facta sit, & vera & bona & cum solemnitate recitata & audita, tamen nunquam valebit donatio nisi tunc demum cum fuerit traditio subsequuta, & sic poterit charta esse vera, sed sine facta seysina, nuda." And to the same effect is another passage in chapter xviii., p. 310.*

In Bracton's day seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham (select Pleas in Manorial Courts, p. 142; see also Professor Maitland's papers on the Seisin of Chattels, the Beatitude of Seisin, and the Mystery of Seisin: Law Quarterly Rev., i. 324; ii., 484; iv., 24, 286) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognized was between things corporeal and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognized seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift has been a purely consensual transaction, and did not require delivery to make it perfect (Inst. ii., vii.).

Coming next to the great law-writers of the reign of Edward I., they hold language substantially the same as that of Bracton, except indeed that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. "Donatio," says Fleta, "est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut rem a vero ejus possessore ad alium transferatur. Dare autem est rem accipientis facere cum effectu, alioquin inutilis erit donatio, cum irritari valeat et revocari" (Lib. iii., c. 3). He then proceeds to discuss various kinds of gifts, and says: "Alia perfecta, et alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondem fuerit subsecuta" (loc. cit.; see also Lib. iii., c. 15).

In Lib. iii., c. 7, he discusses the necessary elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shown, because, according to Fleta, a promise made without duress followed by delivery under duress is not a valid gift. "Refert tamen," he says, "utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promisero, et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus."

Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman-French of the original. In his chapter on Gifts (Lib. ii., c. 3) he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention

* Item non valet donatio, nisi subsequatur traditio, quia non transfertur per homagium res data, nec per chartarum vel instrumentorum confectionem quamvis in publico fuerint recitata.

that the thing shall not return to the doner, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested" (pp. 220, 221).

And again (Lib. ii., c. 3):—

"Some gifts are complete, where both rights unite in the purchaser; others are begun, and not completed; and such titles are bad, as in case of gifts granted whereof no livery of seisin follows" (pp. 225-6).

Passages of similar import will be found in Lib. i., c. 29, and Lib. ii., c. 8.

The third writer of the age of Edward I. is one of a very different character from Fleta and Britton—we mean Horn, the author of the Mirror of Justices; he attacked the judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the 155 abusions or abuses of the law which stirred his soul to wrath some relate to seisin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms that "the law requires but three things in contracts—(1) The agreement of the wills; (2) satisfaction of the donor; (3) delivery of the possession and gift" (chap. v., sec. 1, para. 75).

In the reign of Edward IV. a step seems to have been taken in the law relative to gifts, which resulted in this modification: that, whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

Thus, in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by Choke and other justices that if a man executes a deed of gift of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a court of record.

In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the court said that such a gift is not good without notice, for a man cannot give his goods to me against my will.

An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. 4, pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the court was engaged in considering the sufficiency of his pleas. In the course of the discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seised of them, a stranger takes them away, have you not a writ of trespass against the stranger?" Which he then proceeds to answer. "Yes, sir, for by the gift at once the property was in you and the possession by the writ is adjudged in you presently. Danby, the Chief Justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking of the defendant (car la si vous pled. vr. matter accord, et justif, et vous confess. prisee hors de son poss.). But immediately after this discussion Laicon found his argument so hopeless (videns opinionem curiæ contra eum) that he seems to have amended his pleadings.

This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to show whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to, which occurred a few years later, seem to show that the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day.

Brooke, in his Abridgement (Trespass, 303), cites this case of the 2 Edw. 4, and seems to put it upon a somewhat different ground to the Year Book itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting.

This case, as explained by Brooke, seems to underlie the proposition asserted twice in the case of *Hudson* v. *Hudson*, Latch. 214, 263 (discussed in 2 Wms. Saunders, 47, 6, a) to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them I can bring trespass; for property, it was added, draws possession in chattels personal. The court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by the will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made; and this point was not material to the matter under consideration by the court. Moreover, when a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV. must be mentioned. In Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55, it was said by Brian, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant and then he could have his law—*quod fuit concessum*. The case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII. perhaps requires consideration (Hilary Term, 21 Hen. 7, pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs:—"If I give to a man my cow or my horse, he may take the one or the other at his election; and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which emphasizes the distinction in gifts between words in the present and in

the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry.

In was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly-increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a valuable consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery.

This doctrine, that property may pass by contract before delivery, appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but, at any rate, the point was thought open to argument as late as Elizabeth's reign (see Plowd. 11 b., and see a learned note, 2 Man. & Ry. 566).

Flower's case, Noy, 67, which seems to have been decided in 39 Elizabeth (see p. 59), appears to show that the necessity of delivery was then upheld by the court. The case is thus stated by Noy (p. 67):—

"A. borrowed one hundred pound of B., and at the day brought it in a bagg and cast it upon the table before B., and B. said to A., being his nephew, I will not have it, take it you and carry it home again with you. And by the court that is a good gift by paroll, being cast upon the table. For then it was in the possession of B. and A. might well wage his law. By the court, otherwise it had been, if A. had only offer'd it to B., for then it was *chose in action* only, and could not be given without a writing."

The court seems to have held that delivery was necessary, but that, by the casting of the money on the table, it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew—so that the nephew might wage his law—*i.e.*, might conscientiously swear that he was not indebted to his uncle (see the case discussed in *Douglas* v. *Douglas*).

In Jenkins's Centuries (3rd Century, Case ix.), it is said: "A gift of anything without a consideration is good; but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis.* This is one of the rules of law"—a statement made with little reference to the other matters treated of in the case. We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says, "always accompanied by delivery of possession and takes effect immediately." "But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift but a contract: and this a man cannot be compelled to perform" (Book 2, c. 30).

In 1818, the year before *Irons* v. *Smallpiece* was decided, the then Master of the Rolls, Sir Thomas Plummer, in *Hooper* v. *Goodwin*, 1 Swans. 485, 491, said: "A gift at law or in equity supposes some act to pass the property: in donations *inter vivos* . . . if the subject is capable of delivery, delivery."

These are, so far as we can find, all the relevant authorities before the decision in *Irons* v. *Smallpiece*, though they are not all the authorities that have been cited as relevant. But several that have been relied upon appear to us to have no real bearing on the point at issue. Thus in *Wortes* v. *Clifton*, Mich. 12 James I, Roll. 61, Coke *arguendo* uses as an illustration of the difference between the civil law and ours—that in the civil law a gift is not good without tradition—but that it is otherwise in our law. Here, for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed.

In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery (Perkins' Profitable Book Grant, 57; 2 Shep. Touchs. 227; Comyn Digt. Biens D. 2) have been cited as if they likewise asserted that a gift was good without delivery—a proposition which they do not affirm, or, as we think, imply.

This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery: but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece* was decided: that that case therefore correctly declared the existing law: and that it has not been overruled by the decision of Pollock, B., in 1883, or the subsequent case before Cave, J.

We are therefore unable in the present case to accept the law on this point as enunciated by Lopes, L.J., in deference to the two latest decisions.

But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case—the first, whether the undivided fourth part of the horse admits of delivery, or whether on the other hand it is to be regarded as incorporeal and incapable of tradition; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion, because in our judgment what took place between Benzon and Cochrance before Benzon executed the bill of sale to Cochrane constituted the latter a trustee for Moore of one-fourth of the horse Kilworth.

Another objection to Cochrane's title was based on the bill of sale, which bore date the 26th of July, 1888, and stated the consideration as a sum of £7,575 then owing by Benzon to Cochrane, and of the further sum of £2,425, then paid by Cochrane to Benzon, making together a sum of £10,000; whereas in fact at the date of the bill of sale Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September, and for sums amounting together to £8,300. It is said that by an agreement arrived at at the time, this £8,300 due *in futuro* was to be taken as between the parties as represented by the sum of £7,575; but, if so, this agreement should in our opinion have been stated in the bill of sale, and we are

therefore of opinion that the document was void as not truly stating the consideration for which it was given.

For these reasons we are of opinion that this appeal should be dismissed with costs.

Lord ESHER, M.R.—In my opinion, it always was the law of England that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of and as a mere gift, or by will. Once conclude that such was always the law, and it follows that it is the common law. That law could not and cannot be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary could be overruled at any time, however remote, by a competent court. But each of the above propositions is a fundamental proposition of law — *i.e.*, a proposition which is not evidence of some other proposition which has to be proved, but a proposition the existence of which—*i.e.*, the facts necessary to constitute which—is to be proved by evidence. The moment those facts are proved the proposition of law is proved, to which the legal tribunal will give effect. Although no court can properly alter such a fundamental proposition, the amount or nature of the evidence which will satisfy a court of the existence of such a proposition, as applicable to a particular case, may vary, and has varied, at different epochs. I have no doubt that in every one of the propositions enumerated, unless it be in the case of a gift by will, there was a time when, as part of the evidence of the existence of the proposition in a particular case, the courts always required that there should have been an actual delivery of the chattel in question. Though there was proof of a contract for good consideration, in a form which would now pass the property in a chattel without delivery, proof of actual delivery was required. Though the transfer was contained in a deed, proof of actual delivery was required. Equally the statement that one had declared in mere writing or in words that he did then, at the moment, transfer, without consideration, his chattel to another, and that the other did at the same moment state in writing or in words that he accepted such transfer, was not acted upon by the courts as proof of a gift executed, without proof also of an actual delivery. The evidence required in all cases was not complete without proof of an actual delivery. But in some of the cases the courts undoubtedly do not now require proof of an actual delivery. They do not now require that piece of evidence. They do not in the case of a transfer by deed, or in the case of a transfer by a contract for good consideration, showing in its terms an intention that the ownership should pass at once before or without immediate delivery. If I thought that there was not a difference between those cases and the case of what has been called a gift in words by the donor, and an acceptance in words by the donee of a chattel, I should be strongly inclined to think that, even though the courts would have required in such case proof of an actual delivery, up to and including the case of *Irons* v. *Smallpiece*, the courts might now in such case, as former courts did in the other cases, be satisfied by other evidence of the gift by the one and the acceptance of the gift by the other, which are the facts which constitute the proposition of a transfer of ownership of a chattel by way of and as a gift.

Up to the time of *Irons* v. *Smallpiece*, and afterwards, I have no doubt the courts did require proof of an actual delivery in such a case. Upon long consideration, I have come to the conclusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not—that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction began and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving without then and there receiving the thing given. After these two things done, the donor could not get possession of the chattel without bringing an action to force the donee to give it back. Short of these things being done, the donee could not get possession without bringing an action against the donor to force him to give him the thing. But if we are to force him to give, it cannot be said that he has given. Suppose the proposing donor offers the thing saying, "I give you this thing—take it"; and the other says, "No, I will not take it now; I will take it to-morrow." I think the proposing donor could not in the meantime say correctly to a third person, "I gave this just now to my son or my friend." The answer of the third person would (I think rightly) be: "You cannot say you gave it to him just now; you have it now in your hand." All you can say is, "That you are going to give it him to-morrow, if then he will take it." I have come to the conclusion that in ordinary English language, and in legal effect, there cannot be a "gift" without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift. That being so, the necessity of their existence cannot be altered unless by Act of Parliament. For these reasons I think that the decision in *Irons* v. *Smallpiece* cannot be departed from, and I cannot agree with the decisions, which have been cited to us, of Pollock, B., and Cave, J.

I think, therefore, that we cannot agree with the main reason given by Lopes, L.J., for his decision in the present case, which he gave because he thought that, sitting as a judge of the Queen's Bench Division, he ought to follow the later decisions. His own opinion was in favour of maintaining *Irons* v. *Smallpiece*. But I do entirely agree with what I understand was another ground on which he was prepared to decide this case, and which he found, as a fact, existed in this case—namely, that the deed on which the claimant's case rested was obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud.

For this reason, and the others mentioned by my brother Fry, I think the appeal must be dismissed. I wish to say that I am not prepared to differ in any respect from the judgment of my learned brothers; but I wish to add my own particular reason.

Appeal dismissed.

Solicitors for the appellant, *Cooper & Sons.*

Solicitor for the respondent, *Sydney.*

From Q. B. Div. April 21, 22.

VADALA v. LAWES. (a.)

Judgment—Action to enforce foreign judgment—Defence alleging fraud—Re-trial of the merits of case adjudicated on by foreign court.

In an action brought in England to enforce a foreign judgment, it is legally competent for the defendant to raise a defence alleging fraud, even although the fraud alleged is such as necessitates a re-trial in England of the merits adjudicated on by the foreign court.

Abeuloff *v.* Oppenheimer, 31 *W. R.* 57, 10 *Q. B. D* 295, *discussed and followed.*

Appeal from an order of a divisional court of the Queen's Bench Division (Denman and Wills, JJ.).

The question raised by this appeal was whether, in an action to enforce a foreign judgment, it was open to the defendant to raise the defence that the foreign judgment was obtained by an alleged fraud, the proof of which required a re-trial of the merits of the case adjudicated upon by the foreign court.

The plaintiff was a stock and share broker in Sicily, and the defendant carried on business in England as a chemical manure manufacturer, and had appointed one Reynolds as his agent in Sicily. In 1881 Reynolds, purporting to act on behalf of the defendant, accepted several bills of exchange for a large amount drawn by the plaintiff. Reynolds, having shortly afterwards absconded, the plaintiff took proceedings against the defendant in the Italian court upon the bills of exchange, and the defence raised, in substance, was that the bills were not good commercial bills as the plaintiff represented, but bills given, without the knowledge of the defendant, in respect of gambling transactions. The Italian court gave judgment in favour of the plaintiff, who accordingly brought the present action to enforce that judgment in England against the defendant.

The defendant, by his statement of defence, alleged that the plaintiff, "by fraudulently concealing from the Italian court the true transactions between the plaintiff and Reynolds, and by inducing the said court to believe that the said bills of exchange, fraudulently prepared as herein mentioned, were accepted by Reynolds as the result of commercial transactions entered into by Reynolds on behalf of the defendant, obtained the said judgment." There was also an allegation in the statement of defence that the plaintiff had commenced the foreign action relying on forged bills, and had misled the foreign court by fraudulently substituting, in collusion with Reynolds, the bills signed by Reynolds for the forged bills. The defendant also delivered these particulars of fraud:—"The bills of exchange were given for the purpose of enabling Reynolds to repay to the plaintiff moneys lost by Reynolds in speculative and gambling transactions to the plaintiff. Reynolds, being impecunious and unable to meet his liabilities in respect thereof to the plaintiff, gave the said bills or acceptances, which were discounted by the plaintiff, who kept the proceeds of the said bills and appropriated the same to payment of the debt due to him from Reynolds. The plaintiff concealed from the court the facts above mentioned, and induced the court to believe that the bills were discounted in the ordinary course of business with the authority of the defendant."

The action was tried before Charles, J., who held that in substance the only defence of fraud raised by the defendant was that the foreign judgment had been obtained by the fraudulent substitution of forged bills in the Italian court, and he declined to allow the defendant to give evidence on the point as to whether or not there had been a fraudulent misrepresentation made to the Italian court as to the bills being good commercial bills, and he decided, on the other point of defence, in favour of the plaintiff.

The Divisional Court (Denman and Wills, JJ.) held that the second head of defence was sufficiently raised by the defendant's pleading and particulars, and that it was open to the defendant to raise it, and accordingly ordered a new trial.

The plaintiff appealed.

Finlay, Q.C., A. T. Lawrence, and *Leslie,* for the appellant.—Fraud can only be set up as a defence to an action to enforce a judgment when the fraud alleged is as to a matter extraneous to the question adjudicated on. The defendant is not entitled to have the question actually adjudicated on by the foreign court re-tried in this action: *Bank of Australasia* v. *Nias,* 16 Q. B. 717; *Flower* v. *Lloyd,* 27 W. R. 496, 10 Ch. D. 327; *De Medina* v. *Grove,* 10 Q. B. 152, 171; *Ochsenbein* v. *Papelier,* 21 W. R. 516, L. R. 8 Ch. App. 695; *Cammell* v. *Sewell,* 8 W. R. 639, 3 H. & N. 617, 5 H. & N. 728, 7 W. R. C. L. Dig. 45; *Crawley* v. *Isaacs,* 16 L. T. 529, 15 W. R. C. L. Dig. 57; *Adams* v. *Adams,* 51 New Hampshire Rep. 388. The case of *Abouloff* v. *Oppenheimer,* 31 W. R. 57, 10 Q. B. D. 295, is distinguishable, and was never intended to go against the previous long current of authorities. There would be no finality in judgments if it were open to one of the parties to have the case re-tried by asserting that the other party knew that the case put before the court, and upon which the judgment was obtained, was a false one. The case where a person who was not a party to the suit in which the judgment was pronounced seeks to have that judgment set aside is quite different: *Philipson* v. *Egremont,* 6 Q. B. 587. The principles on which our courts act as to impeaching judgments on the ground of fraud are laid down in the House of Lords in *Shedden* v. *Patrick,* 1 Macq. 535, at p. 607, and also in *Duchess of Kingston's case,* 2 Sm. L. C., 9th ed., p. 812, and *Henderson* v. *Henderson,* 6 Q. B. 288. But in point of fact the defendant, by his statement of defence, has not raised the point that the plaintiff fraudulently represented to the Italian court that the bills were good commercial bills.

Sir R. E. Webster, A.G., and *English Harrison,* for the respondent, were not called on.

LINDLEY, L.J.—This is an action brought by the plaintiff on a judgment obtained in the Italian courts. The Italian action was brought upon certain bills of exchange, and the defence raised in it was in substance that those bills were given in respect of gambling transactions by an agent of the defendant, without the authority of the defendant, and that the defendant was not liable upon them. That defence was tried on its merits—*i.e.,* the questions whether those bills were given for gambling speculations, and whether, if they were, the defendant was affected with notice of it, were fully gone into, and decided in favour of the plaintiff and against the defendant. Judgment was given for the plaintiff for the amount of the bills, and this action is brought to enforce that judgment.

The defence raised in that action is one of the matters in controversy now. It is said on the one side that the only defence raised is, that the judgment of the Italian court was obtained by fraud, consisting in this, that in the Italian courts there was a shuffling of the bills—a substitution of some genuine ones for some forged ones—and that by that shuffle and fraud the Italian court was imposed on. That head of defence, which was obviously open to the defendant, has been tried and decided in favour of the plaintiff by Charles, J.

But the defendandant alleges (and this is what gives rise to the controversy) that he has also raised another ground of defence—viz., that the plaintiff in Italy fraudulently represented these bills as commercial bills,

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

when he knew they were not, and that he thereby imposed on the court and obtained his judgment.

The first question is whether that defence is really raised. Charles, J., thought it was not. The Divisional Court, on looking further into the pleadings and the particulars, came to the conclusion that the defence might be construed, and ought to be construed, as raising that second head of defence. On looking at the amended statement of defence, especially at the seventh paragraph, it appears to me that the defence is capable of being construed in the wider sense. I do not think it is very clear; but there is certainly no surprise to the to the plaintiff, because if there were any obscurity in the pleadings, that is removed by the particulars, which make it clear enough. I have come, therefore, to the conclusion that the second head of defence—viz., that the plaintiff imposed upon the Italian courts by fraudulently representing that these bills were good commercial bills and not bills for gambling transactions, is sufficiently raised to enable the defendant to go into it, if in point of law he is entitled to do so.

That brings me to consider the other and more difficult question—viz., whether this head of defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. There is first the well established rule, that a party to an action can impeach the judgment in it for fraud, whether it be the judgment of an English court or of a foreign court is immaterial; using general language that is a general proposition. But there is another general proposition equally well settled—viz., that in an action on a foreign judgment, the merits which have been tried in the foreign court cannot be gone into.

Then what is to be done in a case where the alleged fraud cannot be gone into without going into the merits? Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff* v. *Oppenheimer*, decided in 1882. At that time there was a long line of cases, including *Bank of Australasia* v. *Nias*, *Ochsenbein* v. *Papelier*, and *Cammell* v. *Sewell*, all recognizing and enforcing the first general proposition—viz., that in an action on a foreign judgment the merits cannot be retried. But until *Abouloff's case* the difficulty of combining the two rules, and saying what ought to be done in a case where an allegation of fraud could not be proved or gone into without re-opening the merits, had never been the subject of explicit decision.

That point was raised and decided in *Abouloff's case*. As I read the judgments of the judges (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.) of the Court of Appeal in that case, they all say this: That if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen it, even although you will have, as a result of that, to go into, in the English court, the very questions investigated and decided in the foreign court. The technical objection that the issue is the same, is technically answered by the reply that the issue is not the same, because in the English court you have to consider whether the foreign court has been imposed upon. That, however, is only meeting a technical argument by a technical answer, and I do not attach much importance to that. But in *Abouloff's case* the court faced the difficulty that you could not give effect to the defence without re-trying the merits. In that case the fraud alleged to have been practised on the foreign court was the misleading of that court by evidence known to the plaintiff to be false. The fact of whether what the plaintiff had said in the foreign court was or was not false, was the very fact that had been adjudicated on in the foreign court, and, notwithstanding that, the English court said, 'If the foreign judgment was obtained fraudulently, and if it be necessary, in order to prove that fraud, to re-try the merits, then, according to the law of England, the merits must be retried.' To understand the judgments in that case, the argument for the defence ought to be looked at, because, as it appears to me, that argument was accepted by the court; and the argument was, "Even if the Russian courts had inquired into the existence of the fraud, and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court." Then Lord Coleridge, C.J., in his judgment says this: [The Lord Justice then read the passage beginning with the words, "An ingenious attempt has been made," and ending, "submitted to the determination of the Russian courts"; and continued:—] Mr. Finlay and Mr. Lawrence have pointed out, and I think unanswerably, that that would be really frittering away the general rule that you cannot re-try the merits. To a technical objection it was a good technical answer. But I understand the decision to go to the length of saying that you do re-try the merits for the purpose of satisfying an English jury that the foreign court has been imposed upon; and that, if you cannot prove the imposition without re-trying the merits, that you are at liberty to re-try them. Baggallay, L.J., in that case said:—"If the judgments had not been improperly obtained the right of the plaintiff would be clear. In using the words 'improperly obtained' I desire to be understood as not limiting them to a case where a fraud has been perpetrated upon the foreign court itself. I apply them also to a case where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based." That is to say, not only where there has been a fraud on the court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence—that is such a fraud as would enable the defendant to impeach the foreign judgment. Then Brett, L.J., in giving judgment, said:—[The Lord Justice read the passage on page 306 beginning: "It is a very small matter to be considered," and ending, "entitled to succeed in the present action"; and also the passage at page 308, beginning, "I accept the whole doctrine," and ending "suit in the foreign court"; and continued:—] That last passage can only be applicable to cases where there is what is called extraneous fraud, such as imposition on the court itself; but when I come to look at the defendant's argument and the whole judgment, I cannot conceal from myself that it has been decided to the effect I have already mentioned, and that, therefore, it is competent in point of law for the defendant in this action to raise this defence, and to satisfy the jury, if he can, that the Italian court was misled by the fraud of the plaintiff; that fraud consisting in this, that the plaintiff knowingly placed before the Italian court bills of exchange which he alleged to be good commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact that not only were the bills bills for gambling transactions, but, further, that the Italian court was imposed on by the fraud, that is a good defence to the present action, according to *Abouloff* v. *Oppenheimer*. It seems to me, therefore, in the face of that case, impossible to differ from the view taken by the Divisional Court, and this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Harries, Wilkinson, & Raikes.*

Solicitors for the respondent, *Markby, Stewart, & Co.*

High Court of Justice.

Chan. Div. } April 18.
Chitty, J. }

MACNEE v. PERSIAN INVESTMENT CORPORATION. (a.)

Company — Lottery — Concession — Illegal contract— Prospectus advertising foreign lottery—English company setting up lottery abroad—Lotteries Acts (9 *Geo.* 1, *c.* 19, *s.* 4; 6 *&* 7 *Will.* 4, *c.* 66).

A company, incorporated in England for the purpose of carrying on financial and other operations in Persia, issued a prospectus stating that it was intended to acquire under a certain contract a concession from the Shah, which granted the exclusive privilege of floating lotteries and similar loans in Persia; that the headquarters of the scheme would be in Persia, but that agents would be employed in the chief cities of Eastern Europe for the purpose of obtaining subscriptions; and that "five issues have to be made annually in Persia, with minimum drawings of £10,000, and it is estimated that these operations should return continuously-increasing dividends." A shareholder moved to restrain the company from acquiring the concession, or advertising the lottery loans or similar enterprizes.

Held, that the purchase of the concession was legal, and that the issue of the prospectus containing the statement of the five annual issues was not a notice of a foreign lottery within 6 *&* 7 *Will.* 4, *c.* 66.

Motion.

The Persian Investment Corporation (Limited) was incorporated in 1889, under the Companies Acts, 1862 to 1886, for the purposes, as appeared by the company's prospectus, dated the 25th of November, 1889, of (1) acquiring and working concessions granted by the Shah of Persia; (2) carrying on financial, exploration, promotion, and commercial business in Persia and elsewhere, and generally for certain other purposes set forth in the memorandum of association, being of a very wide and extensive character. The prospectus further set forth (*inter alia*)—(1) that the company would acquire in the first instance the concession granted by the Shah, and dated the 20th of July, 1889, conferring for the period of seventy-five years the exclusive privilege of conducting all operations in connection with lottery loans and other similar issues in Persia during the term of the concessions; (2) that the granting of this concession would result in business of a very remunerative character, resembling the Government lottery schemes carried on in Austria-Hungary, Italy, and Spain, and that the headquarters of the system would be in Persia, but that the company would not be limited to that country in the field of its operations, for it was intended, as in the case of the continental issues above referred to, that the company should be represented by agents in the chief cities of Eastern Europe for the purpose of obtaining subscriptions; (3) that, by the intended operations of the company, "at least five issues have to be made in Persia annually with minimum drawings of £10,000, and it is estimated that these operations should return continuously-increasing dividends"; (4) that it was in contemplation to establish subsidiary companies for various districts of the Persian Empire, whereby the company would profit by sales or by royalties; (5) that the terms on which the company was to acquire the concession were embodied in a contract dated the 15th of November, 1889, and made between the vendors, the Anglo-Asiatic Syndicate (Limited), and John Thorley, the temporary secretary, as trustee for the company, under which the total amount payable was £220,000, in cash and in shares.

The concession was duly executed by the Shah and authenticated by Prince Malcolm Khan, Persian Minister to Great Britain, being subject, as was represented in the prospectus, to the payment of certain percentages to the Persian Government. The Persian Government also undertook to protect the interests of the company without interfering with its internal administration.

The plaintiff applied for 200 shares of £5 each, of which 150 were allotted to him. He paid on the allotment £2 per share.

On the 27th of March, 1890, the plaintiff issued a writ on behalf of himself and all other the shareholders in the defendant company, except such as were defendants thereto, against the defendant company and five of the directors of the defendant company, claiming an injunction to restrain the defendant company from acquiring or dealing with, and to restrain all the defendants from printing or publishing or causing to be printed or published any prospectus proposal or scheme for or relating to, the acquisition by the defendant company of a concession, dated the 20th of July, 1889, granted by the Shah of Persia for conducting operations in connection with lottery loans or other similar issues in Persia, or any other concession for the like purpose, and from printing or publishing any prospectus, advertisement, or notice in any manner relating to such lottery loans, and from applying or pledging any of the funds of the defendant company in or towards the purpose of the acquisition of the concession aforesaid, or any such other concession, or for any purpose connected therewith.

The plaintiff now moved for an injunction in the terms of the writ.

The motion was by consent treated as the trial of the action.

A correspondence had taken place between the Director of Public Prosecutions and the secretary of the company, the letters forming which were put in evidence, commencing with a letter of the 13th of January, 1890, from the Director of Public Prosecutions, which stated that the attention of the Government had been drawn to the prospectus, and that the enterprise described therein was unlawful, and that if continued the directors and other persons engaged therein would render themselves liable to the penalties prescribed by the Lotteries Acts. The secretary, in reply, wrote a letter dated the 15th of January, 1890, stating that the company was advised by four eminent counsel that their enterprise was not unlawful, that no further copies of the prospectus would be issued, that it was not intended to publish any notice of the drawing or intended drawing of any foreign lottery, or to publish any notice of the sale of any tickets or chances in any such lottery. The letter further stated that the directors proposed in the future to raise in Persia or in other foreign countries where lotteries were legal, Persian State and other loans by drawings there, but not to advertise such lotteries in this country. The Director of Public Prosecutions wrote a letter of the 13th of February, 1890, to the secretary in reply to the last letter, informing him that the Government referred the corporation to the warning already given, and that proceedings to test the legality of any act that might be done by the corporation in furtherance of the enterprise in contravention of the Acts passed for the suppression of illegal lotteries would be commenced without further warning.

On the motion coming on, the defendants consented not to raise any question as to the plaintiff's knowledge of the company's proposed business at the time of his application for shares.

Counsel for the company stated during the course of

(a.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

the argument that it was not intended to publish any other scheme.

Byrne, Q.C., and *J. G. Wood*, for the motion.—The prospectus is illegal. This amounts to advertising a foreign lottery in this country, and inviting subscriptions here to set up a lottery in a country where a lottery is lawful and thereby deriving a profit. The fact is stated that there will be foreign lotteries held, and funds are asked for to promote the enterprize. If the nature of the scheme involves the publishing here of announcements of drawings and accounts, it is an illegal act; it is making known to the public the fact of the existence of the lotteries. It is clear the company hold out here that foreign lotteries will be conducted. The plaintiff is entitled to an injunction to prevent the company doing acts or making payments for the purpose of carrying on such lotteries: 9 Geo. 1, c. 19, s. 4; 10 & 11 Will. 3, c. 17; 6 & 7 Will. 4, c. 66. It is admitted that lotteries are lawful in Persia. [CHITTY, J.—The company may do illegal acts, but it is not necessary for them to do illegal acts. All the business may be done in Persia, you want me to assume illegality. How is the plaintiff concerned by the advertisements?] The advertisements are necessary for working the concession. To advertise that large profits will be made by a foreign lottery is illegal. It is after all setting up a future lottery here, especially if there is an office in England. The plaintiff is interested, and can prevent any acts done towards the completion of the contract, which must be referred to in every prospectus issued. [CHITTY, J., referred to *Sykes* v. *Beadon*, 27 W. R. 464, 11 Ch. D. 170.]

Romer, Q.C., and *G. F. Hart*, for the defendants.—The plaintiff is not damnified in any way. The prospectus is not illegal. The plaintiff says the prospectus referring to the fact that lotteries will be held in Persia renders the promoters liable to penalties, but if that were so any newspaper referring to the existence of foreign lotteries would be so liable. The object of the Lotteries Acts is to prevent persons here being invited to gamble. It is not illegal for a person to take shares in, or for twenty persons to combine to take shares in, a foreign lottery, but it is illegal to invite persons here to take shares in, and to gamble, by means of a lottery. That is not what the defendants have done. The Act of Will. 4 does not deal with lotteries as a whole, only with special or particular lotteries.

Byrne, Q.C., in reply.—The readers of the prospectus know where they can find out where and when the lotteries are to be held, and can inquire where to purchase tickets: this comes within the mischief dealt with by the Lotteries Acts. As to the right to the injunction, it is the right of any shareholder to come and prevent the commission of any illegal act.

CHITTY, J.—Two points are raised on this motion. The first and the more important point is this. It is said that the company, by its directors, are about to apply their money in the performance of an illegal contract; that they have already spent some of the company's money in partly performing the contract, and now they propose to spend more. The case is not one of an illegal company, for it has not been contended, nor can it be contended, that the company has among the objects on the face of the memorandum any object or any purpose which is illegal. But it is said that the contract which the company has entered into (and it is admitted on the part of the plaintiff that it is) is within the objects which are stated in the memorandum. The case, therefore, is not any mere case of *ultrà vires*. It is admitted that the contract is within the powers of the company, but it is said that the contract itself is an illegal one.

The Shah of Persia granted a concession for the sole and exclusive right and privilege throughout the Persian Empire of initiating and conducting all operations relating to lotteries and lottery loans, and the formation of a lottery company and the sale of lottery tickets, and other rights which are now particularly set forth in the concession. The contract, which is impeached by the notice of motion, is a contract which the company entered into to buy that concession. The illegality alleged is illegality under the Lotteries Acts, and the only Act that counsel for the plaintiff has been able to point to as being the Act which makes this contract illegal is the Act of 9 Geo. 1, c. 19, s. 4. That section contains are cital which has been read: "And whereas in order to elude the many good laws made for suppressing unlawful lotteries, several evil disposed persons have of late presumed to erect and carry on several lotteries upon pretence and colour of some grant and authority given by foreign princes or states; for the better preventing of which illegal practices for the future, be it declared and enacted, that if any person or persons shall from and after the 1st day of July, 1723, by virtue or colour of any grant or authority from any foreign prince, state, or government whatsoever, erect, set up, continue, or keep, or shall cause or procure to be erected, set up, continued, or kept, any lottery or undertaking in the nature of a lottery, under any denomination whatsoever, or shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme for any such lottery or undertaking, or shall within this kingdom sell or dispose of any ticket or tickets in any foreign lottery, and shall be convicted of any of the said offences upon the oath or oaths of one or more credible witness or witnesses by two or more justices of the peace of the county, division, or liberty where such offence shall be committed or the offender shall be found (which oath such justices of the peace are hereby empowered and required to administer) the person so convicted shall for every such offence (over and above any former penalties inflicted by any former Act or Acts of Parliament made against unlawful lotteries) forfeit the sum of £200." Now is the contract that I have mentioned a contract falling within the scope of that section? The words principally relied on were "erecting, setting up, continuing, or keeping, causing or procuring to be erected, or set up," and so on. The company, by virtue of its contract, do not propose to set up any lottery in this country, and the proposal or the object of the contract is very simple. In Persia, I take it, seeing that the concession has been granted by the Shah, lotteries are lawful, and this company proposes under the concession to set up lotteries in that country. This Act of Parliament is not addressed to such a case as that; it is directed against the erection of lotteries unquestionably in this country, but the Legislature of Great Britain of that day did not intend to exercise any jurisdiction over lotteries in foreign countries, kept and carried on exclusively in foreign countries; and there is nothing in this Act, nor, indeed, in any of the Acts that I have been referred to (and I think I have read through the Lotteries Acts, not for this purpose, but for some other purpose some time ago), which would prevent two Englishmen in this country, British subjects, from putting together a fund for the purpose of employing that fund in erecting a lottery in a foreign State (and I add though it is unnecessary to do so) where foreign lotteries are lawful. By no ingenuity can the case be brought within that section, and it is to be borne in mind in considering these Lotteries Acts that they are particular enactments directed to particular offences which are specified, and I am not at liberty to take some general notion of what may or may not have been the intention of the Legislature, because I am here dealing with the criminal law, and it is important to remember that the Act of Parliament is so framed as to create and deal with specific offences.

It is said, as part of the argument for the plaintiff, that it would be impossible for the company to perform this agreement without violating in some way or other portions of the Lotteries Acts. I see no foundation whatever for that, and I am not at liberty to speculate and say that the company which can perform its operations lawfully and without violating the Act of Parliament will probably do something which will bring it within some one or other of the Lotteries Acts; that is not my function sitting here as a judge; and turn it over in what way I can, I can find no ground for the suggestion that this is an illegal contract. There is no ground, therefore, for restraining the company from applying its money in the way it proposes. That is the main point of the motion, but there is a subordinate one founded on the prospectus. The company have issued this prospectus, they have obtained their capital, and, as has been stated in the correspondence with Sir Augustus Stephenson, they do not intend to issue any further prospectus. But the plaintiff says he has no undertaking from the company that they will not issue some further prospectus, and that they may, and probably will, put forward to the public another prospectus similar, or somewhat similar, to the one that I have before me. Then it is argued that the prospectus which they have actually issued, and which prospectus has done its business, is an illegal one. Now the material parts of the prospectus which are attacked by the motion are these: "The headquarters of the system will be in Persia, but the company will not be limited to that country in the field of its operations, for it is intended, as in the case of the continental issues above referred to" (the continental issues above referred to relate to Italy, Austria-Hungary, Spain, &c.), "that the company should be represented by agents in the chief cities of Eastern Europe for the purpose of obtaining subscriptions." It is plain, therefore, that the company, upon that statement in the prospectus, does not propose to seek for subscriptions to lotteries in this country. Then the following paragraph was relied on by the plaintiff: "The intended operations of the company will (pursuant to the terms of the concession) be conducted generally upon the lines adopted in the European States where Government lotteries are in vogue. At least five issues have to be made annually in Persia, with minimum drawings of £10,000, and it is estimated that these operations should return continuously-increasing dividends." It is said that this is an advertisement or notice of lotteries to be held in Persia. Now the Act of Parliament relied on by the plaintiff on this point is the 6 & 7 Will. 4, c. 66. The title of that Act is, "An Act to prevent the advertising of foreign and other illegal lotteries." There is a recital, "And whereas the laws in force are insufficient to prevent the advertising of foreign and other illegal lotteries in this kingdom, and it is expedient to make further provision for that purpose"; and it enacts that, "if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of, or relating to, the drawing or intended drawing of any foreign lottery, or of any lottery or lotteries not authorized by some Act or Acts of Parliament"—that is to say, a notice relating to the drawing, or any intended drawing, of any foreign lotteries; those are the important words on the question before me—"or if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of or for the sale of any ticket or tickets, chance or chances, or of any share or shares of any ticket or tickets, chance or chances, of or in any such lottery or lotteries as aforesaid, or any advertisement or notice concerning or in any manner relating to any such lottery or lotteries, or any ticket, chance, or share, tickets, chances, or shares thereof or therein." This, again, is a particular and special enactment; and the only words that the plaintiff could rely upon as bringing the case within this enactment are the latter general words—namely, "any advertisement or other notice concerning, or in any manner relating to, any such lottery or lotteries."

Now I am dealing with this question on a motion for an injunction, and I am not really called upon to express an opinion with reference to this prospectus, because the defendants have said that they do not intend to issue another prospectus of similar effect, and merely at the bar they refuse to give an undertaking. I am not prepared to say, in circumstances of that kind, that the plaintiff is, without any other evidence than the issue of this prospectus, entitled to call upon the court to hold, as a matter of inference, that there is an intention hereafter to issue a similar prospectus, and that such an intention is to be inferred from the acts already done, and the refusal to give the undertaking, and that such an intention is to be inferred notwithstanding the statement in the correspondence with the Government, to the effect that the prospectus has been issued, and there is no intention to issue any further prospectus. But if I am called upon to express an opinion upon the point, I hold that this prospectus is not within those general words at the end of the section—in other words, it is not within the section. There is no lottery that has been set up, that has been opened, that has been commenced, there is no invitation in this prospectus to anybody to subscribe to the lottery or to take tickets in the lottery, it is a mere statement that at least five issues have to be made annually in Persia. That is the material part of the statement. Supposing a newspaper dealing with public news said, "There are five State lotteries held every year in Austria," if the plaintiff's proposition is right that is an offence against the Act. I think that would be straining the Act, and that is not the offence that the Act must mean. I am purposely very careful in what I say with regard to any Act of Parliament of this sort, because I am not disposed in any way to make observations which may lessen the effect of the enactment, and it appears to me that I discharge my duty rightly in this case, supposing I am bound to decide this question, by holding, as I do, that this prospectus is not within the Act of Parliament. The mere general statement that there will be at least five issues to be made annually in Persia, with minimum drawings of £10,000, I say is not an advertisement or notice of any such lottery within the meaning of that section.

Then there is the further point, supposing that what I have said is not well founded. On the second point, what interest has the plaintiff? The Act is a penal Act, and the persons who contravene the Act will be the agents of the company personally, who will issue the advertisements. What has the plaintiff to do with that? He will not be liable, and they cannot make him under any criminal law responsible for their acts, and he cannot of course, after what has taken place, in any way be liable, although he has taken shares in this company, and although this prospectus was before him when the shares were taken, he may or may not have read it, but that is quite immaterial, and he cannot be said to have caused to be printed or published any such advertisement or notice as that which he is afraid may hereafter be issued. Therefore, he has no sufficient interest in the question to justify his motion on that point.

Upon these grounds, the first question being the substantial one, and the second question being comparatively trifling, I refuse the motion, and, as this is the trial, I refuse it with costs.

Motion refused.

By consent, the motion was treated as the trial of the action.

Action dismissed.

Solicitors for the plaintiff, *Faithfull & Owen.*

Solicitors for the company, *Michael Abrahams, Sons, & Co.*

Chan. Div. North, J. } Jan. 30; Feb. 4.

BERRIDGE v. BERRIDGE. (a.)

Principal and surety—Co-sureties—Security given to one surety—Contribution out of security to indemnify other co-sureties.

Where one of several co-sureties receives from the principal debtor a security to indemnify him against liability as surety, he is entitled to apply the whole or such part of the same as may be necessary to repay himself and his co-sureties all payments made by them on account of the principal debt.

Special case.

In March, 1880, W. Berridge, sen., J. Berridge, W. Berridge, jun., W. Gilbert, and A. Gilbert jointly and severally guaranteed to the Leicestershire Banking Co. any sum not exceeding £2,000 which S. Berridge should owe to the bank on his current account.

W. Berridge, sen., in April, 1880, deposited with the bank, as further security, title deeds of his own property, and by the accompanying memorandum of deposit declared that they were deposited as a security "for all sums of money now or hereafter to become due from my brother S. Berridge to the banking company, either upon banking accounts or in any other manner whatsoever." The receipt given by the bank for the deeds stated that they were deposited "as security for his brother S. Berridge's account when in excess of £2,000."

S. Berridge, prior to 1882, deposited with W. Berridge, sen., two policies of assurance on his own life for the sum of £1,000 each.

W. Berridge, sen., died in 1882, and the plaintiffs, J. Berridge and J. Earl, were his executors.

By an indenture dated the 28th of August, 1884, and made between S. Berridge of the one part and the plaintiffs of the other part, S. Berridge assigned to the plaintiffs the two policies of assurance, subject to reassignment, if the estate of W. Berridge, sen., deceased, should at any time be released from all liability in respect of the suretyship.

In February, 1886, S. Berridge was adjudicated a bankrupt, and the bank proved in the bankruptcy, and after receiving a dividend there remained owing to them £3,334 9s.

The bank called upon the five sureties to pay the £2,000 guaranteed, which they did in the following shares—viz., executors of W. Berridge, sen., £400; J. Berridge and W. Berridge, jun., £500 each; W. and A. Gilbert, £600; and the executors of W. Berridge then paid the balance of the debt, amounting to £1,334 9s., and they also paid as premiums on the policies after the bankruptcy of S. Berridge the sum of £165 16s. 8d.

S. Berridge died in 1887.

W. and A. Gilbert were both adjudicated bankrupts.

In June, 1888, the sum of £2,490 was received by the plaintiffs in respect of the policies.

The questions for the opinion of the court were—1. Whether the said sum of £2,490 should be applied (1) in payment to the plaintiffs, as executors of W. Berridge, of the sums expended by them in respect of premiums on the policies with interest thereon, and in payment of the plaintiffs' costs, charges, and expenses in respect of the policies and of the deed of the 28th of August, 1884; (2) in payment to the plaintiffs of the sums of £400 and £1,334 9s. respectively with interest thereon; and (3) whether the residue of the said sum of £2,490 should be paid to the defendants and the plaintiff J. Berridge in his own right, or some or one of them; or 2. How the said sum of £2,490 ought to be dealt with.

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., and *Dibdin*, for the plaintiffs.—A co-surety who obtains from the principal debtor a security is bound to share equally with his co-sureties the benefit he derives from it: *Steel* v. *Dixon*, 29 W. R. 735, 17 Ch. D. 825; *In re Arcedeckne, Atkins* v. *Arcedeckne*, 24 Ch. D. 709, 31 W. R. Dig. 162.

Ingle Joyce, for the trustee in bankruptcy of the principal debtor.—The deed of August, 1884, shows the policies were deposited only for the purpose of releasing the personal estate of the plaintiffs' testator from liability. The surety who holds a security is only entitled to be repaid therefrom the amount which he has paid. The co-sureties cannot call on him for contribution: *Turner* v. *Davies*, 2 Esp. 478; De Colyar on Guarantees, p. 313.

The other defendants were served but did not appear.

Cozens-Hardy, Q.C., in reply.—The £1,334 9s. is entitled to priority over the £2,000.

NORTH, J.—There does not appear to me anything in the memorandum of deposit which shows that W. Berridge, sen., thereby undertook any personal liability, on which he can be sued in respect of the amounts covered by that security. If the security had been given by the principal debtor, who was receiving the advance from the bank, the position would have been totally different. But the surety's liability must be ascertained by what is expressed in the written document which alone constitutes the security; and here the title deeds are merely deposited as security. That is not a contract that he is also to be personally liable for the debt. Then there is the receipt for the deeds signed by the bank's agent, and I think the two documents contain the terms of the deposits and should be read as one. The latter document shows the nature of the deposits. It was to be a security for the surplus of the debt to the bank in excess of the £2,000. Subsequently S. Berridge deposited with W. Berridge, sen., the two policies of assurance, though it is not known at what date, and I have no means of judging. The deed of the 28th of August, 1884, followed, and afterwards S. Berridge became bankrupt and died, and a sum of £2,490 has been received by the plaintiffs in respect of the policies. The question is, How should the money be applied? The £2,000 was paid to the bank by the five sureties in unequal proportions. Of course, the construction of the indenture of August, 1884, cannot be affected by subsequent events; but if the bank had claimed from the plaintiffs, as executors of W. Berridge, payment of the whole debt, and they had paid it, what would be their right as against the policy moneys? The policies were to be re-assigned only if the estate of W. Berridge, deceased, should be released from all liability in respect of the said suretyship. Now, at this point all liability in respect of the suretyship would have been at an end, because the principal debt would have been paid off by the surety. But it would be absurd to suppose that as soon as one surety has paid off the principal debt the deposit by way of security is at an end. The policies are to be a security to the surety so as to relieve him from every liability. Therefore, in the case I have suggested, the executors would have been entitled to receive back the £2,000 which had been paid; but, in fact, only £400 was paid by them as executors. But now, the policy moneys being divisible, in what shares ought they to be divided? The other co-sureties now claim the benefit of the security of W. Berridge, sen., upon the policies, and the question is, What is to be done with this money for the purpose of indemnifying the plaintiffs. I think the premiums should first be repaid with interest, and then the costs of the equitable mortgage and costs of the action. The next claim is the £1,334 9s. paid by the plaintiffs in respect of the equitable mortgage. The plaintiffs are entitled to

receive the £1,334 9s. out of the proceeds of the policies. They are also entitled to the £400 which they paid to the bank on account of the £2,000, and when that £400 has been paid to the plaintiffs or received by them it cannot be applied solely in satisfying them; but it must, according to the doctrine of *Steel* v. *Dixon*, be shared between them and the other co-sureties. Then, will the plaintiffs be entitled to receive anything more? In my opinion they will, because otherwise the testator's estate will not have been released from all liability in respect of the suretyship. It will only have been repaid one-fifth part of the £400 which it has paid to the bank, because the balance of the £400 will have gone to pay the co-sureties. The plaintiffs are therefore entitled to something more—viz., such sum as will make up to them what they have paid to the co-sureties. That further sum will again have to be distributed in a similar manner, and thus, by successive payments, the rights of all the co-sureties must be satisfied before the plaintiffs would be able to say they had got the £400 to which they are entitled under the deed of August, 1884. This is the necessary result of the doctrine of *Steel* v. *Dixon*. In that case the plaintiffs limited their claim to a share of the first payment received by their co-surety by means of his security, and did not ask to share in any subsequent payments made to him. They did not claim to share in the whole of the proceeds of the security, but only to the extent of £400. I think the principle of the decision would have entitled them to more, if it had been asked for, and I think it entitles the co-sureties in the present case to the relief which I have mentioned. This would decide the whole question if the policies were sufficient, after the prior payments I have mentioned, to pay the whole £3,334 9s.; but this is not the case. Ought the £1,334 9s. to be paid in priority to the £2,000. I think not. The deposit of the policies was to release the estate of W. Berridge from all liability in respect of his suretyship, and I find nothing in the indenture of August, 1884, which makes a distinction between his liability under the memorandum of deposit and his liability under the original guarantee.

I therefore hold that the surplus of the policy money, after making the prior payments which I have mentioned, must be applied so far as it will extend rateably in satisfaction of the £2,000 and £1,334 9s.

Solicitors, *Bridges, Sawtell, & Co.*, for *Howes, Percival, & Ellen*, Northampton; *W. Murton, Solicitor to the Board of Trade.*

Chan. Div. North, J. } Jan. 22, 23.

In re CRAWSHAY.

CRAWSHAY *v.* CRAWSHAY. (*a.*)

Power—Special power of appointment—Appointment of part of fund to object of power, with directions for settlement—Appointment of residue of fund to another object of power—Absolute appointment of previously appointed part of fund to last object of power in case of failure of previous appointment with directions for settlement—Validity—Fraud on power.

A testator having, under a settlement, a power to appoint by will a sum of £35,000 among his children, bequeathed a legacy of £150,000 to a daughter J., with directions that it should be paid to trustees upon trust for J. for life, with remainder to her issue; and then, after reciting the power of appointment, appointed £10,000 (part of the £35,000) to J., with directions that it should be paid to the trustees of the legacy of £150,000 bequeathed to her upon the trusts declared with respect to that legacy. After making appointments to other daughters, the testator appointed the residue of the £35,000 to his son R. absolutely, and provided that, in case he had exceeded his power in not appointing the £10,000 to J. unconditionally, but in directing a settlement thereof, and in case anyone having a right to the settlement thereof should so object, or should not confirm such settlement if required so to do, then he appointed the sum of £10,000 to R. absolutely, adding, "But who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." R. did in fact execute a declaration of trust to carry out the testator's wishes, but there was no evidence of any bargain between the testator and R.

Held, that the appointment to J. was invalid, but that the absolute appointment to R. was valid, and that the trustees of the declaration of trust executed by him held the fund upon the trusts declared thereby.

Originating summons.

The question to be decided was, whether a power of appointment among children given by a voluntary settlement was validly exercised.

By a voluntary settlement dated the 7th of August, 1828, and made by William Crawshay, a sum of £35,000 (the payment of which to the trustees of the settlement within six months after his death was secured by his bond) was settled upon trust for all and every or any such one or more of his seven children therein named, including his daughters Amelia and Jessy, as he should by will appoint, and in default of appointment in trust for the seven children in equal shares, with a hotchpot clause to provide for a partial appointment.

By a settlement dated the 17th of October, 1849, made in consideration of the marriage of the daughter Jessy with her cousin Alfred Crawshay, her interest in the sum of £35,000 was vested in the trustees of her marriage settlement upon the trusts therein mentioned.

By his will, dated the 21st of October, 1865, William Crawshay bequeathed to his daughter Amelia a legacy of £150,000 Consols. He also bequeathed to his daughter Jessy a legacy of £150,000 Consols, which he directed to be paid to special trustees to be held upon trust as to the income thereof for his daughter Jessy during her life for her separate use without power of anticipation, and after her death upon trust for her children or remoter issue as she should by deed or will appoint, and in default of any such appointment for her children in equal shares; and in case there were no issue, then upon trust for such person or persons as she should appoint, and in default of appointment for her next of kin exclusive of her husband. The testator then, after reciting his power to appoint the sum of £35,000 among his children created by the settlement of the 7th of August, 1828, proceeded, "Now, therefore, my will is, and by virtue of the said power and of every or any other power enabling me in that behalf, I appoint that the sum of £10,000, part of the said last mentioned sum, shall go and belong to my daughter Amelia; the sum of £10,000 further part thereof, shall go and belong to my daughter Jessy. . . . . But my will is that as to the two first mentioned sums of £10,000 and £10,000 the same shall be paid to the respective trustees hereinbefore named and appointed with reference to the legacies hereinbefore bequeathed to them, my said two daughters respectively, and be held upon the trusts and for the intents and purposes hereinbefore declared of and concerning those legacies. . . . . And as to the residue of the said sum of £35,000, I appoint and declare that the same shall go and belong to my son Robert T. Crawshay, his executors, administrators, and

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

assignees, absolutely. And in case I have exceeded my power in not appointing the said sums of £10,000, and £10,000 . . . unconditionally, but in directing the settlement thereof respectively as aforesaid, and in case my said daughters Amelia and Jessy respectively, or their respective husbands, or others having any right or power to object to the settlement thereof as aforesaid, shall so object or shall not confirm such settlement thereof if required so to do, then I appoint that the said sums of £10,000, and £10,000 shall also go and belong to my said son Robert T. Crawshay absolutely, but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes."

The testator died in 1867, and in November of that year his son Robert T. Crawshay, with the view of carrying out the testator's wishes, executed a declaration of trust of the sum of £10,000 appointed by the testator in trust for his daughter Jessy.

The testator's daughter Jessy survived her husband, Alfred Crawshay, and died on the 17th of July, 1889, having made her will, dated the 29th of January, 1885, and thereby, in expressed exercise of the power of appointment given her by the testator, William Crawshay, over the legacy of £150,000 and the sum of £10,000 respectively bequeathed and appointed to her by his will, appointed certain sums to her children and their issue, and declared that, if any of them should object to or try to defeat the exercise of the powers of appointment and provisions of her will, they should forfeit all benefits conferred by her will, and that every appointment or bequest in their favour should be considered as having been made to her daughter, Jessy Sandeman.

This was an originating summons, taken out by the trustees of the sum of £10,000 appointed in the will of the testator, William Crawshay, to his daughter Jessy, for the determination of the questions—(1) whether the trustees of the settlement of the 17th of October, 1849, made on the marriage of Jessy Crawshay, were entitled to have the £10,000 paid to them, or (2) whether the plaintiffs held the £10,000 upon the trusts declared by the will of the testator, as well as by the declaration of trust by the testator's son, Robert Crawshay, of the 7th of November, 1867.

Bramwell Davis and *Reginald Winslow*, for the plaintiffs, stated the facts.

Seward Brice, Q.C., and *R. F. Norton*, for Jessy Sandeman. — The appointment of £10,000 to Jessy Crawshay by the testator is coupled with a direction that it should be paid to trustees to be held upon the trusts of the settlement thereof declared by the testator. If valid, the trustees of the settlement of the 17th of October, 1849, would not be entitled to it. But it is bad as *ultra vires*. As the testator has exceeded his power, the appointment to Robert T. Crawshay takes effect, and the expression of confidence in him by the testator does not invalidate it: *Blacket* v. *Lamb*, 14 Beav. 482. Failing the latter appointment, the fund is included in the appointment of the residue to Robert T. Crawshay: *Carter* v. *Taggart*, 16 Sim. 423; *In re Harries' Trust*, Joh. 199, 7 W. R. Ch. Dig. 95; *Champney* v. *Davy*, 27 W. R. 390, 11 Ch. D. 949; *Freme* v. *Clement*, 30 W. R. 1, 18 Ch. D. 499; *In re Turner's Settled Estates*, 33 W. R. 265, 28 Ch. D. 205. *Easum* v. *Appleford*, 10 Sim. 274, and the older cases are not now law. [*R. F. Norton* was stopped by the court.]

Everitt, Q.C., and *J. W. Cunliffe*, for the trustees of the settlement of the 17th of October, 1849.—The testator's daughter Jessy Crawshay took the fund absolutely under the appointment in her favour, and the provisions of the will made with a view of compelling her to agree to the settlement of it are void: *Wallgrave* v. *Tebbs*, 4 W. R. 194, 2 K. & J. 313; *Lee* v. *Ferris*, 4 W. R. 352, 2 K. & J. 357; *Woolridge* v. *Woolridge*, Joh. 63, 7 W. R. Ch. Dig. 110; *Moss* v. *Cooper*, 1 J. & H. 352, 9 W. R. Ch. Dig. 114; *Sadler* v. *Pratt*, 5 Sim. 632; *In re Marsden's Trust*, 7 W. R. 520, 4 Drew. 594; *Churchill* v. *Churchill*, 16 W. R. 182, L. R. 5 Eq. 44; *Topham* v. *Duke of Portland*, 18 W. R. 235, L. R. 5 Ch. 40; *Rowbotham* v. *Dunnett*, 26 W. R. 529, 8 Ch. D. 430. [North, J., referred to *Lomax* v. *Ripley*, 3 W. R. 269, 3 Sm. & Giff. 48; *Jones* v. *Badley*, 16 W. R. 713, L. R. 3 Ch. 362.] The gift of residue to Robert T. Crawshay does not include the £10,000: *Page* v. *Leapingwell*, 18 Ves. 463; *Petre* v. *Petre*, 14 Beav. 197; *Wright* v. *Weston*, 26 Beav. 429, 8 W. R. Ch. Dig. 94; *Morgan* v. *Gronow*, L. R. 16 Eq. 1, 21 W. R. Ch. Dig. 176; *Scholfield* v. *Spooner*, 32 W. R. 910, 26 Ch. D. 94; *Wilson* v. *Kenrick*, 31 Ch. D. 658, 34 W. R. Dig. 138. *In re Harries' Trust* is in our favour. *Freme* v. *Clement* was disapproved of in *Holyland* v. *Lewin*, 32 W. R. 443, 26 Ch. D. 266.

Napier-Higgins, Q.C., and *P. S. Stokes*; *Cozens-Hardy, Q.C.*, and *G. Murray*; and *Edward Wilkinson*, appeared for other parties interested.

Seward Brice, Q.C., and *R. F. Norton* also, as he had been stopped before, was heard in reply.—*In re Marsden's Trust* is inapplicable to the present case, and was designated a peculiar case by Baggallay, L.J., in his judgment in *Roach* v. *Trood*, 24 W. R. 803, 3 Ch. D. 429. [They referred to *Wright* v. *Goff*, 4 W. R. 522, 22 Beav. 207; *Birley* v. *Birley*, 6 W. R. 400, 25 Beav. 299; *Goldsmid* v. *Goldsmid*, 2 Hare, 187; *Pryor* v. *Pryor*, 12 W. R. 781, 2 De G. J. & S. 205; *Duke of Portland* v. *Topham*, 12 W. R. 697, 11 H. L. Cas. 32, 55.] The £10,000 is bound by the declaration of trust of Robert T. Crawshay, and did not pass to the trustees of the settlement of the 17th of October, 1849.

North, J., read the provisions of the will above set out, observing that the sum of £35,000 was not a fund requiring conversion or capable of increase or reduction, but a definite sum which the testator had bound himself to pay upon his death at which date the appointment took effect, and proceeded:—The £10,000 is to be paid by the executors to the special trustees and not to Jessy, and, when it is to be paid to the special trustees, it is to be held by them upon the same trusts as are declared of the legacy of £150,000, which include a larger class of persons than the settlement of 1828, and also powers not comprised therein. Jessy is not to receive the money and then to proceed to settle it, but the money which the testator gives to Jessy he gives to her by means of this direction, that it is to be paid to trustees named by him and to be held by them upon the trusts thereinbefore declared of the legacy, under which Jessy takes only a life interest. The testator also appoints another £10,000 in a similar way to his daughter Amelia, and he appoints that the residue of the £35,000 shall go and belong to his son Robert T. Crawshay absolutely.

Now, stopping there, we have the gift to Jessy followed by a direction, that what is given to her is to be paid to trustees to be held upon certain trusts under which her interest is only a limited one; and, if the will had stopped there, it might have been said that as, under the first words of the gift, Jessy took absolutely, subject to the trusts afterwards created, if those trusts failed the original gift remained untouched as in *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Carver* v. *Bowles*, 2 Russ. & My. 304; and many similar cases. But the will does not stop there, for the testator goes on to say, "And in case I have exceeded my power in not appointing" Jessy's £10,000 "unconditionally, but in directing the settlement thereof as aforesaid." That shows that he thought that in doing what he had previously done he

might possibly be held by construction of law to have exceeded his power. In what way? Because he had not given the £10,000 to Jessy absolutely free from any condition. This shows that, in his view at any rate, the only gift to her was as part of the arrangement, and for the purpose of the arrangement, for effecting a settlement of the £10,000, and it shows also that, considering there was some doubt as to his power to do what he had done, he thought it necessary to provide what was to be done in case the law should prevent what he had already attempted to do from taking effect, as he hoped that it would take effect.

Then he says, "In case I have exceeded my power in not appointing the fund unconditionally"—in other words, "If what I have done cannot take effect, and the £10,000 is undisposed of, and in case my daughters Amelia, Jessy, . . . respectively, or their respective husbands or others having any right or power to object to the settlement thereof as aforesaid, shall so object or shall not confirm such settlement thereof if required so to do," which comes to this: "If I have exceeded my power, and if, by reason of an objection on the part of any person entitled to object, that which I have attempted to do cannot be confirmed, then something else is to be done." It is clear that there cannot even now be any confirmation by all the persons who would be interested in the fund in default of appointment. It is true that Jessy Crawshay did all she could to confirm the appointment by him, but unfortunately she did not possess an absolute interest in the fund. In my opinion the testator was dealing with failure by reason of some invalidity in the previous appointment by him and the absence of confirmation by all persons whose consent would be necessary to make the appointment valid. He contemplates the possibility of not being able to procure a confirmation from every person interested in disputing it, and goes on to deal with the fund in a different way. If that is so, he says that Jessy's £10,000 (as I call it for the sake of brevity) "shall also go and belong to my son Robert T. Crawshay absolutely." That is a disposition of the £10,000 which he had already appointed in a way which he treats as possibly invalid. Now Robert T. Crawshay was an object of the power, and, so far as I have yet gone, the gift to him is good. It is suggested that it is bad by reason of what follows. But pausing here there is a gift to him of the £10,000 in an event which the testator contemplated as possible and which has actually happened, and, in my opinion, he takes the £10,000 under that gift, and not under the gift of the residue of the £35,000. I do not think it necessary to consider whether, supposing there had been no express gift to Robert T. Crawshay in the event which has happened, of the £10,000 settled upon Jessy, that sum would, in case the prior dispositions thereof had failed, have passed to Robert T. Crawshay under the gift to him of the residue of the £35,000. But, in my opinion, he cannot, in the event which has happened, take Jessy's £10,000 under the appointment of the residue, because it is clear that the testator did not consider that in that event it would go to him under the gift of residue, for in that event the testator gives to him the £10,000 in express words. I hold that the £10,000 cannot go to Robert T. Crawshay as part of the residue of the £35,000, as there is an express gift of it to him, which is inconsistent with its passing under the gift of residue.

Then arises the question whether Robert T. Crawshay can take the £10,000 at all, by reason of the words which follow. The direction is, first, that the £10,000 s to go and belong to Robert T. Crawshaw absolutely, and then follow these words, "but who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes"; and this is entirely inconsistent with the notion that under the first gift to Jessy she had taken an absolute interest in the £10,000. I think it is quite clear that she did not.

Then the only question is, whether the £10,000 thus given to Robert T. Crawshay is so given to him for the purpose of his applying it for the benefit of persons who are not objects of the power, that the gift must fail. The phrase, "who will, I am assured, settle the same voluntarily," is capable of different meanings. It may mean "I feel certain, not because he has ever said anything to me, or I to him on the subject; but I know that is what he will do with it." That is one natural and simple meaning of the words. But the words "I am assured" may also mean, "as he assures me," or "as my solicitor tells me." If the words mean "as he assures me," that is, if they show that there was a bargain between the two, that, though this fund was given to Robert T. Crawshay absolutely with a statement that he may settle it voluntarily if he chose to do so, he had really bound himself to settle it according to the testator's wishes, then, in my opinion, the appointment would be void. But if, on the other hand, the fund is really given, as it purports to be, to Robert T. Crawshay absolutely, not subject to any trust, but that he might do what he liked with it, and if the word "voluntary" is truly used, then, if he does settle it as the testator says he should like him to do, and as he endeavoured to do himself, that would be an entirely voluntary act on Robert's part, and the appointment to him would be valid. There is no evidence of any conversation, or arrangement, or bargain, or even of any understanding between father and son, or that the son had any knowledge that there was any such provision in the will, before the will was opened after the testator's death and the contents made known to the family, and, even if the son did know of the provisions in the will before the testator's death, yet, unless it was made known to him under circumstances which showed that he accepted a trust, and had bound himself to carry out his father's wishes, I do not think his knowledge would make the gift invalid. In my opinion, the real meaning of the words is, not that Robert was bound to settle the fund, but that it was given to him absolutely, and that the testator, having shown what he wished done by trying to do it himself, and having on this hypothesis failed in doing it, left it entirely to the son whether he would or would not settle the fund upon the daughter. In point of fact, the son has settled it; but that is immaterial, if it was absolutely free to him to deal with the fund as he pleased.

A number of cases have been cited, one or two of which seem to me material. In *Pryor* v. *Pryor* the law was, no doubt, correctly laid down, and Knight-Bruce, L.J., said:—"The donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is, that the appointment would not have been made but for the bargain, then the appointment is bad. The question is, to which of these two classes of cases the present case belongs."

That is precisely the question in the present case. The conclusion to which I come upon the will is that which I have already stated. There is no evidence whatever, and I have to get as best I can at the intention of the parties as it is shown upon the face of the will. I confess that *In re Marsden's Trust* did appear to me at first to create some little difficulty, but even in that case Kindersley, V.C., said:—"Unless it can be shown that the trustee having the discretion" (meaning for this purpose the person having power to appoint)

"exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purpose of the trust, the court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the court will not act upon it. But if, on the other hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly or for a purpose which defeats, instead of carrying into effect, the purpose of the trust, then the court will not permit such an exercise of the power to prevail."

Now in the present case there is no evidence to introduce any element even of suspicion, or, indeed, anything which is not to be found in the will itself. I have no materials for coming to the conclusion that the will is not honestly framed and expressed for the purpose of giving effect to it, and there is nothing behind it for me to consider.

In *In re Marsden's Trust* the facts were very peculiar. It has been treated by other judges as a somewhat exceptional case, and I think it is so for this reason. There a mother, who had under a settlement a power of appointment among children, desired to make a provision for the father out of the settled fund, his circumstances being such that she thought he ought to be assisted in that way. This intention was openly discussed. The father was not an object of the power, and therefore he could not take any part of the settled fund under an appointment. A solicitor was consulted, and he advised that an appointment could not be made to the father, and that project thereupon dropped. An arrangement was then made between the father and the mother that the whole fund should be appointed by the mother to the eldest child, a daughter who was at that time an infant, and who did not require any immediate provision to be made for her, with this object, that, when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her, under an arrangement between her father and mother, with the object of enabling the daughter to provide for her father. One cannot help seeing what an influence would have been brought to bear on the daughter when the father told her that, and that it would be practically impossible that she should resist doing that which it was the intention of her father and mother that she should do, and the doing of which, under the influence thus exercised upon her, would be an entire perversion and misapplication of the fund—taking it away from the persons in whose favour it ought to have been appointed, and giving it to a stranger. If an appointment of that kind is obtained by means of undue influence, of course it cannot stand, and that is shown by the later cases which have been referred to. That, I think, is the true explanation of *In re Marsden's Trust*, and I do not think that case is in any way inconsistent with the law as stated in *Pryor* v. *Pryor*, and I think that the same conclusion is to be drawn from *Roach* v. *Trood*.

I come to the conclusion that an absolute appointment to Jessy was never made; that the only gift to her was by means of the direction that the trustees of the other settled fund were to hold the sum appointed to her and upon the same trusts; and that such a settlement was beyond the power of the testator. Under these circumstances, it appears to me that it was open to him to appoint the fund absolutely and unconditionally to Robert, and I think that is what he did, so that the words which were relied upon as showing that it was really appointed to Robert conditionally do not lead to that result, and do not, therefore, operate to make the prior appointment to him bad.

The order declared that the plaintiff held the £10,000 upon the trusts of the declaration of trust executed by Robert T. Crawshay on the 7th of November, 1867.

Solicitors, *A. R. & H. Steele; Lawrence, Graham, & Long; Cunliffes & Davenport; Bell, Brodrick, & Gray.*

Chan. Div. (Kekewich, J., for Kay, J.) — May 3, 9, 10, 23.

BATTEN, PROFFITT, & SCOTT *v.* DARTMOUTH HARBOUR COMMISSIONERS. (*a.*)

Mortgage — Administration — Costs out of estate — Harbour commissioners—Action to ascertain charges on commissioners' property—Costs of commissioners—Commissioners Clauses Act, 1847 (10 *Vict. c.* 16), *s.* 60.

The plaintiffs were solicitors, who had recovered judgment against the defendants, the commissioners, for the amount of their bill of costs incurred in litigation on their behalf, and who, in this action, which was brought to enforce the judgment, had obtained the appointment of a receiver and an order for inquiries as to the commissioners' property and debts and the priorities of incumbrancers. The chief clerk had made his certificate, and the plaintiffs, on further consideration, asked for their costs of the action out of funds in court in priority to those of other parties. The funds were derived from rates and tolls, and formed part of the property mortgaged to the various incumbrancers.

Held, that the plaintiffs were entitled, in priority to other parties except the commissioners, to their costs of the action so far as they had been incurred for the benefit of the other parties except the commissioners.

The commissioners were constituted by special Acts of Parliament, one of which incorporated the Commissioners Clauses Act, 1847.

Held, that, under section 60 *of that Act, the commissioners were entitled to their costs of the action as between solicitor and client out of the funds in court in priority to the claims of all the other parties.*

Further consideration.

There were two questions of costs in this case: first, whether the plaintiffs were entitled to their costs of the action in priority to other incumbrancers; and, secondly, whether the commissioners ought, under the Commissioners Clauses Act, 1847, to have their costs out of the funds of which they were mortgagors in priority to all other parties.

The action was brought by the plaintiffs to enforce a charge upon the defendants' undertaking in respect of a judgment which they had obtained against the defendants for their bill of costs as solicitors in litigation carried on on their behalf.

On the 29th of January, 1886, the plaintiffs obtained the appointment of a receiver, and, subsequently, an order for inquiries as to the defendants' property, their debts and liabilities, the charges upon the undertaking, or upon the tolls arising thereout, and as to the rights and priorities of the persons holding such charges.

In 1863 the Dartmouth Harbour Commissioners were constituted by a special Act of Parliament (26 & 27 Vict. c. 104) confirming a provisional order of the same year, which empowered them to execute works and borrow money.

In 1870 another Act was passed (33 & 34 Vict. c. 82) for similar purposes.

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

In 1882 an Act was passed (45 & 46 Vict. c. 200) authorizing the defendants to construct a quay and improve the harbour. This Act incorporated the Commissioners Clauses Act, 1847.

The defendants commenced and eventually completed the works, and from time to time borrowed money from different associations for the purpose.

On the 3rd of August, 1889, the chief clerk made his certificate, stating (*inter alia*) that the plaintiffs and defendants had attended; that £664 3s. 9d. was due to the former for principal and interest, and that they were entitled to a charge for that amount on the tolls, rates, and charges receivable by the defendants and on their property, subject to certain incumbrances and in priority to others; and that the property of the commissioners consisted of various items, including a sum in Consols and funds in court derived from rates and tolls.

The action now came on on further consideration, and the plaintiffs asked for their costs out of the funds in court in priority to other parties, and the defendants asked for their costs, charges, and expenses out of the same funds.

Section 45 of the private Act of 1882 provided that the commissioners should apply rates, dues, and other income in paying, first, the costs of passing the Act; secondly, salaries, "and all other current expenses of the commissioners"; thirdly, interest on borrowed money; fourthly, in providing a sinking fund; and, fifthly, in paying the cost of the works, and "the other expenses incurred in the improvement of the harbour, or otherwise under this Act."

Section 60 of the Commissioners Clauses Act, 1847, provided that commissioners were not to be personally liable for acts done in the capacity of a commissioner, and that "The commissioners respectively, their heirs, executors, and administrators shall be indemnified out of the rates and other moneys coming to the hands of the commissioners by virtue of this and the special Act for all payments made or liability incurred in respect of any act done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them."

Millar, Q.C., and *Mulligan*, for the plaintiffs, asked for their costs of the action out of the funds in court in priority to those of other parties: *Ford* v. *Lord Chesterfield*, 21 Beav. 426, 5 W. R. Dig. 73; *Wright* v. *Kirby*, 5 W. R. 391, 23 Beav. 463.

Marten, Q.C., and *Swinfen Eady*, for the commissioners.—We are in the position of trustees, and are entitled under the special Acts and the general Act to our costs, charges, and expenses out of the funds in court in priority to other parties: *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201.

Renshaw, Q.C., and *Grosvenor Woods*, for incumbrancers.—The plaintiffs have acted for their own benefit only, and are not entitled to priority. The commissioners cannot have their costs out of the funds. The special Acts do not help them, and the indemnity clause in the general Act applies only to individuals, not to corporations: *In re The Dominion of Canada Plumbago Co.*, 33 W. R. 9, 27 Ch. D. 33; *Johnstone* v. *Cox*, 30 W. R. 114, 19 Ch. D., 17.

Horton Smith, Q.C., and *Stewart Smith*, for other parties in the same interest.

M. Ingle Joyce, in support of the same contention, referred to *In re Birt, Birt* v. *Burt*, 31 W. R. 334, 22 Ch. D. 604.

Fitzgerald, Upjohn, and *Bakewell*, for other parties.

KEKEWICH, J.—Two questions of costs which have to be decided on the same application are of considerable difficulty. I will deal with Mr. Millar's point first, because it is freshest in my mind, having been last argued. He desires to put his claim on *Ford* v. *Earl of Chesterfield*, but I think I may leave *Ford* v. *Earl of Chesterfield* out of consideration for the moment, because *Wright* v. *Kirby* was decided by the same judge, Lord Romilly, and in *Wright* v. *Kirby* he stated the principles by which the court ought to be guided and the rules in such cases, and expressly stated that it was in accordance with these rules that he decided *Ford* v. *Earl of Chesterfield*. I do not propose to read the rules except to point out this, that the Master of the Rolls places an action by an incumbrancer in which the plaintiff gets his costs on the footing of an administration action, and gives him his costs as in an action of that character. That seems to me at once to let in the discretion of the court to see what is and what is not proper administration, and what costs have been properly incurred for the purpose of administration. The case is to some extent new to me, and I am dealing with it at some disadvantage, but from what I have seen and heard I do not think it at all clear that the plaintiffs have throughout acted for the benefit of those other incumbrancers, whose title to some extent certainly they were disputing. On the other hand there can be no doubt that whether they intended it or not, they have done much good to them. They have obtained the appointment of a receiver and have got a fund brought into court, and an inquiry has been directed and answered, so that the parties entitled to the fund have been ascertained. So far certainly they have laboured for the advantage of others.

Mr. Millar has said that they are therefore entitled to all their costs of the action. That, to my mind, does not follow. They may be entitled to all their costs. I do not say they are not; but it is probable that some of the costs have been incurred on their own behalf only, and with a view solely to their own interests. I think I ought to give them those costs which come within *Wright* v. *Kirby*, but I think I ought not to give them those costs which, in the result, may be ascertained not to be within the doctrine of that case. I shall direct the taxing master in taxing the costs of the plaintiffs to distinguish the costs of which the other parties, except the commissioners, have had the benefit in securing the fund in court and determining the rights of the parties to it. These costs, I think, they are entitled to in priority, and, as Mr. Millar pointed out, they must be distributed over the three funds. As regards the rests of the costs the plaintiffs must add them to their security in the usual way as mortgagees. That disposes of the plaintiffs.

Then, as to the costs of the commissioners there is also a question of some little difficulty. Priority for them is claimed under the general Act, the Commissioners Clauses Act, 1847, and also under the special Acts. I shall call them special Acts because, although they are in fact provisional orders, they are confirmed by Act of Parliament, and have the force of Acts of Parliament, and really are Acts of Parliament being scheduled to Acts. As regards the special Acts, I do not see myself any ground for according to Mr. Marten's argument. I think that the costs and expenses there mentioned do not mean costs or expenses of litigation, but only ordinary expenses—that is those necessarily or properly occasioned by managing their undertaking and doing the work which the Act of Parliament throws upon them. I will not go through all the different clauses of the Acts of 1863 and 1870 because I turn to section 45 of the Act of 1882, which I think, is strongest in favour of the commissioners' view, because, under section 45, sub-section 2, the moneys are to be applied in paying the costs of passing the Act and paying salaries "and all other current expenses," and that is a phrase stronger than I find in any of the other Acts. I do not think it can extend to the

costs of litigation such as this; but that it points to ordinary expenses incurred by the commissioners in discharging their ordinary duties, and I do not think anything has been said which supports the contrary view. Therefore, as regards those Acts, I decide against the commissioners, but after some consideration I have come to a different conclusion as regards the general Act. Mr. Renshaw argued that sections 60 to 64 of the Commissioners Clauses Act, 1847, are only applicable to the commissioners personally, and not to a body incorporated such as are the commissioners in the present case. I cannot think that the Legislature could have intended that, especially when we find that the word "commissioners" means, by the interpretation clause, "the commissioners, trustees, undertakers, or other persons or body corporate constituted by the special Act," and I do not think the words are necessarily limited to persons. The set of sections to which sections 60 and 64 belong are introduced by the words "with respect to the liabilities of the commissioners and to legal proceedings by or against the commissioners," and I see nothing there to limit it to commissioners not incorporated. That is my view. It is rather that there is nothing to limit it than that there is anything to extend it.

By section 60 commissioners are exempted from personal liability, and that provision is no doubt more applicable to persons than to a corporation; but after thus exempting them from liability the section contains the following indemnity clause:—[His lordship read that part of the section, and continued:—] They are to be indemnified against liabilities, and although it may be impossible to issue execution against them individually and get payment of the costs, still the commissioners, as a corporation, are liable for any costs they may be ordered to pay so as at any rate to establish a debt. The commissioners might, I suppose, have the ordinary order for taxation made against them on the retainer given by them, and in that way there is a liability to pay costs. Against that it seems to me they are idemnified. Why should I construe this section differently from the construction of the ordinary indemnity clause in a settlement? It is in every settlement now by Act of Parliament. According to the old form the trustees are indemnified against all liabilities incurred by them in the execution of the trusts, and supposing, in the administration of their trusts, it becomes necessary to inquire what mortgages have been made and what incumbrancers there are, the parties claiming through *cestuis que trust* can only take subject to that indemnity. It seems to me I ought to apply the same sort of principle, and that the commissioners, being trustees against whom nothing has been said as regards the propriety of their conduct, must be entitled to be paid out of their trust fund before anybody else who is interested in it, notwithstanding that they are in the position of mortgagors. It is not a perfect settlement, because, as has been said, the commissioners are at the same time trustees and mortgagors. But I think that I am bound to regard them substantially as trustees instead of mortgagors, and to give them the indemnity. But then it is suggested that what they are entitled to have is money coming into their hands, and that what we are dealing with is money which has been brought into court through the receiver, and that as against that, they have no priority. I referred to a case the name of which I could not recollect, but by referring to the case of *In re Birt, Birt* v. *Burt*, mentioned to me by Mr. Ingle Joyce, I find that the case I was thinking of was *Richmond* v. *White*, 27 W. R. 878, 12 Ch. D. 361, which has recently been followed in *In re Jones, Calver* v. *Laxton*, 34 W. R. 249, 31 Ch. D. 440. What was decided in the last mentioned case was that the executor's right of retainer was taken away by the appointment of a receiver, and that as the moneys taken by the receiver were not moneys in the hands of the executor, he could not insist on his right of retainer.

Richmond v. *White* is an example of a different kind, because there the money was paid into court by an insurance company, and that was said not to have taken away the right of retainer. But I do not think that that applies to this case, because an executor's right of retainer is a very peculiar, though well recognized, right. Here I have a distinct statement of a statutory right to have these costs paid, and I do not think the substance of the clause is that costs are to be paid, or liabilities on their part discharged, by means of moneys in the hands of the commissioners, so much as by moneys which may come to them by virtue of the Act for rents and tolls, and the use of the words "moneys coming to the hands" is for the purpose of pointing out that to which they would resort. I think it would be a narrow construction to say that it only meant the amount actually received. I think what it means is money receivable for tolls or rents by virtue of the provisions of the Act. I therefore think that it is clear on that clause, that the commissioners are entitled to their costs as between solicitor and client in priority to the other parties, who, except the plaintiffs, who will have their costs subject to the direction I have mentioned, will add their costs to their securities.

Solicitors, *Batten, Proffitt, & Scott; Granville, Smith, & Co.; Kendall, Price, & Francis; Austin & Austin; H. Barnes; Woodcock, Ryland, & Parker.*

Q. B. Div. (Grantham and Vaughan Williams, JJ.) May 9.

Sammons v. Bailey. (a.)

Practice—Interrogatories—Power to strike out part of a set—Ord. 31, *r.* 7.

Under ord. 31, *r.* 7, *there is no power to strike out part of a set of interrogatories. The objection that any particular interrogatories are prolix and unnecessary must be taken in the affidavit in answer.*

Appeal from an order of Hawkins, J.

The action, which was for breach of contract, was brought in the District Registry at Cambridge. The plaintiff obtained leave to deliver interrogatories for the examination of the defendant. A set of eight interrogatories having been delivered, the defendant took out a summons under rule 7 of order 31. The district registrar made an order that interrogatories 1 and 8 should be struck out, and interrogatory 2 partly struck out, on the ground that such interrogatories were prolix and unnecessary. This order was affirmed by Hawkins, J., at chambers.

The plaintiff appealed.

E. E. de Witt, for the plaintiff.—Under rule 7, which differs from the corresponding provision in the rules of 1878 (ord. 31, r. 5), the district registrar has no power to go through the interrogatories, allowing some and striking out others; he ought either to have set aside the whole set, or to have left the defendant to take his objections to any particular interrogatories in his affidavit in answer: *McIlroy* v. *Duncan*, W. N., 1884, p. 48.

J. W. Cooper, for the defendant.—The order was rightly made. Either all or any of the interrogatories may be struck out under the latter part of rule 7: see Annual Practice, 1889-90, p. 518.

Grantham, J.—There can be no doubt about this case. The rule was purposely altered to obviate the

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

waste of time that used to be caused in fighting about sets of interrogatories and separate parts of them. There is no authority for the statement in the Annual Practice.

The appeal must be allowed.

VAUGHAN WILLIAMS, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Field, Roscoe, & Co.*, for *J. W. Prior*, Cambridge.

Solicitors for the defendant, *Sharpe, Parker, & Co.*, for *J. F. Symonds*, Cambridge.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 8.

DIXON *v.* WELLS. (*a.*)

*Criminal law—Adulteration of food—Jurisdiction of justices—Summons, illegal issue of—Time—*11 *&* 12 *Vict. c.* 42, *s.* 1*—Sale of Food and Drugs Act Amendment Act,* 1879 (42 *&* 43 *Vict. c.* 30), *s.* 10.

By section 10 *of the Sale of Food and Drugs Act Amendment Act,* 1879, *it is provided that, "in all prosecutions under the principal Act" (the Sale of Food and Drugs Act,* 1875) *"the summons to appear before the magistrates shall be served upon the person charged . . . within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days, from the time of the purchase from such person for test purposes of the food or drug, . . . and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."*

A complaint was made before two justices against the appellant for having sold adulterated milk, and a summons was granted, but not signed. The summons was afterwards signed and issued by a magistrate who had not heard the complaint. The appellant appeared on the return day under protest, and was convicted.

Held, that the summons was void, and that, the period of twenty-eight days having expired at the date of the hearing, the magistrate had no jurisdiction to hear the case, and the conviction must be quashed.

Reg. *v.* Hughes, 4 *Q. B. D.* 614, 27 *W. R. Dig.* 67, *distinguished.*

Special case.

The facts were as follows:—

On the 10th of October, 1889, a complaint was laid before two justices by the respondent, the inspector for the borough of Kingston-upon-Hull under the Sale of Food and Drugs Act, 1875, that the appellant had, on the 20th of September, 1889, sold adulterated milk. A summons was granted, but not signed. On the 14th of October the summons was signed by another justice who had not heard the complaint. The return day named in the summons was the 23rd of October, and on that day the appellant appeared before the stipendiary magistrate for the borough and protested that the summons was irregular, it not having been signed by the magistrates who had heard the complaint, and that there was therefore no jurisdiction to hear the case.

The magistrate was of opinion that if there had been any irregularity in issuing the summons the same was cured by the presence of the appellant in court, and that he had jurisdiction.

He convicted and fined the appellant, and stated this case for the opinion of the court, the questions being—

1. Whether there was an irregularity in the issue of the summons.

2. If there was, whether the same was cured by the appearance of the plaintiff in court on the day of hearing under the circumstances stated.

3. Whether the magistrate had jurisdiction to hear and determine the matter.

Montague Lush, for the appellant, stated the facts.

H. T. Kemp, for the respondent.—Irregularity in the process used for bringing an offender before the court has no effect upon the jurisdiction: *Reg.* v. *Shaw*, 13 W. R. 692; *Reg.* v. *Hughes*, 4 Q. B. D. 614, 27 W. R. Dig. 67; *Gray* v. *Commissioners of Customs*, 48 J. P. 343; *Reg.* v. *Fletcher*, 19 W. R. 781, 1 C. C. R. 320. These cases show that if the offender is before the court, no matter by what means he has been brought there, the court has power to hear and determine the case.

He also referred to *Blake* v. *Beech*, 1 Ex. D. 320, 24 W. R. Dig. 142.

Lush, in reply.—This case is distinguishable from those cited, for in them no protest on behalf of the defendant was made at the hearing. Then, by section 10 of the Act of 1879, the summons must be served within twenty-eight days of the offence. Here there was no good summons at all, and at the date of the hearing it was too late to serve one.

Lord COLERIDGE, C.J.—This is a case which has rightly occupied a considerable time in argument, for it has very important bearings. The facts are simple enough. The appellant was convicted, and as far as the facts go I am bound to assume properly convicted, before the stipendiary magistrate at Hull, under the Sale of Food and Drugs Act, 1875, for selling adulterated milk. The offence was committed on the 20th of September, the hearing took place on the 23rd of October, 1889. At the hearing an objection was raised on behalf of the appellant that the magistrates had no jurisdiction. It appeared that the information was laid before two justices of the borough of Hull, but they did not sign the summons; the summons was taken to another magistrate, Mr. Robson, and he signed it. It was objected at the hearing, and before us, that this was no summons at all, since it was not issued by the justices who heard the information. Apparently a practice has risen up all over the country of magistrates' clerks drawing up summonses and taking them to be signed by any magistrate, thus rendering a man liable to be convicted and perhaps heavily fined for some offence as to which the magistrate who signs the summons is completely ignorant whether there is any *primâ facie* case against him. A looser practice, and one more likely to lead to injustice and wrong, I cannot imagine. Had the magistrate who signed this summons heard the information it is quite possible that he might have found that there was no case against the defendant, and declined to let it go any further. I cannot repair a thing issued in defiance of Jervis's Act, 11 & 12 Vict. c. 42, as a summons under that Act. The Act says (section 1) that it shall be lawful for "such justices" to issue their warrant—that is, the justices who have heard the complaint. It seems to me that a summons which does not conform to the provisions of this Act is no summons at all. This Act is studiously framed for the protection of persons charged, and I should have thought that its provision ought to be obeyed. But it seems that that is not the law. In *Reg.* v. *Shaw*, which was decided in 1865, Erle, C.J., says, "In my opinion if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued unless the statute creating the offence imposes the necessity of taking some such step." That decision does not stand alone: there are several other cases to the same effect, and in particular the important case of *Reg.* v. *Hughes*, which was decided by eight judges after a second argument, and is absolutely binding upon us. These cases seem to me to

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

establish that when a man is before justices who have jurisdiction over the offence of which he is accused, they may try him for that offence without inquiring how he was brought before them, whether it was by force or by fraud. That being the law it is impossible for us to struggle against it.

But this case is not, in my opinion, within these decisions. There are two distinctions which seem to me to sever it from them. In the other cases there was no protest on the part of the person who was charged before the magistrates, and it was held that rules of procedure are rules which the person sought to be affected may waive if he appears and elects to take the chances of a trial. That is an old and sound rule, and I should be sorry to depart from it. But here there was a strong protest made at the time. When the case was called on it was objected on behalf of the defendant that there was no summons and no information, and that the whole proceedings were irregular, and that therefore there was no jurisdiction to hear the case. I think that this marks off the present case from the others. I do not, however, feel strong enough to decide the case upon that point alone, although it certainly does seem to me that it is a very different case where a man protests in the first instance. But the language used in *Reg.* v. *Shaw* and *Reg.* v. *Hughes* shows, as I cannot disguise from myself, that the judges assumed that a protest would be of no avail. I therefore do not decide upon that point, although I think it a very important one.

But another point was taken as to section 10 of the Sale of Food and Drugs Amendment Act, 1879. [His lordship then read the section, and continued:—] Now that section appears to me to enact that, as a condition precedent to the trial of offences under the principal Act, the summons shall be served within a reasonable time, and in the case of perishable articles within twenty-eight days of the purchase for the test purposes of the article complained of, and that the return day shall be not less than seven days after the service of the summons, time being thus secured for the person accused to prepare his defence. The times there mentioned cannot be disregarded; they are essential, and the provision is framed in the strongest way. Unless we were to extend the principle of *Reg.* v. *Hughes* it is impossible to deny that this section has been violated. The Act of Parliament has said that, as a condition precedent to the trial of the defendant before the magistrate he must be treated according to the provisions of section 10. Now in this case, as I have said before, there was, in my judgment, no summons at all. The period of twenty-eight days had expired before the date of the trial. The man was there and they attempted to try him for an offence committed more than twenty-eight days before. I think it is essential to the jurisdiction that it should be exercised according to the provisions of the Act. That was not so here, and therefore the conviction must be quashed.

MATHEW, J.—I am of the same opinion. The summons is a citation which states that the magistrate thinks there is a *primâ facie* case against a man. If the magistrate who issues the summons is not the magistrate who has heard the case it might as well be signed by any person not a magistrate at all. But it is said the information need not be in writing, the man was there and the magistrates had jurisdiction to try him. But the defendant was entitled to say, "You cannot hear the case, because section 10 imposes a limit on your authority, and if a fresh summons were now issued it would be too late." For these reasons I think the conviction should be quashed.

Conviction quashed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *Woodhouse*, Hull.

Solicitors for the respondent, *Cunliffes & Davenport*, for *R. Hill Dawe*, Hull.

Q. B. Div. (Cave and A. L. Smith, JJ.) } Feb, 10, 13.

STUBBS v. DIRECTOR OF PUBLIC PROSECUTIONS. (*a*.)

Criminal law—Bill preferred under Vexatious Indictments Act, 1859 (22 & 23 *Vict. c.* 17)—*Intervention of Director of Public Prosecutions — Acquittal — Liability for costs of accused person*—30 & 31 *Vict. c.* 35, *s.* 2—*Prosecution of Offences Act*, 1879 (42 & 43 *Vict. c.* 22), *s.* 7.

It is provided by section 7 of the Prosecution o Offences Act, 1879, *that, where any criminal proceeding is undertaken by the Director of Public Prosecutions, it shall not be necessary to bind over any person to prosecute, "and, if any person is so bound over, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person."*

In a prosecution for conspiracy, the justice had refused to commit; the prosecutor was bound over to prosecute, but no security for costs was given. On the finding of a true bill the Public Prosecutor undertook the case. The defendants were acquitted.

Held, that the above section only transferred to the Public Prosecutor the burden of the costs (if any) for which the original prosecutor was liable under his security, and that an order made against the Public Prosecutor to pay the costs was invalid.

Special case.

The facts and arguments are fully stated in the judgment of Cave, J.

Finlay, Q.C., and *Willes Chitty*, for the plaintiffs.

Sir R. E. Webster, A.G. (*Avory* and *Danckwerts* with him), for the defendant.

Cur. adv. vult.

Feb. 13.—CAVE, J.—The question in this case was whether an order of the Central Criminal Court of October 25, 1886, as amended by another order of January 31, 1887, is a good order. The court thereby orders the Director of Public Prosecutions to pay to Messrs. Stubbs and Irving a sum of £164 17s. for their costs of defence upon an indictment for criminal conspiracy. This order, it is said, is properly made under 30 & 31 Vict. c. 35, s. 2 In November, 1885, a Mr. Gostling charged Messrs. Stubbs and Irving with criminal conspiracy. The Lord Mayor, who heard the charge, declined to commit. Thereupon Mr. Gostling entered into his recognizance under 22 & 23 Vict. c. 17, and preferred a bill of indictment against Messrs. Stubbs and Irving at the Central Criminal Court, on the 3rd of May 1886, which bill was found. After the finding of the bill the Director of Public Prosecutions undertook the prosecution, and on the 3rd of August, 1886, Messrs. Stubbs and Irving were tried and acquitted. Mr. Gostling had given no security for costs. On the 13th of September, 1886, the recorder made the order dated the 25th of October, 1886, ordering the prosecutor or other person by or at whose instance the indictment was preferred to pay Messrs. Stubbs and Irving the costs, and on the 31st of January, 1887, he amended the order by ordering the Director of Public Prosecutions to pay them.

For the plaintiffs it was contended by Mr. Finlay that the order was good under 30 & 31 Vict. c. 35, s. 2, and 42 & 43 Vict. c. 27, s. 7. By 22 & 23 Vict. c. 17, entitled "An Act to prevent Vexatious Indictments for Certain Misdemeanours," no indictment for (amongst other offences) conspiracy is to be presented to any

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

grand jury, unless (among other alternatives) the prosecutor has been bound over to prosecute the accused, where the magistrate has dismissed the charge. By 30 & 31 Vict. c. 35, s. 2, it is enacted that, "Whenever any bill of indictment shall be preferred to any grand jury under the provisions of 22 & 23 Vict. c. 17 against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person" his just and reasonable costs, to be taxed. By 42 & 43 Vict. c. 22, s. 7: "Where any criminal proceeding is instituted, undertaken, or carried on by the Director of Public Prosecutions, such director shall not be bound over to prosecute or conduct such proceedings or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person." Now, it is clear that in this case no order such as that in question could have been made on the Director of Public Prosecutions under 30 & 31 Vict. c. 35 alone, seeing that he was not the person by or at whose instance such indictment was preferred. 42 & 43 Vict. c. 22, s. 7, is quite general, and is not confined to cases coming under the Vexatious Indictments Act. Where the Director of Public Prosecutions undertakes the prosecution it releases the prosecutor who has been bound over from his obligation, and where he has given security for costs the security is to be deemed to have been cancelled. So far there is no indication of any intention to relieve the prosecutor from any costs he may be ordered to pay under 30 & 31 Vict. c. 35, s. 2. The concluding words of the clause are relied on for this purpose: they are, "and the Director of Public Prosecutions shall be liable to costs in lieu of such person." Looking, however, at the grammatical construction, I think these words must be read to impose no more liability on the Director of Public Prosecutions than that from which the original prosecutor is relieved by the preceding words—that is, the costs for which he is liable under his security.

But for the words "the Director of Public Prosecutions shall be liable to costs in lieu of such person," no one would have been liable for the costs for which security has been given, and it seems more natural to read these words as imposing on the Director of Public Prosecutions the liability, from which the original prosecutor had, by the preceding words been released, rather than to construe them as imposing a liability on the Director of Public Prosecutions greater than that from which the original prosecutor had just been released, and so to give the original prosecutor an immunity that there is nothing in the preceding words to show that he was intended to have. If it had been intended by the last clause that the Director of Public Prosecutions should bear the costs which might be ordered to be paid under 30 & 31 Vict. c. 35 in such a case as this, I should certainly have expected to find in the preceding words some indication of an intention that the original prosecutor should be relieved from them. If, then, this is the natural interpretation of the language of the section, is it also the reasonable one?

It is said that it is unreasonable that the original prosecutor should remain liable for the costs when he has lost all control over the conduct of the prosecution. There would be more force in this observation if the liability to the costs followed automatically on the acquittal of the accused. But this is not so. The court is to make the order in its discretion; and, considering that the object of the section giving the court power to order the prosecutor to pay the costs was to discourage vexatious indictments too frequently preferred for purposes of extortion, it seems far more consonant with reason that in such a case as the present the liability should remain on those who originally started the prosecution and preferred the indictment, rather than it should transferred to the Public Prosecutor, whose action in undertaking a prosecution already commenced and taking up a bill already found the Legislature cannot reasonably have intended to discourage. If the defendant has been acquitted by reason that the prosecution was vexatious in its inception, there seems no adequate reason why the original prosecutor should be relieved from the burden of paying costs simply because, in the interests of justice, the Director of Public Prosecutions has thought it right to intervene.

If the prosecution was not vexatious in its inception, but has failed by reason of the difficulty of proving the case, or even by reason of the intervention of the Director of Public Prosecutions, those seem reasons, not why the Director of Public Prosecutions should pay the costs, but why the defendant should not get his costs, and unless it was shown that the prosecution was vexatious—that is, begun or continued without reasonable and probable cause—or frivolous, I imagine that the court, in the due exercise of its discretion, would decline to give the defendant the costs of the trial.

It is not necessary in this case to consider the wider question, whether an order under 30 & 31 Vict. c. 35 can in any case be made on the Director of Public Prosecutions. It is enough to say that in this case, for the reasons given above, such an order could not be made, and therefore our judgment must be for the defendant, with costs.

I should like to add for myself, that of course we have not had before us the merits of the case, and are deciding simply on the point of law, but I find it very difficult to conceive what the circumstances could be which would justify such an order being made on the Director of Public Prosecutions.

A. L. SMITH, J.—It is clear that the Director of Public Prosecutions in the circumstances of this case could not be ordered to pay costs by reason of 30 & 31 Vict. c. 35, s. 2, for the simple reason that he was not the person who had preferred the indictment. But it was alleged that he could be made to pay by reason of 42 & 43 Vict. c. 22, s. 7, the last words of which section enact that in certain cases "the Director of Public Prosecutions shall be liable to costs in lieu of such person"—that is, in lieu of the original prosecutor: and I own, for myself, that it is a captivating argument, and one likely to lead to the conclusion which was wanted unless we look carefully into the section to see what that section in fact provides.

That section, as it seems to me, is perfectly clear when its phraseology is closely scrutinized. It is a section under which, in certain events, the Public Prosecutor may incur certain responsibilities, but in my opinion the Public Prosecutor is only to incur under that, responsibility from which the original prosecutor has been relieved.

The section says that "nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding. Where any criminal proceeding is instituted, undertaken, or carried on" (in this case it has been undertaken) "by the Director of Public Prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs"—the meaning of that is obvious, because the Public Prosecutor is there as an officer of State, and it would not be necessary

to bind him over or to make him give security for costs—"and it shall not be necessary to bind over any person to prosecute or conduct such proceeding"—that is, when the Public Prosecutor intervenes—"and if any person is so bound over"—as the original prosecutor, Mr. Goetling, was in this case bound over to prosecute—"or if any such person"—that is, the individual prosecutor—"has given security for costs"—which he had not to give in this case, because it was not a case in which security could be called for—"he"—that is, the original prosecutor—"shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation"—that is, the obligation which he entered into by reason of his recognizance to prosecute and being bound over, and he shall also be released from any security which he had given, or in the words of the statute, "and the security" for costs "shall be deemed to have been cancelled."

So far, of course, the Public Prosecutor is not touched; but the original prosecutor is released, and he is released from two things, namely, from his obligation to prosecute and from his obligation as to security for costs, if and when he has given them. Then the section goes on, and it says, "and the Director of Public Prosecutions shall be liable to costs in lieu of such person." Liable to what costs? The meaning of that, in my judgment, is plain. What the original prosecutor is released from the Director of Public Prosecutions comes under obligation to, no more and no less. And what the original prosecutor has been released from here is his obligation to prosecute, which was undertaken by the Public Prosecutor, and his obligation as to security for costs, if any had been given, and as to those costs only does the Public Prosecutor come into the responsibility.

It seems to me that on this reading of the section the case is clear, and that the second order, at any rate, even if it could have been made in the court in which it was made, is not an order which should have been made by the learned recorder. For these reasons I think that the judgment should be for the defendant.

Judgment for the defendant.

Solicitors for the plaintiffs, *C. O. Humphreys & Sons.*

Solicitor for the defendant, *The Solicitor of Inland Revenue.*

Court of Appeal.

App. Bankruptcy. April 18, 25, 28.

Ex parte CONSTABLE. *In re* BARKER.
Ex parte JONES. *In re* JONES. (*a.*)

Bankruptcy—Discharge—Discretion of court in granting discharge—Conduct of debtor—Breach of promise of marriage—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 28, *sub-sections* 2, 3, 5, 6.

The court is entitled, in exercising its discretion as to the granting of an order of discharge to a bankrupt under section 28, *sub-section* 2, *of the Bankruptcy Act,* 1883, *to take into consideration any conduct of the bankrupt connected with or relevant to the bankruptcy, and is not limited to the matters mentioned in sub-section* 3 *of section* 28, *or in section* 24, *of the said Act.*

Decision of the Divisional Court *in* Ex parte Jones, In re Jones, ante, *p.* 429, *affirmed.*

Ex parte CONSTABLE. *In re* BARKER.

This was an appeal against an order of Mr. Registrar Giffard granting the debtor Barker an unconditional discharge.

The debtor had been the defendant in an action for breach of promise against whom a verdict and judgment for £1,000 had been entered. This, with the costs, was the main debt, upon the failure to pay which the debtor had presented his own petition in bankruptcy. There were practically no assets, but the debtor admitted that he had won, and was likely to win, sums of money as a jockey. The chief creditor, Miss Constable, the plaintiff in the breach of promise action, opposed the discharge, and asked for a judgment of £200 to be entered up against the debtor for the judgment debt in the action under the provisions of section 28, sub-section 6, of the Bankruptcy Act, 1883. The registrar held that he had no power to impose such a condition on the debtor's discharge, as the debtor had not committed any of the offences mentioned under section 28, sub-section 3, and granted an unconditional discharge.

The creditor, Constable, appealed against this discharge.

Muir Mackenzie, for the creditor.—The registrar had ample discretion under section 28, sub-section 2, to grant, or refuse, or impose a condition on the discharge. His discretion is only limited from granting an unconditional discharge when the debtor has committed a certain trade offence under sub-section 3. The registrar thought himself bound by *In re Betts and Block,* 35 W. R. 530, 37 *Ibid.* 259, 19 Q. B. D. 39, 13 App. Cas. 570, and *In re Bullen, Ex parte Arnaud,* 36 W. R. 836, 5 Morr. Rep. 243. The registrar is not bound by the official receiver's report, but may receive evidence, and take into consideration other misconduct than trade offences: *In re Jones, ante,* p. 429. The cases do not go so far as to bind the registrar to consider only the debtor's affairs. He may consider his general conduct: *Ex parte Shackleton, ante,* p. 288, 6 Morr. Rep. 304.

H. Reed, for the debtor.—It has been the practice since the decision in *In re Betts and Block* to grant a debtor his unconditional discharge unless he is shown to have committed any offence mentioned in section 28, sub-section 3, or under section 24: *In re Mew and Thorn,* 10 W. R. 790.

Mackenzie replied.

Ex parte JONES. *In re* JONES.

Appeal from the decision of the Divisional Court (Cave and A. L. Smith, JJ.), reported *ante,* p. 429, upholding an order of his Honour Judge Lloyd, sitting at the county court of Wrexham.

The facts of the case were as follows:—In July, 1885, the bankrupt was defendant in an action for breach of promise of marriage, in which the plaintiff recovered judgment for £500. In January, 1886, the bankrupt's father died, leaving real and personal property valued at £4,000. By his will, made five days before his death, all his children took substantial benefits except the bankrupt, to whom a legacy of £10 only, payable on his mother's death, was left. On April 11, 1889, a receiving order was made against the bankrupt on his own petition. The assets were practically nil, and the only creditor was the plaintiff in the said action for £596 for damages, costs, and interest on the judgment debt. Shortly before the petition was filed an offer of £250 had been made to the plaintiff by the bankrupt's family, which offer was refused. Upon those facts the judge gave the bankrupt his discharge subject to his consenting to a judgment for £250 being entered up against him under the powers given to the court by section 28, sub-section 6, of the Bankruptcy Act, 1883, such judgment to be deemed to be satisfied if the bankrupt paid the official receiver £200 within a month.

The bankrupt appealed.

(*a.*) Reported by SPENCER L. HOLLAND and F. G. RUCKER, Esqrs., Barristers-at-Law.

Cooper Willis, Q.C., and *F. C. Willis*, for the appellant.—The court has no jurisdiction to impose a conditional discharge upon the bankrupt unless some of the facts mentioned in sub-section 3 of section 28 are proved against him. It cannot inquire into his conduct or affairs in any other matters than these. It must act upon the facts found in the report of the official receiver, and confine itself to the financial affairs and conduct of the bankrupt. The wide discretion and *quasi*-penal jurisdiction given to the court in regard to the grant or refusal of the discharge under the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), was restrained by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and could not have been intended to be restored under the Act of 1883. If the court had jurisdiction it was wrongly exercised in imposing a penal judgment on a pauper.

Lankester, appearing for the plaintiff in the action for breach of promise, was not called upon.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the respondent, the official receiver, were not called upon.

Cur. adv. vult.

April 28.—Lord ESHER, M.R.—This judgment is given in respect of both cases. In both the main question is the same. In both the bankruptcy was the result of a judgment in an action for a breach of promise of marriage. In both the bankruptcy was upon the petition of the debtors themselves on account of the judgment debt under these actions. In both the judgment debt was the only debt, or was the main and practical cause of the bankruptcy. In the first case the registrar granted an unconditional discharge, and the appeal against such discharge was based on the ground that it was not warranted by the conduct of the bankrupt in respect of the breach of promise. In the second case the county court judge granted a conditional discharge upon the entry of a judgment for the reduced amount of £250 against the bankrupt, to be only carried into effect upon application to and by leave of the court at any time. Against this order the appeal was made on the ground that the judge had no right to consider the conduct of the debtor in respect of the breach of promise at all; and, secondly, that if he had any such discretion he had wrongly exercised it. The question in both cases depends on the construction of section 28 of the Bankruptcy Act, 1883. Does that section give the registrar, in the first case, or in the second case, the county court judge, the power, in granting a bankrupt his discharge or in refusing it, to consider any other facts than those mentioned in the section, or can he consider any other "conduct" or state of "affairs" than those mentioned? Can he act upon any such consideration? If so, is any restriction as to the conduct or state of affairs of the debtor placed by the proviso of the section upon such consideration?

First, Can the registrar consider any other conduct or state of affairs than those mentioned in the section? It is perfectly clear that he may. The section first gives power to the debtor to apply for his discharge and continues:—"On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs." "Shall" is imperative. But the section does not state that the court shall act on that report only, but only that the court "shall" consider it, "and," it continues, "may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt." Had the section stopped there there could hardly be a doubt, upon the ordinary grammatical construction of the words, that this section did not enact that the registrar must only act upon such consideration, but that he had a discretion so to act. He may grant or refuse or do several things. The section gives a wider discretion, in fact, than is often given. It is almost indefinite. Then comes the proviso. The ordinary business of a proviso is to limit a general discretion in certain questions, though sometimes I am aware it enlarges such discretion. Still, that is not the regular purpose of a proviso. This proviso runs as follows:—"Provided that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid." Sub-section (3) then goes on to enumerate the facts upon proof of which the court is required to act in either of the three ways just specified.

In any of these cases mentioned an unconditional discharge is not possible, while in the general instance it is within the discretion of the court. No facts mentioned in this proviso, however, apply to either of the cases before us. Clearly the discretion in such cases, not being restricted to the facts mentioned in the proviso, is unlimited, while in cases coming under the terms of the proviso, it is limited. Other parts of the statute, such as sub-section (6), under which the judge acted in the second case before us—namely, by imposing an assent to a judgment for a reduced amount—clearly imply an unlimited discretion. I have no doubt that in both the cases before us the court had full discretion to grant, or refuse, or impose any conditional or unconditional discharge, and was entitled to consider the judgment in the breach of promise action and the failure to comply with such judgment. May the court, then, take into consideration everything in a man's life? No; but only some things. It may not inquire into or consider conduct of the debtor which had nothing to do with the bankruptcy, and which could not have produced or affected it—for instance, a breach of promise of marriage under which the debtor had been made liable for damages years before, and subsequently to which he had entered or carried on a trade in the course of which trade he had become bankrupt. It is only where the result of an action for a breach of promise could and must have had an effect on the subsequent bankruptcy that it can be taken into consideration. In both the present cases it is admitted that the adverse judgment in such actions was the direct cause of the bankruptcy, and was the main or only debt upon which the debtors had themselves petitioned. A judgment of my own has been cited in support of the appellants' contention, that conduct in matters not directly subject to the bankruptcy law is not conduct which can enter into the consideration of the court upon an application by a bankrupt for his discharge. I do not profess to give my judgments in words of literary accuracy or in beautiful phrases of general application. I only seek to give a businesslike decision in each particular case. The words cited from my judgment in *In re Betts* do not carry the meaning attempted to be attributed to them. I merely gave instances of conduct in other matters than those appertaining to the bankruptcy in the case cited. They only mean what I say now, and said then, that conduct in affairs which had no relation to the bankruptcy, which could not have affected or produced it, is outside the court's consideration. Here in both cases the non-payment of judgments in the actions for breach of promise manifestly did produce the bankruptcies. If so, the registrar in the one case, and the county court judge in the other case, had a right to consider the conduct of the debtors in relation to these actions, and had a complete discretion to act upon such consideration.

Whether such discretion was rightly exercised is the

only remaining question for us. In the first case I see no reason why we should overrule the discretion of the registrar in granting an unconditional discharge. In the second case there are circumstances which lead me to think that the judge exercised a very shrewd discretion in imposing a judgment for the reduced amount of £250 as a condition of the debtor's discharge. It was a Welsh case. The debtor belonged to a well-to-do farmer's family at the time of the judgment. The father subsequently died, leaving to all the other members of his family, except the debtor, a substantial amount of property or interest in different farms. But it is said that the debtor was left without a shilling, and was only acting as bailiff on his mother's farm at £15 a year. He is shown to have given orders for agricultural machinery, which, it is alleged, was for his mother's use. I cannot help suspecting that a Welshman's innate desire to get the better of the law lies at the bottom of all these transactions, and that somehow, some day, the debtor may find himself in a position to satisfy this reduced judgment. The judgment cannot be put into force unfairly; it can only be by leave of the court. On these grounds I hold that the discretion was rightly exercised. The appeals in both cases are, therefore, dismissed.

FRY, L.J.—It is obvious that there has been considerable difference of opinion among county court judges as to the construction of section 28 of the Bankruptcy Act, 1883. It is important to note the statutory course of proceedings to be taken. An application for a discharge is not to be heard until the public examination of the bankrupt is concluded. That is important as denoting that the facts disclosed on the public examination are to form materials for consideration on the application for discharge. The question now to be determined is whether the court before whom such application is made may consider all relevant circumstances, or only such bankruptcy misdemeanours as are mentioned under sub-sections (2) and (3). The tenor of the whole section, taking the sub-sections together, is to show that the Legislature intended that the facts deducible from the public examination of the debtor were the material upon which the court might act at its discretion, at any rate such facts were to form a part of the consideration on which the court was left at liberty to act. By sub-section (2) the court also shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs. These latter are very large words. They must imply not merely all conduct and affairs material and relevant to the matters before the court, but all conduct and affairs tending to assist the discretion of the court so far as they are matters upon which the official receiver may report. But after the consideration of the report there is a further discretion bestowed upon the court. The court may do four things, it may give an absolute discharge, or it may suspend the discharge, or give a conditional discharge, or refuse a discharge altogether. The court is obliged to take one or other of these four courses, but has an absolute discretion as to which course it may adopt. Then comes a double proviso. (*a*) If the debtor has committed any of the misdemeanours under the Act its discretion is taken away and it is bound to refuse the discharge. (*b*) If, again, any facts mentioned under sub-section (3) are proved to the satisfaction of the court the discretion given by the first part of sub-section (2) is so far limited that it cannot give the debtor an absolute discharge, but is still at liberty to adopt any of the three remaining courses. In a particular contingency the section takes away a particular discretion. This is not for the purpose of limiting its general discretion over the facts to be taken into consideration, but only its exercise of its discretionary power in the event of certain specified facts being proved before it.

The enactment in sub-section (5) is a further evidence of this discretionary power of consideration, where it is enacted that the court, on the application for a discharge, "may put such questions to the debtor and receive such evidence as it may think fit"—*i.e.*, may receive any such evidence as it may think fit for the purpose of exercising its discretion. The only limit to such evidence would seem to be its relevancy to the bankruptcy, and so far as it may reasonably tend to bear upon the question of the bankrupt's possible discharge or non-discharge. Then comes sub-section (6), under which the court "may as one of the conditions referred to"—*i.e.*, as one of the terms which may be imposed on a conditional discharge—"require the bankrupt to consent to judgment being entered against him for any balance of the debts provable under the bankruptcy." But this condition is not confined to cases of misdemeanours referred to in sub-section 2, or malpractices mentioned under sub-section (3). It is of general application, and can be imposed whenever the court thinks it equitable and just to do so. The power is not fettered by any previous words in the section, and the discretion of imposing such a condition is complete in any case where it is open to the court to apply this discretion.

As to the second point, that the discretion in the second case has been wrongly exercised. In the first case, I think there are no circumstances to cause us to interfere, though the registrar rather took the view that he was bound to give an unconditional discharge, if any. With regard to the second case, I take much the same view as the Master of the Rolls. I think that the debtor was guilty of bad conduct in trying to evade the consequences of his breach of promise, and was carrying out a scheme to defeat the judgment found against him, and, judging from the circumstances of the official receiver's report as to the real state of the debtor's affairs, I think the county court judge exercised wise discretion in granting him only a discharge subject to a condition which he is likely at some subsequent time to be easily able to fulfil.

LOPES, L.J.—If section 28 is read without any desire to refine the ordinary meaning of the words I do not think it is difficult to construe. By the first part an absolute discretion is given to the court to be exercised in one or other of the four ways provided. Then comes a proviso fettering that discretion in the cases mentioned where the bankrupt has committed certain misdemeanours or malpractices, but its consideration is not limited to the particular cases mentioned, nor is the general discretion given in the first part of the section limited in cases other than those mentioned. As to *In re Betts*, that case does not assist us. It merely decides that the particular conduct of the bankrupt in not submitting himself to medical examination was not such conduct as the official receiver was entitled to consider in his report. The expressions quoted from my judgment do not bear out the construction which counsel has endeavoured to place upon them, nor do I see any reason to prevent my adhering to them. I said: "In my opinion the word 'conduct' in section 28 does not include what I will call general misconduct. For instance, it could not, I imagine, include immoral conduct. . . . Nor, again, in my opinion, would it include a breach of an obligation not connected with the bankruptcy, such, for instance, as a breach of promise to marry."

The instance of a breach of promise was cited as something which might have had nothing to do with the bankruptcy in question. It would be in such a case conduct altogether outside the bankruptcy proceeding, and so not coming within the purview of the court at all. Here the debtors' conduct in respect of

the breach of promise actions is the direct cause of the bankruptcy. I think in the first case the registrar, and in the second the county court judge, had a discretion and exercised it rightly.

Appeals dismissed.

Solicitors for Constable, *Miller, Smith, & Bell.*

Solicitors for Griffiths Jones, *Rooke & Sons.*

Solicitors for Barker, *Eyre & Co.*

Solicitors for Jones, *Morgan, Son, & Upjohn,* for *Williams & Millard,* Dolgelly.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

App. Bankruptcy. April 18.

Ex parte URQUHART.

In re URQUHART. (*a.*)

Bankruptcy—Bankruptcy notice—Petition—Substituted service—Debtor departed out of the jurisdiction for the purpose of avoiding service—Bankruptcy Rules, 1886, *rr.* 141, 154, 156.

Rule 154 *of the Bankruptcy Rules,* 1886, *which provides for substituted service of a bankruptcy notice or a petition where the debtor is keeping out of the way to avoid personal service, applies to the case where the debtor has gone out of the jurisdiction for that purpose.*

Fry *v.* Moore, 37 *W. R.* 565, 23 *Q. B. D.* 395, *distinguished.*

Appeal from the refusal of Mr. Registrar Giffard to rescind a receiving order.

The debtor, a domiciled Scotchman, resided and carried on business in London. In September, 1889, he left this country and went to Scotland. On the 8th of January, 1890, the petitioning creditors issued a bankruptcy notice against him. Being unable to effect personal service of the notice, they applied for an order for substituted service; and the registrar, being satisfied that the debtor was keeping out of the way to avoid service, made an order for service by registered letter addressed to the debtor at his last known residence in London. Such substituted service, having been effected, and the debtor failing to comply with the notice, the creditors presented a petition against him. Substituted service of the petition was effected in the same way under a similar order.

On the 13th of February a receiving order was made. The debtor applied to have the receiving order rescinded on the ground that the bankruptcy notice and the petition had not been properly served, and that the proceedings were invalid.

The registrar refused the application, and the debtor appealed.

Firminger, for the debtor.—The substituted service in each case was ordered under rule 154. But the proviso to that rule only applies to cases where the debtor, if he could be found, might be served personally. It does not apply where the debtor is out of the jurisdiction. *Fry* v. *Moore,* 37 W. R. 565, 23 Q. B. D. 395, shows that there can be no substituted service of a writ if at the time the writ was issued it could not be served personally. The proper course here was for the creditors to proceed under rule 156, which provides that "where a debtor petitioned against is not in England, the court may order service to be made within such time and in such manner and form as it shall think fit."

Wace, for the petitioning creditors, was not called upon to argue.

Lord ESHER, M.R.—In this case it is said that the registrar had no jurisdiction to order substituted service of the bankruptcy notice, because at that time the person to be served was not in England. It is argued that substituted service cannot be effected under rule 154 unless, if it was known where the debtor was, he could be served personally. But there is nothing in the rule confining it to cases where the debtor is avoiding service within the jurisdiction. If he has gone abroad to avoid service, and he has a place of business in England, there is nothing in the rule to show that service cannot be made at that place. And there was evidence before the registrar which satisfied him that the debtor had gone abroad to avoid service. In *Fry* v. *Moore* there was no suggestion that the defendant had gone abroad for the purpose of avoiding service; the irregularity there consisted in issuing a writ against a defendant who was out of the jurisdiction without the leave of the court, and the obtaining an order for substituted service was considered an evasion of the rules as to service out of the jurisdiction. That case is not in favour of the proposition for which it is cited. The same remarks apply to the service of the petition. I think that all the objections to the receiving order fail, and that the receiving order was rightly made.

FRY, L.J.—I agree.

LOPES, L.J.—I also agree. In *Watt* v. *Barnett,* 26 W. R. 400, 3 Q. B. D. 183, Mellor, J., said that the object of the High Court rule providing for substituted service was to obviate the difficulties that the plaintiff might be exposed to by reason of the defendant's going abroad to avoid personal service. I think that rule 154 has the same object.

Appeal dismissed.

Solicitors for the petitioning creditors, *E. F. & H. Landon.*

Solicitors for the debtor, *Perkins & Sawyer.*

From Q. B. Div. April 21.

ELDER *v.* CARTER. (*a.*)

Practice—Discovery—Order for production of documents before trial by person not a party to action—R. S. C., 1883, *ord.* 37, *r.* 7.

The court has no jurisdiction under rule 7 *of order* 37 *to order the production before trial of documents by persons not parties to the action.*

The object of the rule was not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist.

Decision of the Divisional Court (Huddleston, B., and Grantham, J.) *reversed.*

Appeal from the judgment of the Divisional Court (Huddleston, B., and Grantham, J.).

On the 23rd of February, 1888, Carter obtained a judgment for £4,000 against Haldeman, and shortly afterwards Carter, under section 14 of 1 & 2 Vict. c. 110, obtained a charging order upon 37,5000 shares alleged to belong to Haldeman in the Slide and Spur Gold Mines (Limited). Those shares were standing in the name of Elder, but it was alleged that he was a mere trustee for Haldeman. Shortly afterwards an injunction was granted by a divisional court restraining the transfer of, or any dealing with, these shares until after the trial of an interpleader issue for the purpose of determining what interest Haldeman had in them.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

On the 28th of May, 1889, an issue was directed to be tried between the plaintiff and the defendant to ascertain whether Haldeman had any, and what, interest in these shares, or any and which of them.

A summons was then taken out by Carter in this interpleader issue, which was still pending, and had not been tried, asking for an order directing the attendance of the company by their secretary, or other proper officer, for the purpose of producing their books, writings, or documents containing any entries relating either to registration, transfer, or ownership, or other dealings with the shares numbered 1 to 375,000, and for inspection of them. The only party to this summons besides Carter was the company.

The summons was referred by the master to Denman, J., by whom it was referred to the Divisional Court.

The Divisional Court (Huddleston, B., and Grantham, J.) made an order for the production by the company before the master in chambers of their books, and that the defendant should then be at liberty to inspect the books, and make copies or extracts therefrom.

The company appealed.

Johnston Edwards, for the appellants.—The court has no jurisdiction to make an order like the present against persons who are not parties to the issue. If rule 7 of order 37 purports to give this jurisdiction it is *ultrà vires*.

He referred to the Judicature Act, 1875, s. 17; *Central News (Limited)* v. *Eastern Telegraph Co.*, 32 W. R. 493; *Rishdon* v. *White*, 5 Times Rep. 59; *Straker* v. *Reynolds*, 37 W. R. 379, 22 Q. B. D. 262; *Warner* v. *Mosses*, 29 W. R. 201, 16 Ch. D. 100. [BOWEN, L.J., referred to *Arnott* v. *Hayes*, 36 W. R. 246, 36 Ch. D. 731.]

Vennell, for the respondent.—There is jurisdiction under rule 7 to make this order. The rule provides that the court may "at any stage of the proceedings" order the attendance of any person for the purpose of producing any writings or other documents. [LINDLEY, L.J.—That means before or after the trial.] The object of the rule was to facilitate inquiries, to assist litigants, and to save judicial time. The rule gives an enlarged power to the court, and is not limited to the case of witnesses.

He referred to ord. 37, rr. 8, 9; *Central News (Limited)* v. *Eastern Telegraph Co.*; Bankers' Books Evidence Act, 1879.

Edwards was not called upon to reply.

LINDLEY, L.J., stated the facts, and continued:—The question is, whether that order made by the Divisional Court is right or wrong, and whether it can be supported. I confess that when it was first read to me it appeared to me to be one the like of which I had never seen or heard of before, and the more the matter is reflected upon the more difficult it is to support that order. Let us see exactly how the matter stands. This company is no party whatever to the interpleader issue. I do not say in point of fact, but in point of law, the company has no more to do with it than I have or any stranger has. One of the parties to the issue says this:—"Somebody has got some books which I should like to see for the purpose of enabling me to go into court and try my case upon that issue. There is ord. 37, r. 7, which enables the court to order anybody to produce anything if it thinks fit at any time, and I can apply to the court and get an order to see those books." That, to my mind, is a very startling application. It is contrary to principle as far as I understand it. Putting aside the facts of this particular case, and looking at it as a general proposition, the general proposition is this, that if any litigant wants to see books or documents held by anybody else who is not a party, and thinks they will be useful to him, he can go and get inspection of those books or documents from such person. That is entirely contrary to every rule relating to discovery which has ever existed either on the common law side or the equity side of the court. It is a well established rule now (the origin of it I do not recollect) that you cannot get discovery except from a party to the action, and there is sense in that rule. There is another rule equally old and equally well established, that you cannot make a mere witness a party in order to get discovery out of him. That would be abusing the doctrine of production and discovery. This particular application infringes both these rules. The inconvenience and danger of granting such an application as this must be apparent, I think, to anybody who considers it. But then reliance is placed on ord. 37, r. 7, which runs thus:—[His lordship read the rule, and also rules 8 and 9 of the same order, and continued:—] Now on considering rule 7, wide as the language is, it does not say at what time or at what place or for what purpose this order is to be made except for the purpose of producing documents. The rule is simple enough. There were difficulties in obtaining the attendance of witnesses and production of documents at common law except on the trial of actions, and there were statutes passed to remove these difficulties—the Statute of 1 Will. 4, c. 22, s. 5, and the Common Law Procedure Act, 1854, s. 46, and when the rules had to be recast so as to apply not only to common law actions, but also to chancery and all other actions in the High Court, it became necessary to modify and change the words so as to make them applicable to all proceedings in all courts. That is the history of this rule, and there is no question at all that it is a most useful rule.

But the question is, whether we are to construe it as introducing a practice entirely unheard of before, and contrary, as I have endeavoured to show, to all principle and all justice. Now the answer to Mr. Vennell's argument is this, that you must look at this rule with reference to the purpose for which it was introduced; and that purpose was not to give the litigant a right to discovery against anybody not a party to the action. So to construe it would be to abuse the rule. The object of it was to remove the difficulties which existed in compelling production of documents at various stages of the proceedings, both before and after the trial, at the hearing of motions, petitions, summonses, and examination of witnesses, and the like; and that is the real, legitimate object of the rule, though it is not necessarily confined to production on the hearing of any motion or petition, because there may be some proceeding before an official referee, or an examiner, or a commission to take evidence, to which this rule would apply, and I am not at all desirous of doing more than say that the rule cannot be construed so as to enable a litigant to obtain discovery from any person who is not a party, which is the object of this application. I have no doubt whatever that what I have stated is the true view to take of the rule; and I think when the authorities are looked at, and they are very few, there is no authority which is adverse to that view. The view of Mathew, J., as expressed in the case of *Central News (Limited)* v. *Eastern Telegraph Co.*, is clear that this rule does really no more than incorporate the preceding statutory enactments to which I have referred; and I think that is so with this explanation, that the language is made a little more general so as to extend it to all proceedings in the High Court. When that case came on on appeal from the decision of Mathew, J., before the Divisional Court, Watkin Williams, J., suggested, and I think very justly, that if the rule were to bear the construction contended for it would be a very serious question whether it was not *ultrà vires*; and I concur in that view. If it is to be so construed as to give any litigant the right to see the books of anybody who is not a party to the litigation, I should say that that rule would be *ultrà vires*; though I

am satisfied that that is not the true construction of it nor the true meaning.

Then Mr. Vennell says that upon the facts this company, although not a party to this proceeding, is really so interested in it that there would be no injustice done in this particular case. I think that is so. Without going into the merits, I think it is very likely that in this particular case there would not be any particular injustice done. I will assume that; but the principle involved in that line of argument is a dangerous one, and I for one cannot be the first to sanction such a proceeding as is contended for. It appears to me that principle is entirely against this order. Therefore the appeal will be allowed, and the order will be discharged.

BOWEN, L.J.—I am of the same opinion. Rule 7 of order 37 is not intended to enlarge the rights of a litigant to discovery against third persons who have nothing to do with the action, nor to enlarge his rights to production of documents against them. The rule is one of practice and procedure, and therefore is and can only be, a rule which is intended to enlarge the facilities of obtaining production when production is necessary for the purpose of justice.

Now in the present instance the production of the document at the present moment cannot be necessary for the purpose of justice. Whoever heard that there was a right on the part of a litigant, at a time when there was no pending motion and no pending trial, to obtain inspection of a document which belongs to a third person, unless indeed in the possible case where production of such a document was necessary to carry out an order which had already been obtained. The truth is that no judge has a right to think the production of such a document fit at this particular moment, inasmuch as it is interfering with rights of third parties at a moment when there is no evidence being taken in the cause and when the presence of the document is not necessary for the purpose of carrying out or completing any order which has been made.

The Common Law Procedure Act, 1854, s. 46, introduced at common law a very valuable means of obtaining production of documents on the hearing of motions and summonses. At common law the ordinary subpœna was a *subpœna ad testificandum*, and required the witness to be present in court for the purpose of giving evidence to be used at the trial. The Common Law Procedure Act gave judges the power of compelling the attendance of witnesses to be examined, and of directing that documents should be produced upon the hearing of motions and summonses. Then came rule 7 of order 37, the object and scope of which (as has always been said with regard to the Judicature Act) is not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist. That rule does to a certain extent go further than the Common Law Procedure Act, because it abstains from making it a condition precedent that an order should be made upon the hearing of a motion or a summons. It says that an order may be made at any stage of the proceedings whenever production is proper. I do not think we ought to try to define the cases exhaustively in which production may be proper. It is sufficient to say that I can conceive a case in which production of a document might be proper though there was no motion or summons pending; for instance, if an order had already been made and the non-production of the documents by the third person would defeat the rights which had already been declared and defeat the order which had already been obtained.

But I am as certain as one can be of anything with regard to practice, that it is not intended to enact that at any stage of a proceeding a judge may make, subject to his discretion, an order on a third person for the production of a document which belongs to the third person, unless the production of it at that moment is a thing to which the parties are entitled for the purpose of justice; and a person is not entitled for the purpose of justice, at any moment during a suit, simply because he is a litigant, to see what is in the possession of a third person and to have production of it. Such a thing was never heard of. I do not believe it was ever dreamt of until rule 7 was submitted to the ingenuity of counsel. An attempt has been made to extract out of a rule which simply refers to practice and procedure in an action a power of obtaining inspection from a third person outside the action. If such a power exists it is most inquisitorial, and might be used for purposes of infinite oppression. In this particular case I dare say it would work no oppression at all; but we have to construe the rule. The order will be discharged, with costs here and below.

Appeal allowed.

Solicitors, *Burn & Berridge; H. C. Barker.*

From Q. B. Div. Feb. 20; March 31.

KEARLEY v. THOMSON & WARD. (a.)

Contract — Illegal purpose — Partial performance — Action to recover money paid.

If money has been paid in pursuance of an illegal agreement, and any substantial part of the illegal purpose has been performed, the money cannot be recovered back, although part of the agreement still remains unperformed.

Taylor v. Bowers, 24 *W. R.* 499, 1 *Q. B. D.* 291, *discussed, and distinguished.*

Appeal from the decision of a divisional court (Huddleston, B., and Stephen, J.).

On the 2nd of July, 1886, a receiving order was made against one William Clark, on the petition of Frederick Baynes, and on the 15th of July he was adjudged bankrupt.

On the 6th of October, 1887, the plaintiff, who was a friend of Clark, called upon the defendants, who were acting as the solicitors to Baynes, and offered to pay Baynes £40 towards the costs to which he had been put provided that he would not appear on the public examination of Clark, nor oppose his order of discharge. The defendants agreed to accept this offer, and, accordingly, received from the plaintiff the sum of £40, for which they gave a receipt, which stated that in consideration of the sum of £40, "we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge."

On the 7th of October, 1887, the public examination of the bankrupt was held, at which neither the defendants nor Baynes appeared.

On the 3rd of August, 1888, the bankrupt not having applied for his order of discharge, the plaintiff demanded from the defendants the return of the £40, and upon their refusal he brought the present action to recover it, on the ground that it had been given for an illegal consideration.

Field, J., at the trial left the parties to move for judgment, which the Divisional Court entered for the defendants.

The plaintiff appealed.

Crump, Q.C., Sidney Woolf, Q.C., and *Lewis Thomas,* for the plaintiff.—Where money is paid under an illegal contract, so long as any part of that contract remains unexecuted it can be recovered back. The

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

agreement is undoubtedly illegal: *Hall* v. *Dyson*, 17 Q. B. 785; but as long as the illegal purpose has not been accomplished the contract is executory, and the money may be recovered: *Taylor* v. *Bowers*, 24 W. R. 499, 1 Q. B. D. 291; *Herman* v. *Jeuchner*, 33 W. R. 606, 15 Q. B. D. 561; *Tappenden* v. *Randall*, 2 Bos. & P. 467; *Wilson* v. *Strugnell*, 7 Q. B. D. 548, 30 W. R. Dig. 50.

They also referred to *Collins* v. *Blantern*, 1 Sm. L. C., 9th ed., 398; *Merryweather* v. *Nixan*, 2 Sm. L. C., 9th ed., 569; *Atkinson* v. *Denby*, 9 W. R. 539, 6 H. & N. 778; *Symes* v. *Hughes*, L. R. 9 Eq. 475, 18 W. R. Ch. Dig. 139; *Lowry* v. *Bourdieu*, Doug. 468; *Aubert* v. *Walsh*, 3 Taunt. 277.

Edward Clayton (*Jelf*, *Q.C.*, with him), for the defendants.—The defendants were acting as agents, and, having paid over the £40 to their principal, are no longer liable. There is no case in which money has been recovered when part of the illegal purpose for which it was paid has been carried out.

Crump, *Q.C.*, replied.

Cur. adv. vult.

March 31.—FRY, L.J.—In the judgment that I am about to deliver the Lord Chief Justice and the Master of the Rolls concur.

The facts are shortly these. [The Lord Justice stated the facts, and continued:—] Now the tendency of such a bargain as that entered into between the plaintiff and the defendants is obvious. It tends to pervert the course of justice. Although the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing. The case of *Hall* v. *Dyson* was cited in support of the suggestion that this was an illegal agreement, and it was not argued on the other side that it was legal. It must, therefore, I think, be taken to be an illegal agreement. As a general rule, when a plaintiff cannot get at the money which he seeks to recover without setting up an illegal contract he cannot succeed. The rule in such a case is *potior est conditio possidentis*. There is another general rule—namely, that where there is a voluntary payment of money it cannot be recovered back. It follows, therefore, that in this case the plaintiff cannot recover back the £40, because he cannot do so without setting up an illegal contract. In *Collins* v. *Blantern* Wilmot, C.J., says, "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul o procul este profani.*"

To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of them is the case of oppressor and oppressed, in which the oppressed party may usually recover from the oppressor. In such case the maxim *in pari delicto potior est conditio possidentis* does not apply, because the illegality, the *delict*,] is not the same. There are other exceptions where there are illegalities arising or statutes passed for the protection of classes of persons, and where the person seeking to recover is a member of the protected class—for instance, contracts void for usury. In such cases the one wrongdoer may recover from the other, although both have been parties to an illegal contract. In the present case a third exception to the general rule is suggested on the authority of the judgment of this court in *Taylor* v. *Bowers*. In that case Mellish, L.J., said, "if money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before that purpose is carried out." Now it is remarkable that that proposition is to be found in no earlier case than *Taylor* v. *Bowers*, and I cannot help saying for myself that I think, notwithstanding the high authority of Mellish, L.J., that that case may, at some time hereafter, require consideration by a higher tribunal, and in this view I have the entire concurrence of the Lord Chief Justice. But, even assuming that exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried out in a material part? In the present case the contract was not to appear at the public examination, as well as not to oppose the order of discharge. The first part has been performed, though the last remains still unperformed. Can it be contended that, if the illegal contract had been carried out in part, the money can still be recovered because part remains to be performed? In my judgment it cannot. Suppose A. pays B. £100 on a contract that B. shall murder C. and D. B. murders C. but not D. Surely it cannot be said that A. can recover back the £100.

I hold, therefore, that, where there has been a partial performance of an illegal purpose in a substantial manner, it is impossible to recover the money paid under the illegal contract, although part still remains unperformed. We have been pressed with the observations of the Master of the Rolls in *Herman* v. *Jeuchner*, and it was said that he had laid down that, as long as any part of the contract remained imperfectly performed, the money could be recovered. I do not think that his language will bear that construction, and in that case the court were of opinion that the contract had been fully performed. Whatever the construction of his words may be, I have his authority for stating that he concurs in the views I have now expressed. The appeal, therefore, in our opinion, fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Aird & Hood.*

Solicitors for the respondents, *W. Perks.*

From Prob. Div. and Adm. Div. Feb. 5.

ROUTH (*otherwise* FRY) *v.* FRY. (*a.*)

Divorce — Practice — Suit for nullity of marriage — Alleged insanity of wife — Insanity disputed — Appointment of guardian ad litem—*Divorce and Matrimonial Rules and Regulations, r.* 196.

An order ought not to be made, under rule 196 *of the Divorce and Matrimonial Rules, appointing a guardian* ad litem *to a person alleged to be of unsound mind where there is a substantial and* bonâ fide *dispute whether such person is or is not of unsound mind.*

Order of Butt, J. (15 *P. D.* 25), *affirmed.*

Semble (*per* Lindley *and* Lopes, L.JJ.), *that the power given by rule* 196 *to appoint a guardian* ad litem *to a person of unsound mind is only exercisable where such person has been so found by inquisition.*

Appeal from Butt, J.

Mr. Fry married Mrs. Routh in June, 1889. In November following, E. Stanley Routh, a son of Mrs. Fry by her former marriage, obtained an order from the registrar, under rule 196 of the Rules and Regulations in Divorce and Matrimonial Causes, appointing him his mother's guardian *ad litem* for the purpose of promoting a suit to declare her marriage with Mr. Fry null and void, on the ground that she was insane at the time it was solemnized.

In December, 1889, Mrs. Fry applied to discharge that order, adducing evidence of her sanity.

Rule 196 is as follows:—"A committee duly ap-

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

pointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent; but if no committee should have been appointed, application is to be made to one of the registrars, who will assign a guardian to the person of unsound mind for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf: provided that if the opposite party is already before the court when the application for the assignment of a guardian is made, he or she shall be served with notice by summons of such application."

Butt, J., discharged the registrar's order, on the ground that such an order ought not to be made where there is a *bonâ fide* and substantial dispute as to the sanity of the party.

E. S. Routh appealed.

Willis, Q.C., and *Searle*, for the appellant.—The petitioner alleges that the lady was of unsound mind, and consequently incapable of contracting a marriage. The present question arises under rule 196 of the Divorce and Matrimonial Rules and Regulations. It is contended against us that rule 196, so far as it gives power to appoint a guardian *ad litem* to a party of unsound mind, does not apply until the party has been found a lunatic by inquisition. [COTTON, L.J.—My impression is that the rule does apply to a case where there has been no inquisition, but not to a case where the lunacy is disputed. LOPES, L.J.—I cannot help thinking that the inquisition is a condition precedent to the appointment of a guardian under the rule.] In *Hancock* v. *Peaty*, 15 W. R. 719, L. R. 1 P. & D. 335, the case was tried with only a guardian *ad litem*, though the sanity was in question. The jurisdiction of the court cannot be ousted by the mere allegation of the lady that she was sane. Her sanity is a question to be determined by the court. It cannot, surely, be necessary to have an inquisition in every case in order to stop or avoid the marriage of a person of unsound mind not so found. This lady is so insane that she is in the habit of sending food and wine to her son's grave in the cemetery. It would be very inconvenient if no one could get a decree of nullity without an inquisition. There had been none held in *Lord Durham's case*, 10 P. D. 80, 33 W. R. Dig. 96; *Cannon* v. *Smalley*, 10 P. D. 96, 33 W. R. Dig. 96; or *Hunter* v. *Edney, otherwise Hunter*, 10 P. D. 93, 33 W. R. Dig. 96. The present question is whether the lady is insane now, not whether she was insane at the time of the marriage, and if the court is not satisfied with the affidavit evidence there ought to be some means of deciding it without having an inquisition.

They also referred to *Mordaunt* v. *Mordaunt*, 18 W. R. 845, 20 *Ibid.* 553, L. R. 2 P. & D. 109, 382.

Reid, Q.C., and *Middleton*, for the wife, and *Inderwick, Q.C.*, and *Bargrave Deane*, for the husband, were not called upon.

COTTON, L.J.—This is an appeal against an order of Butt, J., discharging an *ex parte* order of the registrar appointing a guardian *ad litem* to a lady alleged to be of unsound mind, and who had not long been married. I will not give any opinion as to whether she was of unsound mind at the date of her marriage, or whether she is so now, because I shall not base my decision on any such considerations. In my opinion an order of this kind, under rule 196, ought not to be made where there is a *bonâ fide* dispute at the time of the application as to the insanity of the party. The question is, whether the court shall give someone else the conduct of the suit, on the ground that the person who wishes to have the conduct of it says that this lady cannot act for herself because she is of unsound mind. In my opinion the court ought not to do so where there is an honest and substantial dispute whether she is now, or was at the time the order was made, of unsound mind. I am not at present inclined to assent to the view of Lopes, L.J., that an inquisition must have been held before a guardian can be appointed under this order. As the rule applies to parties defending as well as to parties petitioning, it might occasion serious inconvenience to hold that where a person of unsound mind is defending, no defence can be put in till such person has been found lunatic by inquisition. But where there is a *bonâ fide* dispute as to the insanity, I do not think a guardian ought to be appointed. In my opinion there is an honest and substantial question raised in the present case as to whether this lady is not now of sound mind, though I say nothing as to what she was at the time of the marriage. I think, therefore, the order made by Butt, J., discharging the order of the registrar, was right, not on the ground that the registrar was wrong upon the materials before him, but on the ground that the evidence before the judge showed that the case was not one in which it was right to make such an order.

LINDLEY, L.J.—In this case an *ex parte* order was obtained from a registrar appointing a guardian *ad litem* to a married woman, the object being to enable him to present a petition in her name to have her marriage declared void, on the ground that she was of unsound mind at the time of its solemnization. She denies that she is of unsound mind, and brings medical evidence of considerable weight to support her denial. It would be monstrous that a self-appointed guardian—that is, one appointed *ex parte*—should be allowed to go on with such a petition when a defence of that nature is put forward. What ought to be done, in my opinion, is to let Mr. Routh get an inquisition, if he pleases, and then, if the lady is found lunatic, her committee can petition; but if no committee is appointed, a guardian can be appointed for the purpose of petitioning.

Upon the true construction of rule 196 I am bound to say I think an inquisition must have been held before a guardian under the rule can be appointed. But I desire to base my decision, not on that ground, but on the ground that, even assuming the rule to be applicable where the party has not been found lunatic by inquisition, a guardian ought not to be appointed under it where there is a *bonâ fide* and substantial question whether the party is of unsound mind at the time.

LOPES, L.J.—I am of opinion that this order of the registrar should be rescinded, and that Butt, J., was right, on two grounds, in rescinding it:—First, on the ground that the rule does not apply to the case of a party who has not been found lunatic by inquisition; and, secondly, on the ground that even if it does so apply, an order ought not to be made under it where there is a *bonâ fide* dispute as to the insanity of the party. The first point arises on the construction of rule 196, and I entertain a confident opinion that that rule is only applicable where an inquisition has been held and the party has been found of unsound mind. That I firmly believe was the intention of those who framed this rule. Then, if a committee is appointed after the inquisition, he is the proper person to petition or defend; but if a committee has not been appointed to the person so found by inquisition to be of unsound mind (for that, I think, is the reasonable way of reading the rule) then a guardian *ad litem* may be appointed. I do not think it was intended that the question of insanity should be discussed before the judge or before the registrar. It is true that the rule is in one way an enabling rule, as it enables a guardian *ad litem* to be appointed, but on the other hand, while it is enabling, it is also restrictive in this way, that it only gives the conduct of the suit to another person on strong and firm evidence that the party is unfit to have the conduct of it herself. It is not, therefore, to be con-

strued so liberally as if it were a purely enabling rule.

With regard to the second point, assuming that the rule is applicable to cases where there has been no inquisition, I agree with the rest of the court that a guardian ought not to be appointed under it where there is a *bonâ fide* dispute as to the sanity of the party.

I think, therefore, the order of Butt, J., was right.

Appeal dismissed.

Solicitors for the wife, *Irvine, Hodges, & Borrowman.*

Solicitors for the husband, *Fry & Hudson.*

Solicitors for the guardian, *Wontner & Sons.*

High Court of Justice.

Chan. Div. Chitty, J. } April 26; May 2.

In re George.

Francis *v.* Bruce. (*a.*)

Promissory note — Renunciation — Note payable on demand—Maturity—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 62, 89.

A testator, having lent a niece £2,000, secured by a promissory note payable on demand, made a codicil to his will, by which he had bequeathed to her a sum of £6,000, and recited the existence of the loan, which he wished to be considered an advance on account of the legacy of £6,000, and directed that, if the sum of £2,000 should be due and owing at his death, such moneys should be deducted from the said legacy, and that the said legacy should be reduced accordingly, in satisfaction of the moneys due. About two hours before his death he expressed a desire to destroy the promissory note and to forgive the debt. The note could not then be found, and a stranger present wrote a memorandum of his wishes, which was not signed by him.

Held, that there was no absolute and unconditional renunciation in writing under the Bills of Exchange Act, 1882, *s.* 62. *A promissory note payable on demand is at maturity as soon as made.*

Norton *v.* Ellam, 2 *M. & W.* 461, *followed.*

Adjourned summons.

By his will, dated the 6th of July, 1887, Thomas Wellington George appointed W. Bruce, A. Kershaw Francis, and R. G. Brook, the defendants, executors thereof. Among other legacies he bequeathed to his niece, the plaintiff M. A. Francis (or her children, in the event of her predeceasing him, which did not happen), the sum of £6,000.

By a codicil, also dated the 6th of July, 1887, after reciting that by his will he had bequeathed to the plaintiff the before-mentioned legacy of £6,000, and reciting that he had lent to the plaintiff the sum of £2,000, which he wished to be considered as an advance on account of the legacy of £6,000, he continued:—"Now I hereby declare that if, at my decease, the said sum of £2,000, or any part thereof, or any interest thereon, shall be due and owing from the said Margaret Anne Francis or her representatives to me, then and in such case all moneys due to me as aforesaid shall be deducted from the said legacy of £6,000 which I have by my said will bequeathed to or for the benefit of the said Margaret Anne Francis and her children. And I direct that in such case the said legacy shall be reduced accordingly in satisfaction of the moneys due to me as aforesaid."

The sum of £2,000 referred to in the said codicil was lent to the plaintiff by the testator on the 6th of September, 1886, and a promissory note payable on demand, for that amount, together with interest thereon at the rate of 4 per cent. per annum from the date thereof, was signed by the plaintiff.

On the 30th of August, 1889, the testator, two or three hours before his death, directed the promissory note to be brought to him that he might destroy it. Search was made, but the note could not be found. The testator then declared that he wished to give the £2,000 to the plaintiff, and to forgive her the debt. He also said that he wished the note to be destroyed, and the following memorandum of his intentions and wishes was written down at the time at his instance:—

"30th August, 1889.—It is by Mr. George's dying wish that the cheque (*sic*) for two thousand pounds money lent to Mrs. and Mr. Francis be destroyed as soon as found. Mr. George is perfectly conscious and in his sound mind.—(Signed) Nurse Travers."

The testator died on the 30th of August, 1889, and his will and codicil were duly proved by all the defendants.

The promissory note was found shortly after his death by two of the defendants in a safe in the testator's house.

On the 8th of January, 1890, the plaintiff took out an originating summons asking for a determination of the following questions: (1) Whether, in the events which had happened, the sum of £2,000 mentioned in the codicil was owing at the decease of the testator, and whether or not the plaintiff was entitled to the payment in full of the legacy of £6,000? (2) Whether, if the court should be of opinion that the sum of £2,000 was not owing, the plaintiff was chargeable with the apportioned interest up to the time of the determination of the indebtedness?

Romer, Q.C., Upjohn, and *J. Bolt,* for the plaintiff.—This is not a *donatio mortis causâ,* nor is it a revocation of the codicil, but a renunciation of the debt. Before the Bills of Exchange Act, 1882, a simple contract might before breach be waived or discharged without a deed, and without consideration; after breach, by deed, or for consideration. Bills of exchange were exceptions to the general rule, and could be waived by parol: Byles on Bills, 11th ed., p. 6. Promissory notes are and were on the same footing as bills of exchange: *Foster* v. *Dawber,* 6 Ex. 851, Byles on Bills, 11th ed., p. 196, 14th ed., p. 265. By section 62 of the Act of 1882 renunciation must be in writing. Section 89 makes (with the necessary modifications) the Act applicable to promissory notes. In this case the renunciation was not signed by George, but that does not affect its validity; section 62 does not say "signed," but only "in writing," and the nurse was his amanuensis. Besides, the words in section 62 are "at or after its maturity": this note, being "upon demand," was never really "at maturity," for a sum payable upon demand is not mature until a demand is made. [Chitty, J.—It seems clear that a promissory note payable on demand is a present debt, increasing day by day with interest: *Rumball* v. *Ball,* 10 Mod. 38; *Collins* v. *Benning,* 12 Mod. 444; *Norton* v. *Ellam,* 2 M. & W. 461; *Garden* v. *Bruce,* 16 W. R. 366, L. R. 3 C. P. 300. Days of grace are not allowed on a bill payable on demand: *Christie* v. *Fonsick,* Selwyn N. P. 13th ed., 301.] [*Byrne, Q.C.,* referred to *Capp* v. *Lancaster,* Cro. Eliz. 548.] There is writing enough to satisfy the statute, but the plaintiff is entitled to the benefit of the testator's intentions on the ground also that, if the writing is not sufficient, there was the clear intention to deliver up the note "to the acceptor." The plaintiff is in that position, and the actual delivery up was only

(a.) Reported by W. H. Quarrell, Esq., Barrister-at-Law.

prevented by the fact that the note could not be found at that moment. The intention was final, it was his dying wish.

Byrne, Q.C., and *J. W. Dunning*, for the defendants.—Section 62 of the Bills of Exchange Act, 1882, covers the case. There was no renunciation in writing, the writing by the nurse was a mere note of what had been said. The intention so expressed is without value if there was no actual delivery up. [CHITTY, J.—The intention of destroying is not sufficient.] The testator could have altered his expressed intention at any time before his death, he had a *locus penitentiæ*. [CHITTY, J.—I do not want to hear any argument as to the note being at maturity.] Had George even signed the writing himself it would not have prevented his revocation of such writing, that would not have been final.

Romer, Q.C., in reply.

CHITTY, J.—The testator has bequeathed to the plaintiff a legacy of £2,000, which he wished to be considered as an advance. This is clear from the terms of the codicil. The question is, was the promissory note discharged or not discharged in the lifetime of the testator. The promissory note, which was dated September, 1886, is a promissory note to pay on demand the sum of £2,000. It has been argued for the plaintiff that, this being a promissory note, payable on demand, it did not come to maturity until a demand was made, and the debt at common law could be waived by parol, and that section 62 of the Bills of Sale Act, 1882, which made an alteration in the law, does not apply to the waiver of a bill or note before maturity. Section 89 of the Act makes the provisions of the statute apply to promissory notes, with the necessary modifications, and the section in question, section 62 (1), runs as follows:—"When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor." The first point is simply this, when is a bill or note payable on demand at maturity. This has often been considered, but not perhaps just in the present form. I select one case, which seems to be the most direct in point: *Norton* v. *Ellam*. In that case the note was in this form, "I promise to pay £400 on demand, with lawful interest"; and the question was whether the Statute of Limitations ran from the date of the note or the time of the demand. Baron Parke said (at p. 464), "It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it."

Therefore the result is that I must hold in this case that the note was mature when made, and falls within section 62 of the Bills of Exchange Act, 1882. The second point is, was there a renunciation in writing within the same section, which I have read. I entertain no doubt as to the truthfulness and integrity of the witnesses, and I am satisfied that the testator intended to discharge the note, and to forgive the debt, for it is clear to my mind that he would have destroyed it had he had it in his possession at that particular moment. I must, however, be on my guard not to allow my sympathy for the plaintiff to influence me in giving my decision, for the question whether the note was actually discharged depends upon whether or not the provisions of the Act have been complied with. It is plain that the note was not delivered up to the maker, so the point is, was there a renunciation in writing. It is clear that what must be in writing must be an absolute and unconditional renunciation. That must be the effect of the document, which must not be a mere note of the intention, but must be the record itself of the renunciation. I am not called upon to say whether or no a signature is necessary to make a renunciation valid. That I leave wholly in doubt, and the section says nothing about it. I now take the written document, and compare it with the evidence of the nurse. The note could not be found, in spite of the search instituted by the directions of the testator, and taking the evidence as to what exactly occurred, it amounts to this, that the testator intended to destroy the note, and the memorandum of the nurse was meant to be evidence of his intention. It was an authority to those concerned to destroy the note if it could be found in his lifetime, but is that an absolute and unconditional renunciation in writing. Mr. Romer's argument on this point was shortly this, it was a final direction to immediately destroy the note, and that it was therefore an absolute and unconditional renunciation by the testator, who used the nurse as his amanuensis. But the real question is, is a written direction to destroy a note as soon as found an absolute and unconditional renunciation? I assume, in favour of the plaintiff, that this is a writing by the testator, and a record of intention, but could not the testator have revoked this intention if he had changed his mind before the note was destroyed. He could, I think I am bound to say, have done so, and I hold, therefore, that the document was not an absolute and unconditional renunciation. I hold that any sum due under the promissory note at the death of testator is still owing. The costs of all parties will come out of the residuary estate.

Solicitors for the plaintiff, *E. K. Francis*, for *Ranson, Best, & Son*, Leeds.

Solicitors for the defendants, *Bell, Brodrick, & Gray*.

Chan. Div. } Feb. 2, 3.
Kekewich, J. }

OLIVER v. HUNTING. (a.)

Contract—Statute of Frauds—What is sufficient memorandum—Parol evidence to connect two documents, when admitted—Specific performance.

H. signed a memorandum of agreement between him and O. for the sale by him to O. of a freehold property for £2,375. The memorandum contained all the terms of the contract, except stating what was the property agreed to be sold. Two days later O. sent to H. a cheque for £375 as a deposit and in part payment of the purchase-money of £2,375. H. answered by letter as follows:—"I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the F. Estate."

Held, that the circumstances under which the letter was written might be explained by parol evidence; and, as such evidence undoubtedly showed a connection between the letter and the memorandum, the two documents might be read together, and together constituted a sufficient memorandum under the Statute of Frauds.

Trial of action.

The plaintiff, Emma Oliver, a married woman possessing separate estate, in August, 1888, entered into negotiations with the defendant Hunting for the purchase of a freehold property known as the Fletton Manor House Estate. As the result of such negotiations she agreed to purchase it for the sum of £2,375, and on the 7th of September, 1888, Mr. Hunting signed and sent to Mrs. Oliver a document in the following terms: "Memorandum of terms of agreement between Mr. Hunting and Mrs. Oliver. Price £2,375. Vendor

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law

to make good title. Purchaser to pay for her own conveyance. Fixtures included in purchase. Purchase to be settled as soon as possible. Possession on 25th of September. Deposit to be paid on the 10th."

On the 12th of September, 1888, Mr. Hunting wrote and sent to Mrs. Oliver a letter in the following terms (omitting formal parts): "I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the Fletton Manor House Estate."

Mr. Hunting refused to complete the purchase, whereupon Mrs. Oliver commenced proceedings against him, claiming specific performance of the agreement of the 7th of September, 1888. In her statement of claim she alleged that the sum of £375 was paid by her on the 10th of September, 1888, in pursuance of the said agreement, as a deposit and in part payment of the purchase-money, and submitted that the memorandum of the 7th of September and the letter of the 12th of September, 1888, formed a valid contract binding under the Statute of Frauds. It appeared from the evidence that no other money than the £375, part of the £2,375 was payable by her to the defendant, as the balance, £2,000, was to be paid to a mortgagee of the estate. The £2,000 was to be found for the plaintiff by her solicitor.

Neville, Q.C., and *Dunning*, for the plaintiff.—The two documents show an agreement to purchase, and parol evidence is admissible to show what that agreement was. The agreement is proved to be none other than that contained in the two documents, which together constitute a sufficient memorandum within the Statute of Frauds.

They referred to *Baumann* v. *James*, 16 W. R. 877, L. R. 3 Ch. 508; *Cave* v. *Hastings*, 7 Q. B. D. 125, 29 W. R. Dig. 92; *Studds* v. *Watson*, 33 W. R. 118, 28 Ch D. 305; *Long* v. *Millar*, 27 W. R. 720, 4 C. P. D. 450; *Ridgway* v. *Wharton*, 5 W. R. 804, 6 H. L. Cas. 238.

Warmington, Q.C., and *Swinfen Eady*, for the defendant.—The memorandum must contain all the terms of the agreement, and there must be a connection between all the documents, if more than one. Parol evidence is admissible only to explain an ambiguity, but not to connect documents which have not on the face of them any connection with each other. In this case there is no ambiguity.

They referred to *Warner* v. *Willington*, 4 W. R. 531, 3 Drewry, 523; *Boydell* v. *Drummond*, 11 East, 142.

KEKEWICH, J.—There can be no doubt about the elementary proposition that the memorandum to be signed by the party sought to be charged need not, in order to bring the case within the Statute of Frauds, be on one piece of paper, nor a complete document signed by the party at one and the same time. It may be contained in two or more documents, but they must be so connected that they can be read together so as to form one memorandum of the contract between the parties. Directly you go beyond that you get into difficulty. The old rule was different from the present rule. I take it from the original edition of Lord Blackburn on the Contract of Sale, cited by Williams, J., in *North Staffordshire Railway Co.* v. *Peek*, 8 W. R., at p. 366, E. B. & E., at p. 1001, where, after referring to *Hinde* v. *Whitehouse*, 7 East, 558, and *Kenworthy* v. *Schofield*, 2 B. & C. 945, he says:—"The principle of these cases seems to me to be well stated in the same work by my brother Blackburn, as follows: 'If the contents of the signed paper themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing.'" The old case of *Boydell* v. *Drummond* and some others may be consistent with that rule; but of late a different rule has been introduced; and it is one consistent with the convenience of mankind because if you were to exclude parol evidence to explain a doubtful reference the result might, in many cases, be to work injustice. Now it seems to me that in a case of that kind you may give parol evidence to show what the document referred to was. And I take it that you may go further than that, and if you find a reference to something which may be a conversation or may be a written document, you may give evidence to show whether it was a conversation or a written document, and, having proved that it was a written document, you may put that written document in evidence and so connect it with the one already admitted or proved. So far there is no difficulty: *Ridgway* v. *Wharton*.

The later cases have gone further than that; and *Long* v. *Millar*, followed in *Cave* v. *Hastings*, does establish a large series of exceptions. In *Long* v. *Millar* Bramwell, L.J., gives an illustration which seems to me to go to the root of the matter. He says:—"Suppose that A. writes to B. saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A. without infringing the Statute of Frauds, s. 4, which requires a note or memorandum in writing." If that is sound, which I take it to be according to other cases, it is difficult to say where parol evidence is to stop; but, substantially, it never stops short of this, that wherever parol evidence is required to connect two written documents together, parol evidence is admissible. You are entitled to rely on a written document which requires explanation. I think that the principle upon which parol evidence of this kind is admitted is, that you are always entitled, with regard to the construction and meaning of a written document, to inquire into the circumstances under which it was written, not to find an interpretation by the writer, but to ascertain from the surrounding facts and circumstances with what intent, and with reference to what, it must have been written.

Turning to the case before me, I find a letter of the 12th of September, 1888:—[His lordship read the letter.] There are two things here perfectly clear—namely, first, that there is a property called the Fletton Manor House Estate, the subject of a purchase, and therefore of a sale; and, secondly, that £375 is part of the purchase-money for that house. Beyond that I have no terms of a contract. This being so, I am entitled to consider the circumstances under which the letter was written, not to add terms to it, but to ascertain what its meaning must be, having regard to the facts and circumstances; and having got the evidence which I have in this case, I conclude that it certainly refers to a previous memorandum of terms of agreement under which Mrs. Oliver becomes the purchaser of this property for £2,375, on account of which the cheque for £375 was sent. Having thus got in evidence sufficient to establish the connection between the two documents, and being, therefore, entitled to read them together, I have a distinct memorandum of contract specifying all the terms, the second document supplying what the first, curiously enough, omitted—namely, the property intended to be purchased and sold. The objection, therefore, that there is no memorandum within the Statute of Frauds, fails.

Under these circumstances I think that the plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.

Solicitors for the plaintiff, *Law & Worssam*, for *Law*, Stamford.

Solicitors for the defendant, *Hatchett-Jones & Co.*, for *Ackers*, Peterborough.

Q. B. Div. (Cave and A. L. Smith, JJ.) June 12.

CRANE *v.* LAWRENCE. (*a.*)

Adulteration of food—Margarine—Exposure for sale—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *s.* 6.

Section 6 of the Margarine Act, 1887, *enacts that "if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine.'"*

Where a customer asking for margarine had been served from a parcel of margarine then in the shop and unlabelled but which was placed behind a screen so as not to be visible to customers,

Held, that such margarine was not "exposed" for sale within the meaning of the above section, because it was not exposed in the shop so as to be visible to customers and so as to induce them to buy it without knowing that it was margarine; and, accordingly, that a summons against the vendor for exposing it for sale without a label, contrary to the provisions of the above section, had been rightly dismissed by the magistrate.

Case stated by a metropolitan police magistrate under provisions of 42 & 43 Vict. c. 49.

The respondent was summoned before the magistrate for unlawfully exposing for sale by retail a parcel of margarine, there not then being attached to such parcel so exposed a label marked "Margarine," contrary to sections 4, 6, and 7 of the Margarine Act, 1887 (50 & 51 Vict. c. 29). Upon hearing the evidence the magistrate dismissed the summons, but agreed to grant a case under the Act above referred to. The case stated, so far as material, was as follows:—

1. The appellant is an inspector appointed by the vestry of St. Mary's, Battersea, for the purpose of enforcing the Food and Drugs Act, 1875, and the Margarine Act, 1887.

2. The respondent carries on business as a retail dealer in butter, margarine, and other things at his shop in the parish of Battersea.

3. On the 24th of January, 1890, the appellant entered the respondent's shop and asked the respondent's wife, who was then in charge, to serve him with half a pound of margarine.

4. She complied, cutting the portion required from a parcel of margarine which was then in the shop, and placing such portion in a paper wrapper upon which was printed the word "Margarine" in all respects as required by the Act.

5. This parcel of margarine from which the half pound was taken is the parcel with reference to which the alleged offence was committed. At the time of the purchase it was placed on the counter behind a screen similar to those used in butter shops for the purpose of the butter, &c., being prepared for sale. Before making the purchase the appellant did not see, nor could he see, the parcel of margarine from the side of the counter on which he stood, nor was it open to the view of any of the customers, unless they went behind the counter, where they were not, in fact, allowed to go.

6. The parcel was not in any case or package, and no label or mark of any kind was upon it to indicate that it was margarine; and it was obvious that, even if such label had been upon it, it could not have been seen by the customers so long as they remained upon their side of the counter.

7. There was no evidence that the parcel was placed behind the screen for the purpose of evading the Act or except in the ordinary way of business.

8. On behalf of the appellant it was contended that the respondent had by placing the parcel of margarine in his shop for the purpose of being forthwith sold by retail exposed the same for sale by retail.

9. On behalf of the respondent it was contended that inasmuch as the said parcel of margarine was not, and would not, and could not be seen by customers or other persons using the shop unless they went behind the counter, the same was not exposed for sale.

The magistrate was of opinion that to constitute exposure for sale, the margarine should be in a position in which it could be seen by customers standing in their usual place in the shop, and he accordingly dismissed the summons.

The inspector appealed.

Earle, for the appellant. — The having the margarine upon the premises for sale, constituted exposing it for sale within the meaning of the section.—Section 6 of the Margarine Act, 1887, runs as follows:—"Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations: Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked, in printed capital letters not less than one and a half inches square, 'Margarine,' and every person selling margarine by retail, save in a package durably branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

No one appeared for the respondent.

CAVE, J.—I think that the objection raised by the appellant in this case cannot be sustained. The Act is a penal one, and as such must be construed strictly in reference to the conduct which shall expose the subject to penalties under it. The words "exposed for sale" are the vital words in this application. It is obvious the word "exposed" may have differing meanings under different circumstances. A thing may be exposed to the air or water, or it may be exposed to view. Here it implies that the article in question, margarine, is to be so exposed to the view of customers in the shop that they may have the opportunity of refusing to take it instead of butter. This is explained by the words "in such manner as to be clearly visible to the purchaser." These words apply to the label to be attached, but beyond question they interpret also the meaning of the word "exposed"—namely, as being "visible to the purchaser." To hold the contrary would be to put an unnatural meaning on the word, which we ought not to do. Merely having a stock of margarine for sale kept upon the premises, or even behind the counter in a place where it is not visible to customers, is not exposing it for sale within the meaning of this section, all the provisions of which apply to prevent the case of margarine

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

being left without a label visible to a customer, so that he might point to it and say he would have a pound or half-a-pound of it without knowing what it really was. A dealer might not have room for a stock of margarine in his shop, and might keep it in a cellar where no customer could see it. Could it be said that it was nevertheless "exposed for sale," and must be labelled or kept in a marked cask? The meaning of this section is that if the stuff is exposed in a shop for sale so as to induce persons coming into, or looking into, the shop to buy, the brand or mark or label must be such, as to show to such persons what the stuff really is.

A. L. SMITH, J.—I think the magistrate was right. The labelling of the article only comes into play where it is exposed for sale, and it is exposed for sale when it is exposed so as to be visible to customers in the shop. Either the margarine is exposed for sale by being kept in the marked casks in the shop, or, if taken out of these casks, and exposed in the shop so as to be visible to customers, it must be labelled, so that it may be clearly shown to be what it is.

Appeal dismissed.

Solicitor for the appellant, *Walton Young.*

Q. B. Div. (Denman and Charles, JJ.) June 9.

In re AN ARBITRATION BETWEEN GALLOP AND THE CENTRAL QUEENSLAND MEAT EXPORT CO. (*a.*)

Practice — Award — Application to set aside—Time—Ord. 64, *r.* 14.

A notice of motion to set aside the award of an arbitrator is an "application" within the meaning of ord. 64, *r.* 14, *and is in time if given before the last day of the sittings next after such award has been made and published, although the motion cannot be heard until after the expiration of those sittings.*

In re Corporation of Huddersfield and Jacomb, 23 *W. R.* 100, *L. R.* 10 *Ch.* 92, *and* Smith *v.* Parkside Mining Co., 29 *W. R.* 154, 6 *Q. B. D.* 67, *followed.*

Motion to set aside an award.

The award of the arbitrator was made and published to the parties on the 27th of February, during the Hilary Sittings. Notice of motion to set aside the award was given by the company to Gallop on the 20th of May for the 23rd of May, which was the last day of the Easter Sittings. On the 23rd of May the motion was not in the paper for hearing, but application was made to the court on behalf of the company for an extension of the time for making the application. The court granted the application, but subject to any objection which might be raised at the hearing.

On the motion coming on for hearing on the 9th of June,

Vennell, for Gallop, objected that it was out of time.—By ord. 64, r. 14, "an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." That means that the motion itself must come on for hearing before the last day of such sittings.

Pollard, for the company.—It is sufficient if the notice of motion is given within the prescribed time: *Smith* v. *Parkside Mining Co.*, 29 W. R. 154, 6 Q. B. D. 67, and *In re Corporation of Huddersfield* v. *Jacomb*, 23 W. R. 100, L. R. 10 Ch. 92.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

DENMAN, J.—I think that this application was made in time. On the 20th of May, which day was within the time prescribed by ord. 64, r. 14, a notice to set aside the award was given. If that notice was an application under ord. 64, r. 14, it was in time, and the proper step was taken to set the award aside. I think that if the *ratio decidendi* in *Smith* v. *Parkside Mining Co.* and *In re Corporation of Huddersfield* v. *Jacomb*, in which the Court of Appeal supported the ruling of Malins, V.C., is to be applied, the notice of motion is the application. The difficulty in adopting this construction is that at first sight it seems inconsistent with ord. 52, r. 1, which provides that "where by these rules any application is authorized to be made to the court or a judge, such application, if made to a divisional court or to a judge in court, shall be made by motion"; from this it would seem that the application and the motion were one. But I think that although this rule says that the application is to be made by motion, it does not mean that the application and the motion are for all purposes the same thing. In my opinion the notice of motion is a sufficient application under ord. 64, r. 14, for the purpose of launching the proceedings. That step is taken in time if taken before the last day of the sittings next after the publication of the award; that step has been taken here and no extension of time is necessary. I will only add, inasmuch as order 64 is relied on to show that the application is out of time, that an extension of time might be granted under rule 7 of that order. But I do not rely on the power of the court to extend the time, for I think upon the construction of the rules, assisted by the decisions under 9 & 10 Will. 3, c. 15, s. 2, that this application is in time and no extension is necessary.

CHARLES, J.—I am of the same opinion, and for the same reasons.

The motion was then heard on the merits, and ultimately remitted to the arbitrators.

Solicitors for the company, *Freshfields & Williams.*

Solicitor for the respondent, *H. C. Barker.*

Q. B. Div. (Lord Esher, M.R., and Lord Coleridge, C.J.) (Divisional Court.) March 21, 28.

REED *v.* NUTT. (*a.*)

Criminal law—Assault—Withdrawal of charge before hearing—Jurisdiction to grant certificate of dismissal—Civil proceedings for the same cause—Power of court to inquire whether certificate was lawfully granted— 24 *&* 25 *Vict. c.* 100, *ss.* 44, 45.

A. obtained a summons for assault against B. A. then gave notice to B. that he would not proceed with the charge, and he did not attend or offer evidence at the hearing. B. attended and obtained from the magistrate a certificate of dismissal under section 44 *of* 24 *&* 25 *Vict. c.* 100. *A. then brought an action for damages in respect of the same assault in the county court.*

Held, that, there having been no hearing on the merits, the magistrate had no jurisdiction to grant the certificate, which was, therefore, no bar, under section 45 *of the same Act, to the action; and*

Held, also (Lord Coleridge, C.J., *doubting*), *that the county court judge had power to inquire into the validity of the certificate.*

Appeal from the Brompton County Court.

The action was for assault. The defence set up was

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

that the plaintiff had obtained a summons against the defendant for the same assault, and that the complaint had been dismissed and a certificate of dismissal granted to the defendant under section 44 of 24 & 25 Vict. c. 100, which certificate it was said was (by virtue of section 45) a bar to further proceedings.

It appeared that the plaintiff, after obtaining the summons, had given notice in writing to the defendant that he did not intend to proceed with the charge, and accordingly on the day appointed for the hearing he did not attend or offer evidence. The defendant appeared and made a statement to the magistrate, who dismissed the complaint and granted a certificate of dismissal. The county court judge held that there had been no hearing upon the merits, and that the certificate was granted without jurisdiction and was no bar to the action. The jury awarded damages to the plaintiff. The defendant appealed.

Horace Avory, for the appellant.—The summons being dismissed the defendant had a right to the certificate of dismissal. He ought not to be prejudiced by the non-appearance of the complainant. [He was stopped by the court.]

John Rawlinson, for the respondent.—The certificate was altogether bad. The magistrate had no jurisdiction to grant it except after a hearing "upon the merits." Those words are important; they are expressly inserted in this section although they are not to be found in the corresponding section of the earlier Act: 9 Geo. 4, c. 31, s. 27. Here there was no sworn evidence, and therefore no hearing on the merits, and the magistrate, although he could dismiss the complaint, could not grant the certificate: *Nicholson* v. *Booth*, 57 L. J. M. C. 43, 36 W. R. Dig. 107. [Lord COLERIDGE, C.J.—At common law could there be an action for damages after a summons had been issued? Is not that contrary to the maxim *Nemo pro eadem causa bis vexari debet?*] Yet in many cases it has been held necessary to obtain a conviction before a civil action can be maintained: *Wellock* v. *Constantine*, 2 H. & C. 146, 11 W. R. C. L. Dig. 7; *Wells* v. *Abrahams*, 20 W. R. 659, L. R. 7 Q. B. 554; *Ex parte Ball*, 27 W. R. 566, 10 Ch. D. 667, *per* Baggallay, L.J., at p. 674. If the criminal proceedings were a bar to the action by the common law this enactment would not have been required.

Avory, in reply.—The county court judge had no jurisdiction to go behind the certificate and inquire into the circumstances under which it was granted. It is admitted that the magistrate had power to dismiss the complaint; that done, the granting of the certificate was merely a ministerial act, and one which the accused person had a right to demand.

He cited *Hancock* v. *Somes*, 7 W. R. 422, and *R.* v. *The Justices of Wiltshire*, 8 L. T. N. S. 242.

Cur. adv. vult.

March 28.—Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. The action was one to recover damages for an assault; the assault was disputed by the defendant, but was found by the jury to have been committed. The defendant put forward as a defence to the action a certificate given by a magistrate under the provisions of 24 & 25 Vict. c. 100, s. 44, and the county court judge received evidence, apparently without objection, as to the circumstances under which the certificate was granted. It appeared that the plaintiff had originally laid an information for the same assault, and had obtained a summons against the defendant, but that, before the summons case on for hearing, the plaintiff had given the defendant notice that he did not intend to proceed with it. The defendant did what had been done under a previous statute—he went before the magistrate and stated his case to him, and asked for a certificate of dismissal of the summons. This the magistrate gave him, and the question for us is whether it was competent for him to do so. That he had jurisdiction to dismiss the summons is not denied; but he also gave the certificate of dismissal; and we have to say, firstly, whether he had any jurisdiction to give that certificate; and, secondly, whether, if he had no such jurisdiction: the county court judge was entitled to go into the circumstances under which it was given with a view of deciding whether the magistrate was right in holding that the case came within the purview and operation of the statute.

The first question depends on the construction of the statute, which is not a mere consolidation Act, but has made sundry alterations in the law contained in former Acts of Parliament relating to criminal law. The language of section 27 of 9 Geo. 4, c. 31, is less precise than that of the section under consideration. It says that "upon the hearing" of a case of assault the justices are in certain circumstances to dismiss the complaint, and to give a certificate of dismissal to the party against whom the complaint is made; and upon that section and those words two cases were decided.

In *Tunnicliffe* v. *Tedd*, 5 C. B. 553, the circumstances were substantially the same as in the present case. An information was laid and a summons obtained for an assault; but upon the case being called, and the defendant pleading not guilty, the prosecutor declined to offer any evidence or proceed further with the information, and thereupon, although no evidence had been given, the justices, upon the defendant's application, granted him a certificate of dismissal. An action having been brought for the same assault, the Court of Common Pleas held that what passed before the justices constituted a hearing under section 27, and was therefore, under section 28, a complete bar to the action. That appears to me rather a technical and strict interpretation of the section; but the decision was approved in *Vaughton* v. *Bradshaw*, 9 W. R. 120, 9 C. B. N. S. 103, where the facts were on all-fours with those in this case. The prosecutor took out a summons, but before the day of hearing gave notice to the defendant not to attend, and also gave notice to the magistrate's clerk that he (the prosecutor) should not attend. The defendant attended, the summons was dismissed, and a certificate of dismissal granted, notwithstanding the prosecutor's absence: and the Court of Common Pleas held that the certificate was rightly granted, and was a bar to a subsequent action in the county court for the same assault

Coming to the later Act, 24 & 25 Vict. c. 100, we find that the language of section 44 is in a very important respect different. It gives a like power to justices to grant a certificate of dismissal, but it is to be exercised "upon the hearing of any such case of assault or battery upon the merits." How are these additional words "upon the merits" to be interpreted? Can we say that the new section which contains them means the same thing as the old section where they were omitted? Speaking for myself, I cannot help thinking that the strict interpretation which had been placed on section 27 of the Act of Geo. 4 had been brought to the attention of the Legislature, and that those words were advisedly inserted, the intention being that if the dispute between the parties were really fought out upon the hearing of the summons and the charge dismissed, the certificate should be given and should bar all further proceedings; but that if the charge were withdrawn, so that there was no real trial, it should be left open to the person who laid the information to be remitted to his common law rights, and to maintain an action for the assault notwithstanding the dismissal of his complaint. If that be so, no certificate of dismissal can be given under 24 & 25 Vict. c. 100, s. 44, unless the parties are present before the justices, and the case is argued, and is decided, upon the facts, or upon the law applicable to the facts.

In my opinion that is the correct view of the law, and the magistrate had, therefore, no jurisdiction to grant this certificate.

We have also to consider whether the county court judge was entitled to consider the circumstances under which the certificate was given, or whether he was bound by the mere production of the certificate—in other words, whether the only mode of getting rid of the certificate was not by getting it quashed upon *certiorari*. The point is a technical one. Looking at the two cases which I have already discussed, it seems that in *Vaughton* v. *Bradshaw* the county court judge did take evidence of what passed before the justices upon the granting of the certificate; while in *Tunnicliffe* v. *Tedd* evidence was received at *nisi prius* upon the point whether the justices acted within their jurisdiction; and it seems to me that the courts have recognized the right of the court trying such an action for assault to inquire whether the facts are such as to give it jurisdiction to hear the case. I think, therefore, that the county court judge had jurisdiction to inquire whether the certificate was properly given; and as he was right upon both points, this appeal must be dismissed.

Lord COLERIDGE, C.J.—I have come reluctantly to the same conclusion. Upon the first point I entirely agree with the Master of the Rolls; it is impossible, without exercising an unreasonable amount of subtlety, to say that the hearing of a case and the hearing of a case upon the merits are the same thing, and to disregard the insertion of those very important words. I think there is a clear difference in meaning between the two sections, and that the later statute requires a more complete and substantial hearing of the charge than the earlier one did, and therefore, although the two cases referred to by the Master of the Rolls were an authority upon the old Act of Parliament, they are no longer an authority, and cannot affect the interpretation of the new Act.

Upon the second point I feel very much more doubt, and I confess that I rather yield to the opinion of the Master of the Rolls than express any clear opinion of my own to the effect that the county court judge had power to go behind the certificate of a magistrate of competent jurisdiction and to inquire whether, in face of the certificate, there was jurisdiction in the magistrate to grant it. I am unable, however, to deny that there have been cases where that has been done, and I do not feel at liberty to differ from the view which has been expressed by the Master of the Rolls.

Appeal dismissed.

Solicitors for the plaintiff, *Bordman & Co.*

Solicitors for the defendant, *Wontner & Sons.*

Prob. Div. & Adm. Div. Admiralty. } March 10; April 28.

"THE CASHMERE." (*a*.)

County court—Admiralty—Jurisdiction—Appeal—No appeal from interlocutory decree or order without leave—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 26—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Costs of witnesses not called—County Court Rules,* 1889, *ord.* 50, *r.* 16.

There is no appeal from any interlocutory decree or order of a county court having admiralty jurisdiction in an admiralty cause without the permission of the judge of the court appealed from, where the decree or order appealed from, is not made at the hearing of the suit.

The 120*th section of the County Courts Act,* 1888, *providing for the manner in which, and the conditions subject to which, appeals may be brought from the judgment, direction, or decision of a county court judge where any party is dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, has not given a right of appeal from interlocutory orders made in admiralty actions previous to or after the hearing of the suit.*

Semble, *ord.* 50, *r.* 16, *of the County Court Rules,* 1889, *directing that "the costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed, though they have not been summoned," is not to be construed as authorizing a judge of county courts to order, as a general rule of practice, that in admiralty actions the costs of witnesses not called shall be disallowed, unless it be otherwise ordered by himself.*

This was an appeal from the judgment of the county court of Glamorganshire, holden at Cardiff. By the decision appealed from, the judge of the court below had upheld the decision of the registrar of that court, whereby he had, on taxation, disallowed certain items in the plaintiffs' bill of costs in an action of damages instituted on behalf of the Great Northern Steamship Fishing Co. against the owners of the vessel *Cashmere.*

The following statement of facts was agreed on, for the purposes of the appeal, between the respective solicitors for the plaintiffs and defendants.

STATEMENT OF FACTS.

1. The appellants, the plaintiffs, appeal against the decision of the judge of the above-named county court, upholding the decision of the registrar, disallowing certain items in the plaintiffs' costs.

2. This was a suit for damage by collision. Judgment was given for the plaintiffs, with costs. The plaintiffs' solicitors made no application to the judge of the county court on the hearing of the action in respect of the witnesses' costs or allowance of their expenses.

3. The registrar, on taxing the plaintiffs' costs, disallowed the expenses of all the witnesses who were not actually put into the box and examined.

4. The registrar disallowed the expenses on the grounds as certified by him in the following words:—"The practice in this court is, by direction of his Honour, to allow the costs of witnesses called—if it be desired to have witnesses allowed who have not been called, application should be made to the judge for their allowance."

5. The plaintiffs filed objections to the taxation.

6. The plaintiffs appealed against such disallowance to the judge.

7. The judge dismissed the plaintiffs' appeal, with costs, on the ground that no application was made at the trial for the allowance of these witnesses' costs and expenses, and on the ground that it was agreed at the time of the hearing that only two witnesses should be called on each side.

8. The circumstances under which it was agreed that only two witnesses should be called on each side at the trial appear from the affidavit of H. W. Nelson, sworn in support of the appeal to the judge.

9. In the event of the Divisional Court of Appeal deciding in favour of the plaintiffs it is agreed between the parties that the items disallowed by the registrar and named in the plaintiffs' objections are correct, and shall be allowed without any further reference to the registrar.

The affidavit referred to in the above statement of facts stated, *inter alia*, that six witnesses on behalf of the plaintiffs were in attendance at the hearing of the action; that, in accordance with a suggestion made in court and assented to by the solicitor for the defendants, only two of such witnesses were called; that it was intimated to the court at the time that the remainder of such witnesses were in attendance and could be called if the suggestion to only call two witnesses was not

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

accepted; and that the charges for the proofs of all the witnesses in attendance but not called, and all the expenses of such witnesses, had been disallowed on the ground that such witnesses had not been called.

March 10.—The appeal now came on to be heard before a divisional court of the Probate, Divorce, and Admiralty Division (The President and Butt, J.).

Pyke, on behalf of the respondents, the defendants in the court below, took a preliminary objection that this court had no jurisdiction to entertain the appeal; no leave to appeal having been given by the judge of the court below, and the order appealed against, being an interlocutory order against which no appeal lay in the absence of any such leave.—The right of appeal without leave from county courts having admiralty jurisdiction was, by section 26 of the County Courts Admiralty Jurisdiction Act, 1868, expressly confined to appeals from the final orders or decrees of such courts, and that section has not been repealed or even modified by the County Courts Act of 1888, which latter Act is, for the most part, merely a consolidation Act, and the 120th section of which does not confer a right of appeal from interlocutory orders any more than the corresponding section of the County Courts Act of 1850 (13 & 14 Vict. c. 61, s. 14) did.

He referred to *Mitchell* v. *Simpson*, 37 W. R. 798, 23 Q. B. D. 373, as showing that where in a consolidation Act an enactment occurs in similar terms to a repealed enactment no greater effect is to be given to the new enactment than was given to the repealed enactment when in force, and to *The Conservators of the Thames* v. *Hall*, 16 W. R. 971, L. R. 3 C. P. 415, in support of the principle that a prior enactment having special reference to a particular subject-matter is not impliedly repealed by a subsequent enactment not expressly referring to such subject-matter.

Sir Walter Phillimore, for the appellants, *contrd.*—The County Courts Act of 1888 is as applicable to admiralty actions in the county courts as to all other actions instituted there, and section 120 of that Act is wide enough to apply to appeals from interlocutory orders, and has impliedly repealed all sections of the County Courts Admiralty Jurisdiction Act, 1868, inconsistent with its provisions: *Jonas* v. *Long*, 36 W. R. 315, 20 Q. B. D. 564.

After hearing the arguments of counsel on the point of jurisdiction the court intimated that before giving judgment it would hear the appeal *de bene esse* on the merits. The appeal on the merits was accordingly then argued by the same counsel, the court on the conclusion of the hearing delivering the following judgments:—

HANNEN, P.—Whatever decision we may come to on the preliminary question of jurisdiction, the learned judge of the court below would in future be influenced by the opinion we may express here on the other points of the case. It is from that point of view that I think it necessary, before we give judgment on the preliminary question, to state the opinion we have arrived at upon this appeal, supposing it can be entertained.

It appears that a practice has prevailed in the court below which is the direct opposite to the provisions of ord. 50, r. 16, of the County Court Rules, 1889, a rule which has been framed by the proper authority, and it is obvious that the learned judge has not the right to establish a practice of that kind, and that such a local practice cannot remain as against the general rules laid down by the County Court Rules of 1889. It is plain that the registrar of the county court based his judgment solely upon the local practice which has thus prevailed, and, in our opinion, that was an insufficient reason upon which to base his decision. Then, when the question came on before the judge of the court below, he dismissed the plaintiffs' appeal, with costs, on two grounds, one of which was that "no application was made to him at the trial for these witnesses' expenses." Well, that is a re-assertion of his own local practice as against the general rule by which he ought to have been governed. The other ground put forward in support of the decision appealed against is "that it was agreed at the time of the hearing that only two witnesses should be called on each side." But what has that to do with the question of what costs and what witnesses should be allowed? The parties said, "We will not trouble the court with a great number of witnesses on the one side or the other, and will each be content with two." How does that prove that the parties were not quite right in bringing down other witnesses than those two men whom they called? Therefore, this last ground is no reason at all, and has no bearing on the question in this appeal.

For these reasons, unless we are of opinion that we have no jurisdiction to hear the appeal, we must allow it.

BUTT, J.—I am entirely of the same opinion. If witnesses are summoned and brought down to a county court, and their expenses are not to be allowed because they have not been called, it involves this—that a solicitor who has a number of witnesses present, even if his case is substantially proved, will go on calling his witnesses, feeling that if he does not he will not get the costs in respect of such witnesses. That leads to a great waste of time, and is most objectionable, and I think, on that ground, the appeal, if we have jurisdiction to hear it, should be allowed.

We reserve our judgment on the question of jurisdiction.

Cur. adv. vult.

April 28.—The following judgment was delivered on the question of jurisdiction:—

BUTT, J.—This is the case of an appeal from the decision of the judge of the county court of Glamorganshire on a question of costs. The registrar of that court had disallowed the costs of certain witnesses who were in attendance on the trial of the cause, but were not called to give evidence. From that disallowance there was an appeal for a review of that taxation, but the learned judge refused to allow the costs claimed. Thereupon this appeal was brought here, and came before us on the 10th of March last. We came to the conclusion that the learned judge of the court below was wrong in refusing to allow the costs in question, and as the case involved a question of principle my lord thought, and I entirely concurred, that we should then state the opinion that we had then formed on the legal question whether the learned judge had rightly decided, and we did so; but a preliminary objection had been taken by the respondents that there was no jurisdiction in this court to hear an appeal from a decision of the county court judge on a mere question of costs, and upon that preliminary point we reserved our judgment.

The objection taken before us was that the appeal was against an interlocutory order of the county court judge, and that no leave had been obtained from him to appeal; and the 26th section of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), was relied upon by the respondents as supporting this objection. That section is as follows:—"An appeal may be made to the High Court of Admiralty of England from a final decree or order of the county court, and by permission of the judge of the county court from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct." As far as that section of that Act of Parliament is concerned it would seem clear that there is no appeal from a decision of a judge of county courts upon such a matter as this without his leave;

but then it was said, as I understood the argument, that the County Courts Act, 1888 (51 & 52 Vict. c. 43), alters that, and section 120 of that Act was relied upon. The material part of that section is as follows:—"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court in such manner, and subject to such conditions, as may be for the time being provided by the Rules of the Supreme Court regulating the procedure in appeals from inferior courts to the High Court." Then there are certain provisions which it is not necessary to consider for the present purpose.

Now I should have been inclined to think that, inasmuch as the first of the two Acts to which I have referred was an Act having special reference to the admiralty jurisdiction of the county courts, and the later Act was a general county court jurisdiction Act, even if the words of that latter Act would, if they stood alone, in themselves give a right of appeal from interlocutory orders without leave of the judge appealed from, they still would not repeal or alter the provisions of the 26th section of the County Courts Admiralty Jurisdiction Act, 1868; but whether or not this be the correct view, I am of opinion that the words of the second Act upon which the respondents rely apply to proceedings at the trial and to an appeal from the final judgment of the court below, and have no reference to interlocutory orders at all. And I find that in the case of *Carr* v. *Stringer*, E. B. & E. 123, 6 W. R. C. L. Dig. 31, the Court of Queen's Bench held that the words of the 14th section of the earlier County Courts Act of 13 & 14 Vict. c. 61, which are almost similar and entirely analogous to the words of the Act of 1888, which I have just read, only gave an appeal in cases of final judgment, and had no reference whatever to the interlocutory orders of a judge. Indeed, this decision would seem to me to be conclusive on the case.

Such are the views I have taken upon considering the Acts referred to, and I am authorized to say that my lord agrees in that view, and therefore our judgment will be that the appeal must be dismissed, but as the appellants really succeeded on the merits of the appeal, we think there should be no costs given.

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondents, *Ingledew, Ince, & Vachell.*

Court of Appeal.

From Chan. Div. May 14, 15.

Van Gelder, Apsimon, & Co. v. Sowerby Bridge United District Flour Co. (a.)

Patent—Mortgage—Mortgagor suing infringer without joining mortgagee as co-plaintiff—Practice—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 46, 85, 87 —*R. S. C.*, 1883, *ord.* 16, *r.* 11.

The assignee of a patent, whose name was entered on the register of patents as assignee, mortgaged the patent by way of assignment, and the name of the mortgagee was entered on the register as mortgagee.

Held (reversing the decision of Kekewich, J.). *that the mortgagor was entitled, on general equitable principles, to sue for infringement without joining the mortgagee as co-plaintiff, and that there was nothing in the Patents Act,* 1883, *to disentitle the mortgagor doing so, having regard to the mode in which the entries were made on the register.*

Fairclough v. Marshall, 27 *W. R.* 145, 4 *Ex. D.* 37, *approved.*

The practice of the comptroller is, not to register a mortgagee, even though the mortgage be by way of assignment, as assignee of the patent, but as mortgagee only, and this is the correct practice.

Under R. S. C., 1883, *ord.* 16, *r.* 11, *the mortgagee may at any time be added as a co-defendant, if it appear to the judge, either of his own motion or on an application in that behalf made by the defendant, that the presence of the mortgagee is necessary for the purposes of justice.*

Appeal from the judgment of Kekewich, J., reported 59 L. J. Ch. 292.

The action was for an injunction and damages in respect of an alleged infringement of a patent for improvements in apparatus for separating substances by means of sieves, and in the mode of operating parts of the same. The plaintiff company were assignees of the original patentee, and the name of the plaintiff company was, on February 22, 1886, entered in the register of patents as assignees of the patent by virtue of such assignment, and the deed of assignment itself was duly filed at the Patent Office.

On the same day, February 22, the name of the Halifax Joint-Stock Banking Co. was entered in the register as mortgagees of the patent under a mortgage from the plaintiff company dated December 31, 1885. This mortgage was by way of assignment, subject to redemption, with a proviso that the mortgagor should not be at liberty to grant licences. The names of other mortgagees of the plaintiff company were, at various subsequent dates, entered on the register as mortgagees of the patent, and these mortgages also were by way of assignment. The various mortgage deeds had also been filed at the Patent Office.

Section 87 of the Patents, &c., Act, 1883, enacts that: "where a person becomes entitled by assignment, transmission, or other operation of law to a patent . . . the comptroller shall, on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent . . . in the register of patents. . . . The person for the time being entered in the register . . . as proprietor of a patent shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences, or to otherwise deal with the same. . . . Provided that any equities in respect of such patent . . . may be enforced in like manner as in respect of any other personal property."

Section 23 of the same Act enacts:—"(1) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments, and of transmissions of patents, . . . and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed. (2) The Register of Patents shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein. (3) Copies of deeds, licences, and any other documents affecting the proprietorship in any letters patent, or in any licence thereunder, must be supplied to the comptroller in the manner prescribed for filing in the Patent Office."

Kekewich, J., at the trial of the action, held that the plaintiff company were not the registered proprietors of the patent, and could not, suing as sole plaintiffs, maintain an action for alleged infringement of the

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

patent without having the mortgagees joined as co-plaintiffs, and, the mortgagees having refused to join as co-plaintiffs, he accordingly dismissed the action.

The plaintiff company appealed.

Sir Horace Davey, Q.C., and *Bousfield* (*Aston, Q.C.*, with them), for the appellant company.—The plaintiff company are mortgagors in possession, and in equity they are the owners of the mortgaged property, subject to the mortgage. Kekewich, J., held that the plaintiff company, as mortgagors, were "strictly fettered owners," and were not in a position to act for themselves so as to assert any rights of ownership. That is contrary to the principles acted on in courts of equity for the last 300 years; it has never, before this case, been held that the fact of the existence of a mortgage disentitles the mortgagor to sue alone for the protection of the mortgaged property. Even if it were necessary, therefore, for the plaintiff company, in order to maintain the action, to bring themselves within the definition of "patentee" given in section 46 of the Patents, &c., Act, 1883, I submit they have in fact done so. But the Act does not say that only the registered proprietor of a patent can sue for infringement. It is said that the defendants might have to fight the question of validity of the patent in another action brought by the mortgagees if the latter are not joined in this action, but objections as to the validity of a patent can be taken by way of defence only, and the nature of the defence cannot affect the abstract right to sue. One of several co-owners of a patent has a right to sue alone for infringement without joining the other co-owners as plaintiffs: *Sheehan* v. *Great Eastern Railway Co.*, 29 W. R. 69, 16 Ch. D. 59; *Dunnicliff* v. *Mallett*, 8 W. R. 260, 7 C. B. N. S. 209. The case of *Fairclough* v. *Marshall*, 27 W. R. 145, 4 Ex. D. 37, decides that a mortgagor in receipt of rents and profits has, upon the general principles of equity, sufficient interest in the mortgaged property to enable him to maintain an action to restrain an injury done to it without joining the mortgagee. Under the Patent Act of 1852, s. 35, it was provided that, until the entry of an assignment of a patent on the register should have been made, the original patentee should be deemed the sole proprietor, and in *Chollet* v. *Hoffman*, 5 W. R. 573, 7 E. & B. 636, it was held an assignee could not sue at law until his assignment had been registered, though registration after action brought, but before trial, was held sufficient in equity, *Hassall* v. *Wright*, 18 W. R. 821, L. R. 10 Eq. 509; but this provision is not contained in section 23 of the Act of 1883.

They also referred to the Patent Rules, 1883, rr. 64.77.

Sir R. E. Webster, A.G., *Warmington, Q.C.*, *Moulton, Q.C.*, *Carpmael*, and *Roskill*, for the respondent company.—The mortgages are by way assignment, and the legal interest in the patent is absolutely vested in the mortgagees; there is no reservation to the mortgagor of any power to grant licences. The mortgagees' names are entered on the register, and, that being so, they are, under the Act of 1883, the proprietors, and can sell the patent or grant licences of it. The mortgagee assignee may, in equity, be a trustee for the mortgagor; but section 85 of the Act of 1883 provides that the comptroller shall not take any notice of trusts or *cestui que trusts*. Section 87 of the Act of 1883 effects a statutory alteration of what would otherwise, on the general principles of equity, be the rights of the mortgagor with respect to strangers to the patent, though, as between mortgagor and mortgagee themselves, those equitable rights are preserved. The defendants are entitled to have on the record as plaintiffs all the persons who together are entitled to the full ownership of the patent, otherwise the defendants would be liable to be sued in a fresh action by the mortgagees. But, assuming that it was not necessary to have the mortgagees joined as plaintiffs, nevertheless, the mortgagees were necessary parties, and it was the duty of the plaintiff company to have had the suit properly constituted as to parties. [Cotton, L.J., referred to R. S. C., ord. 16, r. 11]. The question as to parties was raised in the court below, and the plaintiff company declined to make any application to the court to have the mortgagees joined either as co-plaintiffs or co-defendants.

They referred also to *Bergmann* v. *Macmillan*, 29 W. R. 890, 17 Ch. D. 423.

Sir Horace Davey, Q.C., in reply.—[Cotton, L.J.—Do you object to the mortgagees being added as co-defendants?] They may be proper parties, but they are not necessary parties, and if the other side want them as parties it is the other side that must apply. [Cotton, L.J.—You must argue the question whether the mortgagees are necessary parties.] The mortgagees cannot be damnified by anything taking place in this action: *Fairclough* v. *Marshall*. If the plaintiff company succeed, the mortgagees are in fact benefited. The mortgagees could not assist the court at the trial of any question of injunction or damages; no counsel appearing for the mortgagees at the trial would be heard. The fact of the mortgagees being made co-defendants would not prevent them suing for infringement, the present defendants, in a fresh suit. When the accounts come to be taken it may be proper to have the mortgagees made parties, but they are not necessary parties, at all events, up to the trial of the action. I object to this point as to parties being taken by the defendants at this stage: *Werderman* v. *Société Générale d'Electricité*, 30 W. R. 33, 19 Ch. D. 246, and I ask for the costs thrown away by the appellant company by reason of the action not being tried when it came on for trial.

He also referred to ord. 16, r. 12, and *Keill* v. *Butcher*, 32 W. R. 378, 25 Ch. D. 750.

Cotton, L.J.—This is an appeal by the plaintiffs from a judgment of Kekewich, J., who decided that the plaintiffs had no right of suit unless they joined as co-plaintiffs the mortgagees, and he dismissed the action on that ground; for although the plaintiffs had been given an opportunity to amend by making the mortgagees parties as plaintiffs, yet the first mortgagee on being applied to would not consent to that being done, and Kekewich, J., therefore dismissed the action.

That, in my opinion, was clearly on this ground, that as there was in fact a mortgage, the plaintiffs, as assignees of the patent, had no right of action at all against an infringer unless they joined as co-plaintiffs the mortgagees.

Now (subject to the question as to the effect of section 87, which I will refer to presently), there is nothing in the Act which in any way prevents a patentee who has granted a mortgage of his patent from suing. The Attorney-General relied on sections 46 and 87. Now section 46, in my opinion, really does not bear upon it, because it says, "Patentee means the person for the time being entitled to the benefit of a patent," and if we are to look to the general law, I should say that the assignee of a patent, although he has granted a mortgage, is entitled to the benefit of the patent. It is very true he has given a mortgage upon it which may have the effect, by foreclosure or sale under the powers contained in the mortgage, of depriving him of his right to the patent; but in equity the mortgage is looked on merely as a security for the debt, and, that being so, it is not considered in equity that a mortgagor is not entitled to the benefit of his patent. He is entitled, subject to the charge which he has created, and to those rights which he has given his mortgagee.

But section 87 was much relied on. The register of patents was produced before Kekewich, J., by an officer from the Patent Office, and it has been found that on the register the plaintiffs are mentioned as assignees. The plaintiffs are registered as assignees, and the date is February 22, 1886. The entry shows that the plaintiffs are registered as assignees of the patent by two assignments, one by the original patentee, and the other by a mortgagee of that patentee.

Then on the same date, February 22, 1886, there is an entry on the register, of the mortgage to the banking company, the first mortgagees, but that registers them, not as assignees (although the mortgage was by assignment in the usual terms of such a mortgage), but as mortgagees. The officer from the Patent Office told Kekewich, J., that that was an intentional difference of language, that the official in the Patent Office did not register a mortgagee, even though he took by assignment, as assignee of the patent, but only as mortgagee. I think that is a right practice, for if the mortgagee had been registered as assignee it might have been contended that under section 87 he was treated as the proprietor of the patent, whereas, as I have said, a court of equity does not consider the mortgagee as the proprietor of that which is comprised in his mortgage. It is therefore unnecessary to consider the argument of the Attorney-General on section 87, because whatever powers are thereby given independently of what the general law may be, they are given only to the person who is on the register as proprietor, and the Attorney-General, in pressing his argument upon us, did not know what was really the intention of the officers in the Patent Office in making this entry on the register in the way they have done.

Section 87, therefore, cannot be relied on. What we have is simply a registration of the instruments affecting the title under section 23, which section does not say anything like that which is contained in section 87. [The Lord Justice then read section 23, and continued:—] Section 23, therefore, leaves it to the court to decide, when the matter is brought before it, what the interests are, having regard to the general law, and what is the position of those who are so registered. If we had to deal with the argument of the Attorney-General that section 87 makes such a tremendous alteration as to put the mortgagee in the position of proprietor as against his mortgagor, I should have hesitated very much in acceding to that argument; but I need not consider that now, because, as I have said, the banking company are not registered as proprietors.

It is a question, therefore, of what is the general law. In the present case the assignee of a patent is on the register. No difficulty, therefore, as to not being on the register arises. But there is also on the register an assignment by way of mortgage, and a copy of that deed is also on the register or with the registrar. It was urged that this gave certain rights to the mortgagee, which would very much interfere with any action brought by the assignee of the patent—I will call him the "patentee" as a short term. What is the general law? Is a man who has mortgaged his interest, either in land or in that which is personal estate, prevented from asserting his right to prevent someone else injuring the thing which is the subject-matter of the mortgage? I assume for the present—it will have to be decided hereafter whether the defendants have done so or not—that there has been an infringement of the patent rights vested by assignment in the plaintiffs and mortgaged by them. To my mind it would be contrary to all the principles of equity and to all the previous decisions on the general law to say that under these circumstances a mortgagor cannot assert and protect that interest which is vested in him as mortgagor for the purpose of preventing an infringement and a violation of the rights which—although he holds as mortgagor—he still has, subject, it is true, to any rights which the mortgagee may exercise under, and in proper accordance with, his mortgage. If section 87, therefore, does not give a special right to the mortgagee here—as in my opinion it does not, having regard to the circumstances I have stated—the mortgagor can, and ought to be at liberty to, vindicate as against a wrongdoer the right which he still has, and which a court of equity recognizes as a substantial right, to the property which he has mortgaged.

It has been decided (*Sheehan* v. *Great Eastern Railway Co.*) that the assignee of part of a patent can bring an action; that answers a good many of the objections urged by the Attorney-General and Mr. Warmington against allowing a mortgagor to bring an action because the person entitled to the other portion of the patent rights might bring an action in respect of those, and then the person who was said to be infringing might have to again vindicate what he was doing by alleging that there was no infringement or that the patent was bad altogether, because if it were bad in part that would vitiate the whole of the grants contained in the patent.

In the case of *Fairclough* v. *Marshall*, although the plaintiff there was not even in as beneficial a position as a mortgagor, yet the Court of Appeal properly treated him as being in the same position as if he were the mortgagor, and held that he was entitled to bring his action without making the person in whom the legal estate was vested a plaintiff, or bringing him before the court in any way, and that as the defendant was violating rights which were vested in the plaintiff, the fact that there was another person in whom those rights were to a certain extent vested did not deprive the then plaintiff from preventing an infringement of the rights which he had, but had also together with the person whom the court considered as his mortgagee.

In the present case Kekewich, J., took an entirely different view. I cannot but see that the real and the only point which he decided was, that as there was an assignment by way of mortgage it must be considered that the assignee, though by way of mortgage only, was the only person who could protect the patent, the subject of the mortgage, against an infringer; and he dismissed the action.

Now, in my opinion, if he was not right in that view, it was wrong to dismiss the action, because ord. 16, r. 11, says that no cause shall be dismissed for misjoinder, or want of joinder, of parties. If he had not thought that ground which I have mentioned, was the ground for dismissing the action, but simply that the mortgagee ought in some way to be before the court, he would not have dismissed the action, but would simply have given a direction that the mortgagees should be added as defendants or as parties. We disagree with the view taken by Kekewich, J., and, in my opinion, as regards the costs, the respondents ought to pay the costs of the appeal, and the costs incurred by reason, or thrown away in consequence, of the decision of Kekewich, J., preventing the case, when the matter came before him, being tried on the merits as between the plaintiffs and the defendants. It was said we ought not to do so, because the order shows that there was full opportunity given to the plaintiffs to apply for any amendment which they thought desirable. In my opinion, however, that is a wrong reading of the order. It is true that it is in terms to that effect, but as Kekewich, J., has decided that the mortgagors—*i.e.*, the plaintiffs—could not bring an action, it would have been useless to apply to have the mortgagees added as defendants when the court had expressed an opinion and decided that the plaintiffs could not bring any action at all without joining other persons, not as defendants, but as plaintiffs.

Then, as to the objection made on behalf of the defendants, that the action cannot go on unless the

mortgagees are added as defendants. The plaintiffs do not in any way require the mortgagees as defendants. What they seek in the action will in no way interfere with or be injurious to their mortgagees, on the contrary, it will be for the benefit of the mortgagees as well as themselves. The banking company, who are the first mortgagees, have declined to allow their names to be added as plaintiffs and to join in bringing this action, and that goes strongly to show that it is in the highest degree improbable that any real difficulty will be caused to the defendants by the fact that the mortgagees are not here.

If there is any substantial difficulty or danger, what ought to be done? The defendants may, under ord. 16, r. 11, at any time apply for an order that the mortgagees, or any of them, should be made defendants. If the defendants can satisfy the court that they have any reasonable ground for supposing or suggesting that there will be any danger to them in consequence of the mortgagees not being defendants—we decide that they need not be plaintiffs—they may apply at any time to the judge for an order that the mortgagees, or any of them, be made parties to the action, and our order will be expressly without prejudice to any such application.

If the matter comes to the taking of an account, then I can see that the presence of the mortgagees—or the first mortgagee at any rate—would be necessary in order to bind him by those accounts, but I do not say that the defendants will not be able to make out any case for making the mortgagees parties before that time, though I cannot see how they will.

I think the order we ought to make is this. Reverse the order of Kekewich, J.; the plaintiffs to have the costs of the appeal, and the costs below of any proceeding or evidence which has been thrown away by the order made by Kekewich, J.; liberty to the defendants to make at any stage of the action such application as they may be advised to have the mortgagees, or any of them, made defendants in the action.

Lindley, L.J.—I agree. The proposition involved in the judgment of Kekewich, J., is so serious, so startling, and so novel, that I will say a few words about it. If his judgment is right, the mortgagor of a patent, unlike the mortgagor of any other property, can obtain no relief against anybody who is destroying the mortgage property, unless he can induce his mortgagees to join with him, or unless he can redeem the mortgage and get rid of it. That is a very startling proposition, and to me entirely new; the question is, is it sound? It certainly is unsound if tried by the ordinary principles of equity. I think it would startle anybody who is acquainted with the doctrines of equity relating to mortgages, to be told that a mortgagor by the fact of making a mortgage hands over the mortgage property so as to be precluded from protecting it from destruction unless he can pay off his mortgage. Such a doctrine is contrary to principle, because, in the view of a court of equity, the mortgagor does not cease to be the owner of the property mortgaged; he remains the owner subject to the security, and he has rights available in equity to protect the subject-matter of that security in which he is so seriously and greatly interested.

Then it is said that there is something in the Patent Act which places the mortgagor of a patent in a worse position than the mortgagor of any other property. I cannot see that. I have looked in vain through the various sections which have been referred to, and even if these mortgagees were registered as proprietors under section 87—which they are not—I should still very much hesitate to come to the conclusion that a mortgagor was incapable of getting redress unless he could induce his mortgagees to join with him, or unless he could redeem them. I can find nothing in the Act which warrants such a contention. It appears to me that the mistake which has been made is an extremely serious one. It is not merely making a mistake as to the course to be pursued in consequence of the absence of proper parties, but it is holding as a proposition of law that a mortgagor, in the position in which I have assumed him to be, is incapable of getting redress in a court of equity. That appears to me to be utterly wrong. I will say no more. I agree with the form of the order which Cotton, L.J., has suggested.

Bowen, L.J.—I am of the same opinion. It seems to me that nothing can be clearer than that a man does not lose his right to protect his property against wrongdoing by a stranger simply because he has mortgaged his property; and nothing that has been said as to the consequences of the opposite doctrine can be too strongly said.

In the present case the mortgagee, whom, it is said, ought to be made a co-plaintiff, is not a registered proprietor under section 87. We have not therefore, strictly speaking, to decide how far section 87, as regards mortgagees whose names are registered as those of proprietors under it, disturbs the general law of this court. We have not got to consider or decide that; we have only, in the present case, to go by the general law. It is clear that a mortgagor does not lose his right to protect what is his own because he has created a debt and secured the debt by a mortgage; and, further, if I required authority—which I do not know that it would—to make good the decision at which we have now arrived, the case of *Fairclough* v. *Marshall*, in the reasoning of it, appears to me to cover the present ground.

As I understand what Kekewich, J., intended to be was this—he thought that, in the first place, a mortgagee was either a necessary co-plaintiff or, at all events, that he must be made a defendant in the suit. I am not so clear as my learned brother is, that he took the first line alone; if he did, then from what we have said I obviously disagree with him; but from the offer which he made to the plaintiffs to allow them to add the mortgagees as co-defendants, it strikes me that he thought that that was a possible way of curing the defect. I do not say that it would have cured the defect, but it strikes me that he thought so. But if he had thought that the defect could be cured by adding the mortgagee as a defendant, I am strongly of opinion that it was his bounden duty to add him himself under ord. 16, r. 11, for it is of the essence of the procedure since the Judicature Act to bear in mind that an action shall not be defeated by the nonjoinder of right parties, and if the judge sees that a mortgagee's presence is necessary for the purpose of doing justice, he ought not to allow an action to be defeated, but ought himself to join the mortgagee.

That is my view, and as Kekewich, J., did not take that course I think he was wrong there, too—that he was wrong in the first instance in his view of the law, and wrong also, in the second instance, if his view was what it strikes me it may have been—in not curing the defect if he thought it could be cured in the way in which, as it strikes me, he thought it could be cured.

With regard to the costs, it seems to me that the order which has been indicated by my learned brethren is the right order to make.

Appeal allowed.

Solicitors, *Walker & Whitfield; Wilson, Bristows, & Carpmael.*

From Chan. Div. March 26.

EDDOWES v. ARGENTINE LOAN AND MERCANTILE AGENCY CO. (a.)

Practice—Affidavit—"Before me" omitted in jurat—R. S. C., 1883, *ord.* 38, *rr.* 6, 14.

The words "before me" were omitted in the jurat of an affidavit purporting to be signed and sealed by a British vice-consul in a foreign country. Blanks in the affidavit had been filled up and alterations initialed in apparently the same handwriting as the signature, the handwriting being peculiar.

Held (affirming the decision of Kekewich, J., *upon an application to take the affidavit off the file), that the proper and reasonable inference to be drawn from the facts, in the absence of proof to the contrary, was that the affidavit had been in fact sworn before the vice-consul and everything rightly done; and as to the omission of the words "before me,"*

Held, that ord. 38, *r.* 14, *was applicable, and ought to be applied to the cure of such a mere formal defect or irregularity, and that the affidavit ought, therefore, to be received under that rule, and the application refused.*

Appeal from Kekewich, J.

This was an appeal by the defendant company from a decision of Kekewich, J., refusing to order an affidavit sworn by the plaintiff to be taken off the file for irregularity.

The chief irregularity alleged consisted in the omission of the words "before me" in the jurat, which was in the following words:—"Sworn at Rosario de Santa Fé, Argentine Republic, in the British Vice-Consulate, this 20th day of January, 1890.—(Signed) H. M. MALLETT, British Vice-Consul."

The seal of the vice-consul was affixed to the document, and some blanks in it had been filled up, and the initials "H. M. M." affixed to some alterations had been written, in what appeared to be the same handwriting as the signature.

The plaintiff resided in the Argentine Republic, and the affidavit in question contained her answers to interrogatories administered by the defendant company.

Ord. 38, r. 14, is as follows:—"The court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."

Kekewich, J., refused to direct the affidavit to be taken off the file.

The defendant company appealed.

Channell, Q.C., and *Glenn*, for the appellants.—The omission of the words "before me" has always been held fatal in previous cases. There is nothing to show that the affidavit was sworn before the vice-consul himself: *Reg.* v. *Bloxham*, 6 Q. B. 528; *Graham* v. *Ingleby*, 1 Ex. 651; *Pilkington* v. *Himsworth*, 1 Y. & C. Ex. 612. The affidavit was made under ord. 38, r. 6. Rule 14 cannot have been intended to apply to an irregularity of this sort, but merely to irregularities in immaterial details, such as are dealt with in rules 7 and 8 of the same order. The statutes dealing with the subject are 15 & 16 Vict. c. 86 (s. 22), and 18 & 19 Vict. c. 42. [LOPES, L.J., referred to the Act of 1889 (52 Vict. c. 10).] The words I rely on are re-enacted in section 6 of the Act. [LOPES, L.J., referred to *Empey* v. *King*, 13 M. & W. 519.] There the affidavit was stated to have been sworn at the chambers of the judge who signed it.

Warmington, Q.C., and *O. L. Clare*, for the respondent.—The Act 52 Vict. c. 10 now makes the matter clear, whatever may have been the case previously. Section 5 shows what is required to be stated in the jurat, and section 6 makes certain provisions on the subject, and the words "before me" do not seem to be now essential under those sections. Here there can be no doubt the oath was, in fact, administered by the vice-consul. If not, the affixing of his seal and signature would have been a scandalous impropriety. The object of administering the interrogatories was only to gain time and delay the plaintiff. The alterations made in the vice-consul's handwriting show that he went carefully through the affidavit, and there can be no doubt, therefore, that he did administer the oath himself. Assuming there is any irregularity, which we deny, rule 14 applies. The cases cited on the other side were decided before these rules were in force.

Channell, Q.C., in reply.—When the Act provides that so and so shall be done, that does not show that nothing else need be done. By section 6 the affidavit must have been sworn "before" the person authorized. *Empey* v. *King* was distinguished in *Graham* v. *Ingleby*, on the ground that in the former case the affidavit was sworn before a judge at chambers, and that a judge is on a different footing from an inferior officer, the oath being usually administered before the judge, but not by him. [COTTON, L.J., referred to *Cheney* v. *Courtois*, 13 C. B. N. S. 634, 11 W. R. C. L. Dig. 25]. In *Reg.* v. *Bloxham* it was clear that the oath had been, in fact, administered by the person who signed the jurat, but that was not held sufficient. Rule 14 only applies to misdescription or defects of form. [COTTON, L.J., pointed out that the alterations and initials in the vice-consul's handwriting clearly showed the affidavit to have been, in fact, sworn before him.] Probably it was, but that is not enough.

COTTON, L.J.—This is an appeal from a decision of Kekewich, J., refusing, upon an application by the defendants, to order this affidavit to be taken off the file on the ground of there being no sufficient proof of its having been properly sworn.

The jurat of the affidavit states that it was sworn at Rosario in the Argentine Republic on a certain day, but it does not say that it was sworn "before me"—that is, before the vice-consul whose signature appears at the foot of it. It would, no doubt, have been better if those words "before me" had been inserted in the jurat (as in the ordinary form adopted by commissioners), but they were not. It does not, however, follow that the affidavit ought to be taken off the file. Rule 14 of order 38 says:—[His lordship read the rule, which is set out above, and proceeded:—]. That was intended, in my opinion, to cure a defect such as this. If it is shown to our satisfaction that this affidavit was, in fact, sworn before a person who had authority to administer the oath in the place where the affidavit was sworn, we are authorized, notwithstanding the defect in the form of the jurat, to direct it to be placed, or allowed to remain upon the file.

What one sees is this—the affidavit is signed by the vice-consul, and his handwriting is a peculiar one. But that is not all. There are a considerable number of alterations in the affidavit which are verified by his initials, evidently in the same handwriting.

Besides this, not only are there alterations made by someone else identified by his signature, but there are also additions to the affidavits, blanks filled up by him in his own handwriting, and I feel satisfied that it was, in fact, sworn before him personally. Therefore, I have no hesitation in saying that in this particular case,

(a.) Reported by R. H. DEANE, Esq., Barrister-at-Law.

notwithstanding the informality in the jurat, we both can and ought to order that this affidavit shall remain on the file, and we will do whatever is necessary for the purpose of remedying the defect. [His lordship then disposed of several other objections, and concluded that the appeal must be dismissed.]

LINDLEY, L.J.—I am of the same opinion. With respect to the defect in the jurat, it is quite true that the vice-consul omitted the expression "Sworn before me." What he has said is, "Sworn at Rosario de Santa Fé, Argentine Republic, in the British Vice-Consulate, this 20th day of January, 1890." That is followed by his signature. There are indications upon the document that the vice-consul looked through it, and looked through it carefully. But it is suggested that it might have been sworn before his clerk, or some other official. That may possibly have been so, but what is the reasonable inference? It seems to me that the reasonable inference is all in favour of everything having been rightly done. It would, in my opinion, have been a gross impropriety and breach of duty if he had signed and sealed that document without having had it sworn before him. Then it was said that there are cases which decide that an affidavit which omits these words must be bad. No doubt there are such cases, and a vast amount of expense and injustice has been caused by rejecting affidavits like this by reason of some defect or omission by some clerk or official before it was sworn. It was to cure that very thing that rule 14 was introduced into order 38, and addressed to the curing of that very defect. [His lordship read the 14th rule of order 38, pointing out that it was for civil purposes only, and had nothing to do with criminal procedure.] What is this but some defect or irregularity in form? The jurat is defective in form. Is there the slightest reason to suppose that anything seriously wrong was done—that the affidavit was not in fact sworn before the vice-consul? There is none whatever. It appears to me that that rule (judging from its language) was put in for the very purpose of curing such a defect as this, and though the words omitted ought to have been in the jurat, in my opinion that rule applies. I think this appeal must be dismissed.

LOPES, L.J.—This is an application by the defendants that the plaintiff's affidavit may be taken off the file, on the ground that it is defective in form in omitting the words "before me" which ought to precede the vice-consul's signature.

Now, having regard to the cases which have been cited, I express no opinion as to what might have been the result of this application but for ord. 38, r. 14. But, in my opinion, that rule covers the present case, and that appears to be clear when we come to consider certain circumstances connected with the affidavit. On looking at the affidavit we find that it is signed in the right place by the vice-consul, that there are alterations in various places initialed by him in his handwriting, and that there are blanks, which have been filled up by him, also in his handwriting. Now, having regard to these facts, can any reasonable person doubt that the affidavit was sworn before him, although the words "before me" are not expressed?

Then does rule 14 apply? I think it does. I believe the intention was to give the judges a discretion to admit affidavits where, in their opinion, the defects in them were not, having regard to the surrounding circumstances, defects of substance. I think that was the object of the order, and a very useful object too, because there can be no doubt that injustice has very often been done by the rejection of an affidavit on the ground of some defect which has not been a defect of substance. In my opinion the omission of these words in this case is a defect, but a curable one, and not a defect of substance. I think, therefore, that the appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Hurrell & Mayo.*

Solicitors for the respondent, *Wynne, Holme, & Wynne.*

From Q. B. Div. June 11.

ATKINSON v. BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY. (a.)

Statute of Limitations—Money deposited on loan—Conditions as to repayment—Conditions precedent—Death of depositor—Time from which statute runs against administrator.

A sum of money was deposited with the defendants by way of loan, upon certain conditions contained in a loan pass-book, which was handed to the depositor at the time of the loan. Those conditions were that notice of withdrawal was required, that the money was payable according to the terms stated when the notice was given, and that no money would be paid out except on production of the pass-book, and the depositor must either attend personally or send a written authority. The depositor having given notice of withdrawal, the defendants sent him a memorandum stating that the sum would be payable on or after a certain day, between 10 a.m. and 5 p.m., and that the memorandum and pass-book must be produced when the money was applied for. Upon the day named in the memorandum for repayment the depositor died intestate, without having applied for or received the money. The plaintiff, who had taken out letters of administration to the estate, brought an action to recover the amount of the deposit more than six years after the date named in the memorandum for repayment, but within six years from the grant of the letters of administration.

Held, that the conditions contained in the pass-book were conditions precedent to any liability in the defendants to repay the money, and that, as these conditions had not been fulfilled by the depositor, no cause of action accrued to him in his lifetime, and the Statute of Limitations did not begin to run until the letters of administration had been taken out.

Held, also, by Lord Esher, M.R., *and* Lindley, L.J., *that, even assuming the conditions—except that as to notice—were not conditions precedent, in the absence of proof by the defendants that the depositor died after the hour named for the repayment, it was not proved that a cause of action accrued to him in his lifetime, and therefore the Statute of Limitations did not begin to run until letters of administration had been taken out.*

Appeal from the judgment of Mathew, J., in favour of the plaintiff, at the trial of the action without a jury.

The action was brought by the plaintiff as administrator of the estate of Thomas Atkinson, deceased, to recover £214 15s. 6d. deposited with the defendants by way of loan. The defence, so far as material to the present report, was that the claim was barred by the Statute of Limitations (21 Jac. 1, c. 16, s. 3).

By rule 29 of their rules the defendant society were authorized to receive loans at such rate of interest, not exceeding five per cent., and on such conditions as the directors might decide.

It appeared that in March, 1877, Thomas Atkinson deposited the sum of £200 with the defendants by way of loan at interest, and at the time of the deposit he received a loan pass-book from the defendants which

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

contained, amongst others, the following printed terms upon which they received loans:—"Loans are received and paid daily at the central office only, 48, Market-street. Rate of interest £4 per cent. per annum. No commission or charge of any kind. £20 may be withdrawn any day without notice at intervals of not less than a week. Larger sums are payable on the day after the first and second Mondays in the month, and require notice according to terms stated when the notice is given. No money will be paid out except on production of the investor's book, and he must either attend personally or send a written authority. Forms of authority may be obtained at the office. The directors request that depositors will be careful to keep their pass-books in their own possession, as the society will not be responsible for any money paid to any person not legally entitled or authorized to receive it."

On the 18th of December, 1878, Thomas Atkinson gave notice to the defendants of his intention to withdraw the deposit of £200, which, with the interest due, amounted to £214 15s. 6d., and on the same day the defendants gave Atkinson the following memorandum in writing:—"The sum given notice for will be payable on the 14th of January between ten in the morning and five in the evening, or on any subsequent day between ten and five, except on Saturdays, when the office is closed at one. The person in whose name the money is invested must sign his or her name at the foot of this paper, which must be produced with the pass-book when applying for the money, or it cannot be paid. N.B.—No loan account can be kept open with less than £1 in it besides the interest." At the foot of the paper was the following:—"To the secretaries of the Bradford Third Equitable Benefit Building Society. Pay myself or bearer on presenting my pass-book the sum for which I have given notice as above."

On the 14th of January, 1879, the day fixed for the repayment of the deposit, Thomas Atkinson died intestate, without having applied for or received the money. On the 16th of January, 1879, a person representing himself to be Thomas Atkinson applied at the defendants' office for payment of the deposit, and produced the pass-book and the above memorandum. The defendants accordingly paid him the amount of the deposit upon his signing the name of Thomas Atkinson in a receipt-book kept by them, but without requiring him to sign at the foot of the memorandum, the custom of the defendants being not to require such signature if the depositor attends in person.

On the 3rd of May, 1889, letters of administration of the estate of Thomas Atkinson were granted to the plaintiff, and on the 18th of May, 1889, the present action was brought. At the trial no evidence was given as to the hour on the 14th of January at which Thomas Atkinson died, nor as to who the person was who received the deposit on the 16th of January, 1879. Mathew, J., held that it was a condition precedent to the liability of the defendants that the depositor should attend personally at the defendants' office with his pass-book, or give an authority to someone to attend with the pass-book for him, and receive the money, and that, as this condition precedent had not been performed, no cause of action accrued on the 14th of January, 1879, and the Statute of Limitations did not begin to run until the grant of the letters of administration on the 3rd of May, 1889. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Tindal Atkinson, Q.C., and *Montagu Lush*, for the defendants.—The Statute of Limitations ran from the 14th of January, 1879, when the notice of withdrawal came into operation. There was then a debt due to the depositor, though he had to go through certain formalities before the money could be paid to him. The production of the pass-book by the depositor, or by someone authorized by him, was not a condition precedent to the debt accruing. Its production was only necessary for the purpose of identification. It is like the case of a banker and customer with a current account. There is a debt due to the customer from the time of deposit, and the statute runs from that date, though the money is only payable upon presentation of a cheque. Again, a solicitor cannot sue until a signed bill of costs is delivered, but the statute runs from the date on which the work is done. In the same way here the money was due on January 14, though it was only payable on production of the pass-book. If the plaintiff had shown that Thomas Atkinson died before the money was due on that day, then the statute would not have begun to run.

They referred to *Foley* v. *Hill*, 2 H. L. Cas. 28; *Pott* v. *Clegg*, 16 M. & W. 321.

Henn Collins, Q.C. (*Percy Gye* with him), for the plaintiff.—This is not like the case of a solicitor's bill of costs, as in that case the debt is due, but the statute adds a condition before the solicitor can bring an action. Nor is there any analogy between this case and the common law relation between a banker and his customer. This case depends upon the special terms on which the deposit was made. The conditions in the pass-book cannot be split into two parts. It is admitted that notice of withdrawal is a condition precedent to the cause of action accruing. The remaining conditions, as to production of the pass-book, &c., must also be conditions precedent.

Tindal Atkinson, Q.C., replied.

Lord ESHER, M.R.—This case turns upon the contract between the deceased man and the defendant society, which was made when the money was deposited with the society. When a deposit by way of loan is made, the society gives to the depositor a loan pass-book, in which the amount is entered, and which contains certain stipulations in writing. It is clear that the contract is contained in that book. The book is given to the depositor as containing the terms upon which the society receives the money. The terms relating to repayment are that larger sums than £20 are payable on certain days, "and require notice according to the terms stated when the notice is given." There is no liability to repay, and no cause of action accrues to the depositor, until that stipulation has been fulfilled. Therefore notice of withdrawal is a condition precedent to the accrual of a cause of action. The terms go on: "No money will be paid out except on production of the investor's book, and he must either attend personally or send a written authority." In my opinion the depositor has no cause of action until those stipulations are fulfilled. Those stipulations are, therefore, also conditions precedent. It is admitted that they were not fulfilled in Thomas Atkinson's lifetime, and so no cause of action accrued during his lifetime. It is said that the pass-book has never been produced by the administrator, and that, therefore, one of the conditions has not been fulfilled. The defendants, however, have got the book, and when the present plaintiff brought this action they had the book. Hence the condition has been fulfilled. In my opinion, therefore, no cause of action accrued to the deceased in his lifetime, and the Statute of Limitations did not begin to run until the letters of administration had been granted, no cause of action accruing to the administrator until then. That is sufficient to dispose of the case. I cannot see that this case is like the case of a customer having a current account with a banker, in which case the money becomes due at once. I cannot see any analogy between such a case and this one. Whether it is like the case of money being placed on deposit with a banker I do not say, as that all depends upon the

terms on which the money is deposited. Nor, in my opinion, is it like the case of a solicitor suing upon a bill of costs. The contract between the parties there is that the client will pay the solicitor for the work when it is done, and the liability to pay is then in existence. The statute steps in and imposes a condition before the solicitor can bring an action.

But, further, even assuming that, though the stipulation as to notice is a condition precedent, the stipulation as to the production of the book is not, still, in my opinion, the defence of the Statute of Limitations has not been made out. The whole burden of proving the plea, and every element of the plea, lies upon those who set it up. They must prove it strictly. The liability to pay did not accrue until the time stated in the memorandum of December 18. If a creditor dies intestate on the day upon which the debt becomes payable, and there is no evidence to show whether he died before or after the hour on which the debt becomes payable, the statute does not begin to run until letters of administration have been taken out. In the present case there is no evidence to show at what hour on January 14 the deceased man died. The defendants, therefore, have not proved their plea. In either view, therefore, the judgment was right, and the appeal must be dismissed.

Lindley, L.J.—I am of the same opinion. The contract upon which the money was deposited governs the rights of the parties in this case. The terms of the contract are contained in the loan pass-book, and are totally different from the terms upon which a person lends money to a banker. The special contract prevents a depositor from claiming his money until he complies with the terms as to notice and production of the pass-book. When we look at those terms as expanded by the memorandum issued on December 18, it is clear that there is here a special contract which distinguishes this case from that of a banker and customer. Not only must notice of withdrawal be given, but the pass-book must be produced by the depositor or by someone authorized by him at or after the date named in the memorandum as the date of repayment. In my opinion these are conditions precedent to the accrual of any cause of action against the defendants for the recovery of the deposit. These conditions were not fulfilled in the lifetime of the deceased. Unfortunately the defendants paid the money to some person who produced the book but who had no authority to do so, and they did not take the precaution of seeing that the memorandum was signed. No cause of action, therefore, accrued in the lifetime of the deceased, and the Statute of Limitations did not begin to run until the letters of administration had been granted.

But assuming that these conditions can be divided, and that the stipulation as to notice is a condition precedent to any liability accruing, but that the production of the pass-book and the other conditions are not, still, by the terms of the memorandum of the 18th of December, the money was not payable until 10 a.m. on the 14th of January, and there was no liability to pay until that time. Thomas Atkinson died intestate on that day, and there is no evidence to show at what hour. I am of opinion that if a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not run against his administrator until administration is taken out. No case on this exact point is to be found, but on principle I believe the law to be as above stated. Here the cause of action accrued at 10 a.m. on the 14th of January, and Thomas Atkinson died intestate on that day. It has not been proved that he was alive when the money become payable, and therefore it seems to me that the cause of action accrued to him in his lifetime. Therefore, from whatever point of view the case is looked at, the plaintiff is entitled to recover.

Lopes, L.J.—In my opinion, no cause of action accrued in this case until notice of withdrawal was given, the pass-book was produced, and the depositor either attended personally or sent a person with a written authority to receive the money. That being so, no cause of action accrued to the deceased man. All those matters seem to me to be conditions precedent to any cause of action accruing. If Thomas Atkinson had lived, he would have had no cause of action until he had complied with those conditions. He died intestate without having complied with them, and some years elapsed before the present plaintiff took out letters of administration. The statute, under those circumstances, does not operate as a bar until six years after the grant of the letters of administration. It was argued that, though the condition as to notice might be a condition precedent, the other conditions were not. I am unable to sever the conditions. They all seem to me to be conditions precedent. I rest my judgment upon the ground that these are conditions precedent necessary to be complied with before a cause of action could arise, and I desire to express no opinion as to the other point.

Appeal dismissed.

Solicitor for the plaintiff, *E. Shirley Parker.*

Solicitors for the defendants, *Yewdall, Son, & Marriott,* for *Yewdall & Son,* Bradford.

From Q. B. Div. [and Q. B. Div.] Nov. 20; May 2.

Guardians of Mitford and Launditch Union v. Guardians of Wayland Union. (a.)

*Poor law—Removability—Child having no other settlement than parent's—Girl over the age of sixteen living with her father as part of his family—Derivative settlement—Emancipation—*11 *&* 12 *Vict.* c. 111, s. 1 *—Divided Parishes Act,* 1876 (39 *&* 40 *Vict.* c. 61), s. 35.

The meaning of section 1 *of* 11 *&* 12 *Vict.* c. 111 *is that, where a child lives with its father or mother as part of his or her family, and has no settlement other than one derived from the parent, the removability of such child depends on the removability of the parent.*

A girl lived with her father as part of his family for a period during which he acquired by residence a settlement in the M. Union. Before she attained the age of sixteen they went to live in the W. Union. After she had attained the age of sixteen, but before they had lived twelve months in the W. Union, she became chargeable. After they had lived twelve months in the W. Union, and the father had become irremovable, an order was made removing the girl to the M. Union.

Held, that the settlement which, by virtue of section 35 *of the Divided Parishes Act,* 1876, *the girl retained on reaching the age of sixteen, was still a derivative settlement after she passed that age; and therefore she came within the meaning of section* 1 *of* 11 *&* 12 *Vict.* c. 111, *and, her father being irremovable, she was irremovable also.*

Case stated by J. R. Bulwer, chairman of the quarter sessions for the County of Norfolk.

At the general quarter sessions of the peace for the county of Norfolk, holden at Norwich on the 2nd of January, 1889, an appeal against an order of two

(a.) Reported by Sir Sherston Baker and F. G. Rucker, Esq., Barristers-at-Law.

justices of the peace for the county of Norfolk was heard and determined. The order was dated the 24th of October, 1888, and was an order for the removal of a pauper from the Wayland Poor Law Union to the Mitford Poor Law Union.

The grounds of removal set up a derivative settlement from the pauper's father, who was therein stated to have acquired a settlement by residence in the parish of Shipdham in the Mitford Union.

The grounds of appeal set up that the pauper's father was irremovable from the Wayland Union, and that she was so too, inasmuch as she was unemancipated and had no other settlement than her father's, and was, therefore, not removable.

The pauper is the legitimate daughter of her father, and was born on the 29th of February, 1872. She became chargeable to the Wayland Union on the 13th of August, 1888, being then over sixteen years of age, and she so became chargeable in consequence of paralysis, producing permanent disability. The relief given was given to her in her own name. The pauper's father resided in the parish of Shipdham, in the Mitford Union, from July, 1874, to October, 1887, without a break and without relief, and thereby acquired a settlement by residence in the parish of Shipdham. On the 11th of October, 1887, he removed to the parish of Hockham, in the Wayland Union, in which parish he has since resided, and is now residing.

The pauper always, up to the time of her becoming chargeable, resided, and is now residing, with her father as part of his family.

At the date of the order for removal, the pauper's father had resided in the parish of Hockham, in the Wayland Union, for twelve months in such manner as to render him irremovable from the said union.

For the Mitford Union it was contended that the pauper, being an unemancipated child residing with her father, and suffering from permanent disability, and having no settlement but her father's, was irremovable under the provisions of 11 & 12 Vict. c. 111, s. 1, notwithstanding that she was over sixteen years of age, and (*inter alia*) *Reg.* v. *St. Mary Arches, Exeter*, 10 W. R. 268, *Reg.* v. *St. Olave's Union*, 22 W. R. 75, L. R. 9 Q. B. 38, were cited; and it was further contended that there was no express enactment to deprive her of her right of irremovability.

For the Wayland Union it was contended that the pauper, when she attained sixteen years of age, had and took her father's settlement in Shipdham, in the Mitford Union; that the common law doctrine of emancipation as it existed prior to the Divided Parishes Act, 1876, could no longer prevail; that the pauper, who had attained the age of sixteen, and received relief in her own name, was emancipated at that age and was removable to her settlement, though her father might not be removable, and in support of this view were cited 9 & 10 Vict. c. 66, s. 3, and *Dorchester Union* v. *Poplar Union*, 36 W. R. 706, 21 Q. B. D. 88.

The court of quarter sessions determined that the pauper, being unemancipated, was a child within the meaning of section 1 of 11 & 12 Vict. c. 111; that she had no other settlement except that of her father, with whom she resided, and that she was, therefore, irremovable, and that the order for removal should be quashed. The order was accordingly quashed, with costs, and the question for the opinion of the court is whether the pauper is or is not removable from the Wayland Union.

H. D. Greene, Q.C., and *Thorne*, for the appellants, the Wayland Union.—Here is an emancipated pauper of seventeen years of age, and why should she not be removed to her own settlement? In the Act of Parliament the word "child" means a child under sixteen years of age, and, if so, the proviso in section 1 of 11 & 12 Vict. c. 111 has no application to the present case as here the child is over sixteen. A child of sixteen now, by the effect of the recent legislation, attains its own *status*. The case of *Reg.* v. *St. Olave's Union* is a totally different case, as in that case the pauper was unemancipated, and, therefore, had no settlement of her own.

Poland, Q.C., and *Morton Smith*, for the respondents, the Mitford Union.—The father, by a year's residence in the Wayland Union, acquired a *status* of irremovability, but the child did not reside there for a sufficient time to acquire a *status* of her own. She acquired her father's *status* of irremovability. By the proviso in section 1 of 11 & 12 Vict. c. 111, whatever be the *status* of the head of the family such is the *status* of the child. There is no question that that was the law up to the time of the passing of the Divided Parishes Act, 1876, and that statute has not changed the law on the point. It is said that under that statute emancipation takes place at the age of sixteen; it does for some but not for all purposes, and fixing the age of emancipation does not oust the operation of the proviso in section 1 of 11 & 12 Vict. c. 111. [They were stopped.]

Greene, Q.C., replied.

Lord Coleridge, C.J.—I am of opinion in this case that the respondents are entitled to our judgment.

The facts are clearly stated to us in the case, and they are, shortly, these:—The father had acquired by long residence a *status*, possibly a settlement, but at any rate a *status* of irremovability in the respondent parish, and he then moved into the appellant parish, and at the time of the order being applied for he had acquired a *status* of irremovability, although not a settlement in that parish. The settlement was a settlement in the respondent parish. The *status* of irremovability had been acquired in the appellant parish, and he had a child, the subject-matter of the present order and appeal. That child, having lived with the father during the whole time he was living in the respondent parish, had acquired a settlement, if it was necessary for her to acquire a settlement, in that parish, and, at all events, by her father's residence she had acquired his settlement, and, if he was settled there, she, having done no other act to acquire a settlement, was also settled there; and by the Acts 9 & 10 Vict. c. 66 and 11 & 12 Vict. c. 111 it is perfectly clear that she had also acquired a *status* of irremovability in the respondent parish. Then she leaves with her father, the respondent parish, and comes to live with him in the appellant, parish, and before the order is applied for and before he had acquired a *status* of irremovability in the appellant parish, she became sixteen. These are the only material facts to consider in this case.

Now it is not disputed that if this matter had arisen before the Act of 1876 she would have been irremovable, because the course of legislation has been to substitute for five years in the 9 & 10 Vict. c. 36 a single year's residence, and to confer the *status* of irremovability which five years' residence conferred under the statute 9 & 10 Vict. c. 66.

Therefore, it could not have been disputed, if this matter had taken place prior to 1876, that the child would have been irremovable because the father was. But the statute of 1876 enacted that "emancipation,"—a term not used in Acts of Parliament, but one well-known in the courts—is to take place at the age of sixteen. Heretofore it might have taken place at any age, before sixteen or after sixteen, and no doubt very difficult and embarrassing questions often arose as to whether emancipation had taken place, depending, in point of fact, on the facts of each case. Therefore, in 1876, it was enacted that at the age of sixteen years

persons should be emancipated. The old poor law, unless it was altered by statute, would have been that such a person with a settlement of her own under 9 & 10 Vict. and 11 & 12 Vict. would be removable, whether the father or mother was removable or not; the moment she became chargeable to the parish to which she could not acquire a settlement herself, she would be removable into her own parish. That was when removals were common, and when it was the everyday practice to remove persons, even if they were of tender years, the moment they became chargeable, if they had acquired a separate settlement, to the parish of settlement. There were many modes of acquiring a separate settlement which might give a person a settlement long before the age of sixteen.

Upon that state of the law these two statutes, 9 & 10 Vict. c. 66 and 11 & 12 Vict. c. 111, are enacted to operate, and they operated, as it seems to me, broadly and clearly to enact that, where the head of the family, whether father or mother, was removed, then the children should be removable as long, of course, as they were living together. Upon these statutes several decisions have taken place. The provisoes in these statutes are, as it seems to me, perfectly clear, and the object of them is, as I have said, that children should not be, or a child should not be, removed unless the father or mother were removed. That was the state of the enactments furthering that which had been the general bearing of the courts and of the Legislature also—namely, to keep families together, and although there might be necessary removals those removals should be made as few as possible, and that they should be, as far as possible, of whole families together or not at all, so that families should not be divided when it was necessary to remove them. That has been the general policy of the law. Upon that state of the law it has been argued by Mr. Greene that the statute of 1876 has produced this consegence, that it has at once, in the case of children of sixteen, repealed the whole of the law, and gone counter to the whole of the principles which had been laid down by the courts over and over again. Of course, if Parliament had deliberately said so in plain terms, we should have nothing to do but to give effect to the words of the Act of Parliament, but I think it has been very satisfactorily pointed out that these statutes may well stand together. The statute of 1876 does put an end to questions arising upon emancipation, and does fix for the purpose of emancipation, and for that purpose only, a time at which as a general rule the emancipation shall be held to take place, and where no other unrepealed Act of Parliament intervenes it is plain that an emancipated child, if he or she becomes chargeable, will and must be sent back to the parish of settlement. But then the Act of 1876 does not repeal those earlier Acts. Those earlier Acts create for the first time that which has not heretofore existed in the poor law, the *status* of irremovability. Formerly, if you could show a settlement you at once showed a case for removal, and however long a person might have resided in another parish, if he had not fulfilled the necessary requirements of the law and gained a settlement in the other parish, he might be torn up by the roots and sent off to any distance.' In order to remedy that, the *status* of irremovability was created, and in the statutes creating the *status* of irremovability the provisoes occur with which we have to deal.

The proviso applying to the *status* of irremovability enacts that children shall not be removed except where the head of the family is removed, and shall be removable. It seems to me, therefore, that when we are dealing with statutes which for the first time create a *status*, and annex as an incident to that *status* that which shall affect the children whatever their settlement may be, and whatever the father's settlement may be, and when we know that at that time a child might very easily acquire a settlement long before it was of an age to be able to live apart from its father, and when, consequently, having acquired a separate settlement, it may still be a member for all practical purposes of its father's family, then we can see upon that state of things that the 3rd section had a complete and useful operation, and that it carried the matter so far as to make the child irremovable, not only from its father or mother, but from its stepfather or stepmother, and still more from its reputed father. When we recollect all that, and when we see that those sections and those provisoes are left entirely unrepealed by the Act of 1876, which deals solely with the question of emancipation, I come to the conclusion that they may well stand together, and that this child is within—not the 9 & 10 Vict. c. 66, because that is gone—but the re-enacted provisoes of 11 & 12 Vict. c. 111.

I think, therefore, that the court of quarter sessions quite right in holding under these circumstances that was the pauper was irremovable, and that the judgment must be affirmed.

Mathew, J.—I am of the same opinion. The construction of section 35 of the Act of 1876 which Mr. Greene invites us to adopt, would involve us in the renunciation of the old-established rule that a family is not to be scattered. The earlier statutes plainly indicate that intention of the Legislature, and nothing would have been easier than to have repealed those statutes if that rule was intended to be rescinded. The statute of 1876 is silent on the subject of repeal. We ought, therefore, to construe the earlier statute and this statute together, if we can do so consistently. There is no difficulty about that if we treat the statute of 1876 as relating to a settlement in the strict sense of the term.

As regards the earlier statutes they are confined to the question of irremovability. Reading the statutes in that way it seems to me that the argument of Mr. Poland is right, and this judgment must therefore be affirmed.

The Wayland Union appealed.

May 2.—*H. D. Greene, Q.C.* (*Thorne* with him), for the Wayland Union.—The pauper is not within section 1 of 11 & 12 Vict. c. 111, so as to be irremovable. Some limitation must be put on the meaning of the word "children" in that section. The proper limitation would be to confine it to children under the age of sixteen. This would make the proviso consistent with section 3 of 9 & 10 Vict. c. 66. It is true that in *Reg.* v. *St. Mary Arches, Exeter*, and *Reg.* v. *St. Olave's* the paupers were over sixteen; but the ground of the decision in each of those cases was that the pauper was unemancipated. Section 35 of the Divided Parishes Act, 1876, has now done away with all nice questions as to emancipation, and has fixed the age of sixteen as the age when every child shall cease to follow its parent's settlement: *Guardians of Reigate Union* v. *Guardians of Croydon Union*, *ante*, p. 295, 14 App. Cas. 465. In this case the girl, on reaching the age of sixteen, retained as her own the settlement which she had derived from her father: *Guardians of Dorchester Union* v. *Guardians of Poplar Union*, 36 W. R. 706, 21 Q. B. D. 88. There is no reason why she should not be removed.

Lumley Smith, Q.C. (*Poyser* with him), for the Mitford Union.—The word "child" in the Removal Acts cannot be limited to a child under sixteen. It means a child who continues to be a member of the family. This is shown by *Reg.* v. *St. Mary Arches, Exeter*, and *Reg.* v. *St. Olave's*. The law is not altered in this respect by the Divided Parishes Act. Section 35 of that Act deals with setttlement only, and not with the *status* of irremovability. The pauper is within the

proviso of section 1 of 11 & 12 Vict. c. 111, and cannot be removed.

H. D. Greene, Q.C., replied.

Lord ESHER, M.R.—In this case the pauper is a girl over the age of sixteen living with her father as part of his family in Hockham parish, in the Wayland Union. His settlement, when she attained the age of sixteen, was not in this parish; neither is it now, but he has become irremovable from this parish. The pauper has become chargeable, and the parish insist, that though the father is not removable, yet they are entitled to an order removing her to the parish of her settlement (Shipdham parish, in the Mitford Union)—that is to say, the parish in which she has a settlement derived from her father. The question is not which is her settlement, but, assuming that parish to be her settlement, whether she can be removed there.

This question depends on the proper construction of the proviso in section 1 of 11 & 12 Vict. c. 111, and on that of section 35 of the Divided Parishes Act, 1876, and on the application of the one section to the other.

Before the statute 9 & 10 Vict. c. 66, where a parent and child had different settlements, but were living together, and both became chargeable in the place where they lived together, they might be removed to their different places of settlement. That appeared to the Legislature to be hard and cruel, and these statutes, 9 & 10 Vict. c. 66, and 11 & 12 Vict. c. 111, were passed with the object of preventing the separation of a family so long as it continued to live together as one family.

Section 1 of 11 & 12 Vict. c. 111, after reciting section 1 of 9 & 10 Vict. c. 66, enacts as follows:—"Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." I think that applies to every person having a wife or children living with him or her as part of his or her family, and the words "having no other settlement than his or her own" mean having no other settlement than a settlement derived from him or her. In such a case the statute says the members of the family are not to be separated.

Then section 35 of the Divided Parishes Act was passed, with the object of getting rid of the difficulty which was experienced in giving proof as to derivative settlements. The section abolishes derivative settlements with two exceptions, the case of a wife and that of a child under sixteen. The section proceeds to state what is to happen in the case of a child under sixteen. Such child is to take the settlement of its father or widowed mother up to the age of sixteen, and, when it is sixteen, is to retain the settlement so taken until it shall acquire another. What settlement is it which the child is to retain the moment it reaches sixteen? Clearly, the settlement which it had the moment before—that is, the settlement derived from its parent.

Then, to apply these sections to one another and to the facts of the case, the result is that this child, being over the age of sixteen, has the settlement which, when under that age, she derived from her father; and as she is also living with him as part of his family, and he is irremovable, she is irremovable also. Therefore the appeal fails.

FRY, L.J.—I am of the same opinion. The statute 9 & 10 Vict. c. 66 had for its object to prevent the removal of any person from a parish in which he had lived for a certain length of time. The statute 11 & 12 Vict. c. 111 introduced a proviso which applies to every husband or parent whose wife or child has no other settlement than that derived from him or her, and enacts that in such case the wife or child is not to be removed unless the husband or parent is removable. I agree that that can only be held to apply to children so long as they continue to live with their parent as part of his or her family.

Then the effect of section 35 of the Divided Parishes Act is that a child, while under sixteen, is to take the settlement of its father or widowed mother—that is to say, a derivative settlement—and that derivative settlement varies as the settlement of the father or mother may vary; and when the child attains the age of sixteen it is to retain the derivative settlement which it then has till it acquires another. It is still a derivative settlement, but no longer liable to vary with the parent's settlement; it is to be retained permanently by the child till it acquires another. A child can have no other settlement than its parent's until it has reached the age of sixteen, and, after reaching that age, has acquired a settlement of its own.

Therefore the present case comes within 11 & 12 Vict. c. 111, and, as the father is irremovable, the child cannot be removed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the Mitford Union, *Harrison & Powell*, for *Barton & Vores*, East Dereham.

Solicitors for the Wayland Union, *White & Co.*, for *Grigson & Robinson*, Watton.

From Q. B. Div. May 1.

DE ROTHSCHILD FRÈRES v. MORRISON, KEKEWICH, & Co.

LA BANQUE DE PARIS ET DES PAYS BAS v. SAME.

LA BANQUE DE FRANCE v. SAME. (a.)

Practice—Interpleader—Payment of charges of applicant—Ord. 57, rr. 2, 15.

The court has power, under ord. 57, r. 15, to order one of the parties to an interpleader issue to pay the charges of the person claiming the interpleader, although such charges were incurred before the interpleader issue was directed.

Appeals from the decisions of a divisional court (Lord Coleridge, C.J., and Fry, L.J.).

The defendants, acting as agents for the Société des Métaux, had deposited with Logan a large quantity of copper, and had received from him delivery warrants for the same, made out in their names and given subject to the wharfinger's charges. These warrants they indorsed and forwarded to the société, from whom they came into the hands of the several plaintiffs.

In May, 1889, the defendants sued Logan for the delivery of the copper, and on the 18th of June the plaintiffs claimed the copper as holding the warrants. Logan applied to interplead, and issues were directed, the action against Logan being stayed. Subsequently the defendants relinquished their claim to the copper, and on the 29th of January, 1890, an order was made at chambers directing that the issues should be discharged, and that the charges for wharfage of the copper from the 18th of June to the date of the order should be paid by the defendants.

The Divisional Court affirmed the order, and the defendants appealed.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

Barnes, Q.C., and *Hugh F. Boyd*, for the defendants.—The court had no power to order the payment of these charges.

They cited *Attenborough* v. *St. Katharine's Dock Co.*, 26 W. R. 583, 3 C. P. D. 450; *Dabbs* v. *Humphries*, 3 Dowl. 377; *Cotter* v. *Bank of England*, 3 Moore & Scott, 180.

Pollard, Wood Hill, and *English Harrison*, for the respective plaintiffs.

Loehnis, for Logan.

Lord ESHER, M.R.—In this case it is said that the judge had a right only to deal with the costs of the wharfinger, and not with his charges. By ord. 57, r. 2, the applicant for an interpleader must satisfy the judge that he claims no other interest in the subject-matter than for costs and charges. By rule 15 of the same order the judge is to make such order "as to costs and all other matters as may be just and reasonable." What can those other matters be if they do not include the charges of which the applicant has informed the judge under rule 2. I think it is clear, therefore, that the judge had jurisdiction to deal with these charges. The case of *Attenborough* v. *St. Katharine's Dock Co.* is a direct authority in this court for dealing with such charges, and if any reasoning is required to justify that decision, such reasoning is supplied by the rules. There was, therefore, jurisdiction to make the order, and as the judge exercised his discretion wisely in making it, I think that the appeals must be dismissed.

LOPES, L.J.—When rules 2 and 15 of order 57 are looked at, it is plain that there was jurisdiction to make this order. The applicant disclaims all interest in the matter except for charges and costs. Then the judge is to make an order "in and for the purposes of the interpleader" as to costs "and all other matters." It is impossible not to see that that includes the charges before mentioned. I agree that the appeals must be dismissed.

Appeals dismissed.

Solicitors for the plaintiffs, *Dawes & Sons; Markby, Stewart, & Co.*

Solicitors for Logan, *Rowcliffes & Co.*, for *Stone, Fletcher, & Co.*, Liverpool.

Solicitors for the defendants, *W. A. Crump & Son.*

High Court of Justice.

Chan. Div. } Chitty, J. } June 4.

In re TUNNO.

RAIKES *v.* RAIKES. (*a.*)

Will—Legacies given out of sale moneys—Deficiency—Lapse of one legacy—Abatement.

A testatrix made a bequest of jewels and ornaments to trustees upon trust to sell for the best price obtainable, and to pay thereout two legacies of definite amounts, but the will contained no gift of surplus sale moneys. One of the legacies lapsed. The price obtained was insufficient to pay both in full.

Held (*distinguishing* Page *v.* Leapingwell, 18 *Ves.* 463), *that the legacy which did not lapse was not liable to abate in favour of the residuary legatee.*

Adjourned summons.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

A testatrix by her will gave and bequeathed to trustees certain diamond ornaments upon trust to sell and dispose of the same for the best price or prices that could be obtained for the same, and upon trust, by, with, and out of the proceeds to arise from such sale, to lay out and expend a sum not exceeding in the whole £600 in repairing a parish church, and also upon trust to lay out and expend the sum of £700 in building six labourers' cottages on the Warnford Estate, which was described as being then in the possession of E. Sartoris.

The will contained also a residuary bequest. The ornaments had been sold, but had realized only about £900. At the testatrix's death the Warnford Estate had ceased to be in the possession of E. Sartoris, and the court had already declared that the gift of the £700 had accordingly failed, and that this sum fell into the residue.

The residuary legatee took out this summons for a declaration that, on the true construction of the will, and in the events which had happened, the whole of the proceeds arising from the sale of the ornaments fell into the residue. He also asked, alternatively, for a declaration that the proceeds of sale of the ornaments, being insufficient to provide for the two sums of £600 and £700, the former sum ought to abate in the proportion of £900 to £1,300, leaving the balance to fall into the residue. It is upon the latter point only that the case calls for a report.

Romer, Q.C., and *S. Dickinson* (*Rigby, Q.C.*, with them), for the applicant, argued that the sums given ought to abate, each legatee taking a proportion: *Page* v. *Leapingwell*, 18 Ves. 463.

Sir A. Watson, Q.C., and *P. F. Wheeler*, for the vicar and churchwardens, the legatees of the sum of £600, referred to *Currie* v. *Pye*, 17 Ves. 462.

G. A. Watson, for the trustees of the will.

Romer, Q.C., replied.

CHITTY, J., after deciding that the gift of the £600 was effectual, continued:—But there is a further point raised. The residuary legatee says that as the gift of £700 out of the proceeds of sale of the diamonds has failed, this lapse has taken place for her benefit. The diamonds did not produce £1,300, but only about £900, and the residuary legatee contends that the £600 legacy must abate, that legatee taking six-thirteenths only of the £900. It is plain that, as between the legatee of the £700, had that legacy taken effect, and the other legatee, the legacies must have abated in the proportion stated, but it does not follow, therefore, that the residuary legatee can, in the existing circumstances, claim seven-thirteenths of the £900. It is clear that if a specific property be given in trust for A. and B. as tenants in common in equal shares, and B. dies in the testator's lifetime, A. takes only one-half of the property. It is equally clear that the same result follows whatever be the fractions in which the property be divisible among the specific legatees. And it is equally clear that if property be given upon trust for sale, with a direction to divide the proceeds into aliquot portions, the gift intended in each case is that of a specific portion only of the proceeds. And the argument on behalf of the residuary legatee proceeds on the assumption that, on the true construction of this will, there is a gift to these two legatees of £700 and £600 of aliquot portions of the proceeds of sale. But, in my opinion, on the true construction of this will that is plainly not the true interpretation. It is not as if the direction had been to sell the diamonds for not less than a sum of £1,300, and the testatrix had then proceeded to give thereout the legacies; that would have amounted to a gift of the fund in specific proportions. The residuary legatee's argument is founded on the well-

known case of *Page* v. *Leapingwell*, where the sum of the gift, to put it quite shortly, was, "distribute £10,000 in aliquot proportions among certain named legatees, with a gift over of the overplus moneys to A.," and, on the question of the construction to be put on this term "overplus," Sir W. Grant held that it meant a sum of £2,200, being the fractional remainder of the sum of £10,000, for the testator having directed a sale for not less than £10,000, the gift was considered as being, in substance, a division of that sum in specific or aliquot portions among the legatees who were to take as tenants in common in the proportions named. It followed that if any one of them died in the lifetime of the testator, or if for any other reason the gift to any of them failed, such event did not increase the benefits intended to be given to the others. But that decision has no application to the present case. To my mind, on the construction of the will, it is not open to argue that the gifts here are of aliquot proportions of the produce of sale. The will contains no statement of the amount of the fund to be disposed of, nor of the sum for which the diamonds are to be sold, nor is there, in terms, any gift of the overplus in the event of their fetching more than £1,300, and it is only by the general law that such overplus, being undisposed of, would have fallen into the residue. And it is clear that, if these diamonds had sold for, say, £2,000, the persons entitled to the sum of £600 would not have taken six-thirteenths of the £2,000. In the result the gift here is simply equivalent to a gift by a testator of the Consols which he may be possessed of at his death upon trust to sell and raise thereout £600 to be paid to A. and £700 to be paid to B., in which case, there being no priority between the two, if the Consols turn out to be insufficient, abatement would be necessary. But in reality such gifts amount to charges on the Consols, and as such, must be paid before the residuary legatee can claim anything thereout. In the present case the residuary legatee is attempting to creep into the shoes of the legatee of the £700 as if that legacy had taken effect, but this legacy is gone, and the residuary legatee is entitled to claim, not the legacy of £700, but only so much of the produce of sale as will, but for the legacies bequeathed thereout, fall into the residue. And none of it does so fall until the specific gift of the £600 has been discharged. It is unnecessary for me further to consider the authorities. I hold the £600 must be paid in full before the residuary legatee can take any part of the fund.

Solicitors, *Francis & Johnson; H. R. Reynolds; Harries, Wilkinson, & Raikes.*

Chan. Div. (North, J., for Kay, J.) May 13.

In re THE OPERA (LIMITED). (*a.*)

Company—Winding up—Sheriff in possession before presentation of petition—Execution put in force after commencement of winding up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 87, 163.

The sheriff, before the presentation of a winding-up petition, entered the premises and took possession of the chattels of a company, and after the commencement of the winding up received moneys paid by the public for admission to the premises.

Held, that the execution was, as to these moneys, put in force after the commencement of the winding up, and was void under section 163 *of the Companies Act*, 1862.

Adjourned summons.

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

On the 5th of February, 1890, an order was made for the winding up of the Opera Co. (Limited) upon a petition which was presented on the 18th of January. The company carried on a theatre, and on the 16th of January the sheriff, under a *fi. fa.* issued by a judgment creditor of the company, took possession of the chattels at the theatre, consisting of the scenery and dresses. The sheriff continued in possession till the 8th of February, when he withdrew in pursuance of an order of the court made in the winding up, and whilst in possession, and after the presentation of the petition, received the moneys paid by the public for admission to the performances at the theatre, and paid thereout the execution creditor his debt and costs. This was a summons by the official liquidator in the winding up claiming the moneys which had been thus received and paid by the sheriff.

Marten, Q.C., and *Manby*, for the official liquidator.—As regards the moneys received by the sheriff from the public, the execution was put in force after the commencement of the winding up, and is therefore void under section 163 of the Companies Act, 1862.

They cited *In re Liverpool Civil Service Association, Ex parte Greenwood*, 22 W. R. 636, L. R. 9 Ch. 511; *In re Vron Colliery Co.*, 30 W. R. 388, 20 Ch. D. 442.

Renshaw, Q.C., and *Rose-Innes*, for the sheriff.—The execution was put in force when the sheriff entered: *In re London and Devon Biscuit Co.*, 19 W. R. 943, L. R. 12 Eq. 190; the Companies Act, 1862, ss. 85, 87; *In re Withernsea Brick Works*, 29 W. R. 178, 16 Ch. D. 337. In receiving these moneys from the public the sheriff was continuing to enforce the execution which he had already "put in force." Having seized the goods of the company the sheriff might have sold everything and prevented the company from receiving any of these moneys; they are, therefore, the fruit of his forbearance, and he is entitled to apply them in discharge of the judgment creditor.

NORTH, J.—In my opinion the official liquidator is entitled to have an account from the sheriff of the moneys which he has received, and the sheriff is not entitled to be allowed the amount which he has paid to the execution creditor. All these moneys were received by the sheriff after the commencement of the winding up; he was putting the execution in force when he actually received the money.

The money paid by the public for entrance to the theatre belonged to the company; the spectators had no right to it when they had paid it. If it had not been the property of the company the sheriff could not have received it at all; it was only because it was paid to the company that he did receive it.

Section 163 of the Companies Act provides that any execution put in force after the commencement of the winding up shall be void to all intents; as to these particular moneys the execution was put in force after the commencement of the winding up; it is, therefore, void, and the liquidator is entitled to the money.

The order will be without prejudice to any right which the sheriff may be able to establish against any property of the company of which he took possession before the commencement of the winding up.

Solicitors, *Boxall & Boxall; Burchells.*

Chan. Div. North, J. } Feb. 22.

In re CARLISLE.
CLEGG *v.* CLEGG. (*a.*)

Arbitration—Agreement to refer questions in dispute—Staying proceedings—Discretion of court—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 19.

The court has a discretion under section 4 *of the Arbitration Act,* 1889, *as to staying legal proceedings commenced by one of the parties to an instrument of submission to arbitration, against the other party, and will not stay proceedings where the question to be decided is a question of law only.*

Summons.

This was a summons taken out by C. H. Carlisle and J. W. Carlisle, two of the defendants to the action, asking for a stay of proceedings on the ground that the matters in dispute had been agreed to be referred to arbitration.

Under a partnership deed, dated the 3rd of February, 1879, H. Carlisle, W. Clegg, W. H. Clegg, and G. Kirby carried on business together. The deed contained the usual clause for reference of differences and disputes between the partners or their representatives in relation to the affairs of the partnership to two arbitrators or their umpire, pursuant to the Common Law Procedure Act, 1854.

W. Clegg died on the 24th of August, 1887, and the plaintiffs and two of the defendants were his executors and trustees. The business was continued by the surviving partners. H. Carlisle died on the 10th of March, 1889, and after his death the two surviving partners continued the business. The plaintiffs commenced this action in November, 1889, and by their statement of claim alleged that, under a general account and valuation of the assets and liabilities of the partnership in June, 1887, the amount due to the executors of W. Clegg on the day of his death in respect of his share and interest in the partnership was £30,119, and that £28,341 still remained owing to them, and the plaintiffs claimed a declaration that the surviving partners and the executors of H. Carlisle, deceased, were jointly and severally liable for such sum, or, in the alternative, to have an acount taken.

Hornell, for the summons.—It is no answer to an application for stay of proceedings, in cases where the deed has agreed to refer to arbitration, that the question in dispute is one of law only: *Randegger* v. *Holmes,* L. R. 1 C. P. 679, 15 W. R. Dig. 6, decided on section 11 of the Common Law Procedure Act, 1854, which is replaced by section 4 of the Arbitration Act, 1889.

Cozens-Hardy, Q.C., and *Swinfen Eady,* for the plaintiffs.—The court has a discretion in the matter: *Lyon* v. *Johnson,* 37 W. R. 427, 40 Ch. D. 579.

Napier Higgins, Q.C., and *Bruce,* for other defendants.

NORTH, J.—At the present stage of these proceedings it appears to me that the only question arising is a question of law. It would be absurd to refer such a question to an arbitrator, who would probably come to the court for its opinion under section 19.

Section 4 gives me a discretion, and in my opinion the best course will be, in the first place, to try the question of law. The summons must stand over until the defences are delivered, when the point of law will be raised, and any of the parties can apply for me to decide it. If, after the decision, any question of account remains, it can go to an arbitrator to fix the amount.

Solicitors, *Merriman, Pike, & Merriman; Phillips; Snow, Snow, & Fox.*

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) } June 10.

REG. *v.* JUDGE OF THE CITY OF LONDON COURT AND THE OWNERS OF THE STEAMSHIP "MICHIGAN." (*a.*)

County court—Admiralty jurisdiction of—Action in rem *for wages—County Courts Admiralty Jurisdiction Act,* 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-section* 2.

The mate of a vessel who had finished his articles and been paid off, but who remained on board as her chief officer and superintended the unloading of the cargo, and generally looked after the vessel while in port, is entitled to proceed in rem *in the county court against the vessel for his remuneration.*

Rule *nisi* for a *mandamus* to the judge of the City of London Court to hear and determine the cause. It appeared that the plaintiff, who was employed as mate on board a vessel called *The Michigan,* had brought an action *in rem* in the City of London Court for wages earned by him as chief officer after he had finished his articles and been paid off, and while the vessel was in port unloading her cargo. The judge of the City of London Court held that he had no jurisdiction to try the case, on the ground that the plaintiff was not at the time employed as a seaman, and was not therefore entitled to proceed *in rem.*

Aspinall, shewed cause.—The County Courts Admiralty Jurisdiction Act, 1868, has been construed to confer on county courts the same jurisdiction that the Admiralty Court had at the time of the passing of that Act. By section 3, sub-section 2, of the Act it is provided that the county court shall have jurisdiction to try any claim (*inter alia*) for "wages." At that date the jurisdiction of the Admiralty Court over wages was restricted to seamen's wages. The question, therefore, is, Was the plaintiff at the time of his employment a seaman within the meaning of the Act? By the Merchant Shipping Act, 1854, s. 149, the engagement as seaman commences from the time of his signing the articles. Here the old articles had expired and no new ones had been entered into; and the plaintiff had been paid off. The case of *The Great Eastern,* 1 L. R. Adm. 384, 5 Aspinall M. C. N. S. 511, 34 W. R. Dig. 180, is distinguishable, as in that case the seamen were engaged for the next voyage, and the services were mere preliminaries to the signing of the articles.

Nelson, for the plaintiff, in support of the rule.—The plaintiff was performing all the duties which as mate he ought to perform. There is no distinction between this case and that of *The Great Eastern.* By the interpretation clause of the Merchant Shipping Act, 1854, "seaman" includes every person employed or engaged in any capacity on board any ship, and section 181 gives such a person a right to his wage. It is true this is not a proceeding to enforce a maritime lien, and this man had no maritime lien, yet he had a right to proceed *in rem.*

Cur. adv. vult.

June 11.—Lord COLERIDGE, C.J.—I have consulted Butt, J., a judge of the Admiralty Division, and in deference to his authority I have come to the conclusion that the judge of the City of London Court

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

was wrong in holding that he had no jurisdiction in this case. My first opinion was the other way, but I now think that the judge had jurisdiction, and that he must therefore hear and determine the case on its merits. It appears that according to the practice in Admiralty persons in the position of the plaintiff have been in the habit of maintaining actions of this kind in that court. That determines the case, because the question depends upon what was the admiralty jurisdiction transferred by the Act of Parliament to the county court.

WILLS, J.—I concur, not merely in deference to the authority of my brother Butt, but also because it is my own view of what the judge's authority was in this case.

Mandamus *allowed*.

Solicitors for the plaintiff, *Lowless & Co.*

Solicitors for the defendant, *Botterill & Roche*.

Q. B. Div. (Grantham and Charles, JJ.) May 16.

HOBBS & CO. (LIMITED) *v.* HUDSON & CO. (*a*.)

Practice—Interrogatories—Penal action—Fraudulent removal of goods by tenant—Action by landlord for double value under 11 *Geo.* 2, *c.* 19, *s.* 3.

An action brought by a landlord under 11 *Geo.* 2, *c.* 19, *s.* 3, *to recover double value against a tenant for fraudulently removing his goods to avoid a distress for rent, and against others for wilfully and knowingly aiding the tenant in such removal, is a penal action, and the plaintiff is not entitled to administer interrogatories to the defendants.*

Jones v. *Jones*, 37 *W. R.* 479, 22 *Q. B. D.* 425, *followed.*

Case referred to the court by Hawkins, J., at chambers, upon the question whether, in an action by a landlord, under 11 Geo. 2, c. 19, s. 3, to recover against the tenant double the value of goods alleged to have been fraudulently removed to avoid distress, interrogatories can be administered by the plaintiff to the defendant.

The plaintiffs brought their action under 11 Geo. 2, c. 19, s. 3, to recover against both the defendants double the value of goods which it was alleged that the defendant Myers, the tenant, had fraudulently removed to avoid distress, and which it was alleged that the defendants Hudson & Co. had wilfully and knowingly aided the tenant in removing.

The plaintiffs had delivered interrogatories; the defendants, Hudson & Co., had declined to answer, on the ground that the action was a penal action, and that the answer might tend to criminate them. The plaintiffs then applied to a master to order an answer; upon this application the master made no order, and on appeal Hawkins, J., referred the matter to the court.

W. Graham, for the plaintiffs.—The question is whether the action for double value under the Act 11 Geo. 2, c. 19, s. 3, is a penal action. I submit it is not so: where the main object is to compensate the party aggrieved, then the action is not a penal action, and interrogatories may be administered; but where the object is to punish the defendant, then interrogatories are not allowed. There is no distinction between the present case and the case of *Adams* v. *Batley*, 35 W. R. 437, 18 Q. B. D. 625, where interrogatories were allowed. The question is not whether this is a penalty in the sense of the party having to pay more than the damage actually suffered, but whether it is an action to compensate, and, if so, interrogatories are allowed. The case of *Martin* v. *Treacher*, 34 W. R. 315, 16 Q. B. D. 507, and *Jones* v. *Jones*, 37 W. R. 479, 22 Q. B. D. 425, are different from the present. The object of the action, as shown by the statement of claim, is to compensate the landlord for the injury he has received for what is described as a fraud, and, that being so, he was entitled to ask what goods the defendant had got or where they were, and what goods they had got which had been removed. If there was any objection, then the objection ought to be taken on oath in the affidavit in answer.

Duke, for the defendants Hudson & Co., was not heard.

GRANTHAM, J.—I have no doubt on the authorities that interrogatories cannot be administered here. The question was decided in *Jones* v. *Jones*, for whether the action is for recovery of double value or treble value the principle is the same. I think therefore that there is no authority for saying that interrogatories can be administered in cases of this kind. I am of opinion we are bound by *Jones* v. *Jones*, and under these circumstances this appeal ought to be dismissed.

CHARLES, J.—I am of the same opinion. I think the case is decided by *Jones* v. *Jones*, and I may add that I concur with that case.

Appeal dismissed.

Solicitors for the plaintiffs, *Bonner, Wright, Thomson, & Co.*

Solicitors for the defendants Hudson & Co.; *Law & Worsam.*

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Q. B. Div. (Huddleston, B., and Grantham, J.) April 21, 23.

HUBBARD AND ANOTHER *v.* GOODLEY. (*a*.)

County court—Jurisdiction—Sum claimed exceeding £50—Claim reduced below £50 by sum not admitted by defendant—"Admitted set-off"—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 57.

Section 57 *of the County Courts Act*, 1888, *gives the county court jurisdiction to try a case "where the debt or demand claimed consists of a balance not exceeding £50, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff."*

Held, that a set-off, to be an "admitted set-off" within the meaning of this section, must be a set-off admitted by both parties, so that, in a claim above £50, a plaintiff cannot, by giving credit for a sum which is not admitted by the defendant, reduce his claim below £50, so as to give the court jurisdiction to try the case.

Appeal from Wisbeach County Court.

The action was brought by the plaintiffs, the landlords, against the defendant, as tenant of a certain farm, for breaches of covenant by the tenant, and in the particulars the plaintiffs allowed a set-off in respect of manures. The plaintiffs claimed in their particulars the sum of £56 9s. 11d., and they gave the defendant credit for a set-off of £14 9s. 11d., which reduced the claim to £42.

This set-off was not admitted by the defendant, and as soon as the case was called on and the jury sworn, the objection was taken, on behalf of the defendant, that the county court had no jurisdiction, as the claim was one above £50, and that it could not be reduced so as to bring it within the jurisdiction by a set-off which was disputed by the defendant, and that such set-off was

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

not an "admitted set-off" within the meaning of section 57 of the County Courts Act, 1888.

The learned judge upheld this objection, and he nonsuited the plaintiffs, on the ground that the county court had no jurisdiction to entertain the case, as the plaintiffs' claim exceeded £50, and that it was not reduced below that amount by an "admitted set-off" within the section.

The plaintiffs appealed.

Section 57 of the County Courts Act, 1888, enacts: "Where in any action the debt or demand claimed consists of a balance not exceeding £50, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action."

W. J. Brooks, for the plaintiffs.—The question is whether this sum of £14 9s. 11d. is an admitted set-off within the meaning of the section. In section 57 of the Act a set-off is sufficient if it be admitted by the plaintiff. *Walesby* v. *Goulston*, 14 W. R. 899, L. R. 1 C. P. 567, appears to be against me, but there is a later case of *Percival* v. *Pedley*, 35 W. R. 566, 18 Q. B. D. 635, which extends the meaning of "admitted set-off" in *Walesby* v. *Goulston* to cases where the set-off is admitted by the plaintiff before action. The only difference between *Percival* v. *Pedley* and the present case is that *Percival* v. *Pedley* was a case remitted to the county court under section 7 of the County Courts Act, 1867. That, however, makes no substantial difference. In *Walesby* v. *Goulston* the plaintiff did not admit the set-off, whereas in the present case it is admitted by the plaintiff, as it was in *Percival* v. *Pedley*, which is an authority upon the present point and governs the case.

Horace Brown, for the defendant.—The case of *Walesby* v. *Goulston* was decided on the 24th section of the County Courts Act, 1856 (19 & 20 Vict. c. 108), and the words of that section are identical with the words of the present section. *Walesby* v. *Goulston* is therefore an authority precisely in point in the present case. The answer to the case of *Percival* v. *Pedley* is that that was a decision on a remitting Act under a section which remitted actions from the High Court, and not under a section which gave jurisdiction *ab initio*. In addition to this, the words of the present section are different from the words of the section of the Act of 1867 under which *Percival* v. *Pedley* was decided, for the words in the present section are "claimed or recoverable," which do not occur in the section of the Act of 1867.

Brooks replied.

HUDDLESTON, B.—We have now to give our judgment upon one question, and upon one question only—whether, when the set-off is admitted by the plaintiff, but not admitted by the defendant, the judge has a right to say that there is no jurisdiction to try the case. That is the real question in the case. The plaintiffs claim £56 9s. 11d., and in their particulars they give the defendant credit for £14 9s. 11d., leaving a balance of £42.

It was said that this sum of £14 9s. 11d. is an admitted set-off within the meaning of the section, and if so, then the county court judge had jurisdiction to try the case. But if the defendant had a right to say I will not admit the set-off, then the amount claimed would be above £50, and there would be no jurisdiction. The question then is simply this, can a plaintiff give himself credit for a sum which will reduce the claim below £50. We must look at the section: what is the meaning of the word "admitted" in the section? Is it "admitted" by both parties, or by the plaintiff alone? In my opinion, "admitted" in that section means admitted by both parties, and the case of *Walesby* v. *Goulston* is, in my opinion, conclusive on the point. It is true that the case of *Walesby* v. *Goulston* was decided under a different Act of Parliament, but it was an Act where the words were precisely the same as in the present Act, for the words there, as in the present case, were "after an admitted set-off of a debt or demand claimed or recoverable by the defendant from the plaintiff." Not only is there a decision on the point in *Walesby* v. *Goulston*, but there are some strong expressions of opinion on the matter by Erle, C.J., which were acquiesced in by the other judges.

I must say that in my view the set-off must be admitted by both parties. It is true that there is the case of *Percival* v. *Pedley*, but that case was under a different Act of Parliament, and raised the question whether the plaintiff can bring his case within the Act of Parliament by giving credit for a certain sum which may not be admitted by the defendant. In the argument of *Percival* v. *Pedley* the case of *Walesby* v. *Goulston* was not referred to, and I don't think *Percival* v. *Pedley* applies to the present case. Looking at the words of the Act itself, we see that there are words in section 57 of the present Act which were not in the Act under which *Percival* v. *Pedley* was decided. The 57th section has the words "claimed or recoverable," which were not in the earlier Act. The set-off must be an admitted set-off of a sum "claimed or recoverable" by the defendant. Here there has never been any sum claimed by the defendant, and there was no evidence to show that there was any sum recoverable by him.

The question for us is whether a plaintiff can, by giving credit for a certain sum, bring his case within the section; I do not think he can, and under these circumstances this appeal should be dismissed.

GRANTHAM, J.—I am of the same opinion. The plaintiffs here rely on *Percival* v. *Pedley*, but not only is that a decision under a different Act, but it is under an Act where the same language is not used, for in the section under which that case was decided, there is not a word about a debt "claimed or recoverable" by the defendant. That decision may be right, as that had reference to remitting actions to county courts. Here if the plaintiffs are right the defendant has no voice at all in the matter, and the superior court no voice at all. The facts do not bring the case within the section as an admitted set-off, and the judge had no jurisdiction to try the case.

Appeal dismissed.

Solicitors for the plaintiffs, *Smiles, Binyon, & Co.*, for *Welchman & Carrick*, Wisbeach.

Solicitors for the defendant, *Oldman & Clabburn*, for *A. R. Ollard*, Wisbeach.

Q. B. Div. (Huddleston, B., and Grantham, J.) April 28.

REG. v. JUSTICES OF GLAMORGANSHIRE. (a.)

Justices—Quarter sessions—Practice—Appeal from conviction—Recognizance out of time—Estreat of, for costs—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-section* (3).

An appellant from a conviction of a court of summary jurisdiction to a court of quarter session had entered into the recognizance specified by section 31, *sub-section* (3), *of the Summary Jurisdiction Act*, 1879, *but not, as that section requires, within three days after the day on which he gave notice of appeal. The appeal was accordingly dismissed, with costs.*

Held, that the recognizance was not void, and might be estreated by the court of quarter sessions for non-payment of the costs awarded upon the dismissal of the appeal.

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Rule *nisi* calling on the justices of Glamorganshire to show cause why a *certiorari* should not issue to bring up, for the purpose of quashing it, an order of quarter sessions estreating a recognizance.

On July 3, 1889, a conviction was obtained at Cardiff Petty Sessions against one John Elliott for selling beer by retail without a licence. He gave notice of appeal to quarter sessions on July 6, but did not enter into the recognizance required by section 31 of the Summary Jurisdiction Act, 1879, until July 12. The recognizance was entered into by Elliott in a sum of £50, and by two sureties in a sum of £25 each. When the appeal came on for hearing objection was taken that, the recognizance being out of time, the court had, under sub-section (3) of section 31 of the Summary Jurisdiction Act, no jurisdiction to hear the appeal.

The objection was allowed, and the appeal accordingly dismissed, with costs, which were taxed at £21 8s. 9d. On the application of the respondent, on December 31, the court of quarter sessions ordered the recognizance to be estreated.

The recognizors then obtained a rule *nisi* for a *certiorari*.

W. D. Benson, for the justices, showed cause.—The recognizance can only be avoided by performance of all the conditions contained in it, and one of these conditions is that the appellant shall pay such costs as the court may award. This he has failed to do, and the recognizance may accordingly be estreated.

Abel Thomas, in support of the rule.—The consideration in respect of which the recognizance was given—viz., the right of appeal—has wholly failed, and therefore the bond itself is void.

HUDDLESTON, B.—I am of opinion that this recognizance was not void, and that the quarter sessions had jurisdiction to estreat it. A recognizance is stated in Burn's Justice, tit. Recognizance, to be "a bond of record testifying the recognizor to owe a certain sum of money to some other." The form of a recognizance taken by justices of the peace as a condition of appeal is that given in Archibald's Quarter Sessions, 4th ed., p. 665, and it provides that if the recognizor "personally appear at the next general quarter sessions of the peace . . . and there try such appeal and abide the judgment of the said court of quarter sessions thereupon, and pay such costs as shall be by the said court awarded, then this recognizance to be void." It is only to be avoided if the appellant performs all three of the above conditions. But here he never performed the last condition—that of payment of the costs of the appeal; therefore the recognizance held good. The appellant, knowing that he had made default in the matter of the recognizance, and that he consequently had no right of appeal, thought he would take his chance of the objection being taken, and would go to the quarter sessions to get rid of his conviction if he could, and then, if the objection were taken, would turn round and say that the recognizance was void, and so escape liability for the costs of the unsuccessful appeal. That he cannot be permitted to do.

GRANTHAM, J., concurred.

Rule discharged.

Solicitors for the recognizors, *Riddell, Vaizey, & Co.*, for *J. H. Jones*, Cardiff.

Solicitors for the justices, *Andrew, Mel'or, & Smith*, for *Wheatley*, Cardiff.

Court of Appeal.

From Chan. Div. June 13.

COOKE v. SMITH. (a.)

Creditors' deed—Assignment by debtor of business upon trust for creditors—No express trust of surplus after payment of debts in full—Resulting trust.

A trading firm, by a deed, which recited the inability of the firm to pay its creditors in full, assigned the business and all the estate and effects of the firm to trustees on trust in their discretion either to carry on the business or at any time to sell the same, and to divide the clear residue (after payment of all costs incurred in the execution of the trusts) of the profits of the business while carried on, and of the moneys arising from the sale when sold, among the creditors of the firm, in rateable proportions according to the amounts of their debts; and the creditors, whose names were scheduled to the deed and who were parties to and executed the deed, thereby released the assignors from all debts and claims of such creditors. The deed contained a declaration that the trustees might pay off in full, or compromise with, any of the creditors whose debts or claims were under £30. There was no express declaration of trust as to any ultimate surplus remaining after all the creditors had been paid in full.

Held (reversing the decision of Kekewich, J.), *that, on the true construction of the deed, there was a resulting trust of such surplus in favour of the assignors.*

Appeal from the decision of Kekewich, J., sitting for Kay, J.

The action was brought by H. Cooke, one of the partners, and Rachel Swinnerton, the executrix of J. F. Swinnerton, a deceased partner of the firm of Cookes & Swinnerton, iron manufacturers, as plaintiffs, against the trustees of a deed of assignment of the business of the firm, for the purpose of paying the debts of the firm. The plaintiffs claimed that the sale of the business made by the defendant trustees to the Barrow Hæmatite Co. might be set aside as fraudulent, and that the trustees might be ordered to account to the plaintiffs for receipts and payments.

The deed of assignment in question was made on the 29th of December, 1876, between the plaintiff H. Cooke and the defendant J. Cooke of the first part, the plaintiff R. Swinnerton of the second part, the defendants J. T. Smith and T. Storey of the third part, and the several creditors mentioned in a schedule whose names and seals were subscribed to the deed of the fourth part; it contained recitals that the parties of the fourth part were creditors of the firm of Cookes & Swinnerton; that the firm being unable to pay its creditors in full, an agreement was in process of arrangement at the time of the decease of J. F. Swinnerton (who had died on the 15th of May, 1876) for the making of an assignment, and for the granting of a release to the said firm similar to that thereinafter contained; and by the operative part of the deed, the parties of the first and second parts assigned to the defendants Smith and Storey the business then lately carried on by the firm, and all other the personal estate and effects of the firm, to hold the same on trust in their absolute discretion either to carry on the business or at any time after to sell the business and premises thereby assigned, and out of the profits of the business if carried on, and out of the moneys to arise from such sale, to pay the costs, charges, and expenses to be incurred or become payable in or about the execution of the trusts, and to pay and divide the clear residue of the profits and moneys unto and among all and singular the creditors of the firm

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

in rateable proportions, according to the amount of their several and respective debts, subject, nevertheless, to the covenants and provisions thereinafter contained; the scheduled creditors further released the assignors of all debts and claims. Then followed a declaration that the trustees in their absolute discretion might pay off in full or compromise with creditors whose debts were under £30. The deed contained no express declaration of trust as to any ultimate surplus that might remain after paying all the creditors in full.

The scheduled creditors who executed the deed were eighteen in number, some of whom were creditors whose debts were under £30, but among the remaining ten or twelve were several creditors claiming large sums, including the Barrow Hæmatite Co. and the Lancaster Banking Co.

The defendant trustees, in December, 1883, sold the business and premises to the Barrow Hæmatite Co., with the consent of the other creditors, in consideration of that company paying the other creditors the full balance due to them. In 1889 the plaintiffs instituted the present action.

On the application of the defendant Smith, one of the trustees, and of the Barrow Hæmatite Co., who were also defendants in the action, an order was made that a preliminary point of law—viz., whether the plaintiffs had any title to maintain the action—might be argued before the action was tried.

Kekewich, J., held that, on the true construction of the deed of assignment, the plaintiffs had no title to maintain the action.

The plaintiffs appealed.

Neville, Q.C., and *T. E. Mansfield*, for the appellants.—On the true construction of the deed there is a resulting trust to the plaintiffs, the assignors, of any surplus that remains after the payment of the debts in full. The deed is a creditors' deed, and as all the debts have been paid, the plaintiffs, as the original owners of the business, are entitled to the residue. The clause in the deed as to the payment in full of creditors under £30 is inconsistent with the view taken by Kekewich, J., that it was intended by the deed that the creditors were to take the residue for their own benefit.

Renshaw, Q.C., and *Farwell*, for the respondent Smith and the Barrow Hæmatite Co.—The bargain on the face of the deed was an assignment of the property of the debtor firm to the creditors in satisfaction of their debts, and in consideration therefor they released the debtors from the whole of their liability. The recital as to the inability of the debtors to pay their debts in full is only that they were unable to do so at the time of J. F. Swinnerton's death—*non constat* that they were unable to do so at the date of the deed—and it was really only inserted to protect Swinnerton's executrix. The common form of such deeds is that there is either an express trust of the surplus for the assignor or for distribution among the creditors according to the laws of bankruptcy. [FRY, L.J., referred to a form of assignment in trust for creditors given in Forsyth on Compositions with Creditors, 3rd ed., p. 230.] There is a similar form given in Davidson's Precedents, 3rd ed., vol. v., Part II. at p. 532, and these two forms, no doubt, do not contain any express trust as to the ultimate surplus; but, on the other hand, the forms given in Davidson, 3rd ed., vol. v., Part II., at pp. 521 and 542, do contain an express ultimate trust for the assignor. The object and intention of this deed was to transfer the business to the creditors; it was to be taken over by them in satisfaction and in lieu of their debts, and they had to run the risk of its proving insufficient. The idea was that the business should be carried on for some time, and the trusts as to the distribution of the proceeds were to take effect from time to time and not *uno flatu* merely. The fraction of interest that the creditors under £30 would receive of the profits while the business was being carried on would be so small that it was desirable to insert the stipulation that they might be bought out. [BOWEN, L.J.—There was no valuation made of the property assigned.] The parties to the deed were, probably, well aware of its value.

J. M. Solomon and *L. Sanderson*, for the defendant Storey.

COTTON, L.J.—Though this deed follows, as far as I can see, the exact terms of a precedent inserted in Mr. Davidson's book, the question arises as to what trusts are implied after all the debts are paid. In my opinion this is a deed intended to provide for payment, either in full, or partly, as far as the estate goes, of creditors; and although it is true that the parties did not contemplate that there would be a surplus—or else, I suppose, they would have provided for that—yet as there is, in fact, a surplus after payment of all the creditors in full, the question arises whether there is a trust for the assignors. In my opinion there is. It is true that there is no express provision on this point in the deed, but when property belongs to a debtor who assigns it for the purpose of paying his creditors the whole amount of their debts as far as the property will go, if those creditors are paid, then, in my opinion, there is a resulting trust—though not expressed—for the debtor. It is said when this deed was executed by the debtors and assented to by the creditors, that then the debtors had no longer any interest in this property, that the trustees were trustees only for the creditors, and that if the assignors by a stroke of good luck got the means of paying off their creditors, they could not have said to the creditors, "Take all the money that is due to you, release us from it, and we require you or your trustees to reassign the property to us." It is true that the deed contains a direction to divide all the proceeds arising either by the profits or the sale of the property amongst the creditors, and it was said that this direction was intended to cover everything, and therefore excluded the assignors from any interest in the property. But, to my mind, that is only a direction for payment of the creditors as long as they are creditors—that is, so long as their debts which they thereby release are not paid in full, but not a direction as to what is to be done with the surplus arising from this property when that has been done. In that event it would not, in my opinion, be right for the trustees to hand the surplus to the creditors, but it must go back to those who were the debtors, and who were released in consequence of the assignment which they made. Though this deed does not contain a clause directing the trustees to hold the surplus, after the payment of all the creditors in full, on trust for the assignors, yet, in my opinion, that is not necessary, because I can see clearly that the object intended to be provided for by this deed was payment or satisfaction of the debt due by the assignors; and when that was done any portion remaining, must go back to the person from whom it came to the trustees for that purpose. I differ from the view of Kekewich, J., but I cannot myself have any doubt on the subject.

BOWEN, L.J.—I am of the same opinion. Had it not been for the judgment of Kekewich, J., whose experience I respect, I also should have said that I had no doubt on the subject. It must be taken that this deed does not contain words which would have prevented this question arising. In order, however, to construe the clause, the construction of which is really the matter of our decision, one must make up one's mind as to what is the object of this deed. Is it the true object of this deed to pay the debts of the assignors and devote so much of the property of the assignors to that purpose as may be necessary—in which

case as soon as the object is satisfied there would be a resulting trust to the assignors — or is it the true object of the deed, as the respondents contend and as the learned judge appears to have thought, that the assignors should get rid of their property, and as a consideration therefor should at the same time get rid of their debts? Those are the two alternative views. We start with this, that the deed is a deed which contains a schedule of the various creditors to whom, or for the benefit of whom, the assignment is made; and when we look at the schedule we find it consists of some eighteen firms and individuals, and after deducting a certain number of them whose debts are under £30, there are still some ten or twelve creditors remaining, among whom are the Barrow Hæmatite Steel Co. and the Lancashire Banking Co. The first recital, upon which I think stress ought to be laid, is a recital that the assigning firm are unable to pay their creditors in full—or, rather, that some months before, at the time when the negotiations were first entered into, they were unable to pay their creditors in full. I think, however, one can hardly read that recital without deriving from it the conviction that all the parties to this deed, at the date of its execution, regarded the assignors as unable to meet their engagements. Then comes the clause we have to construe. After assigning the business to the trustees on trust, at their discretion, either to carry on the business, or to sell immediately, or at any time afterwards, and after paying out of the profits of the business carried on, and out of the moneys to arise from the sale, if sold, the costs, charges, and expenses to be incurred or become payable in or about the execution of the trusts, there is a provision that the trustees shall pay and divide the clear residue of the profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions thereinafter contained. I think it is doing no violence to that clause or to the deed, to allow the words of that clause to be read by the light of the previous recital of the inability of the firm to pay their debts; and I think that the language of the clause "to divide in rateable proportions according to the amounts of their several and respective debts" is to be accounted for by the fact that at that moment it was supposed that the property would not do more than satisfy in full the claims of the respective creditors. Then comes a further clause, which I think is also material, which gives the trustees the power, at their own discretion, to pay in full and make arrangements with creditors whose claims are under £30.

If the true effect of this deed were that the entire property was to pass to, and vest for ever in, the trustees for the benefit of the creditors whose names are scheduled, it seems to me almost incomprehensible that the deed should contain a provision which gave the trustees a power, at their discretion, to pay off or compromise debts under £30. The truth is that there is nothing at all in this deed inconsistent with the idea that its object is to pay the debts, and only to divide so much of the property of the assignors as is necessary for that purpose, unless it be that the absence of an express direction as to what is to be done with the surplus, and the somewhat limited language of the direction as to division (which I think is amply to be accounted for by the state of circumstances at the time the deed was made) are inconsistent with that idea. Having regard, however, to the fact that the number of scheduled creditors who have signed and sealed this deed at the time were, and are now, carrying on every kind of business, and together constitute a multifarious group, I cannot help feeling satisfied that it is far more reasonable and business-like to suppose that this deed was intended to protect them, and to devote to them so much of the property as was necessary to pay their debts, than to assume that they were buying a business, and intended, through the medium of their trustees, to embark in a new and—as far as several, at all events, of their businesses were concerned—a heterogeneous venture.

I confess that, reading this deed by one's ordinary natural lights, I should not have doubted that it was simply intended to be an assignment in payment of debts, and that there was implied in it, what equity always does imply after the object of the deed is obtained, a trust for the settlors.

FRY, L.J.—The question we have to decide is—What is the true nature of this deed? Is it a deed by which the firm agreed with their creditors upon a certain mode of satisfying their debts, and nothing more? in which case there would plainly be a resulting trust for the benefit of the assignors; or is it a deed by which the firm sold their business to their creditors, or by which they agreed to give up their business by way of satisfaction and accord to their creditors? in either of which two latter cases the creditors, and they alone, are the owners of the business.

Now I have no hesitation in coming to the conclusion that it is a deed of the first kind, and is what is commonly known as a creditors' deed—that is, a deed by which the creditors either extinguish or suspend certain of their rights as creditors in consideration of certain provisions to be made for the payment of their debts.

We start with this, that the deed throughout describes the persons who are of the fourth part as being creditors of the firm, and we find the usual recitals of inability to pay which are common in deeds of that description. We find no recital indicating an intention to sell the business; we find no recital indicating any intention to give up all interest in the business by way of accord and satisfaction of the debts of the several creditors; but we do find the assignment in the usual terms. Then come the words of the declaration of trust, which no doubt are not very felicitous, and which would create some little doubt if they stood by themselves. The declaration is that the trustees "shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions, according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained." Now, I think it is not unduly straining the language of that clause to hold that the words "according to the amount of their several and respective debts" have a double function; that they describe the *ratio* in which the division is to take place, and that they also determine the limit to which the payment is to be made. In other words, you are not paid according to the amount of the debt if you exceed the debt or go beyond the debt. That, I think, is the meaning which may be fairly put on those words to give effect to what, in my judgment, is the plain and obvious intention of the deed in its ordinary scope.

Then comes the clause as to the payment of creditors under £30, which, I think, is very material. It gives the trustees an absolute right and power to pay off all creditors under £30. Does that leave a creditor under £30 still a *cestui que trust* under the deed? If not, it is remarkable that these creditors, being, according to the view of the respondents, purchasers of the business, may be excluded from their share in the business, even although it is turning out a flourishing concern, at the will and discretion of their own trustees. That is a possible arrangement, but it is a highly improbable one. I think, therefore, that the true meaning of the deed is, that it is only a deed for the benefit of the creditors, and consequently there is a resulting trust, and that we must make a declaration accordingly, and remit the

matter to the judge. The order of Kekewich, J., was, "This court doth declare that, upon the true construction of the said indenture, dated the 29th of October, 1876, the plaintiffs have no title to maintain this action." I think it should run in this way, "According to the true construction" of that deed "a trust resulted for the benefit of the assignors."

Appeal allowed.

Solicitors for the appellants, *Trass & Jarmain*, agents for *F. Taylor*, Barrow-in-Furness.

Solicitors for the respondents Smith and the Barrow Hæmatite Co., *Currey, Holland, & Currey.*

Solicitors for the respondent Storey, *Redpath, Holdsworth, & Marshall*, for *C. F. Preston*, Barrow-in-Furness.

From Chan. Div. Jan. 18, 20, 25.

In re UXBRIDGE AND RICKMANSWORTH RAILWAY CO. (*a*.)

Railway company—Parliamentary deposit—Company having no assets—Abandonment of railway—"Ordered to be wound up"—Respective rights of landowners, creditors, Crown, and depositors against deposit—Notice to treat—Compulsory powers—"Injury or loss."

A railway company's private Act of Parliament, passed in 1881, *incorporated the Lands Clauses Consolidation Act,* 1845, *and provided (by section* 34) *that the parliamentary deposit should not be repaid to the depositors if the railway was not completed and opened to the public by a specified time, and (by section* 35) *that, in such case, the deposit should be applicable towards compensating landowners or other persons whose property had been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, or who had been "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company" by that Act, and, if no such compensation was payable, or any balance of the deposit remained after paying such compensation, the deposit or such balance thereof should either be forfeited to the Crown or, in the discretion of the Chancery Division, if the company was insolvent and had been "ordered to be wound up" or a receiver had been appointed, should be paid to such receiver or to the liquidator of the company, or be "otherwise applied as part of the assets of the company for the benefit of the creditors thereof."*

In 1888 *a private Act was passed for the abandonment of the railway in a form commonly used for such Acts, and provided (by section* 4) *that where, before the passing of that Act, any contract had been entered into or notice given by the company for the purchase of land, the company should be released from all liability to complete such purchase, but that full compensation should be made by the company to the owners and occupiers, or other persons interested in such land, for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice. Section* 5 *provided that, "subject to the provisions of this Act, and of section* 35 *of the Act of* 1881, *with respect to compensation to landowners and other persons injured, and for the protection of creditors," the court might and should order the deposit to be repaid to the depositors. Section* 6 *was as follows:—"Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements."*

At the dates of the passing of the private Acts of 1881 *and* 1888 *there was in existence no general Act under which the Chancery Division could order a railway company incorporated after* 1866 *to be wound up in the ordinary way, as apparently contemplated by section* 35 *of the Act of* 1881.

Held (reversing the decision of Stirling, J.), *that the effect of section* 6 *of the Act of* 1888 *was that the company had been "ordered to be wound up" within the meaning of section* 35 *of the Act of* 1881; *that section* 5 *of the Act of* 1888 *took away incidentally any claim to the deposit money which the Crown previously had under section* 35 *of the Act of* 1881; *and, consequently, that, subject to the priority of landowners and other persons injured who might be entitled under section* 35 *to compensation out of the deposit, it was applicable to the payment, as creditors,* pari passu *with other creditors, of any landowners proving injury or damage under section* 4 *of the Act of* 1888; *but*

Held (affirming the decision of Stirling, J.), *that, by the words "in consequence of the compulsory powers of taking property conferred upon the company," in section* 35, *what was meant was, "in consequence of the exercise of" such powers, and that service of a notice to treat did not of itself, or even if a contract resulted, amount to an exercise of compulsory powers, so as to give the landowner any claim in priority under that section against the deposit; and*

Held, lastly, that, even if service of notice to treat were an exercise of compulsory powers, the incurring of costs by a landowner to his solicitors and surveyors by reason of such notice, even though there resulted therefrom an agreement to purchase, which ultimately failed owing to the abandonment, did not amount to such injury or loss as was contemplated by section 35.

Appeal from Stirling, J.

The Uxbridge and Rickmansworth Railway Co. was in 1881 incorporated by its special Act (44 & 45 Vict. c. clxxv.), and was thereby authorized to construct a short line of railway between the places named, and to raise the capital necessary for that purpose, and the said Act also incorporated the Lands Clauses Consolidation Acts.

Sections 34 and 35 of the special Act, which were in the common form then in use for such Acts, are the only sections of that Act which are material to the present case.

Section 34 recited that a sum of £5,838 £3 per cent. Consols had, in pursuance of the statute and standing orders in that behalf, been deposited in court, but that, one of the proposed railways having been struck out, the sum of £5,233 (part of the before-mentioned sum) was therein referred to as "the deposit fund," and provided (*inter alia*) that the said deposit fund should not be paid or transferred to, or on the application of, the depositors, or the majority or survivors of them, unless the railway should be opened for public use within the period limited by the Act.

Section 35 provides that if the railway should not be so opened within the period so limited, "the deposit fund, or as much thereof as shall not have been paid to the depositors, shall be applicable, and after due notice . . . shall be applied, towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid, in such manner and in such proportions as to the Chancery Division of the High Court of Justice in England may seem fit; and if no such compen-

(*a*.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

sation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund, or such portion thereof as may not be required as aforesaid, shall either be forfeited to her Majesty . . . or in the discretion of the said Chancery Division, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof; provided that, until the deposit fund has been repaid to the depositors, or has become otherwise applicable as hereinbefore mentioned, any interest or dividends accruing thereon shall from time to time, and as often as the same shall become payable, be paid to, or on application of, the depositors."

In 1886 the company obtained a further Act, which authorized certain deviations in their line, and the raising of further capital, and also extended the time for the exercise of their compulsory powers.

The company having afterwards determined to abandon the undertaking, the Uxbridge and Rickmansworth Railway Abandonment Act, 1888, was passed which provided that the company should abandon the construction of the railways, and, "except only as is by this Act otherwise expressly provided," should "be absolutely freed and discharged from all obligations with respect to the making and maintaining of the railways."

Section 3 provided that the abandonment should not prejudice or affect the right of the owner or occupier of any land to compensation for damages occasioned by entry for taking levels or setting out the lines of railways, or for loss, damage, or injury sustained by him through any temporary occupation of his land, or through the exercise of any of the powers contained in the Railways Clauses Consolidation Act, 1845, or the Act of 1881, or that of 1886.

Section 4 provides that "where, before the passing of this Act, any contract has been entered into or notice given by the company for the purchase of any land for the purposes of, or in relation to, any portions of the railways or works authorized to be abandoned by this Act, the company shall be released from all liability to purchase or to complete the purchase of any such lands, but notwithstanding full compensation shall be made by the company to the owners and occupiers, or other persons interested in such lands, for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice, and the amount and application of the compensation shall be determined in manner provided by the Lands Clauses Consolidation Act, 1845, as amended by any subsequent Act," &c.

Section 5 provides that: "Subject to the provisions of this Act, and of section 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors, the High Court of Justice may and shall, at any time after the passing of this Act, on application by the depositors mentioned in section 34 of the Act of 1881," order the deposit to be paid or transferred to the depositors, and thereupon the deposit should be paid or transferred accordingly.

Section 6 is as follows:—"Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements."

Section 7 provided that when all the debts, liabilities, and engagements of the company should be paid, satisfied, or discharged, and the affairs of the company should be wound up, the company should be by that Act dissolved, and should thenceforth forthwith wholly cease to exist, and the Acts of 1881 and 1886 should be by that Act repealed.

The above Act was in a form in common use for private Abandonment Acts.

The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), applied only to railway companies authorized by Act of Parliament passed prior to the passing of that Act.

The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31, extended the application of the Act of 1850 to all companies authorized to make railways by Act of Parliament passed before the then present session.

Section 31 of the Act of 1850 and section 31 of the Act of 1867 together, therefore, enabled a shareholder of any company to which those Acts applied to present a winding-up petition under the Companies Act, 1862.

The Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), contained further provisions for the winding up of railway companies authorized to abandon their railways, and section 3 thereof provided that that Act should be construed as one with the Act of 1850, as amended by the Act of 1867; the result, therefore, was that the Act of 1869 applied only to railway companies authorized to make railways before the session in which the Act of 1867 was passed.

Section 199 of the Companies Act, 1862, excepts railway companies from being wound up under it, so that only such railway companies as section 31 of the Act of 1867 expressly provides may be wound up under the Act of 1862 can be so wound up.

There is no general Act providing for the winding up of railway companies incorporated during or since the session of 1867, though the common form in use in private Abandonment Acts passed since that date appears erroneously to assume the existence of some general statutory provisions for the winding up of railway companies without reference to the dates of their incorporation.

After the present company had abandoned the construction of their railway, the depositors applied for payment out to them of the deposited fund, and thereupon inquiries were directed as to any prior claims upon the fund of landowners and creditors, and leave was given for persons interested to apply in chambers for distribution of the fund after the result of the inquiries should be known.

In the result four separate claims, which were stated to be representative cases, were carried in by persons claiming a right to be paid in priority to the depositors, the claimants being a judgment creditor of the company and three landowners. The applications were adjourned into court to be argued as test cases.

The first case was that of John Macintyre, the judgment creditor, who had been the company's engineer, and had got a judgment against them for £2,144 6s. 2d., the amount of his charges for work done and costs. The company had practically no assets.

The second case was that of Benjamin H. W. Way, who was a landowner, and claimed compensation and damages on account of the company's non-completion of the purchase of some land from him at £300 per acre under a provisional agreement between himself and the promoters of the company, confirmed by a subsequent agreement between himself and the company, and also under a notice from the company that they required to purchase 15a. 2r. 13p. of his land. Mr. Way claimed the difference between the £300 an acre and the present market value of the land, and also his costs and charges incurred to his solicitors and surveyor consequent upon the said agreements and notice.

The third case was that of Grainge, who was also a landowner, who had had notice to treat served on him by the company under section 18 of the Lands Clauses Consolidation Act, 1845, and had accordingly delivered a claim for a fixed sum as purchase-money and compensation. The company had done nothing further, and Grainge now claimed for costs and charges incurred by

him to his solicitors and surveyor consequent upon the notice to treat.

The fourth case was that of Messrs. Harman, who had been served by the company with notice to treat in respect of land of which they were co-owners, and had delivered particulars of their claim. As the company failed to accede to their claim, or to take any steps to summon a jury to assess the compensation, Messrs. Harman brought an action against them in the Queen's Bench Division for a *mandamus* to compel the company to take the necessary steps to have the compensation assessed, but the action was compromised, and the company agreed to purchase the lands at a fixed price, and to pay Messrs. Harman a sum for their solicitors' preliminary charges, the costs of the action and motion, a sum for surveyor's charges, and their solicitors' costs of the agreement. The company never completed the purchase, and Messrs. Harman now claimed for compensation, and for costs incurred to their solicitors and surveyor consequent upon the agreement.

Stirling, J., held in Macintyre's case that the company had not "been ordered to be wound up" within the meaning of section 35 of the company's 1881 Act, and, therefore, the deposit was not applicable for the benefit of the creditors.

In Grainge's and Harman's cases he held that the mere service of a notice to treat did not amount to an exercise of compulsory powers within the special or general Acts, that there had been, in fact, no such exercise in these cases, and that, therefore, the claimants had not been "subjected to injury or loss in consequence of the compulsory powers conferred upon the company" by the special Act of 1881, and that section 4 of the Abandonment Act of 1888 did not entitle the claimants to be paid out of the deposited fund, but that their remedy was merely against the company.

In Way's case he held that the depositors had no claim to a return of the deposit, which, subject to being applied for compensation in proper cases, was liable to be forfeited to the Crown, and that, no winding-up order having been made, it was not liable to be applied as a part of the company's assets for the benefit of their creditors; that the remedy of the applicants was only against the assets of the company, and section 4 gave them no claim against the deposited fund.

The four claimants appealed.

Hastings, Q.C., and *Farwell*, for Macintyre.—Our client is entitled, concurrently with other creditors of the company, to payment out of the deposit, of his judgment debt and costs, subject to prior payment of any sums found due, under section 35 of the company' special Act of 1881, to landowners or other persons injured by the construction or abandonment of the railway, or in consequence of the compulsory powers of the company. The Abandonment Act of 1888 provides what is in effect a statutory order to wind up the company, and therefore the deposit may be applied as part of the assets of the company for the benefit of the creditors thereof under section 35 of the company's special Act of 1881. Otherwise what could have been the object of section 6 of the Act of 1888? In *In re Birmingham and Lichfield Junction Railway Co.*, 29 W. R. 908, 18 Ch. D. 155, on which Stirling, J., relied, there was nothing of that kind. The two Acts here deal with the same subject-matter, and must be read as one. Where there are earlier Acts relating to the same subject-matter the later Acts should be construed by the light of the earlier: Maxwell on Statutes, 2nd ed., p. 40. Looked at thus, the Legislature must have intended by the later Act to supply the winding-up order contemplated in the earlier, the later provision being otherwise meaningless. At the time the Act of 1881 was passed there was no statutory provision for the winding up of railway companies incorporated during or since the session of 1867, and this fact must be taken to have been within the knowledge of the Legislature, who consequently provided for it in the case of this company by section 6 of the Act of 1888. The deposit was specially intended for the protection of landowners and meritorious creditors like Mr. Macintyre, and such creditors are entitled to be paid in priority to landowners claiming under section 4 of the Abandonment Act: *In re Bradford Tramways Co.*, 25 W. R. 88, 4 Ch. D. 18.

Hastings, Q.C., and *Gaselee*, for Way.—Way claims compensation and damages, under the Act of 1888, for alteration of his land, and his solicitors' and surveyor's costs incurred in consequence of the agreement to take his land. The amount claimed is payable out of the deposit. A fourth of the line was to pass through Way's land, and when the Bill was before Parliament the promoters agreed to pay him £300 an acre for the land required belonging to him, and he accordingly supported the Bill, and it was passed. The agreement was confirmed by the company. They afterwards served notice on Way that they required to take about fifteen and a half acres of his land, and thereupon abstracts of his title were delivered, and other expenses incurred, and the relation of vendor and purchaser was thus constituted. Then section 4 of the Abandonment Act released the company from their liability to complete the purchase, but provided that they should pay compensation for "injury or damage sustained" "by reason of the purchase not being completed pursuant to the contract or notice." The company having no assets, we are entitled, therefore, to be paid out of the deposit. Section 5 makes the repayment of the fund to the depositors "subject to the provisions of this Act" (that includes section 4) "and of section 35 of the Act of 1881 with respect to compensation to landowners and other persons injured." Therefore, if the company fail to compensate the landowners, the deposit becomes liable to their claims.

S. B. L. Druce, for Grainge.—Grainge claims for costs incurred in consequence of the notice to treat served on him. Such costs are payable out of the deposit. Notice to treat is the first step in the exercise of the compulsory powers. "Compulsory powers" mean powers to be put into operation for the purpose of taking lands otherwise than by agreement. [*Lopes*, L.J.—The effect of the notice to treat is simply to put the landowner into the position of a vendor whether he likes it or not.] The assumption that notice to treat is an exercise of the compulsory powers runs through the whole case of *Loosemoore* v. *Tiverton and North Devon Railway Co.*, 31 W. R. 130, 32 W. R. 929, 22 Ch. D. 25, 9 App. Cas. 480, so that I do not rely so much on the actual judgments there given as on the entire case. *Guest* v. *Poole and Bournemouth Railway Co.*, 18 W. R. 836, L. R. 5 C. P. 553, is distinguishable, for even accepting the general proposition that notice to treat is not necessarily an exercise of the compulsory powers, it must have been so in the present case, and *Guest's case*, therefore, does not apply. But that notice under section 18 of the Lands Clauses Consolidation Act, 1845, is an exercise of the compulsory powers appears by the case of *Marquis of Salisbury* v. *Great Northern Railway Co.*, 17 Q. B. 840. Grainge has sustained damage by the non-completion, of which damage the costs incurred are the measure. He has a further claim to come in, under section 35, as a landowner who has been subjected to loss in consequence of the compulsory powers conferred on the company. In the Lands Clauses Consolidation Act, 1845, service of notice to treat is provided for by section 18, which comes under the heading of "Purchase of Lands otherwise than by Agreement".

and that is equivalent in the Act to compulsory purchase.

Grosvenor Woods, for Messrs. Harman. — Messrs. Harman had a contract with the company to sell them their property at a fixed price. That, of course, is rescinded by section 4 of the Act of 1888. But *In re Harman and Uxbridge and Rickmansworth Railway Co.*, 31 W. R. 857, 24 Ch. D. 720, decided that Messrs. Harman had made out a good title. They therefore ask for their surveyor's and solicitor's costs, and the costs incurred for the purpose of getting the *mandamus* against the company to have the compensation assessed, and other costs. I adopt Mr. Hastings' arguments upon section 4. Upon section 5, I avail myself of the arguments of Mr. Druce. Messrs. Harman have sustained loss in consequence of the compulsory powers of the company, as, but for such powers, they should not have entered into the agreement, or taken steps to obtain the *mandamus*. Section 35 does not say "subjected to injury or loss in consequence of 'the exercise of' the compulsory powers," but "in consequence of the compulsory powers." That section ought to be construed liberally in favour of a landowner who has suffered loss in consequence of the compulsory powers. What was decided in *Guest* v. *Poole and Bournemouth Railway Co.* was that notice to treat was not necessarily "an exercise of" the compulsory powers, so that that case need not be overruled in order to decide in favour of Messrs. Harman.

Phipson Beale, Q.C., and *Ingle Joyce*, for the depositors.—The company's creditors have no claim against the deposit. The decision in *Guest* v. *Poole and Bournemouth Railway Co.* was upon the ground that, though the company, not having fulfilled the condition precedent prescribed by the Legislature, could not have enforced their notice to treat, yet, as against the landowner who had no means of knowing whether the condition precedent had been fulfilled or not, the company, having served the notice to treat, could not be heard to contend that it had no effect. Here section 35 of the company's special Act of 1881 provides for compensation being given, first, to landowners whose property has been interfered with, or made less valuable by the construction or abandonment of the line; and, secondly, to persons who have been subjected to injury or loss in consequence of the compulsory powers of taking land conferred on the company by the Act. That must mean, as held by Stirling, J., "in consequence of the exercise," and not "in consequence of the existence," of those powers. A special Act was necessary to enable the company to be wound up, as in the case of the *Potteries, Shrewsbury, and North Wales Railway Co.*, 32 W. R. 300, 25 Ch. D. 251, 254. There is nothing in the Abandonment Act here to make the deposit liable to creditors. *In re Bradford Tramways Co.* is distinguishable. In *Marquis of Salisbury* v. *Great Northern Railway Co.* all that was decided was that notice to treat, places the landowner and the company in the position of vendor and purchaser. Here, Macintyre is merely a general creditor, and, as such, can only claim under section 35, and that is subject to the condition that the company must have been ordered to be wound up, or a receiver appointed. It has, accordingly, been contended that the company has been ordered to be wound up by section 6 of the Abandonment Act of 1888, and that that is a compliance with the condition in section 35 of the earlier Act. But section 35, having regard to the context, clearly means "ordered by the court to be wound up" in the usual manner, and with the usual incidents, of winding up by the court under the Companies Act, 1862. The 6th section of the Abandonment Act of 1888 merely says, "The company shall proceed to wind up their affairs." That is not such a compulsory winding-up order as is required. Section 5 of the Abandonment Act of 1888 cannot be intended to extend the benefit of the deposit to creditors who could not come in under section 35 of the Act of 1881, and merely preserves rights existing in virtue of that section, or of other sections of the Act of 1888. If the Legislature had meant section 6 to be a compulsory winding-up order, particular directions would have been given as to the manner of carrying out the winding up.

Cur. adv. vult.

Jan. 25.—COTTON, L.J.—These are four appeals which raise, though in a somewhat different way as to one or two of them, the question as to what ought to be done with regard to the fund which there is in court, and which was deposited there under the parliamentary rules when application was made for the Act to incorporate the Uxbridge and Rickmansworth Railway Co. The railway has now been abandoned, and the value of its assets seems to be five shillings—or to have been so some time ago—but that we have not now to deal with.

In the year 1888 an Act was obtained for the abandonment of the railway, and the question turns really on section 35 of the Act of 1881 and the sections to which I shall presently refer of the Act of 1888.

Under the Act of 1881 there was a parliamentary deposit which is referred to in section 34, and section 35 directed what was to be done with that money. It was not, of course, in any way assets of the company, but only a deposit which was required to be made when application was made to Parliament to give this company parliamentary powers; and that section did direct what was to be done with the deposit in the event of the company not carrying its undertaking into execution. At the time when the Act of 1881 was passed there had been an Act or Acts of Parliament enacting that railway companies who had been authorized to abandon their railway might have applications for a winding-up order made against them, but before the Act of 1881 was passed the Board of Trade had come to the conclusion not to grant the necessary certificate to enable application to be made for a winding-up order as regards companies which were formed after 1867, I think, or, at any rate, before the Act of 1881. Whether they were right or wrong we have not to consider, but in fact it was known at the time the Act of 1881 was passed, and still remained the fact at the time the Act of 1888 was passed, that the Board of Trade had come to that conclusion.

Now, what we have to determine is, whether or not, independently of the right to compensation in terms given to landowners by section 35, there is any claim maintainable by the company's creditors as against this deposit? Section 5 of the Act of 1888 I think is material. [His lordship read section 5 of the Act of 1888, and proceeded:—] This Act does interfere in some way with the provisions of section 35, because section 35, after providing that compensation out of the fund shall be made to landowners injured by the action taken by the company under their compulsory powers, did direct an alternative—namely, that what remained after making provision for that compensation should either be forfeited to the Crown, or, in the alternative, if a receiver had been appointed or a winding-up order had been made, the Chancery Division might apply it for the purpose of paying the creditors by payment to the receiver or to the liquidator, or otherwise apply it as assets of the company for the benefit of the creditors. Those are the terms of section 35, but I think I need not read the whole of that section in detail. It first provides for compensation to be paid out of the deposited fund for compensating any landowner whose property has been interfered with, or who has been subject to injury or loss in consequence of the compulsory powers for taking property. Then when that is done, and after that compensation is made, what

remains shall be forfeited to her Majesty, or at the option of the Court of Chancery if the company is insolvent. I had better read this part in detail: "If the company is insolvent, and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company." Undoubtedly up to that time, unless there is an order so to apply it, the deposit is not assets of the company, and all the claims creditors can have must be under the special powers of the Act, they not having, apart from the Act, any claim as against the deposit, although they are creditors of the company. Then, practically, it comes to this, What is the effect of the Act of 1888? Does it contain a provision ordering the company to be wound up? Undoubtedly section 35 does contemplate a winding up in the ordinary way by an order of the court when an application is made under the winding-up Act, because there is a reference to the liquidator, and that points to someone being appointed under a particular winding-up order in order to distribute the assets of the company. But is the section confined to that? If we can find anything in the Act of 1888 which ought to be construed as an order to wind up the company, although it is not that kind of order to wind-up which is *primâ facie* contemplated by section 35 of the Act of 1881, yet, in my opinion, it would be wrong for us to hold that that does not come within the provisions of the Act of 1881, and is, therefore, not an order to wind up the company which enables us to say that the company has been ordered to be wound up. I think it would be wrong, by deciding in that way, to deprive the creditors of that which *primâ facie* Parliament intended to give them —namely, a claim against the deposit as assets of the company. I have already shown that section 5 of the Act of 1888 does interfere with the claim of the Crown. I think Stirling, J., considered that it did not do so; but undoubtedly it does, because when the provisions of that Act and of section 35 of the Act of 1881 for the protection of creditors have been complied with, it says that, subject to those provisions, the court "may and shall" order what remains of this fund, after paying compensation to the landowners, to be handed over to the depositors, thus leaving no room for any claim by the Crown. There the depositors do get a benefit. Do they get that benefit without making provision for the creditors of the company? That is answered by the words in section 35 with respect to compensation to landowners and other persons injured, and providing for the protection of creditors, and it is subject only to that being duly performed that the depositors can claim. There is in section 5 an express reference to the protection of the creditors, and, of course, that means payment to them of that which *primâ facie* section 35 of the Act of 1881 gives them, and it is only subject to that payment that the depositors have a right to this fund.

But it would have been strange if, when Parliament knew, at the time the Act of 1888 was passed, that without special legislation no petition could be presented under the Companies Act, 1862 so as to get a winding-up order against a railway company, there had not been in this Act something which would enable the creditors to get the benefit of that provision without a petition being presented and order made upon it —if there had not been, in fact, something equivalent to an order for the winding up of the company. Then is not section 6 something which enables us, and requires us, to say that the company has been ordered to be wound up? "Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements." In my opinion that would not enable the company, or a creditor of the company, to present a petition under the Companies Act, 1862, for obtaining the winding-up order which is pointed at and, *primâ facie*, contemplated by section 35; but, in my opinion, that is a section which enables creditors of the company to say that the company has been ordered to be wound up. It is very true it does not say in terms that the company shall be wound up, but it does say that the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements. That is not in terms an order that the company shall be wound up; but, in my opinion, it would be too narrow a construction to put upon this section, to make a distinction between that and an order or an enactment for the company to be wound up, and to say: "No, it is not an order for the company to be wound up; it is only an enactment that the company shall wind up its affairs." It orders the company to do that which, if it were wound up under the Companies Act, 1862, and a liquidator were appointed, would be done by the liquidator. But here it is left to the directors of the company to do that which they are ordered to do, and which would be what would have to be done by the liquidator if the company were wound up by a common order. In my opinion, having regard to what must be taken to have been in the minds of the Legislature at the time this Act was passed, seeing that they recognize as still existing in section 35 of the Act of 1881 some provision for the protection of creditors, we ought to give to this section (section 6) of the Act of 1888 the meaning which I give to it—that there is a protection for the creditors in section 35 of the Act of 1881, but which exists only if the company is ordered to be wound up, as has in fact been provided for by section 6.

One must remember that at this time, without special parliamentary authority, there could be no winding up under the Act of 1862 by any order, because, as I say, the Board of Trade had refused to give, as regards railway companies incorporated at the time of this company's incorporation, any such certificate as would enable application to be made for a winding-up order. In my opinion, therefore, the proper conclusion to arrive at—not forcing the meaning of section 6 at all, but giving to it what, under the circumstances known to Parliament, is a proper and reasonable construction—is to treat it as an order made by Parliament, and not by the Court of Chancery, that this company should be wound up.

Therefore, in my opinion, the provisions of section 35 do apply, and the protection for the creditors exists which would not exist if there was no order to wind up, and none could be obtained. It does exist here, because in my opinion the company has been ordered to be wound up, and there is, therefore, power for the Court of Chancery, which I think it ought to exercise, to order that this sum shall be applied in satisfaction of the creditors of the railway company.

Of course there will be a question here arising as to the different claims which we have now before us, because some of them, it is said, will have priority over others. As I stated before, compensation under section 35 to landowners must be paid before the fund is so cleared that it may in the discretion of the Court of Chancery, under section 35 of the Act of 1881, be applied in payment of creditors.

Now let us look at these different claims. The first is Macintyre's claim. He was simply a creditor of the company, and not in any way a landowner. He had obtained judgment, and, that being so, it is not necessary for us to say anything about the rights of a meritorious creditor. He is a creditor who had obtained judgment against the company. He has no claim under the first part of section 35, but in my opinion he will come in under the latter part of the section as a creditor against

this fund, with the other creditors who are entitled (after provision has been made for proper compensation to landowners), to take their debts rateably out of what remains of this fund.

Then we come to the other claimants, and I think I may say practically that the other claimants appear to be creditors of the company in respect of any loss or damage that they may have sustained either by reason of the contracts entered into by the company with them, or in consequence of any notice to treat which has been given to them. I need not read the words, but section 4 of the Act of 1888 does say that compensation is to be made to the owners and occupiers or other persons interested in the land for any injury or damage sustained by them by reason of the purchase not being completed pursuant to the contract or notice—that is, the notice to treat. Therefore these claimants must have a claim as creditors in respect of any loss they have sustained in consequence of the contract not being completed, or in consequence of notice to treat having been served upon them. But it was urged that they were entitled to something more than that; because they say "we come under the first part of section 35, which gives us a right to be paid in priority out of this fund, before it comes to be divided between the creditors of the company." The only thing they rely upon is really this notice to treat, because nothing was done in exercise of the compulsory powers—if there was an exercise of the compulsory powers by the railway company—beyond notice to treat. In my opinion it cannot be said that a mere notice to treat is an exercise of the compulsory powers.

It was argued that it was not necessary that there should be any exercise of compulsory powers, the words being, "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company." I cannot take that view. The mere fact that compulsory powers have been conferred upon the company is, I think, not even what is here referred to. Here, in the first place, we have compensation given to "any landowners or other persons whose property has been interfered with, or otherwise rendered less valuable by commencement, construction, or abandonment of the railway, or any portion thereof." That does not mean because compulsory powers have been granted, but because there has been an exercise of them; and I think, as regards what follows, that it would be wrong to say that "in consequence of the compulsory powers" means simply in consequence of the existence of those compulsory powers. If that were so, directly the Act was passed powers would have been granted, and compensation might therefore be claimed, though the powers could not be exercised until the capital had been subscribed. In my opinion it would be quite wrong to hold that if any loss or damage had been incurred, a landowner could come and say, "This loss was thrown upon me because the Act of Parliament was passed." That is not it. In my opinion there must be some actual exercise of the compulsory powers to enable landowners to come in under section 35. One must remember, as I have said before, that this deposit fund is in no way an asset of the company. The only effect of the section is that certain rights are given to certain persons as against the depositors and against the fund which they deposit.

Then has there been an exercise of the compulsory powers? In my opinion there has not. It is very true the power to give notice to treat is included in that bunch of clauses in the Lands Clauses Consolidation Act, 1845, which are headed, "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then there follows the clause which provides for giving the notice to treat. But, although that is brought within that group of clauses, there may never be any step taken as regards the exercise of compulsory powers, because, if the company have not got their capital subscribed, they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely the beginning of an agreement with the landowner, and intended to ascertain whether he is willing to make the contract with the railway company, the company thereby saying, in effect, "We want that land—will you sell it us?" In my opinion it cannot be said that that alone amounts to an exercise of compulsory powers. We are not deciding this for the first time, because there is a decision which was given in 1870 in the case of *Guest* v. *The Poole and Bournemouth Railway Co.* that notice to treat was not an exercise of the compulsory powers. It was contended that that was not necessary to the decision of the case—that it was only that the company could not give the notice—but all the judges (and they were judges of considerable authority) in their judgments say that serving the notice was not necessarily an exercise of the compulsory powers. And in the events which have happened here it is shown not to have been an exercise of the compulsory powers. It is very true it is a step towards the exercise of the compulsory powers—that is to say, the compulsory powers, as regards the purchase of land, cannot be exercised until the notice to treat has been given, but neither can they be exercised unless the capital has been subscribed. Subscribing the capital is not an exercise of the compulsory powers, although it is a necessary step towards the exercise of those powers; and, similarly, a notice to treat is not an exercise of the compulsory powers, though it is a step that must be taken before the compulsory powers can be exercised and put into force. So, in my opinion, all these persons here—the three separate claimants—can only come in under section 4, and cannot come in at all except so far as they can show, just as the judgment creditor Macintyre can show, that they have suffered loss. He is simply a creditor, and they can only come in as creditors if they can show that they have suffered loss in consequence of the notice to treat, or in consequence of an agreement to purchase not having been completed by the railway company.

I differ, therefore, from the judgment of Stirling, J., in the opinion which he has expressed upon this part of the case. In my opinion the construction I have adopted is the right construction of these Acts of Parliament. It is very true—and I ought to have mentioned it before—it would have been very much plainer if the Legislature had said in the Act of 1888: "After this any creditor or shareholder may present a petition without any certificate from the Board of Trade." But Acts of Parliament are not always as plain as they might be, and the true construction of this Act is, in my opinion, what I have expressed.

I think, therefore, we ought to make a declaration letting all these persons come in—the judgment creditor and the others—the judgment creditor as a creditor of the company by reason of his judgment; the other persons as having a right, upon showing injury or damage within section 4, to become creditors of the company, provision then being made for payment of creditors of the company out of the surplus of this fund.

In my opinion, therefore, the appeals should succeed.

LINDLEY, L.J.—The case before us raises two questions—first of all, whether these claimants are to be paid out of the money which is in court, and represents what is called the parliamentary deposit; and, secondly, supposing they are to be paid, whether they, or any of them, are entitled to any priority of payment over each other, or over other persons who have not made claims on the fund. Both these questions turn upon the construction of two Acts of Parliament, one of which, to say the least of it, is anything but clear. The parliamentary deposit is a fund which does not belong to the company.

The creditors of the company have no more right to be paid out of the deposit than any other creditors, except by Act of Parliament. There is no *à priori* right on the part of the creditors of the company to be paid out of money provided by the depositors, and they must look to the words of the statute or statutes upon which they rely to give them any claim at all upon that fund. The mere fact that they are creditors of the company will not do. That is not *ad rem*.

The Acts before us, to which the Lord Justice has adverted, do give them certain rights, and the question is, what rights? Under the first Act of 1881 the parliamentary deposit is applicable in this way. First of all, those landowners and persons who have really sustained injury by reason of the compulsory powers, or the works done by the company, were entitled to be paid in priority to everybody else. That is under section 35, which I will not read at present. Then, subject to that, the rest of the fund was dealt with in this way. It was in the discretion of the court to hand it over to the Crown, but if the court was of opinion that it would not be just to hand it over to the Crown, then the court could, if the company was insolvent and ordered to be wound up, apply the deposit in payment of the creditors of the company. The governing idea there was this, that, subject to the payment of those who were entitled to priority, the balance of the fund was to be handed over to the Crown, or to the creditors of the company if the company was insolvent. That is the governing idea. The language used is, "If the company is insolvent and has been ordered to be wound up"—which was one method of disposing of the assets of insolvent companies. But there can be no question that when those words were used, what was contemplated by anybody would be an order to wind up, in the ordinary sense of that expression. There was only one sort of order familiar to lawyers or to draftsmen of Acts of Parliament, and that was an order made by the Chancery Division under the Companies Act, 1862. It was overlooked that such an order could not be made in the case of a railway company incorporated after 1866 without a special Act of Parliament, and when we come to 1888, when the Legislature passed an Act enabling this railway company to abandon this undertaking, the same thing was overlooked. Now in 1888 the position of affairs was this. The railway company was not a registered company under the Companies Act, 1862—whether it could be is well known to be one of those thorny points which have not been decided. It was not registered, anyhow, and, not being registered, there was no possible procedure by which it could be wound up at all. It could not present a petition under the Companies Act, 1862—no creditor could do it—no shareholder could do it—it could not be done. Now in 1888 the Legislature was in this position—it intended the affairs of this company to be wound up, but overlooked the fact that it could not be done. It orders it to proceed to wind up its affairs.

Now, what does that mean? We are driven to this, that we must either say that this means nothing, or that it is a legislative order to wind-up substituted for the order referred to in section 35. There is no alternative. We must either say that the Act of Parliament is meaningless and utterly useless and not workable; or we must say that this is a statutory order to wind-up, substituted for the one contemplated by the previous Act. The latter, I do not hesitate to say, under those circumstances, is the true construction and meaning of it. In other words, when we come to look at these two Acts of Parliament, and work them together, as we must, we must hold that this company has been ordered to be wound up. It is insolvent enough, beyond all doubt, and the time has come, and the contingency has occurred, for paying the creditors of the company out of the deposit.

As I understand the judgment of Stirling, J., he seemed to be under the impression that it was still in the discretion of the judge to hand over the balance of this fund, after paying those who were entitled in priority to it, to the Crown. I cannot say that that is so on reading the section, because section 5 of the Act of 1888 does not say merely "subject to the provisions of section 35 of the Act of 1881," but it says that, subject to the provisions of that section "with respect to compensation to landowners and other persons injured, and for the protection of creditors," that fund is to go to the depositors. That seems to me to exclude the Crown entirely. Therefore, the net result seems to me to be this—that this parliamentary deposit is to be applied in the first place in payment of those persons who are entitled to priority under section 35 of the Act of 1881, and subject to that, it goes to the creditors of the company. That lets in the whole of these claimants. They were all excluded by Stirling, J., but I am of opinion that they should all come in.

Now I pass to the second question, whether any of them are entitled to priority. They are creditors of the company, and are entitled to come in and claim against this particular fund—which is not an asset of the company—by the joint operation of sections 4 and 5 of the Act of 1888 to which the Lord Justice has alluded. But for those sections they could not come in at all. Now are they entitled to priority? Section 4 gives them no title at all to priority. The sections together give them a title to be paid as creditors *pari passu* with other creditors. To make out their claim to priority, they must make out that they are amongst the class of people entitled to priority under section 35 of the Act of 1881. The persons so entitled are formed into two classes—first of all, landowners and other persons whose property has been interfered with, or otherwise rendered of less value by the commencement, construction, or abandonment of the railway. None of these claimants come under that class. But the three landowner claimants say they come under the next class, who are thus described, "or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid." I do not think they do. In the first place the language is peculiar, and I think it is rather forcing the words to say that any of these gentlemen have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company. I think that is straining the language. But when we look upon the interpretation which has been put upon the expression "compulsory powers" in *Guest* v. *Poole and Bournemouth Railway Co.*, and acted upon invariably and without hesitation ever since, it appears to me that these gentlemen are excluded from the benefit conferred upon that class of people by the section, and I do not think they can make out satisfactorily that they do come within the words "persons subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act."

That being so, the net result is this—that they are all entitled to claim against this fund as creditors, but subject to the prior rights of such persons, if any, as may be entitled to priority under section 35.

LOPES, L.J.—I have had an opportunity of talking this case over with the rest of the court. I entirely agree with what has been said, and I have only one observation to make, which is this—it is an observation with regard to priority of landowners—that, in my opinion, even if notice to treat is an exercise of the compulsory powers, which I do not think it is, I do not think any injury or loss has accrued to any of these claimants in consequence of the notice to treat. I quite

agree with the rest of the court that this appeal should be allowed.

Cotton, L.J.—I ought to say that I concur with what Lopes, L.J., has said. I had intended to mention it in my own judgment, but had forgotten it in dealing with more important matters.

Lindley, L.J., also expressed his concurrence.

Appeal allowed.

Solicitors for the appellants, *Burchell & Co.; Thompson & Groom; Gamlen & Burdett*, for *Woodbridge & Sons*, Uxbridge; *Paterson & Sons*, for *W. Garner*, Uxbridge.

Solicitors for the respondents, *Williamson, Hill, & Co.*

From Q. B. Div. April 24.

London Steamship Owners' Mutual Insurance Association *v.* Grampian Steamship Co. (*a.*)

Marine insurance—Lloyd's "running-down clause"—Further "protecting clause"—"Liability to pay"—Collision where both ships to blame.

The defendants insured their ship at Lloyds on a policy containing a running-down clause to the effect that the underwriters should pay three-fourths of any sum which the shipowners might become liable to pay, and might pay, to the owners of any other vessel for damage caused by a collision. They then insured with the plaintiffs against damage to any other vessel, so far as not covered by the running-down clause in the Lloyd's policy. Subsequently the defendants' ship came into collision with another vessel, both being to blame. Both vessels were injured, but the damage done to the defendants' ship exceeded that sustained by the other. The owners of the other ship therefore paid to the defendants the difference between half the damage sustained by their ship and half the damage sustained by the defendants' ship.

Held (affirming the decision of the divisional court, ante, *p.* 190, 24 *Q. B. D.* 32), *that the defendants had not incurred any liability to pay to the owners of the other ship half the damage sustained by her, and therefore that they could not recover a proportion of that sum from the plaintiffs under the policy.*

Appeal from the decision of a Divisional Court (Mathew and Wills, JJ.), reported *ante*, p. 190, 24 Q. B. D. 32.

The facts are fully set out in the report in the court below.

The defendants, the owners of the steamship *Balnacraig*, claimed to retain against the plaintiffs, a mutual marine insurance association, certain moneys which they had received to their use, under the following circumstances, which were stated in a special case for the opinion of the court:—

The Balnacraig was insured by a Lloyd's policy with a running-down clause in the following terms:—"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, any sum or sums not exceeding the value of the said vessel hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the said ship." The defendants then insured *The Balnacraig* with the plaintiffs against loss or damage to any other vessel so far as such loss or damage was not covered by the running-down clause in the Lloyd's policy.

On the 10th of December, 1886, *The Balnacraig* came into collision with *The Karo*. Both vessels were to blame, and both sustained damage, but the damage sustained by *The Balnacraig* largely exceeded that done to *The Karo*. In accordance with the admiralty rule, the owners of *The Karo* paid to the defendants a sum equal to the difference between half the amount of the damage sustained by *The Karo* and half the amount of the damage sustained by *The Balnacraig*, that being the sum for which the defendants, as owners of *The Balnacraig*, would have been entitled to issue a monition if a decree of the Admiralty Division had been obtained. The defendants alleged that they were entitled to recover from the plaintiffs under the policy their proportion of half the damage done to *The Karo*, since, as they contended, they had become liable to pay it, although it was in fact deducted from the amount paid to them by the owners of *The Karo*. The Divisional Court held that half the amount of damage to *The Karo* was not a sum which the defendants had become liable to pay, and had paid, within the meaning of the running-down clause, and, therefore, that they could not recover a proportion of it from the plaintiffs.

The defendants appealed.

Barnes, Q.C., and *Arthur Russell*, for the appellants.—The defendants must be considered as having paid to the owners of *The Karo* half the damage sustained by that vessel. The decision in *The Khedive* (*Stoomvart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*), 31 W. R. 249, 7 App. Cas. 795, had no reference to the rights and liabilities of underwriters.

Cohen, Q.C., and *B. A. Cohen*, for the respondents, were not called upon to argue.

Lord Esher, M.R.—The sole question in this case is as to the meaning and application of the Lloyd's policy to the state of things which has happened. It is true that the decision in *The Khedive* was not directed to the rights of underwriters under any policy, but the House of Lords in that case laid down a principle as to the liability of shipowners when two ships come into collision and both are to blame which is applicable here. They said that when two vessels came into collision, both being injured and both to blame, only one liability resulted, and that that must be determined by the Admiralty rule. That is to say, the amount of damage done to each ship is to be first ascertained. If those amounts are equal they cancel each other, but if one is larger than the other, then the owner of the vessel which has sustained least damage has to pay to the owner of the vessel which has sustained most damage the difference between half the damage sustained by the vessel which has sustained least damage, and half the damage sustained by the vessel which has sustained most damage. There is only one liability and only one compulsory payment, and it is ascertained by a simple process of arithmetic as soon as the amounts of damage have been ascertained, whether they have been ascertained in the same or in different inquiries. Now, applying that law to the present case, it is plain that there was neither any liability to pay nor any actual payment by the owners of *The Balnacraig* to which the running-down clause can apply. The underwriters undertook to make good to the defendants any sum which they might have to pay to the owners of another vessel. There has been no such payment and no such liability here, and therefore the owners of *The Balnacraig* cannot recover against the underwriters.

Fry, L.J.—I agree. The suggestion of the appellants is that they became liable to pay to the

(*a.*) Reported by A. P. Percival Kemp, Esq., Barrister-at-Law.

owners of *The Karo* half the damage sustained by that vessel. That is, I think, the very opposite of the principle laid down in *The Khedive*. It was there determined that there was only one liability in such cases—namely, to pay the difference between the respective halves of damage. Therefore, in this case, the defendants have not been under a liability to pay, nor have they paid, and there is nothing to which the policy can attach. The Divisional Court were therefore right in their conclusion, and this appeal must be dismissed.

Lopes, L.J.—I agree.

Solicitors for the appellants, *Waltons, Bubb, & Johnson.*

Solicitors for the respondents, *Parker, Garrett, & Parker.*

High Court of Justice.

Chan. Div. North, J. — May 16.

In re Layton, Steele, & Co. (*a.*)

Solicitor — Costs — Taxation after payment — Special circumstances—Delivery of bill—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

Solicitors to trustees delivered to their clients in the years 1883 *and* 1884 *bills of costs for work done for them as trustees, which were paid without taxation, the solicitors not having informed their clients that, if administration proceedings were subsequently brought and the bills were moderated in those proceedings, the trustees would have to pay out of their own pockets the amounts by which the bills were reduced on moderation. The solicitors also delivered to the manager of an asylum carried on by the trustees as part of the trust estate, other bills of costs for work done for the trustees. It was admitted that the bills delivered to the trustees were honest, and not excessive.*

Held, as to the bills paid without taxation, that the fact of the solicitors not having given such information to their clients was not a special circumstance justifying taxation after payment; and, as to the bills delivered to the manager of the asylum, that delivery to him was not, in the absence of proof that he was authorized to receive bills for the trustees, delivery to the trustees.

In re F———, 16 *W. R.* 749, *distinguished.*

Adjourned summons.

This was a summons by the trustees of the will of Dr. Harold Owen, asking that Messrs. Layton, Steele, & Co., who had formerly acted as their solicitors, might be ordered to deliver to them all such bills of costs as had not been already delivered, and that those bills and all other bills of costs which had already been delivered to them might be taxed.

Dr. Harold Owen, who died in 1883, was the proprietor of a private lunatic asylum, and the trustees, acting under a power contained in his will, had since carried on the business of the asylum, which was under the superintendence of a manager. Messrs. Layton, Steele, & Co. had acted as solicitors to the trustees from 1883 to July, 1889, when the trustees changed their solicitors; and the costs in question were for work done by the trustees during that period.

Several bills of costs had been delivered by Messrs. Layton, Steele, & Co. The three earliest in date were delivered to the trustees in the years 1883 and 1884, and had been paid without having been taxed; the solicitors, when delivering these bills, had not informed the trustees that if the bills were paid without being taxed, then, in the event of subsequent administration proceedings, if these bills should be moderated by the chief clerk in such proceedings, the trustees would have to pay out of their own pockets the amount by which the bills were reduced on moderation. But it was admitted that the three bills were fair and did not contain excessive charges. Of the subsequent bills, which had not been either taxed or paid, four had been delivered to the manager of the asylum instead of the trustees, who alleged that the bills had not been delivered to them.

The evidence with respect to the duties of the manager of the asylum did not show that he had any authority to accept the delivery of solicitors' bills as agent for the trustees.

C. Church, for the trustees.—With regard to the three bills delivered in 1883 and 1884, which had been paid without taxation, it was the duty of the solicitors to inform their clients, the trustees, that if they paid the bills without having them taxed, then, if administration proceedings should be subsequently commenced and the bills were moderated at the instance of the *cestui que trust*, the trustees would have to pay out of their own pockets the amount taken off the bills. The solicitors, however, did not fulfil this duty to their clients, and this is a special circumstance justifying the taxation of these bills after payment. This is supported by *In re F*———, 16 W. R. 749, in which Lord Romilly considered the continuance of the relation of solicitor and client after the delivery of the bill a special circumstance, and referred the bill for taxation. [He also referred to *In re Boycott*, 29 Ch. D. 571, 33 W. R. Dig. 68; *In re Norman*, 34 W. R. 313, 16 Q. B. D. 673; the Solicitors Act, 1843, s. 37.] As to the bills delivered to the manager of the asylum, that does not amount to a delivery to the trustees, as the manager had no authority to act as agent for the trustees with respect to solicitors' bills.

Bardswell, for the solicitors.—There was no duty on the solicitors to make any such communication as suggested to the trustees concerning the three bills paid without being taxed; and there is no special circumstance to warrant taxation after payment. The decision in *In re F*——— is not applicable to the present case. With respect to the bills delivered to the manager, who had the management of the whole establishment, the delivery to him operates as a delivery to the trustees.

C. Church replied.

North, J.—In this case the first three bills were delivered in 1883 and 1884 respectively; the other bills are of subsequent dates. Although the first three bills were delivered six or seven years ago, and have been paid, they are said to be liable to taxation because the solicitors are said to have omitted their duty to their clients in not telling them that, unless the bills were taxed, if the bills should be afterwards moderated at the instance of third parties in case of subsequent administration proceedings, their clients, in their accounts with their *cestuis que trust*, might have to pay out of their own pockets the amount which might be taken off the bills; and the decision in *In re F*——— has been cited as an authority for this contention. It is said that these bills ought to be taxed by reason of this special circumstance. But it is begging the question to say that the solicitors omitted their duty to their clients in not giving them that information unless it is shown that the bills are excessive and would be reduced on moderation, which is different from taxation. There is no evidence that there is a single item which would be taken off on moderation. Mr. Church admits that his

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

clients looked through the bills and did not find anything excessive. There is nothing to show that the solicitors omitted any duty.

The case of *In re F*——— is not applicable to the present, as it appears from the report that the bills in that case had been before the chief clerk, who thought that they contained items which ought to be struck out. Here there is no evidence that any item would be reduced, and it is admitted that the bills are honest bills. I do not think that *In re F*——— is an authority in this case, whatever it might be where the facts were the same as they were there. As to the first three bills, the summons must be dismissed. With respect to the other bills, which were delivered to the manager of the lunatic asylum, they must be taxed. They were not delivered to the trustees, but to the manager of the asylum, who had no authority to accept solicitors' bills for the trustees, or to decide whether the bills should be taxed or not. The manager might have been constituted agent to receive solicitors' bills for the trustees; but in the absence of evidence that he was such agent I cannot hold that he had authority to receive solicitors' bills for the trustees. The trustees say that these bills have not been delivered to them. Therefore, there must be an order for the delivery of those bills, and the bills must be taxed. But there will be no costs to either party of the adjournment of the summons into court.

Solicitors, *A. Pearce-Jones & Co.; Jaques & Co.*

Chan. Div. }
Stirling, J. } May 22.

GUARDIANS OF TENDRING UNION *v.* DOWTON AND SLIMON. (*a.*)

Local government—Street improvement—Expenses of metalling and paving—Charge upon premises—Charge upon whole proprietorship—Premises subject to restrictive covenant—Sale to satisfy charge free from covenant—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257, 276.

The charge upon premises for expenses for improvements created by the Public Health Act, 1875, *s.* 257, *is a charge upon the whole proprietorship of the land, and not merely a charge upon the estate in fee simple.*

Premises subject to a restrictive covenant against building, which become liable to such a charge, may, for the purpose of satisfying the charge, be sold free from the covenant.

Motion for judgment upon admissions in the pleadings.

The plaintiffs were the guardians of the poor of the Tendring Union, in the county of Essex, and were the rural sanitary authority within the meaning of the Public Health Act, 1875, for the area of that union. The parish of Great Clacton was one of the parishes in the union, and was a contributory place within the meaning of the Act, and by an order of the Local Government Board, dated the 30th of September, 1884, and made pursuant to section 276 of the Act, it was declared that the provisions of section 150 of the Act, except so far as they related to sewering, should be in force within certain streets, including one called Anglefield-road, situate in Great Clacton.

On the 20th of March, 1886, the plaintiffs served notices on the owners or occupiers of land and premises abutting upon Anglefield-road, including the then owner or occupier of the piece of land (in this report called Anglefield), the subject of this action, which adjoined the road, such notices being under section 150 of the Act, requiring them to level, pave, metal, flag, and channel the road within two weeks from that date. The road was then a street, not being a highway repairable by the inhabitants at large within the meaning of section 150.

This notice was not complied with, and the plaintiffs executed the works therein mentioned, which were completed on or about the 5th of February, 1887, at which date the defendant Dowton was the owner of Anglefield.

On the 16th of September, 1887, notice was duly served on the defendant Dowton stating that the proportion of the expenses incurred by the plaintiffs in the execution of such works, which was payable by him as owner of, and in respect of, Anglefield, was £131 1s. 9½d. The defendant Dowton did not, within the statutory period of three months (section 257) after service of such notice of apportionment, dispute the same.

On the 18th of March, 1889, an order was made by a court of summary jurisdiction that the defendant Dowton should pay to the plaintiffs the sum of £131 1s. 9½d., with interest at 5 per cent. per annum and costs. A warrant of distress was issued, but no goods of the defendant Dowton could be found to satisfy such warrant.

In the year 1872 William Grimwade was the owner in fee simple of Anglefield, and also of the land opposite to two sides of Anglefield, which was of a triangular shape, on the other side of Anglefield-road. In 1872 Grimwade sold and conveyed to different purchasers such land in building plots, and entered into a covenant with each of such purchasers to the effect that he, his heirs and assigns, would not build or cause to be built any permanent erection of any kind upon Anglefield, and that in the event of any trees being planted upon Anglefield the same should not be allowed to grow beyond the height of six feet.

The defendant, William Slimon, was the owner of certain of the plots of land sold by Grimwade, and was entitled in respect thereof to the benefit of the covenant before mentioned, as against Grimwade and his assigns.

By an indenture dated the 21st of March, 1876, Grimwade conveyed Anglefield unto and to the use of J. Harman and T. Young in fee simple, subject to a covenant therein contained, whereby Harman and Young covenanted to the effect above mentioned with respect to buildings or erections and trees upon Anglefield.

By an indenture dated the 28th of January, 1884, Harman and Young conveyed Anglefield in fee simple to the Clacton-on-Sea and General Land Building and Investment Co. (Limited), subject to the covenant above mentioned, and by an indenture dated the 1st of October, 1886, that company conveyed Anglefield, subject to such covenant, to the defendant Dowton in fee simple.

The plaintiffs commenced the present action in August, 1889, claiming that the sum of £131 1s. 9d., with interest thereon, might be declared a charge upon Anglefield, and that, for the purposes of satisfying such charge, Anglefield might be ordered to be sold free from the covenant above mentioned, and that out of the proceeds of such sale the sums claimed, with interest and costs, might be paid.

By an order of the 10th of February, 1890, made in this action by Stirling, J., it was ordered that the defendant William Slimon, should be appointed to represent all other persons interested in the benefit of the said covenant for the purpose of deciding the question whether the charge claimed by the plaintiffs should override such covenant.

The defendant Dowton did not enter an appearance in the action; the defendant Slimon put in a defence,

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

admitting the several allegations contained in the statement of claim, and above shortly stated, for the purposes of this action only, and for no other.

It was stated, though not in evidence, that if Anglefield was sold subject to the covenant, the proceeds of the sale would be merely nominal.

The sections of the Public Health Act, 1875, so far as they are relevant to this report, are:—Section 4. "'Owner' means the person for the time being receiving the rack rents of the lands and premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

"Section 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved . . . and made good . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved . . . require them to sewer, level, pave . . . or make good . . . the same within a time to be specified in such notice. If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises."

"Section 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act, or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

Alexander Macmorran, for the motion.—These expenses are expenses which come under section 257. The charge which is given by the Act is a charge on the actual land, not upon any one particular interest: *The Tottenham Local Board* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378, followed by Jessel, M.R., in *The Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782 (see page 785, referring to the judgment of James, L.J., in the first-named case).

Edward Beaumont, for the defendant Slimon.—The plaintiffs practically propose to cut off the defendants' view of the sea. As to *The Corporation of Birmingham* v. *Baker*, it is probably clear enough that where there is a house subject to any number of mortgages or charges in succession, the charge for improving the property comes in front of them all. That is not the case here, where Slimon has only an easement over the property and a restrictive covenant. I admit I must argue to some extent by analogy. If this were the case of a school board or a railway company buying under compulsory powers it would not be necessary to give notice to Slimon to treat; he would not have an ownership in land, but would be a person having interests injuriously affected, and would have to be compensated: *Clark* v. *School Board for London*, 22 W. R. 354, L. R. 9 Ch. App. 120; *Duke of Bedford* v. *Dawson*, L. R. 20 Eq. 353, 24 W. R. Dig. 236. Where the Legislature means to give a public body power to destroy and put an end to easements, that is done in plain and unmistakable language: Artizans' Dwellings Act (38 & 39 Vict. c. 36), s. 20. It is not in accordance with the true construction of the Act that the premises should be dealt with free from these negative restrictions; the land can only be sold as the local board find it. Besides, this is not an improvement to the land such as a road or a sewer would be to building land, for by the nature of the land it cannot be built upon. Then how can anyone who has only a negative easement redeem a charge upon land, supposing the charge came under mortgage or any other way? If the authority entitled to the charge had a statutory power to sell, they could not sell free from easements. The fact that Slimon has paid his share on the other half of the road on his own side is, of course, conceded.

Macmorran was not called upon to reply.

STIRLING, J.—I have no doubt this application raises a new point, but it seems to me to be governed in principle by the decision which I have been referred to in *The Corporation of Birmingham* v. *Baker*. Under the powers conferred by the Public Health Act of 1875, the local board, who are the plaintiffs in this case, have made a public road which runs to a considerable extent along a piece of land belonging to the defendant Dowton. The defendant Dowton is entitled to this land, called Anglefield, in fee simple, subject to certain restrictive covenants, which prevent him from building upon it, and as I am told, subject to those covenants, this piece of land is really worth little or nothing. The cost of making the road is £131, or rather the proportion of it which is attributable under the Act to this piece of land is £131—a substantial sum—and the plaintiffs, the sanitary authority, are unable to recover that from Dowton personally. That being so, section 257 applies. Turning to section 4, the definition of "owner" to be found there amounts to this, that any person for the time being receiving the rack rent of premises is the owner. That I believe has been held to be so, even though he may have no title at all and another person is the real owner; and he is so according to the terms of the Act, whether he is receiving it on his own account or as agent of another person, so that it may be recovered from the agent of a person who is actually in receipt of the rack rent of the property. That being the very wide sense in which the word owner is used, what is the language of section 257 with reference to the charge? "Until the recovery of such expense and interest, the same shall be a charge on the premises," not on the interest of the owner in the premises, but on the premises themselves. That means in the land itself, and it accordingly has been held by Jessel, M.R., in the case of *The Corporation of Birmingham* v. *Baker* that a charge, under section 257, extends to what he terms the whole proprietorship in the land, not in any particular section or portion of the proprietorship, but on the whole, and in that particular case he held the charge thus created took precedence of a mortgage on the land in respect of which the charge was sought to be enforced.

It is said that this charge does not take precedence of these restrictive covenants. I am unable to accede to that. If I did so I should be holding in this particular case that the charge was constituted, not on the land itself, but on the interest of the particular person who happens to be the owner in fee simple. I cannot accede to that argument, and it seems to me to be contrary to the decision which was given in *The Corporation of Birmingham* v. *Baker*.

I think, therefore, that I must declare the plaintiffs are entitled to their charge upon the land, and that for the purpose of satisfying the said charge the premises

called Anglefield may be ordered to be sold free from the covenant in question.

Solicitors for the plaintiffs, *Oldman & Clabburn*, for *R. S. Daniell*, Manningtree.

Solicitors for the defendant Slimon, *Chamberlayne, Beaumont, & Taylor*.

Chan. Div. (Kekewich, J., for Kay, J.) May 9.

Kinahan & Sons v. Kinahan, Lyle, & Kinahan (Limited). (a.)

Practice—Service out of jurisdiction—Sequestration—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), ss. 90, 107, 111, 117—*R. S. C.*, 1883, *ord.* 11, *rr.* 1 (*f*), 2.

In an action to restrain infringement of the plaintiffs' trade-marks, the defendants being a company having their principal place of business in Belfast, and supplying customers, but having no agents in England, an order made ex parte, *giving leave to serve the writ out of the jurisdiction, was discharged.*

The fact that a motion on behalf of the plaintiffs to rectify the register by striking out the defendants' trade-mark is pending is not material in considering the balance of convenience to the parties.

Motion.

This action was commenced to restrain the infringement of the plaintiffs' registered trade-marks.

The defendants were a company having their principal place of business in Belfast, and having a considerable business in Ireland and elsewhere, but supplying comparatively few customers in England, and having no agents in England.

The plaintiffs had obtained an *ex parte* order giving leave to serve the writ out of the jurisdiction, and had given to the defendants notice of motion to rectify the register by striking out the defendants' trade-marks.

This was a motion on behalf of the defendants to discharge the order for service out of the jurisdiction.

Benshaw, Q.C., and *Whinney*, for the defendants.—An injunction could not, if granted, be rendered effectual against the defendants by sequestration, since they have no goods within the jurisdiction; leave should not therefore have been given to issue the writ: *Marshall* v. *Marshall*, 38 Ch. D. 330, 36 W. R. Dig. 161; *Burland* v. *Broxburn Oil Co.*, 37 W. R. 470, 41 Ch. D. 542. The courts in Scotland and Ireland have jurisdiction to rectify the register; the plaintiffs could, therefore, have brought their motion to rectify before the court in Ireland, and cannot say that their motion and action should be tried together on the ground of convenience: Patents Act, ss. 90, 107, 111, 117.

Marten, Q.C., and *Willis Bund*, for the plaintiffs.—Sending goods to private customers in this country with the plaintiffs' trade-marks is a passing off of their goods by the defendants as much as sending them to agents. The plaintiffs could enforce an injunction by seizing the defendants' goods at the Custom House. It is doubtful whether there is jurisdiction in the courts of Scotland and Ireland to rectify the register. Section 111 of the Patents Act does not confer jurisdiction. The motion to rectify and this action should be tried together on the ground of convenience, since the same evidence will be required in both proceedings.

Kekewich, J.—This jurisdiction requires to be carefully watched and carefully exercised, and the court has a right to review the exercise of its discretion when additional facts are brought to its notice. The present case is that of traders carrying on business in Ireland, and the ground on which service out of the jurisdiction was applied for was that an injunction was claimed to restrain the sale of goods with certain trade-marks.

Where are those goods sold? It is sworn that the defendants have no business premises and no agents in England; but they do supply occasional customers in England, and they have a large business in Ireland and elsewhere. It is said that an injunction could be enforced in this country by sequestration of the defendants' goods, but no goods of the defendants ever come to this country, the goods come to customers; there is, therefore, nothing of the defendants in this country to proceed against.

As regards the business of the defendants carried on elsewhere than in Ireland and England, it must be treated as immaterial; there is no reason to prefer England or Ireland as the forum.

But as regards the Irish business the action ought to be an Irish action, the witnesses are in Ireland and discovery must be had in Ireland. Under R. S. C., ord. 11, r. 2, the comparative cost and convenience of both parties, and the dispatch of business have to be considered, and also the residence of the defendants, which is in this case in Ireland.

With regard to the argument founded on the motion to rectify the register, there was a motion of that character in *Marshall* v. *Marshall*, and there is no substantial difference between the motion in that case, which was to place a mark upon the register, and that in the present case, which is to strike out a trade-mark.

I am not satisfied, therefore, that that motion ought to interfere with the balance of convenience, and the order must be discharged, with costs.

Solicitors, *Linklater & Co.; Paddison, Son, & Fullilove*.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 16.

Huth v. Clarke. (a.)

Local government—Executive committee of county council—Delegation of powers to sub-committees—Contagious Diseases (*Animals*) *Act*, 1878 (41 & 42 *Vict.* c. 74)—*Local Government Act*, 1888 (50 & 51 *Vict.* c. 41), s. 28.

A county council, as the local authority for carrying out the provisions of the Contagious Diseases (*Animals*) *Act*, 1878, *had appointed an executive committee, who had delegated to a sub-committee, as authorized by schedule* 6 (5) (6) *of that Act, the exercise of powers under that Act. Subsequently an Order in Council was issued, calling upon the local authorities to take steps against rabies under the powers given them by the Act of* 1878, *and the executive committee thereupon issued regulations against rabies on their own authority, for breach of which regulations the appellant had been fined.*

Held, that the executive committee had the right to issue such regulations, since, in delegating their powers, under the Act of 1878, *to a sub-committee, they had in no way parted with their original powers as local authority under that Act.*

Case stated by the justices of Sussex sitting at petty sessions at Chichester.

The appellant had been convicted and fined for letting his dog out "unmuzzled and not under proper control" against the provisions of an Order of Council

(a.) Reported by James H. Bakewell, Esq., Barrister-at-Law.

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

in 1887 and recently extended to the county of Sussex by an order of the Executive Committee of the County Council of Sussex in March, 1890. By the Local Government Act, 1888, s. 3 (xiii.), county councils become the local authority empowered, among other things, to carry out the provisions of the Contagious Diseases (Animals) Act, 1878, against rabies. The county council of Sussex appointed an executive committee, and in October, 1889, the executive committee delegated to a sub-committee their powers for carrying out the provisions against the spread of rabies under the said Act of 1878. In March, 1890, the executive committee, however, issued the order against un-muzzled dogs. It was contended that, having delegated their powers under the Act of 1878, the executive committee had deprived themselves of power to issue this particular order affecting rabies in dogs.

Gill, for the appellant.—The sub-committee was the only proper authority to issue such an order. The executive committee having delegated their powers in this respect to the sub-committee without limit of time, they could only recover their powers by revoking the authority given to the sub-committee.

Gore, for the respondent, was not called upon.

Lord Coleridge, C.J.—By the incorporation of the Act of 1878 in the Local Government Act of 1888 the county council in this case have become the duly constituted local authority in this district to exercise the powers given to such local authority under the Act of 1878. In the county council there have been properly formed sub-committees to whom the executive committee may delegate such powers (other than rating powers) as they may think fit under the provisions of schedule 6 (6) of the Contagious Diseases (Animals) Act, 1878, including, of course, all the powers given them under that Act, or by subsequent Orders in Council for the prevention of diseases such as rabies. As a matter of fact, this county council of Sussex did, in October, 1889, delegate to a sub-committee such powers. Subsequently an Order in Council affecting rabies in dogs was extended to the county of Sussex, and the local authority was called upon to take steps to carry out this order. Thereupon, in March, 1890, the executive committee issued the order against dogs going about unmuzzled and not under control, under which the appellant was prosecuted and fined. There were no regulations issued by the sub-committee upon this subject, such as might have been made under the powers delegated to them. The regulations made by the executive committee have not been contravened by any other authority. It is, however, suggested that because there did exist another authority, such as the sub-committee, which might have issued regulations inconsistent with those issued by the executive committee, there must be assumed to have been no power in the executive to issue those regulations. But delegation does not imply denudation of original powers. Those delegated powers might be resumed if the executive committee thought fit. Such an act of delegation expressly implies that the authority which is the subject delegated, can always be resumed, unless there is something in the act of delegation inconsistent with such resumption. In every other case there is impliedly a liability to the resumption of the original powers by the delegating authority. There is here no conflict of jurisdiction at all. I am of opinion that the executive committee had the right to exercise this power and issue the regulations, and that the magistrates were entitled to convict under them.

Wills, J.—I am of the same opinion. What is the meaning of the word delegate? There is an instance of its use for nearly thirty years under 24 & 25 Vict. c. 53 as a term for those who hand in votes at university elections, and one which illustrates its ordinary and popular meaning. The word does not imply in any sense a parting with the power delegated, but only a conferring of authority upon another person, which authority the giver might, if he chose, exercise himself. The maxim *delegatus non potest delegare* undoubtedly conveys this signification of the word. It is never used in text-books so as to convey the meaning that the person delegating the power impliedly parts with the right to exercise that power. In matters, for instance, of contract, the expression only implies the relationship of principal and agent.

By clause 6 of schedule 6 of the Act of 1878 the executive committee shall have all the powers of the local authority, except the power to make a rate, and in their delegation of these powers or any of them to a sub-committee there is nothing to restrict the exercise by the executive committee of the original powers so given them.

Appeal dismissed.

Solicitors for the appellant, *M. Abraham & Co.*

Solicitor for the respondent, *H. Sowton.*

Prob. Div. & Adm. Div. } April 15.
Divorce. }

Cook v. Cook. (a.)

Land Charges Registration and Searches Act, 1888 (51 & 52 *Vict. c.* 51)—*Divorce—Order for alimony—Writ of sequestration—Registration—Power to vacate registration.*

Where a writ of sequestration has been issued and duly registered under the Land Charges Registration and Searches Act, 1888, *there is no power under the Act or inherent in the court to order the registration to be vacated, even by consent of all parties concerned, and although the writ is satisfied by payment.*

This was the hearing of a summons adjourned from chambers into court calling on the petitioner to show cause why two writs of sequestration issued in the cause should not be discharged and the registration thereof vacated upon payment into court by Wm. Hall Warren of the sum of £132 19s. 2d. or such other sum as might be found due to the petitioner. The writs of sequestration were issued to enforce payment of alimony *pendente lite*, and taxed costs, which the respondent had been ordered to pay, and on the 7th of March, 1889, they were both registered at the office of the Land Registry under and in pursuance of the Land Charges Registration and Searches Act, 1888. Pending proceedings in the Chancery Division, the respondent assigned his interest in the premises, and subsequently, on the 19th of December, 1889, Kay, J., made an order, which *inter alia* directed that upon payment into court by the said W. H. Warren of the sum of £250, the petitioner in this cause should do and concur in all necessary acts for the discharge of the sequestrators named in the two writs of sequestration. The £250 was paid into court, and the petitioner, in pursuance of the before mentioned order of Kay, J., applied to the officials of the registry to vacate the registration, but was informed that Bowen, L.J., and other judges at chambers had refused similar applications on the ground that there is no provision in the statute for vacating any writ or order affecting land.

Cluer, for the respondent, stated that, although no one appeared for the petitioner, both sides were agreed as to the order if the court had power to make it.—By section 14 of the Land Charges Registration and Searches Act,

(a.) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

1888, any "land charge" may be vacated by the order of a court or judge. Rule 7 of the Land Charges Rules, 1889, gives the registrar power to modify or cancel entries, and under 23 & 24 Vict. c. 115, s. 2, there was power in the Court of Common Pleas to enter satisfaction of Crown debts and judgments, and there is inherent jurisdiction in every court to revoke anything done by its authority.

BUTT, J.—I understand that Bowen, L.J., sitting in chambers, has held that he had not the power to grant a similar application, and I am reluctantly compelled to agree with him. I am willing to assist you as far as I can, and will grant that part of the application which orders the discharge of the two writs of sequestration, but it is clear that the Act has omitted to provide for the vacation of their registration.

Solicitor for the petitioner, *H. H. Hood Barrs.*

Solicitor for the respondent, *W. H. Warren.*

ERRATUM.*

Court of Appeal.

From Chan. Div. June 30; July 1.

In re HEAD'S TRUSTEES' AND MACDONALD'S CONTRACT. (*a.*)

Vendor and purchaser—Contract—Title—Sale by trustees of real estate—Power of trustees to sell estate, arising on death of tenant for life—Concurrence of beneficiaries.

A testator devised his real estate to trustees upon trust to pay the rents to his wife, and after her decease to sell the property and hold the income in trust for all his children equally, and he authorized his trustees to adjust and pay all claims made upon his estate. The estate being insolvent, the trustees contracted to sell the real estate, with the consent of the life tenant, but the purchaser declined to accept the title. The trustees subsequently offered to obtain the consent of all the beneficiaries to the sale of the estate.

Held, that the trustees had no power of sale under the will during the life of the testator's widow.

Held, further (following In re Bryant and Barningham's Contract, ante, 469, 44 *Ch. D.* 218), *that the purchaser could not be compelled to accept a title other than that for which he had contracted.*

Appeal from Chitty, J.

The testator, William Henry Head, by his will, gave and devised all his real estate to Philip Head and John Walker upon trust to receive and pay the rents to his wife, Martha Head, during her life, and after her decease upon trust to sell his said real estate, and to invest the proceeds of such sale, and to hold the resulting income in trust for all his children equally. And he authorized his trustees "to release or compound any debts owing to me or to my estate, or to give time for payment, or to take such security for payment, and to adjust and pay all claims made upon my estate, and generally to act in the premises, as my said trustees or trustee shall in their or his discretion think fit." The two trustees were appointed executors of the will.

The testator died on the 7th of November, 1889, and, the will having been duly proved by them, the executors found the estate insolvent, and with the consent of the tenant for life, Mrs. Head, who survived the testator, they put up the trust property for sale by auction on the 17th of December, 1889. A portion was then purchased by J. Macdonald, who paid a deposit, the 24th of January being the date fixed for completion. The purchaser objected to the title of the trustees, on the ground that they had no power of sale during the lifetime of Mrs. Head, and on the 21st of January the purchaser definitely refused to complete the contract, and demanded the return of his deposit. The trustees, on the 29th of January, offered to obtain the consent of the other beneficiaries; but the purchaser declined to accept the title, and took out a summons under the Vendor and Purchaser Act, 1874, for a return of the deposit and a declaration that a good title had not been made out by the trustees. Chitty, J., made the order asked for.

The trustees appealed.

Cozens-Hardy, Q.C., and *O. L. Clare*, for the appellants.—The estate being insolvent, the trustees had a power of sale under the authority to adjust and pay all claims upon the estate. At all events, they could make a good title with the consent of all the beneficiaries.

Romer, Q.C., and *Strickland*, for the respondent.—The will merely gave authority to the trustees to manage the estate and settle any claims there might be upon it; and there was no trust for sale. The beneficiaries have not even now consented, and even if they have, the purchaser cannot be forced to accept a different title from that which he contracted for.

They referred to *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167; *Brewer* v. *Broadwood*, 31 W. R. 115, 22 Ch. D. 105; *In re Bryant and Barningham's Contract*, *ante*, p. 469, 44 Ch. D. 218.

Cozens-Hardy, Q.C., in reply, cited *Brown* v. *Higgs*, 4 Ves. 708.

COTTON, L.J.—The first question in this case is, whether there is, under the terms of the will, a charge on the real estate which gives the trustees a power of sale. In my opinion there is not. There is simply an authority to pay debts, and no case has been cited which holds this to be a charge. The trustees, under this clause, have merely power given them to decide what are to be recognized as debts, which they could not otherwise do, and have no enlarged power of sale given them.

But then it is said that, even if the first point fails, the trustees can make a good title to this property by obtaining the consent of the seven beneficiaries, who are all *sui juris*. First of all, it is not even now ascertained that they will concur; and, even if they do, their title must be investigated. Then, the case of *In re Bryant and Barningham's Contract* in the Court of Appeal is in point to show that a purchaser cannot have a new and different title put upon him in place of the one he contracted for.

FRY, L.J., after reading the material parts of the will, proceeded as follows:—The words of what is commonly known as the "management clause" do not constitute a charge on the real estate. They only enable the trustees to determine what are proper debts, which they can only pay out of the funds on which they are properly chargeable. No case has been produced to show that this authority is equivalent to a charge.

Then, as to the second point. If this consent of the beneficiaries had been obtained in a reasonable time before the purchaser's solicitor had given notice that he had put an end to the contract on his client's behalf, possibly the vendors might have enforced it. This, however, was not so; and even now their consent

* *Atkinson* v. *Bradford Third Equitable Benefit Building Society.*—In the report of this case, *ante*, at p. 632, in the last line of the first column, for the words "*the cause of action accrued*" read "*no cause of action accrued.*"

a.) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

has not been actually obtained. Therefore the trustees fail in their appeal, and cannot make out a title to this property.

LOPES, L.J.—In this case there is no charge of debts on the real estate, and no immediate power of sale given to the trustees. They are merely authorized to settle claims, but are not directed to sell; nor is there any enlargement of the fund out of which the debts are properly payable. The consent of the beneficiaries, by which it is proposed to make a good title, has not been clearly proved; and, even if it were, it would be necessary to inquire into their title, which they may have incumbered or otherwise dealt with. This appeal must fail.

Appeal dismissed.

Solicitors for the appellants, *Burton, Yeates, Hart, & Burton*, for *Horne & Engell*, Staines.

Solicitors for the respondent, *Roy & Cartwright.*

From Chan. Div. March 27.

SIBUN *v.* PEARCE. (*a.*)

Building society—Instrument of dissolution—Statutory majority of members—Withdrawing members—"Cease to take part in the affairs of the society"—Building Societies Act, 1874 (37 *&* 38 *Vict. c.* 42), *ss.* 20, 32.

Section 32 *of the Building Societies Act,* 1874, *provides that a society under that Act "may be dissolved* (inter alia) *by dissolution, with the consent of three-fourths of the members . . . testified by their signatures to the instrument of dissolution."*

The rules of a building society formed under the Act provided that a member wishing to withdraw should give three months' notice in writing to the secretary to repay the subscriptions standing to his credit, and that members having given notice of withdrawal should, "from the date of such notice, cease to take part in the affairs of the society." Sixty-nine members had given notice of withdrawal, but had not been paid off, when an instrument of dissolution was executed, which was signed by fifty-seven out of the seventy-four remaining members, but by none of the sixty-nine withdrawing members.

Held (*affirming the decision of* North, J.), *that, upon the true construction of the rules* (*which would otherwise conflict with the Act*), *withdrawing members were merely precluded from taking any part in the affairs of the society as a going concern, but that they were still "members" within the meaning of section* 32 *of the Act, and must therefore be taken into account in determining whether the instrument of dissolution had been signed by the requisite statutory majority of the members.*

In re Sheffield and South Yorkshire Permanent Building Society, 22 *Q. B. D.* 470, 37 *W. R. Dig.* 29, *explained and distinguished.*

Appeal from North, J.

This action was brought against the trustee of the East Dulwich 295th Starr-Bowkett Building Society and the society itself, by a withdrawing member, on behalf of himself and other withdrawing members, for a declaration that a deed of dissolution of the society was void, on the ground that it was not signed by a statutory majority of the members (the withdrawing members, who had not been paid the amounts due to them, not having been taken into account), and for an injunction to restrain the dissolution of the society.

Section 20 of the Building Societies Act, 1874, provides that "any certificate of incorporation or of registration or other document relating to a society under this Act, purporting to be signed by the registrar, shall in the absence of evidence to the contrary, be received by the court and all courts of law and equity and elsewhere without proof of the signatures."

Section 32 provides that "a society under this Act may terminate or be dissolved" (*inter alia*)—"(1) Upon the happening of any event declared by its rules to be the termination of the society; (2) By dissolution in manner prescribed by its rules; (3) By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution"; and that "the instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules, and shall be binding upon all the members of the society."

Rule 3 of the society's rules provides that:—"The taking up or subscribing for one or more shares shall constitute membership on payment of four weeks' subscriptions."

Rule 6 provides (*inter alia*) that any member, not having executed a mortgage to the society, who may continue to neglect the payment of his subscriptions until the fines incurred and any other charges due are equal to the amount of subscriptions already paid by him, shall have notice of arrears sent him by the secretary, and four weeks from the date thereof (unless the amount due shall be previously paid) "shall then cease to be a member, and forfeit all the moneys paid in respect of the shares."

Rule 18 provides that a member wishing to withdraw shall "give three months' notice in writing to the secretary to receive back subscriptions standing to his credit, less all fines due and unpaid, and 1s. 3d. per share per annum for working expenses"; and also that "in case of any loss to the society, from whatever cause, the member withdrawing shall have deducted from his account a fair portion with other members, if such loss happens before his notice to withdraw has been received by the secretary"; and that "all notices of withdrawal shall be preserved and entered by the secretary in the book for that purpose in the order they are received, and the withdrawing member be paid in the same order of rotation"; and that "the secretary shall inform the member in writing when the money is ready for him"; and that "members being thirteen weeks in arrear (unless out of employment or sick, as per rule 6), or having given notice of withdrawal, shall, from the date of such notice, 'cease to take part in the affairs of the society,' but may cancel such notice at the discretion of the board of management"; and that "on the return of subscriptions the withdrawing member shall cancel his pass-book and surrender it to the society."

Sixty-nine, out of a total of 143 members, had given notice of withdrawal, but had not been repaid their subscriptions at the date when a deed of dissolution under section 32 of the Act was executed, which deed was signed by fifty-seven out of the seventy-four remaining members, who had not given such notice. None of the withdrawing members had signed it. The instrument of dissolution had been registered, and a certificate of registration obtained from the registrar.

North, J., held that a member who had given notice of withdrawal did not cease to be a member until he had been paid off; that, consequently, the instrument of dissolution was not signed by the necessary statutory majority of the members, and that such instrument, being, therefore, invalid under the Act, could not be made valid by the certificate of registration.

The defendants appealed.

Napier Higgins, Q.C., and *Bramwell Davis*, for the appellants.—In determining whether there was a statutory majority, the withdrawing members ought not,

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

having regard to the society's rules, to be taken into account. Otherwise, this society cannot be dissolved, as the withdrawing members are nearly equal in number to the other members, and are precluded by the rules from taking part in the affairs of the society. [LINDLEY, L.J.—The rules cannot override the Act, and you must construe them with reference to it. COTTON, L.J.—You can take the dissolution in one of the alternative ways.] The withdrawing members have no stake in the society, and ought not to have a voice in the matter. Section 16 of the Act makes it obligatory to set out in the rules the terms as to withdrawing. The notice to withdraw is irrevocable, and directly it is given the rights of the parties are fixed, and are not affected by the mere fact that the withdrawing members have not been paid off: *In re Blackburn, &c., Building Society*, 32 W. R. 159, 24 Ch. D. 421. [LINDLEY, L.J., referred to *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33.] Here the withdrawing members are the only creditors, and if there were five or six more of them they could, if North, J., is right, stop all proceedings for a dissolution in any way. On withdrawal of their shares the holders cease to be members of the society: *In re The Sheffield and South Yorkshire, &c., Society*, 22 Q. B. D. 470, 37 W. R. Dig. 29. [LINDLEY, L.J.—That turned on section 14.] The two cases together show that notice is the operative fact, and not repayment. The same view is involved in the decision in *Auld* v. *Glasgow, &c., Building Society*, 35 W. R. 632, 12 App. Cas. 197. In *Walker* v. *General Mutual Building Society*, 36 Ch. D. 777, 36 W. R. Dig. 26, the point decided was that a dispute between the society and any member, or person claiming on account of any member, was to be referred to arbitration under the rules there, and that for that particular purpose a withdrawing member must be deemed to be a member. The point decided in *Wright* v. *Deeley*, 4 H. & C. 209, was much the same. The real question here is, what is the meaning of the word "members" in section 32 (3)? It must mean members who have all the rights of members. After notice to withdraw, a member becomes simply a creditor. It is clear on rule 18 that he has no more right to a voice on the question of dissolution than as to any of the other affairs of the society. It makes no difference to him what is done with the society; in any case he must be paid the full amount due to him out of the first money available: *Walton* v. *Edge*. It could not be contended that withdrawing members would have a voice in deciding on an amalgamation or transfer of engagements under section 33 of the Act.

Farwell (*Cozens-Hardy, Q.C.*, with him), for the respondent.—The signatures of three-fourths of the members are, by section 32 (3), required to the instrument of dissolution. The amount standing to the credit of "members" in the society's books includes the amounts to the credit of withdrawing members, thus admitting them to be "members." The fact that they are also creditors does not make them the less members: *Walker* v. *General Mutual Building Society*; *Wright* v. *Deeley*. Rule 18 does not say they shall "cease to be members," but that they shall "cease to take part in the affairs of the society," though the expression "cease to be a member" does occur in rules 6 and 32, where it expresses the undoubted intention. That shows that they know how to use it when they mean it. The words "cease to take part" do not deprive the withdrawing members of the right to take part in such a vital transaction as a dissolution. In the *Sheffield and South Yorkshire case* the expressions used are to be construed only with reference to the facts of that case. [He was stopped.]

Bramwell Davis, in reply.—The withdrawing members are clearly treated as creditors in the schedule. For the purposes of section 32 they are creditors only, and not members. Rule 6 deals with a totally different set of circumstances. By that rule a defaulter ceases to be even a creditor, and, *à fortiori*, ceases to be a member. In *Walker* v. *General Mutual Building Society* all that was decided was that a withdrawing member might remain a member for the purposes of being bound by the rules affecting withdrawing members. In the *Sheffield and South Yorkshire case* there was a clear decision that upon withdrawal a member ceases to be a member so far as regards liability.

COTTON, L.J.—In this case an injunction has been granted to restrain the society from acting on a deed of dissolution. It will be necessary for us to look both at the Act and at the rules of the society in order to determine whether these withdrawing members are to be considered as being still members. I will deal with the rules first, and endeavour to find out how the position and qualification of membership is to be maintained, and also what is to be done by the members. [His lordship read the material part of rule 6, as stated above, and proceeded:—] I notice that, because it is the rule which definitely states when the contract of membership is to be put an end to, and that, in a certain event, a member "shall cease to be a member."

Now, is there anything like that in rule 18—the rule relating to withdrawal? It provides that the member wishing to withdraw is to give three months' notice in writing to the secretary to receive back subscriptions standing to his credit. I do not discuss the question whether his *status* is affected immediately upon his giving the notice of withdrawal, or not until the end of the three months, because I do not quite see how that is material to the question we have to decide. The rule goes on to provide that all notices of withdrawal are to be preserved and entered in a book kept for the purpose in the order in which they are received, and that the withdrawing members are to be paid off in the same order, and that the secretary is to inform each member in writing when the money is ready for him. This provision was much relied on, and, in my opinion, the withdrawing member remains a member after he has given the notice, and even after the three months have expired. He is to receive his money in rotation as a member, and as a member he is to be informed when it is ready for him. [His lordship next read that part of rule 18 which provides that a member shall cease, from the date of his notice of withdrawal, to take any part in the affairs of the society.] That has been very much relied on; yet it is to be observed that it applies, not only to withdrawing members, but also to members who are in arrear with their payments, who, though not expelled, and though their shares are not forfeited, are to cease to take any part in the affairs of the society. If they were expelled or ceased to be members by the forfeiture of their shares, it would clearly be unnecessary to provide that they should cease to take part in the affairs of the society.

Then it is said that, as these withdrawing members are not to take part in the affairs of the society, they are no longer members. I cannot assent to that, as, for the reasons I have given above, it is clear to my mind that they must still be members of the society. But it is next contended that, as they cannot take part in the affairs of the society, they cannot sign this deed of dissolution, and therefore it cannot be signed by the prescribed majority. But, in my opinion, the proper meaning of the expression is that they shall cease to take part in the affairs of the society as a continuing business. It does not prevent their doing that which, according to my view, the Act of Parliament requires them to do, if they are in favour of the dissolution of the society—that is, to show their assent by signing the deed. I do not think that is taking part in the affairs of the society within the fair meaning of this rule, but

it is doing something which the Act requires to be done for the purpose of dissolving the society. It is argued that withdrawing members are not members whose assent is required by section 32 of the Act, which must refer only to members who have the full rights of members. But, in my opinion, that is erroneous, because, though they are prevented from taking part in the affairs of the society as a going concern, that is not inconsistent with their remaining members and continuing to hold their shares, and the fact of their continuing to hold their shares necessarily involves that they are entitled to exercise the rights in respect thereof of which they are not expressly deprived by the rules. In order to support the contention of the appellants it would be necessary to give different meanings to the word "members" in different parts of the rules. In some parts, as, for instance, in the later paragraphs of rule 18, money standing to the credit of the members has reference, not only to members who have not given notice of withdrawal, but also to those (to whom the rule is then referring) who have given such notice. Then, under sub-division (*b*) of paragraph 3 of section 32 of the Act, the deed of dissolution is to set forth "the number of members, and the amount standing to their credit in the books of the society," and in my opinion the officers of the society cannot be absolved, by putting a different construction upon the rules, from taking into account what is required under that sub-division of section 32.

Then it is said the cases are against the withdrawing members being still considered members of the society. But the only case on which I think the appellants can in any way rely is *Sheffield and South Yorkshire Building Society*, and that gives no real support to their contention, because the decision there was on an entirely different point. The county court judge had held, and properly held, that certain members who had given notice of withdrawal after the whole of their payments had been made, were not liable; but, as regards certain other members who had withdrawn before their shares had matured, and before they had paid the full amount payable on those shares, he had held that, under section 14 of the Act, they were liable in the winding up for the amount unpaid on their shares. I cannot see, looking at section 14, how the decision of the county court judge on that point could have been right. However, the grounds relied upon by the appellants here were certain expressions used by the judges in the Divisional Court in giving judgment in that case. I think the explanation given by Mr. Farwell of those expressions is the correct one—that is, that they were intended to be applicable to those members who had given notice of withdrawal, and were to be paid off as soon as any funds were available for the purpose, and that as soon as that payment was made, then the connection of those members with the society was completely severed. That, I think, is the fair meaning of what was said by Cave, J., in his judgment in 22 Q. B. D., at p. 475.

In my opinion, therefore, this decision of North, J., was right.

LINDLEY, L.J.—I have no doubt the decision of North, J., is right. The question, to my mind, turns upon the construction of an Act of Parliament which is less obscure than usual.

First of all, I will refer to this instrument of dissolution. I cannot myself obtain much light from that document, because it is plain to me that the word "members" is there used sometimes in one sense and sometimes in another. When it speaks of the "number of members" it excludes the withdrawing members; when it speaks about "the amount standing to the credit of members" it includes the withdrawing members. That gives one no help, one way or the other.

Then, as regards the rules, they are made pursuant to the Building Societies Act, 1874, s. 16, clause 4 of which provides that the rules are to regulate the terms upon which shares may be withdrawn, and upon which mortgages may be redeemed; and clause 14 provides that they are to regulate "the manner in which the society . . . shall be terminated or dissolved." Accordingly, the rules of this society were made pursuant to that enactment, and the first question is as to the meaning in those rules of the word "members," of which the Act gives no interpretation. [His lordship referred to rules 3 and 6, and proceeded:—] Then we come to the rule relating to withdrawals (rule 18) which is important, and the case really turns upon the construction of that rule taken in connection with the Act of Parliament. You may construe a rule by reference to the Act of Parliament, but you can hardly construe an Act of Parliament by reference to a rule; and if rule 18 does conflict with the Act, that is so much the worse for the rule, not so much the worse for the Act. I do not think it does conflict. What it says is this:—[His lordship shortly gave the effect of the earlier parts of the rule, and proceeded:—] Then it continues, "the secretary shall inform the member in writing when the money is ready for him"—treating, therefore, the person who has given notice, and who has been entered in the book, as a member. Then it says, "Members being thirteen weeks in arrear, or having given notice of withdrawal, shall, from the date of such notice, cease to take part in the affairs of the society, but may cancel such notice at the discretion of the board of management."

Now what is the position of a member who has given notice of withdrawal, but who has not been paid back the amount due to him for his subscriptions? It is contended on the one hand that he is a member, and on the other that he is a creditor. I take it the true way of describing him is as a member who has given notice of withdrawal and is a creditor. That he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor; and that was decided in the *Blackburn and District Society's case*, which afterwards came before the House of Lords under the title of *Walton* v. *Edge*.

But does he cease to be a member before he is got rid of altogether under these rules? It seems to me he does not. He is not to take part in the affairs of the society; but neither is a person who is thirteen weeks in arrear; yet the latter does not cease to be a member until he is got rid of, and no more does the person who withdraws. I take it the words "he shall cease to take part in the affairs of the society" mean that he shall not take part in the affairs of the society as a going concern. If they mean more, the rule is in conflict with the Act of Parliament, which I will refer to presently. I do not think, on a fair construction of the rules, that they mean more than I have said, but if they do, then they conflict with the Act of Parliament, which must prevail over them.

Now what the Act of Parliament says (in section 32) is this:—"A society under this Act may be terminated or be dissolved . . . by dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution."

Now, has this deed or instrument of dissolution been consented to in compliance with this provision of the Act—that is to say, has it been consented to by three-fourths of the members holding two-thirds of the shares? The answer is, "Certainly not." Of course, the contention is that those persons who have given notice of withdrawal (but who, as I read the rules, have

not ceased to be members) have ceased to be members. For the reasons I have given I cannot come to that conclusion. Then it is said to be settled by authority that they are no longer members, and in support of that the case of *Sheffield and South Yorkshire Permanent Building Society* was referred to. But it is quite obvious, when you look at the section of the Act and the rules which the court had to consider there, that as soon as you came to deal with a man who had given notice of withdrawal, even if he had not already been paid out, he was not, under that section and those rules, liable to contribute anything. Section 14 of the Act makes that plain. His liability is to be limited to the amount paid. That does not mean that calls are to be made upon him to the extent of the amount paid. That would be making him pay twice over. If he is in arrear, the amount of the arrears may be called up, but nothing additional can be due from him after notice of withdrawal, whether he has received his money out or not—he has nothing more to contribute. Therefore it is perfectly plain that the decision in that case was right. There were, however, some expressions in that case which look as if the judges treated members who had given notice of withdrawal as no longer members of the society. That is explained by the circumstance that in that particular case these withdrawing members had been paid out, and, therefore, had ceased to be members of the society, and had nothing more to do with it.

The only other case referred to which is at all important is that of *Walker* v. *General Mutual Building Society* (the arbitration case), which, as far as it goes, accords with the view we are now taking, that a member who has given notice of withdrawal, but has not been paid out, is still a member.

Therefore, that being so, I think the judgment of the court below must be confirmed, and that this appeal must be dismissed.

Lopes, L.J.—The question is whether the plaintiff and certain other persons who are withdrawing members are "members" within section 32 of the Building Societies Act, 1874, and whether they are members for the purpose of the dissolution of this society.

If the withdrawing members are members the deed is bad, but if they are not the deed is good. The question depends on section 32 and on the society's rules. In my opinion the withdrawing members are members of the society, and it is to be observed that in section 32 the word "members" is used without any qualification, the words being "by dissolution with the consent of three-fourths of the members." I cannot see where Mr. Davis found the meaning he sought to put upon it—*i.e.*, members who have the full rights of shareholders."

Now I come to rule 18, which is the important rule in this case. In the course of the argument I have pointed to different parts of that rule which, to my mind, all tend to the same conclusion, which is that what was intended was that the withdrawing members should continue to be members until paid out. As I read the expressions in that rule they are inconsistent with any other construction. It seems to me that Mr. Higgins is not entitled to rely upon the expression which occurs in that rule that withdrawing members "shall cease to take any part in the affairs of the society." That very expression seems to me to recognize the fact that they are still to be members—not, it is true, members who are to take active interest in the affairs of the company as a going concern; but still members, and members for the purpose of the dissolution of the society. Rule 6 is a rule which is worthy of attention, as clearly showing that where the intention was that a member should cease to be a member, the framers knew how to use the apt and explicit term that was used in that rule—viz., "cease to be a member." The *Sheffield and South Yorkshire case* relied on by Mr. Higgins is clearly distinguishable from the present case, because there the withdrawing members had been paid out. In fact, it seems to me that it is rather an authority in favour of the respondents.

I think, therefore, that this appeal fails.

Appeal dismissed.

Solicitors for the appellant, *Crawford & Chester.*

Solicitors for the respondents, *Savery & Stevens.*

From Q. B. Div. June 10.

Mayor, &c., of Salford v. County Council of Lancashire. (a.)

Local government—County council—Contagious Diseases (Animals) Act, 1869 (32 & 33 *Vict. c.* 70), *ss.* 90, 97 —*Contagious Diseases (Animals) Act,* 1878 (41 & 42 *Vict. c.* 74), *ss.* 4, 37—*Local Government Act,* 1888, *ss.* 64, 79.

The Contagious Diseases (Animals) Act, 1869, *enacted that the expenditure of the local authority of each county under the Act should be defrayed out of a local rate, but that the local authority of each borough assessed to the rate should be recouped the proportionate amount contributed by the borough to the expenses incurred under the Act by the local authority of the county.*

By the Contagious Diseases (Animals) Act, 1878, *the Act of* 1869 *was repealed, all liabilities under it being preserved, and it was enacted that, for all the purposes of this Act, a local authority might be sued as if they were incorporated.*

By the Local Government Act, 1888, *the powers, liabilities, and property of the local authority were transferred to the county council.*

The plaintiffs having brought an action against the defendants to recover the proportionate amount contributed by them between the years 1869 *and* 1878 *to the expenses incurred by the local authority for the county under the Act of* 1869,

Held, that no action would lie against the defendants for the amount claimed, and that the plaintiffs' remedy under the Act of 1869 *against the local authority for the county was by* mandamus, *and not by action.*

Appeal from the decision of Grantham, J.

The action was brought to recover the sum of £686 paid by the borough of Salford to the local authority of the county of Lancaster between the years 1869 and 1878 under the provisions of the Contagious Diseases (Animals) Act, 1869.

By section 90: "The expenditure of a local authority in compensation for animals slaughtered under Part V. of this Act, or in respect of principal of, or interest on, money borrowed in pursuance of this Act, shall be defrayed out of the local rate, or out of a separate rate to be levied in all respects as the local rate, and included under the term local rate."

By section 97: "Notwithstanding anything in this Act, the local authority of each borough situate within a county and assessed to the county rate thereof shall be recouped the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county in pursuance of this Act (including expenditure in compensation for animals slaughtered, or in respect of principal of, or interest on, money borrowed in pursuance of this Act), so that the burden of those expenses shall be borne wholly by the county, and not as to any part thereof by any borough situate within the county."

(a.) Reported by A. P Percival Kemp, Esq., Barrister-at-Law.

only be deprived of his priority by some act or omission amounting to an estoppel; if he acts *bonâ fide* and without gross negligence he will not be postponed: *Dixon* v. *Muckleston*, 21 W. R. 178, L. R. 8 Ch. App. 155; *Roberts* v. *Croft*, 5 W. R. 773, 6 W. R. 144, 2 De G. & J. 1; *Wallwyn* v. *Lee*, 9 Ves. 24. [Kay, J., referred to *Hunt* v. *Elmes*, 8 W. R. 632, 9 W. R. 362, 2 De G. F. & J. 578; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Newton* v. *Newton*, 17 W. R. 238, L. R. 4 Ch. App. 143.] *Lloyd's Banking Co.* v. *Jones*, 33 W. R. 781, 29 Ch. D. 221; *Union Bank of London* v. *Kent*, 37 W. R. 364, 39 Ch. D. 238; *Sanders* v. *Dehew*, 2 Vern. 271. The defendants did not better their position by getting in the legal estate, with notice of the plaintiffs' mortgage, by a voluntary conveyance: *Sanders* v. *Dehew*; *Cory* v. *Eyre*, 1 De G. J. & S. 149, 12 W. R. Ch. Dig. 61; *Harpham* v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207; *Sharples* v. *Adams*, 11 W. R. 450, 32 Beav. 213.

Renshaw, Q.C., and *Scott Fox*, for the defendants, the subsequent equitable mortgagees.—The facts of the case show gross negligence on the part of the plaintiffs. They should have made a proper requisition as to the identity of the property, which was more than a quarter of a mile from the property formerly mortgaged to them by Toward: *Rice* v. *Rice*, 2 W. R. 139, 2 Drew. 73; *Layard* v. *Maud*, 15 W. R. 897, L. R. 4 Eq. 397; *Bradley* v. *Riches*, 26 W. R. 910, 9 Ch. D. 189; *National and Provincial Bank* v. *Jackson*, 34 W. R. 597, 33 Ch. D. 1, at pp. 12, 13; *Dixon* v. *Muckleston*; *Collyer* v. *Finch*, 2 W. R. 655, 5 H. L. Cas. 905, 5 W. R. H. L. Dig. 255; *Hewitt* v. *Loosemore*; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482; *Harpham* v. *Shacklock*. The rule *qui prior est tempore, potior est jure* is only *primâ facie* applicable in the absence of any other circumstances which affect the equities between the parties. A less degree of negligence is necessary to postpone an equitable mortgagee than a legal mortgagee. The defendants have not to show gross negligence on the part of the plaintiffs: *Edmunds* v. *Povey*, 1 Vern. 187; *Sadler* v. *Bush*, 2 Vern. 30. [Kay, J., referred to *Sanders* v. *Deligne*; 2 Freeman's Ch. Cas. 123.] *Belchier* v. *Butler*, 1 Eden. Rep. 523; *Goleborn* v. *Alcock*, 2 Sim. 552; *Pilcher* v. *Rawlins*, 20 W. R. 281, L. R. 7 Ch. App., p. 268; *Blackwood* v. *London Chartered Bank of Australia*, 22 W. R. 419, L. R. 5 P. C. 92; *Keate* v. *Phillips*, 29 W. R. 710, 18 Ch. D. 560. This is an ordinary case of tacking; by getting in the legal estate the defendants are entitled to priority.

Haldane, Q.C., in reply, referred to *Cory* v. *Eyre*; *Allen* v. *Knight*, 5 Hare, 272.

Cur. adv. vult.

June 19.—Kay, J., delivered the following written judgment:—[After stating the facts as set out above, his lordship continued:—] The property not being sufficient to pay both of these mortgages, the question which mortgage is to be first, is important. The case was very well argued by Mr. Scott Fox. It was contended that the plaintiffs' security must be postponed to the defendants', not because of any act done by the plaintiffs, but because they were guilty of negligence, which, it was urged, was sufficient to deprive them of their *primâ facie* right to priority. The argument rested mainly on a distinction between the position of a first mortgagee who has an equitable estate and that of a mortgagee whose estate is legal. In the latter case the doctrine of the court is thus stated in *Plumb* v. *Fluitt*, 2 Anstr. 432:—"Nothing but fraud or gross and voluntary negligence in leaving the title deeds will oust the priority of the legal claimant." This doctrine was accepted by Lord Eldon in *Evans* v. *Bicknell*, 6 Ves. 174, and was re-stated in like terms by Turner, L.J., in *Hewitt* v. *Loosemore*, and has always been recognized as the undoubted law on the subject. In the last-mentioned case Turner, L.J., says, in effect, that such negligence will be imputed to the legal mortgagee if he omits all inquiry as to the deeds, but not if he has inquired and a reasonable excuse is given for their non-delivery. But it was argued that a much smaller amount of negligence was sufficient to postpone a mortgagee whose estate is only equitable. That proposition, stated in other terms, is that a court of equity would deprive a mortgagee of an advantage which is less than the legal estate much more readily and easily than it would deprive him of the legal estate. From the mortgagee's point of view it is difficult to see any justice or reasonable principle for this. He says: "I want my money; whether you take from me the legal estate, or only an equitable estate, the effect is to me precisely the same; you take from me the money I have advanced. If I have the legal estate equity will not deprive me of my money on the ground of negligence unless it be 'gross and wilful.' Why should it deprive me of it for less negligence when I have the first equitable estate, which *primâ facie* entitles me to priority as much as the possession of the legal estate would do?" The doctrine, however, it was contended, is settled by authority; and reference was made to the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, where it is said (32 W. R., at p. 626, 26 Ch. D., at p. 487), "The question is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstances justify the court in depriving a legal mortgagee of the benefit of the legal estate"; and again (32 W. R., at p. 629, 26 Ch. D., at p. 494), "the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

From these words, and an observation during the argument that the case of *Waldron* v. *Sloper*, 1 Drew 193, was a contest between equitable incumbrancers, the conclusion has been drawn by the defendants' counsel that it was the view of the Court of Appeal that gross negligence must be proved in order to postpone the legal mortgagee, but that a much less amount of negligence, such as "mere carelessness or want of prudence," would suffice to postpone the first of two equitable mortgagees. I do not think that this is the true meaning of that judgment. The court was not dealing with a contest between two equitable mortgagees, nor attempting to define the amount of negligence necessary in such a case, but merely emphasizing the fact that the estate which it was called upon to displace was legal, and not equitable. No doubt courts of equity have always manifested great reluctance to deprive a mortgagee or other purchaser of the legal estate; but so they have also when the attempt has been to displace the first of two equitable mortgagees. I have not found any case of authority in which this has been done on the ground of negligence that was not "gross"—that is, so great as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee. This seems to me to be the accurate statement of the rule as between two equitable mortgagees; and for this view of the law there is positive and very high authority.

In *Cory* v. *Eyre* Turner, L.J., says:—"Questions of priority between equitable incumbrancers (and the incumbrances both of the plaintiff and of the defendants in this case are equitable, the legal estate being, as has been stated, outstanding) are in general governed by the rule *qui prior est tempore potior est jure*, and in determining cases depending on the rule we must, of course, look at the principle on which the rule is founded. It is founded, so I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or

declared. Where, therefore, it is sought, as in the present case, to postpone an equitable title created by declaration of trust there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it. A vested estate or interest ought not to be disturbed upon any light grounds."

In *Shropshire Union Railways and Canal Co.* v. *The Queen*, 23 W. R. 709, L. R. 7 H. L. 496, Lord Cairns says (23 W. R., at p. 710, L. R. 7 H. L., at p. 507): "But I conceive it to be clear and undoubted law, the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

In *Roberts* v. *Croft* Lord Cranworth, dealing with a contest between two equitable mortgagees, says that "the former, when she took her security, acquired a right which was good against all other merely equitable claimants, unless she was guilty of gross negligence enabling the mortgagor to commit a fraud by holding himself out as unincumbered holder of the property."

In *Dixon* v. *Muckleston* Lord Selborne treats the rule that negligence to postpone the mortgagee must be "gross and wilful negligence which, in the eye of this court, amounts to fraud," as applicable between two equitable mortgagees, and he says, in effect, that where deeds were deposited which were stated in writing by the mortgagor to be the title-deeds of a certain property, and to be deposited as security, whether those were all the deeds, or only part of the deeds, or "had not been truly deeds relating to" that estate at all, "as between the mortgagor who had signed such a statement, and those claiming under him" on the one side, and the mortgagee on the other, a good equitable security would be created, which they "would be estopped from at any time whatever disputing," and for this his lordship refers amongst other cases to *Hunt* v. *Elmes*, *Collyer* v. *Finch*, and to the statement of the law in *Hewitt* v. *Loosemore*, all of which were cases of legal mortgages.

These are not *obiter dicta*, but the carefully-worded reasons on which some of the most eminent of modern judges based their decisions in the cases I have referred to, in the Court of Appeal, in Chancery, and in the House of Lords. Nothing short of a decision of the House of Lords can overrule the law so laid down.

Great reliance was placed in argument upon the judgment in *Rice* v. *Rice*, where Kindersley, V.C., says that, "in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to." In that case the claimant was a vendor who had conveyed the estate without receiving his purchase-money, and was seeking to establish an equitable lien for it against a subsequent mortgagee by deposit of the conveyance, which had upon it a receipt for the purchase-money signed by the vendor, who had thus armed the purchaser with the means of committing a fraud upon the depositee. No one can object to the decision, but the doctrine as above stated by Kindersley, V.C., has not been accepted. The case was cited in each of those from which I have just quoted, and the language used by Turner, L.J., in *Cory* v. *Eyre* seems expressly addressed to answer the observations of Kindersley, V.C. It has also been remarked upon in *In re Vernon, Ewens, & Co.*, 35 W. R., at p. 226, 33 Ch. D., at p. 408, and in *Union Bank of London* v. *Kent*. In the last-mentioned cases many of the decisions in contests between two equitable mortgagees are discussed and explained. In each of those decisions in which a prior equitable mortgagee was displaced for negligence, the negligence was such as, according to the definition given in the cases I have referred to, would have been sufficient to postpone a mortgagee who had the legal estate. I conclude, therefore, that the negligence necessary to postpone the first equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed upon the second mortgagee.

The question is, was there sufficient negligence in this case on the part of the plaintiffs? They intended to have, and had every reason to believe they were obtaining, a perfectly good legal mortgage. If the legal estate had passed, it would have been impossible, I think, to deprive them of it at the instance of the defendants. The negligence of which they are accused was omitting to make a requisition as to the property having been at one time owned by Smithson. If they had done this, it is said the forgery of the deed of the 3rd of November, 1882, would have been discovered. But would it? If by requisition is meant exhausting all means of information by applying to Smithson's trustees, inquiring in the neighbourhood, and the like, that might have been the result. But the requisition which a purchaser usually makes is a question asked of the vendor or his solicitors; unless he has reason for suspicion, it is not usual to do more, and if he gets a satisfactory answer he does not inquire further; and he cannot be truly said to be guilty of gross negligence if he is so satisfied. In this case the mortgagor had not a separate solicitor; the question, if asked, must have been asked of him. But it was anticipated, so far as he was concerned, by production of the forged deed, which he produced as genuine, and which the plaintiffs' solicitors had no reason in the world to doubt. Therefore, to my mind, this, if negligence, was not gross negligence; was not such negligence as would have postponed the plaintiffs if the legal estate had passed to them by the deed of mortgage; and was not such negligence as made them responsible in the view of a court of equity for the fraud subsequently committed by the mortgagor upon the defendants.

Lord Selborne, in *Dixon* v. *Muckleston*, held that an equitable mortgagee receiving a parcel which the mortgagor stated in writing to contain the title deeds of the estate upon which he by that writing contracted to give security could not be postponed to a subsequent mortgagee by deposit of the real title deeds. Even if the parcel did not contain any of the title deeds, and he, trusting to the mortgagor's statement, never examined it, such negligence would not be sufficiently gross to postpone him.

That would be greater negligence than can be imputed to the plaintiffs in this case.

I think myself bound by principle and authority to hold that the plaintiffs cannot be postponed on the ground of negligence.

Then does the possession of the title deeds confer upon the defendants an advantage, in respect of which they are entitled to plead that they are purchasers for value without notice.

There has been some fluctuation of opinion on this point. Lord Cranworth, in *Collyer* v. *Finch*, says that the principle is not confined to cases where the person who sets it up has the legal estate.

In *Thorpe* v. *Holdsworth*, 17 W. R. 394, L. R. 7 Eq. 139, Giffard, V.C., thought the question a difficult one, but, having established the priority of the first equitable mortgagee, he directed a sale to raise his charge, and that the second mortgagee, who had the deeds, should produce them for the purpose of such sale.

But in *Newton* v. *Newton*, where the claim was to have a trust fund of £2,000 raised out of

an estate, in priority to an equitable mortgage by deposit of the mortgage-deed by which the fund had been secured to the trustee, who had advanced the trus money to the mortgagor, the Lord Chancellor held that where the equitable right was established against the defendants having the deeds the decree should go on to order them to be delivered up; distinguishing *Wallwyn* v. *Lee* and like cases on the ground that the sole object in them was to recover the deeds, and not to determine the right to the estate; but when the right to the estate was decided it would confer the right to the possession of the deeds.

Another point insisted upon was that the legal estate which the defendants have got in will protect them against the plaintiffs' claim.

But if this was obtained from someone who was trustee for the persons beneficially interested, and who knew of the plaintiffs' claim, it is quite clear it will not protect the defendants.

I have pointed out that by the conveyance by Surtees' trustees to Toward on the 30th of January, 1883, it appears that the contract with them was to convey the fee simple free from incumbrances.

When Surtees' trustees obtained the legal estate after this conveyance there was a duty incumbent upon them to convey it to Toward, or to the assign of Toward, who had the best right to call for it. In that sense they were trustees for such assign. Any conveyance by them to another person would be a breach of such trust, and the defendants could not obtain an advantage by availing themselves of such a breach of trust. I have spoken of trustees. I believe, in fact, there was only one trustee at the time of these transactions.

In *Harpham* v. *Shacklock* copyholds had been mortgaged in 1850 by conditional surrender, without admittance, to one Peck. In 1876 the owner of the equity of redemption mortgaged to Pritchard. In 1877 Peck and the owner mortgaged to Shacklock, Peck being paid off. Shacklock deposited this mortgage and the documents obtained from Peck with his bankers to secure an advance, and about the same time he handed some of the other title deeds to the plaintiff, for whom Shacklock was trustee of the mortgage of 1877. After they knew of the plaintiff's claim the bankers procured Peck to be admitted under his conditional surrender of 1850, and he surrendered to them and they were admitted. In the Court of Appeal Sir G. Jessel said: "Then, as regards the legal estate, nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from the bare trustee after you have received notice of a prior equitable claim. If Peck knew of the claim it was a wilful breach of trust in him to surrender to the bankers, if he did not know of it the bankers did, and knew that they were inducing him to commit a breach of trust by getting him to hand over the legal estate. The appellants' case, therefore, fails, and the appeal must be dismissed, with costs."

I must, therefore, hold that the plaintiffs are entitled to priority.

With reference to costs, the case is a very hard one, and I do not think it right to do more than to allow each party to add his costs to his debt without interest upon such costs.

There must be a declaration that the plaintiffs have the first charge, the usual accounts, a decree for sale, and a direction that the costs be added to the debt, but without interest, and that the title deeds be delivered to the plaintiffs.

Solicitors, *C. & S. Harrison; Iliffe, Henley, & Co.*, for *Russell & Mackay*, York.

Chan. Div. } North, J. } April 19, 29, 30; May 1.

In re THE CROWN BANK (LIMITED). (a.)

Company — Winding up — Shareholder's petition — Business for which company was formed abandoned, and business not authorized by memorandum of association substituted—"Just and equitable" that company should be wound up—Companies Act, 1862 (25 & 26 *Vict.* c. 89), s. 70.

A company was formed for the purpose of carrying on a banking business in Northamptonshire, but, after about seven months, closed the local bank, changed its name, took an office in London, and carried on a business consisting of speculations in stocks and shares.

Held, on the petition of a shareholder for the winding up of the company, that it was "just and equitable" that it should be wound up.

This was a petition for the winding up of the above-named company, presented by a shareholder holding twenty shares on which £5 per share had been paid up, and supported by other shareholders. It was opposed by the company and by certain shareholders and creditors of the company.

The company was incorporated in 1888 under the Companies Act as a company limited by shares, with a capital of £250,000, divided into 25,000 shares of £10 each, under the name of the Mid-Northamptonshire Bank (Limited). The objects of the company, as defined in the memorandum of association, were the carrying on of the business of bankers in all its branches, with all incidental matters and things connected therewith, and generally all banking and monetary operations, and for the purposes aforesaid, or in common with any of the said objects, the acquisition and holding or resale of real and personal estate, either by way of security, investment, or otherwise, the discounting of bills, and the granting and making of loans on security of almost any kind, and to carry on financial operations of every kind; the borrowing of money and making and issuing mortgages and other securities for money secured on property of the bank, or without security; the investing the moneys of the bank in shares, stock, bonds, &c., and securities of any company, trust, or corporation formed under British, foreign, or colonial law, and upon any other securities; and numerous other objects.

In the prospectus inviting applications for shares which was issued by the directors, the objects were thus stated:—"This bank has been formed for the purpose of extending banking facilities in the county of Northampton, particularly in the Parliamentary Division of Mid-Northampton, where, from the rapidly-increasing manufacturing population in the boot trade and other local circumstances, it is known there is a profitable field for further banking operations."

In January, 1888, the company opened an office for banking business at Rushden, in Northamptonshire, but did little or no business there of any kind, and after a few months that office was closed, as it did not pay its expenses. No other business was carried on by the company in the county of Northampton.

In February, 1889, the name of the company was changed to that of "The Crown Bank (Limited)," and from about that date the only place of business of the company was its registered offices, No. 56, Cheapside, where the company used two rooms on the first floor, but possessed none of the accommodation usually required by bankers.

The petition alleged, among other things, that upon the faith of the prospectus the petitioner and other shareholders subscribed for shares; that there were

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

various misrepresentations and misstatements in the prospectus; that no banking business was done by the company according to the balance-sheet issued by the directors, but only dealings in stocks and shares of a speculative character and loan transactions upon the securities of the bank; that the balance-sheet was not a proper one; that the company was insolvent and unable to pay its debts; and that, under the circumstances, it was just and equitable that it should be wound up.

The allegations in the petition were denied on behalf of the company.

Napier Higgins, Q.C., and *Duke*, for the petitioner.—The company ceased from February, 1889, to carry on the business for which it was formed, and it is just and equitable that it should be wound up. It was formed to carry on the business of a local bank, but that business has been entirely given up, and the directors do nothing but speculate systematically in stocks and shares. The funds of the company are being improperly used for purposes which are not justified by the memorandum of association of the company.

They referred to *In re Haven Gold Mining Co.*, 30 W. R. 389, 20 Ch. D. 151; *In re German Date Coffee Co.*, 30 W. R. 717, 20 Ch. D. 169; The Companies Act, 1862, s. 70.

Bramwell Davis, for shareholders supporting the petition.

Cozens-Hardy, Q.C., and *A. R. Kirby*, for the company.—The objects of the company as set forth in the memorandum of association include and justify the dealings in stocks and shares which have been carried on by the directors. The fact that the banking business has been discontinued, and that the company now engages in speculation on the Exchange is not sufficient to justify a winding-up order.

Everitt, Q.C., and *Chadwyck Healey*, for shareholders opposing the petition.

P. F. Wheeler, for creditors opposing the petition.

Napier Higgins, Q.C., replied.

NORTH, J., after examining the evidence given on the petition, and stating the facts of the case, proceeded:—It appears that the main business which the company was started to carry on was a local banking business, that such business has been entirely abandoned, and that the business which has actually been carried on in London is a speculative business of an entirely different character.

The prospectus of the company, on the faith of which the petitioner and the shareholders supporting the petition have taken their shares, was addressed to the formation of a local bank and nothing more, and I think that it correctly describes what were the real objects of the company. I agree that the prospectus cannot control the objects as defined by the memorandum of association of the company, but I think that the prospectus has placed the true interpretation upon them. It is said that the speculations carried on by the directors are comprised in the objects stated in the memorandum. [His lordship went through the objects, which were very numerous, and continued:—] In my opinion, if the memorandum of a company were to state the objects of the company to be the carrying on of any business whatsoever which the directors might think would be profitable to shareholders, that would not be such a statement of the objects as required by the Companies Act. The objects comprised in this memorandum, if the interpretation put upon them, by counsel for the company, is correct, might authorize a scheme for running a line of balloons between the earth and the moon. If such an interpretation were true the memorandum would not, in my opinion, be within the Companies Act at all. In my view the company could only properly engage in these numerous objects as subsidiary to its main business. The business of the company was that of bankers. It is a business which has been abandoned by the company, and the company ought to be wound up. What the company are now doing, and have been doing for a year past, is something outside the objects for which the company was formed.

It has been urged that if what the directors are now doing is *ultrâ vires*, there is a well known remedy open to the petitioner and the shareholders supporting him, that they should apply to the court to restrain the directors from doing what is beyond their powers, and that it is in such case to seek an improper remedy if they present a petition for winding up. As a general rule I do not dissent from that proposition; but it must be properly understood and must be limited. If a company were carrying on an illegitimate business and also a legitimate one, a winding-up order would not be the proper remedy, but an injunction would. If the legitimate business had become impossible, and the company were carrying on an unauthorized business, a winding-up order would be the proper remedy.

Take the case of a steamship company established for the conveyance of goods by sea between Liverpool and Dublin. If for the sake of convenience the directors proposed to land the goods before they reached Dublin, and to purchase a railway to carry the goods by land, the purchase of a railway being beyond their powers, there would be a case for an injunction. But if by any chance, by reason of a tunnel being constructed or otherwise, it became practically impossible for them to convey the goods by steamer, and they proposed to buy the railway and carry the goods by that way only, and to carry on a business which was unlawful for them to carry on, instead of their proper business, then I think it would be open to a shareholder to apply for a winding-up order. The ground on which I decide that there ought to be a winding-up order is that the case comes within the class of cases in which it is "just and equitable" that there should be a winding-up order, which is the last and most difficult to define and limit of the several grounds specified in the Companies Act, 1862, for resting a winding-up petition upon. I find these grounds specifically put forward in the petition. There are matters in evidence which I cannot go into. There was, however, one remark made as to the petition. It was said that the presentation of the petition was an attempt to levy blackmail. But what the petitioner has done is to say that the company are not carrying out the objects of the company, and that he desired to have his shares cancelled, and what he has paid returned; and this is no more than he is entitled to.

The parties subsequently came to an arrangement, and, upon application to the court, the petition was dismissed by consent.

Solicitors, *C. Curtis; C. R. Steele; Godden Styles Hare; G. Lincoln.*

Chan. Div. Stirling, J. } May 22.

THYNNE v. SHOVE. (a.)

Vendor and purchaser—Goodwill—Sale of business—Restricted right to use name of vendor.

T. sold a business, goodwill, and stock-in-trade to S., including business cards bearing T.'s name. S. issued

(a.) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

further cards, bearing T.'s name as before. The assignment contained no express authority to S. to use T.'s name. T. moved to restrain S. from using his name on business cards, or otherwise trading in such name.

Held, that S. must be restrained from using T.'s name, so as to in any way expose T. to any liability by holding him out as a person with whom contracts were made which might impose liability on him.

Levy *v.* Walker, 27 *W. R.* 370, 10 *Ch. D.* 436, *distinguished.*

Motion.

The plaintiff, Arthur Thynne, formerly carried on business as a baker and confectioner at 44, Tranquil-vale, Blackheath. On the 27th of March, 1890, he entered into a contract with the defendant to sell to him as a going concern the leasehold house and premises where his business was carried on, together with the goodwill of the business, with certain stock-in-trade and fixtures.

By an assignment dated the 26th of April, 1890, in consideration of the sum of £850, the house or shop and premises, and all the beneficial interest and goodwill of the plaintiff in the trade of a baker and pastrycook there carried on by him, were assigned to the defendant.

Under the conditions of sale the defendant purchased from the plaintiff the stock-in-trade, including a number of paper bags, bill-heads, and cards, all bearing the name of the plaintiff, and also other articles for the sum of £42. After these cards were exhausted, the defendant caused to be printed and issued trade cards, bearing the name of "A. Thynne, baker and confectioner, the Village Bakery, Blackheath (established 1850)," as he alleged, in the ordinary course of business. Such cards did not bear the name of the defendant.

The assignment contained no express authority to use the name of the plaintiff.

The plaintiff commenced the present action on the 16th of May, 1890, claiming by his writ an order for the delivery up to him of all cards, bill-heads, and bags printed by or for the defendant in the name of "A. Thynne," an injunction to restrain the defendant from so using the name of the plaintiff or otherwise trading in his name.

The plaintiff now moved for an injunction in the terms of the writ.

Graham Hastings, Q.C., and *Bradford*, for the motion.—The assignee of the business cannot use the plaintiff's name, unless that is expressly authorized. The assignment contains no authority to use the name of "A. Thynne." The assignment of the goodwill does not amount to an irrevocable power of attorney; that would result if the assignee could so act as to make the assignor liable in any way. *Levy* v. *Walker*, 27 W. R. 370, 10 Ch. D. 436 (see judgment of James, L.J., at p. 448), and *Gray* v. *Smith*, *ante*, p. 310, 43 Ch. D. 208, take the question of what goodwill includes, as far as it can go.

Buckley, Q.C., and *Levett*, for the defendant.—The nature of the contract must first be ascertained exactly. The defendant bought a large number of articles bearing Thynne's name, including paper bags and cards. The plaintiff seeks to use his name again in business in Blackheath, after assigning his goodwill. This would seem to follow from his complaint of Shove's reprinting the name. *Levy* v. *Walker* and *Gray* v. *Smith* are not inconsistent. [STIRLING, J.—There is a difference between using the name in the business simply, and making the plaintiff liable in some way as carrying on the business.] The plaintiff cannot be injured, for Shove buys all goods in his own name. *Levy* v. *Walker* decides that the sale of goodwill includes the right to use the name; it is an exclusive right to use the name for the purposes of that business. There is no special virtue in adding to the assignment of goodwill, "together with the right to use the name of"; that is implied, for the business purposes. There is no copyright in a name, the defendant can use Thynne's name as he likes.

Hastings, Q.C., in reply.—The defendant has no right to use Thynne's name as a trade name; there is a liability if he does so, if I authorize him to trade under my name I may be liable. *Levy* v. *Walker* only decides that the name may be used where there is no possibility of any liability being incurred.

STIRLING, J.—I dispose of this motion as the hearing of the action, as that course has been consented to. The question which arises on the motion is an important one, and is not altogether covered by authority. [After stating the facts, and mentioning especially that the assignment contained no express assignment of the right to use the plaintiff's name, his lordship continued:—] Upon the evidence before me, the plaintiff puts his case upon these grounds: "I discovered on the 13th of May that the defendant had issued cards in my name, by which he wished the public to understand that I was still carrying on the business at 44, Tranquil-vale aforesaid. The defendant has no right to use my name, and I strongly object to his so doing, as it will materially injure me if I start in business again at Blackheath."

Now this, taken literally, is far in excess of the plaintiff's rights, for he has assigned the goodwill, and to the extent of carrying on the business in every way the defendant has the right to use the plaintiff's name, except so far as doing any act or using the name in any way so as to hold out the plaintiff as the owner of the business or to render him in any way liable. That is the only limit to the defendant's right to use the plaintiff's name. The defendant, on the other hand, says (paragraph 4): "I deny that the plaintiff can be materially or at all injured, and I deny his right to solicit any of the customers of the said business so purchased by me as aforesaid, and contend that I have a right to use the name of Arthur Thynne as a trade name."

The question is, is he absolutely entitled to use the name of the plaintiff, and this I think he is not entitled to do, so as to expose the plaintiff to any liability. *Levy* v. *Walker* has been relied upon. In that case Miss Charbonnel and Miss Walker carried on business in London. Miss Charbonnel married Levy; the partnership was dissolved, and the business and goodwill purchased by Miss Walker, who continued business under the style, as before, of Charbonnel & Walker. Mr. and Mrs. Levy carried on business in Paris under the style of Charbonnel et Cie., and sought to prevent Miss Walker from using the name of Charbonnel & Walker in London, and the relief claimed was refused, partly, it is clear, on the ground that Miss Walker put the plaintiffs under no possible liability by so carrying on the business. James, L.J., gave an opinion upon a point which Jessel, M.R., did not refer to, though he did not say that he held a contrary opinion, I mean that the assignment of the goodwill and business did convey the right to use the name of Charbonnel & Walker, and the exclusive right to use that name as between the vendor and the purchaser of that business.

In that case it is important to observe that the name of "Charbonnel & Walker" was not the name or names of any two persons carrying on the business, but really a fancy name; that is entirely different from a case where a person is exposed to liability, and the point that Miss Charbonnel could not have been liable to any claim was very important. In *Gray* v. *Smith* Cotton, L.J., said, "Mr. and Mrs. Levy could not be subjected to any liability by the use of the name of 'Charbonnel & Walker' by the defendant"; on that ground he seems to distinguish that case, so as to imply that no

liability could be imposed by the use of the name in *Levy* v. *Walker*. In the present case the parties seem to me to have put their respective rights too high. The defendant seems to be entitled to use the name of "A. Thynne" so far as this, that he must not expose the plaintiff to any liability. The proper way to deal with the case will be to restrain the defendant, his servants and agents, from using the name of the plaintiff in such a way as to expose the plaintiff to any liability by holding him out as a person with whom contracts are made, which would impose liability on him. No order as to costs.

Solicitors, *Ingoldby & Adkin; Keene, Marsland, & Bryden.*

Q. B. Div. (Cave and A. L. Smith, JJ.) June 12, 24.

MOORE AND ANOTHER *v.* GAMGEE. (*a.*)

County court—Defendant residing out of jurisdiction—Leave not obtained for commencement of action—Objection to jurisdiction—Waiver—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 74.

A summons from a county court having been issued at the instance of a plaintiff and served upon a defendant residing out of the jurisdiction without leave for the commencement of the action having been first obtained under section 74 *of the County Courts Act,* 1888, *the defendant appeared, but, after one of the causes of action had been heard and determined against him, objected to the jurisdiction.*

Held, that the practice under this section was analogous to that in the High Court in cases requiring leave for notice of service of a writ upon a defendant residing out of the jurisdiction, and that the defendant, having appeared and contested the action, had waived his right to raise any objection to the jurisdiction of the court.

Motion for a writ of prohibition referred to the court by Hawkins, J., at chambers.

The motion was made by the defendant for the purpose of prohibiting the judge of the county court of Brighton from further proceedings in an action by the plaintiff, on the ground that he had no jurisdiction over the defendant, who admittedly resided out of the jurisdiction, but had carried on business in the jurisdiction within six months before action. No leave had been obtained by the plaintiff under section 74 of the County Courts Act, 1888, for the commencement of the action in the court within the district in which the defendant had carried on business within six calendar months next before the commencing of the action. The defendant had appeared by his solicitor on the first day of the hearing at the county court, and had raised no objection to the jurisdiction. The judge had decreed specific performance of the contract sued upon, but adjourned till the next day the question whether there had been any acceptance by the defendant of the plaintiff's title. In the interval the defendant's solicitor became aware that no leave had been obtained for the commencement of the action, though the defendant resided out of Brighton. He thereupon took the objection to the jurisdiction of the court. The judge held as a fact that the defendant had carried on business in Brighton within six months of the commencement of the action, but that, even if he had not, the defendant had waived his right to raise the objection to jurisdiction, and that it was now too late to maintain it.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Wedderburn, for the defendant.—The defendant took the objection as soon as he was made aware of the defect in the proceedings. There was nothing patent on the form of summons to show that leave was necessary and had not been obtained. The judge was bound, under section 114 of the County Courts Act, 1888, to have dismissed the action as one over which he had no jurisdiction except by the consent of the parties.

Gregson, for the plaintiff.—The last section only refers to causes coming under section 56 which the county court had no jurisdiction to try. The objection has been taken too late. The further proceedings related to a claim of lien mainly. Such a claim is expressly excepted by section 75 from the provisions of section 74.

Wedderburn replied.

Cur. adv. vult.

CAVE, J.—This is an application by the defendant in an action for a prohibition to be directed to the judge of the Brighton County Court, on the ground that he had no jurisdiction to entertain the plaint laid before him by a plaintiff, the present respondent. The claim in the county court was for the specific performance of a contract. Objection to the jurisdiction was taken by the defendant on the second day of the hearing, on the ground that he resided outside the jurisdiction, and that no leave to serve the summons upon him had been obtained, as required by the County Courts Act, 1888, s. 74. That section enacts that, "except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant shall dwell or carry on business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant dwelt or carried on business within six months next before the commencement."

It was argued that, in the absence of such leave, there was a lack of jurisdiction in the county court, and that the judge was thereby bound to dismiss the plaint under section 114, which enacts that, "whenever an action or matter is commenced over which the court has no jurisdiction the judge shall, unless the parties consent to the court having jurisdiction, order it to be struck out."

There are two senses in which an objection to jurisdiction may be advanced. First, it may imply that there is no jurisdiction under any circumstances for the court to entertain the matter sought to be brought before it. Such matter is dealt with by section 56, which enumerates causes of action which are altogether excluded from the jurisdiction of the county courts. In the cases dealt with by section 74 there is no want of jurisdiction over the subject-matter. Specific performance is clearly within the ordinary jurisdiction of the county courts. No doubt the leave of the court or registrar is necessary before this particular claim could be entertained, owing to the defendant residing outside the jurisdiction. Ordinarily the registrar would be made aware of that fact on the entry of the plaint, and would have drawn the attention of the party entering the plaint to the fact that objection might be taken if leave was not previously obtained. However, that objection was not present to the registrar at the time of entry; the writ issued, and the defendant appeared.

It is difficult, as a rule, to draw analogies between actions in the High Court and those in the county courts, since the jurisdiction of the former depends largely upon the common law, and that of the latter depends entirely upon statute, but there is, I think, some analogy to be derived from the High Court practice in cases where a British subject is resident out of the jurisdiction, and the leave of the court must be obtained before a writ, or notice of a writ or summons, can be served. That is

ing, cleansing, and watering, in so far as they were necessary for the maintenance of the road.

Henn Collins, Q.C., and *Macmorran*, for the local board.

R. S. Wright, for the county council.

GRANTHAM, J.—There can be no doubt as to what our decision must be in this case—namely, that we have no right to put a more limited construction on the words of the Act of 1888 than they naturally would have, reading them in conjunction with the general legislation that from time to time has been passed in reference to roads.

The sections on which our decision mainly turns are the 13th section of the Highways and Locomotives (Amendment) Act, 1878, and the 11th section of the Local Government Act of 1888. We have first of all to find out what is the meaning of the term "road," as referred to in the 13th section of the Highway Act, 1878, and then what is the meaning of the words "main road," more particularly as affecting the question of the footpath on each side.

By the old Highways Act, a road included footways; that is common ground, and admitted by both sides. That being so, the Legislature in all legislation dealing with roads always dealt with the word road under the impression that they were dealing with the carriageway and the footway, and we must assume that that was the intention of the Legislature. Then when they made the alteration by the Highway Act of 1878, of modifying to a certain extent the liability for cost of repair by throwing half the cost of certain roads on the county authority as distinguished from the local authority, as they did not in terms make any difference between footways in urban districts and those outside urban districts, we must assume that the Legislature had it in its mind, when that Act was passed, that the incidence of the alterations of liability would be the same in the urban authority as it was in the local authority outside the urban authority. Then comes the Local Government Act of 1888, without any limitation at all as to the liability which is thrown on the county of paying the whole expense of certain roads, whereas before, the county authority only paid half. I think we must assume that the Legislature again intended that which they purport to state—namely, that every road in a county which is for the time being a "main road" shall after the appointed day be wholly maintained and repaired by the council of the county in which the road is situate. Now as they have not by any other section limited the natural meaning of the word "road," I do not see what power we have to put an interpretation upon it which is not the natural interpretation of it, looking at the effect of the legislation of the last fifty years on highways in this country.

All I can add to what I have already said during the argument is that, in my opinion, with regard to the first question, "Whether under section 11 of the Local Government Act, 1888, the county council is liable for the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair, of all or any of the above-mentioned footpaths or footways on the sides of main roads as parts of such main roads, or to make payments in respect thereof," our answer must be that the county council is liable to the cost of maintenance and repair and reasonable improvement of the footpaths or footways on the sides of main roads as parts of such main roads, and to make payments in respect thereof. I am also of opinion that, with regard to the paved or pitched crossings over such main roads, the same answer must be given as is given to the first—namely, that they are liable.

As regards scavenging, that the learned counsel for the county council gave up, and the point as to scavenging is not now contended for. With regard to lighting, that has been given up by the local authority. Then, with regard to the fifth question, our decision is that that must be left for the particular case that is brought before the authorities; or, if there is a dispute between them, before the Local Government Board. Under certain circumstances the county authority would be liable, but under other circumstances, if the change were greater than could fairly be considered a change likely to take place, or desirable, then the local authority must be at the expense of such a special change, which could not have been intended to have been thrown upon the county authority.

CHARLES, J.—I am of the same opinion. The section which we have to construe is the 11th section of the Local Government Act of 1888; but to construe that section it is necessary to consider what is the proper construction of sections 13 and 15 of the Highways and Locomotives (Amendment) Act of 1878, for the 11th section of the Act of 1888 refers to roads which are for the time being "main roads" within the meaning of the Act of 1878. Therefore it is necessary to look at the two sections of the earlier Act to be enabled to place a true construction on the 11th section of the later Act.

Now the two sections of the earlier Act constituted two classes of roads, as main roads: in the first place, roads which had ceased, or which would cease to be turnpike roads; in the second place, under section 15, any highways which appeared to the highway authority proper to be made main roads.

Now what, at the time of the passing of the Act of 1878, was the duty of the highway authority with reference to the repair of these roads? First, take the case of roads which had been disturnpiked prior to the passing of the Act. At that time the highway authority had imposed upon it a double duty. In the first place, it had the duty of repairing the footways, which the turnpike trustees were never under any duty to repair. In the second place, it had the duty, restored to it, after the close of the turnpike trusts, as representing the inhabitants at large, of repairing the highway, and therefore, at the time of the passing of this Act, with reference to the disturnpiked roads, there was imposed on the county authority the duty of repairing roads and footways alike. The same observation is true with reference to highways—highways which are dealt with under the 15th section of the Act—that is to say, highways which had never been turnpike roads at all. With reference to those highways the duty rested upon the inhabitants at large at all times; and the duty, at the time of the passing of this Act, rested on the highway authority of repairing both roadway and footway. Therefore the Legislature passed the Act of 1878 in this state of things—they were dealing with disturnpiked roads, or roads which would be thereafter disturnpiked, and they were dealing with ordinary highways; and they provide that one-half of the expenses incurred—by whom? by the highway authority—in the maintenance of such roads shall be paid to the highway authority by the county authority.

We have been invited by Mr Wright, on behalf of the county council, to read these words thus: one-half of the expenses incurred by the highway authority, as successors of the turnpike trustees, in the maintenance of such roads, and reading in those words, and referring us to the Turnpike Act of 3 Geo. 4, c. 126, ss. 111 and 112, he pointed out to us that upon the turnpike trustees there was no duty of reparation with reference to the footpaths; quite the contrary, the duty of reparation of footpaths was reserved to the inhabitants at large. The effect of the two sections is to empower the trustees to keep the footways in rural districts in repair, but with regard to the footways in urban districts, undoubtedly the Turnpike Act reserves the liability to repair those, and leaves it where it always was, upon the inhabitants

at large. If I could see my way to insert this limitation in section 13 I would insert it, but I own that, having regard to the fact that the same Act deals with two classes of main roads, one disturnpiked road, and the other ordinary highways, and having regard to the fact that, at the time it passed, the highway authority undoubtedly had the duty of repairing both highway and footway, it is impossible to insert any such limitation as that which is suggested.

It seems to me that, the turnpike trusts having come to an end, the Legislature means exactly what it says when it enacts that in the case of these disturnpiked roads one-half of the expenses incurred by the highway authority in the maintenance of these roads is to be borne by the county authority, the expenses of the highway authority including at that time undoubtedly both the expense of repairing the footway and the expense of repairing the roadway.

Now, that being the construction which I put upon the Act of 1878, I do not feel any difficulty at all with reference to the Act of 1888. There the whole of the expense is placed upon the county authority. I think it may be open to doubt under the former Act whether, in the case of roads which were simply declared main roads, one-half of the expenses could legally be thrown on the county, but, however that may be, it is quite certain now that under the Local Government Act the whole of the expenses of the maintenance of main roads, that is to say, main roads from hedge to hedge, including the footpaths, are thrown on the county authorities.

That disposes of the case. The urban authority in this instance have chosen to exercise the power reserved to them under sub-section 2 of section 11 of claiming to retain the duty of maintaining and repairing a main road, and, therefore, having done so, they are entitled to an annual payment or contribution from the county authority; they have to perform the duties which otherwise the county council would have to perform, and they may demand from the county council an annual payment; that annual payment is to cover the cost of maintenance and repair and reasonable improvement.

I may add, with reference to question 5, which is put to us, that if the alteration and substitution of flagging and paving for gravel is, under the circumstances, a reasonable improvement, undoubtedly that ought to be borne by the county council, they ought to contribute towards it. But whether in any particular instance it is an improvement or not seems to me to be a matter which, in case of difference, must, under sub-section 3 of section 11 of the Act of 1888, be determined by arbitration of the Local Government Board.

It is unnecessary for me to add anything to the answers we return to questions two, three, and four.

Solicitors for the local board, *Berkeley & Calcott*, for *Wakeman & Blecck*, Warminster.

Solicitors for the county council, *Merriman, Pike, & Merriman*, for *R. W. Merriman*, Marlborough.

Court of Appeal.

From Chan. Div. June 18.

In re PALMER. (a.)

Costs—Solicitor and client—Solicitor acting for mortgagor and mortgagee—Agreement as to amount of remuneration, inclusive of costs of both parties—Reference to taxing master—Solicitors' Remuneration Act, 1881, *ss.* 1 (3), 2, 8.

A solicitor was instructed by a letter signed by S. to borrow £300 for him upon certain specified security, and S. thereby undertook to pay "your costs (which I agree at £20, exclusive of money out of pocket) . . . to be incurred in . . . doing what is necessary for the purpose of carrying out these instructions." The solicitor, who acted in the matter for the mortgagee as well as the mortgagor, procured the advance, and retained £20 for his costs of both parties. S. having subsequently applied that the solicitor might be ordered to deliver a bill of his fees, charges, and disbursements, and that it might be referred to taxation,

Held (affirming the decision of North, J.), *that, though the remuneration agreed upon included matters in respect of which the solicitor was not engaged as solicitor for S. (including as it did the mortgagee's costs), yet as the solicitor was engaged by S. to do business for him as a solicitor, S. was thereby constituted a "client" of the solicitor within the meaning of section* 1, *sub-section* (3), *of the Solicitors' Remuneration Act*, 1881, *and within the meaning of that Act generally, and the letter amounted to an agreement within section* 8 *of the Act.*

Held, also, that, in the absence of any evidence impeaching the agreement as unfair or unreasonable, the court ought not to refer it to the taxing master under section 8, *sub-section* (4), *to deal with it in exercise of the powers thereby given.*

Appeal from North, J.

Slater, the appellant, was a journeyman butcher, and being entitled to some money under his grandfather's will, was desirous of raising a sum of £300 upon his interest thereunder. Accordingly he consulted Mr. Palmer, a solicitor, upon the subject, and in the result wrote him the following letter:—"I hereby request and instruct you to raise, or endeavour to raise, for me the sum of £300 at 10 per cent. per annum, on the security of all my estate and interest under the will and in the property of the late Thos. Symons, and I hereby undertake to pay your costs (which I agree at £20, exclusive of money out of pocket) incurred and to be incurred in and about doing what is necessary, in your opinion, for the purpose of carrying out these instructions." The letter was duly signed. Palmer, who acted in the matter as solicitor for both mortgagor and mortgagee, accordingly obtained an advance of £300, which was secured upon a mortgage of Slater's interest under his grandfather's will, and retaining £20 out of the £300 for his costs of both parties, handed the balance to Slater. Out of a further advance of £50, an agreed sum of £15 was deducted for costs in the same way. A summons was subsequently taken out by Slater for delivery by Palmer of a bill "of all such his fees, charges, or disbursements as he claims to be due or paid, or as have been deducted by him from the applicant, or out of his moneys" and for reference of such bill to taxation.

The Solicitors' Remuneration Act provides by a paragraph in section 1 (3) that "in this Act 'client' includes any person who, as a principal, or on behalf of another, or as trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, or retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor for his services any costs, remuneration, charges, expenses, or disbursements."

Section 2 mentions "business connected with . . . mortgages" among the different kinds of business the remuneration in respect of which is dealt with by the Act.

Section 8 provides that "(1) With respect to any business to which the foregoing provisions of this Act relate . . . it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business,

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly.

"(2) The agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf.

"(3.) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of the remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters.

"(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts, and certify the same to the court; and if, upon such certificate, it shall appear to the court or judge that just cause has been shown either for cancelling the agreement or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit."

North, J., held that the letter amounted to an agreement within section 8 of the Solicitors' Remuneration Act, and that he could not make an order for taxation for the purpose of setting aside the agreement. He accordingly dismissed the application.

Slater appealed.

Farwell (*Cozens-Hardy, Q.C.*, with him), for the appellant.—First, there was no agreement here within the Solicitors' Remuneration Act. Secondly, if there was, the appellant is not debarred from having it taxed. By the scale the costs would have been under £10, instead of £20. There was no power to agree upon a sum which included the mortgagee's costs as well as the mortgagor's, for, though a mortgagor has to pay his mortgagee's costs, he is not the mortgagee's agent to retain a solicitor for him, nor is he himself the client of the mortgagee's solicitor: section 1 (3) (the definition clause) where client is defined. [FRY, L.J.—That is not a definition clause—it merely says "client" includes so and so. It does not exclude everything else.] Then, under section 8 (4), if the client objects to the agreement as unfair or unreasonable, it may be referred to the taxing master, and the amount may be reduced, or the agreement set aside: *In re Inderwick*, 32 W. R. 541, 25 Ch. D. 279, at pp. 281, 282; *In re Gray*, 30 SOLICITORS' JOURNAL, 551. The agreed sums here are clearly unreasonable, and the figures speak for themselves. Clients in humble life are at the mercy of solicitors, and it is not desirable that agreements should be made which require the machinery of a Chancery action to set them aside. The whole of these costs should be sent to the taxing master with a direction to have regard, in taxing them, to these agreements: *Cole* v. *Park*, 37 W. R. 742, 41 Ch. D. 326.

Dunham, for the respondent, was not called upon.

COTTON, L.J.—Two points have been raised, which have been argued with great ingenuity by Mr. Farwell, but, in my opinion, the appellant cannot succeed on either of them.

First of all it was said that this was not an agreement within the Solicitors' Remuneration Act, 1881, at all, on the ground that Mr. Palmer and Mr. Farwell's client did not stand in the relation of solicitor and client. I think the construction of section 1, sub-section (3), is against that contention. According to the definition contained in that sub-section "client" includes any person who has power, express or implied, to retain or employ, and retains or employs, a solicitor. To my mind the appellant has done that. It is very true the remuneration agreed upon was partly with reference to matters in which the solicitor was not engaged as solicitor for the appellant, but he was engaged to do business for him as solicitor, and therefore, in my opinion, the relation of solicitor and client was created within the meaning of this clause and within the meaning of the Act.

But then it is said that this agreement ought to have been referred to the taxing master, having regard to section 8, sub-section (4), of the Act. Now the appellant has not filed any affidavit that this charge is unfair or unreasonable, and, although sub-section (4) does, in my opinion, give the court power, where an agreement is so impeached, to refer it to the taxing master to consider whether the charge is fair and reasonable, no foundation for such a reference has been laid in the present case; and though Mr. Farwell says that this is a very unfair and unreasonable charge, I do not think the court ought, merely upon such an argument by counsel alone, unsupported by an affidavit or facts which lead to that conclusion, to refer such an agreement to the taxing master to exercise the power given by the 4th sub-section of section 8.

In my opinion the appeal fails.

BOWEN, L.J.—I am of the same opinion, and I entirely agree with what Cotton, L.J., has said.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *G. B. Crook; H. B. Palmer.*

From Chan. Div. March 18, 20—22; April 1.

In re PYLE WORKS (LIMITED). (a.)

Company—Mortgage of uncalled capital—Power to mortgage uncalled capital given in memorandum and articles of association—Winding up—Priority—Unsecured creditors—Companies Act, 1862, *ss.* 7—9, 14, 16, 26, 38, 43, 75, 94, 95, 98, 101, 102, 133.

The Companies Acts, 1862 *and* 1867, *contain no prohibition, either in express terms or by necessary implication, against mortgaging the uncalled capital of a company limited by shares.*

In the case of a company limited by shares, calls made by the liquidator in the winding up form part of the capital of the company; and, accordingly, where the memorandum and articles of association of a company limited by shares give a power to mortgage the uncalled capital of the company, such a mortgage, when made by the directors while the company is a going concern, is effectual to operate after the winding up upon calls made in the winding up by the liquidator, and entitles the mortgagee to be paid out of such calls in priority to the unsecured creditors of the company.

Decision of Stirling, J. (ante, *p.* 282), *affirmed by the Court of Appeal* (Cotton, Lindley, *and* Lopes, L.JJ.; Lopes, L.J., dubitante).

In re Phœnix Bessemer Steel Co., 44 *L. J. Ch.* 683, 23 *W. R. Dig.* 45, *approved.*

Ex parte Stanley, 12 *W. R.* 894, 4 *De G. J. & S.* 407; Black & Co.'s case, 21 *W. R.* 249, *L. R.* 8 *Ch.* 254; *and*

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

In re Whitehouse & Co., 27 *W. R.* 181, 9 *Ch. D.* 595, *discussed.*

Appeal from the decision of Stirling, J., reported *ante*, p. 282.

The question raised by this appeal was whether mortgages of their uncalled capital made by a limited company did in fact cover, or could validly cover, calls made by the liquidator in the subsequent winding up of the company, so as to give the mortgagees priority over the unsecured creditors of the company in the distribution of the assets of the company.

The company was registered in 1880 as a company with a capital limited by shares, and amongst the objects stated in the memorandum of association were these:

"To borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds, and mortgage debentures and other securities, founded or based upon all or any of the real and personal assets or on the credit of the company."

By the articles of association, which bore even date with the memorandum, it was provided (Article 111) that the board of directors "may from time to time borrow on bonds or debentures of the company or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sum of money as they from time to time think expedient."

The directors, while the company was a going concern, had executed the following mortgages:—

1. A mortgage dated the 3rd of January, 1882, in favour of Frederick Greenwood and John Brooke Greenwood, by which, first, all the then uncalled-up amounts of £6 per share on 3,500 preferred shares of the company; and, secondly, all the personal property, assets, and effects which then, or at any time during the continuance of the security, should belong to the company, but not including any uncalled capital of the company, except that thereinbefore expressly mentioned, were assigned to secure repayment of an advance of £2,500.

2. A mortgage dated the 3rd of May, 1886, in favour of Robert M'Ilwraith and Edward Gotto, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were assigned, by way of security against any loss or damage which M'Ilwraith and Gotto might sustain by reason of their having guaranteed to the British Linen Co.'s bank the repayment of a sum of £3,000 advanced by the bank to the company, and also guaranteed to the London and North-Western Railway Co. and to the Great Western Railway Co. the payment of such sum as might be due to those railway companies by the company for carriage of goods upon their ledger account with the railway companies.

3. A mortgage dated the 10th of August, 1887, in favour of L. Gautier, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were (subject to the prior mortgages) assigned to secure an advance of £4,000.

4. A mortgage dated the 28th of October, 1887, in favour of R. M'Ilwraith, whereby the uncalled amounts of £4 per share on 5,000 shares of the company were assigned (subject to the prior mortgages) to secure an advance of £3,000.

All the mortgagees, with the exception of F. Greenwood, were themselves shareholders in the company.

The mortgages had been registered under section 43 of the Companies Act, 1862.

The company having subsequently gone into liquidation, the question arose whether these mortgages covered, or could validly cover, calls when made by the liquidator in the winding up, so as to entitle the mortgagees to be paid in priority to the unsecured creditors of the company.

Stirling, J., decided in favour of the mortgagees.

The unsecured creditors appealed.

Rigby, Q.C., Phipson Beale, Q.C., and *Carson*, for the appellants.—All mortgages of uncalled capital are inoperative as against the liability that arises after liquidation has commenced, and no provision to the contrary in the memorandum or articles of association can defeat or alter the statutory right of the creditors in the liquidation to have the assets of the company applied in payment *pari passu* amongst them: Companies Act, 1862, s. 133, sub-section 1. Section 16 imposes a liability to pay calls on every person joining a company, and constitutes such liability a specialty debt, but that is a liability arising in pursuance of the conditions and regulations of the company, and is applicable only while the company is a going concern. When a company is being wound up an entirely new liability, a liability to contribution in the winding up, arises under, and is imposed by, section 38. Then section 75 deals with this latter liability and constitutes it also a specialty debt. If the liability to pay calls were the same as the liability to contribute in the winding up, then section 75 would be superfluous, but if the liability to contribute in the winding up be a new liability, as we contend it is, then section 75 is intelligible. Calls made by the liquidator in the winding up do not form any part of the uncalled capital of the company. The capital of a company is that which is agreed on and fixed by the memorandum and articles of association as the capital—that which is placed at the disposal of the company as a going concern—and does not include the liability to contribute imposed by statutory obligation. This liability to contribute, imposed by section 38, applies to unlimited as well as to limited companies, and to past as well as present members; but how can a call made on a member in an unlimited company be part of the capital of the company? When a company fixes its capital at a fixed amount, can that be increased by the liability to contribution under section 38? There may be six persons liable as contributories, under section 38, in respect of one share, five as past members and one as a present member, and is the contribution of the present member part of the capital of the company and the contribution of the past members not, and, if so, what is the distinction? No doubt in the case of a limited company the liability to contribute under section 38 is limited by sub-section (4) to the amount unpaid on the shares, but though the limitation of the liability to contribute is thereby measured by the amount of the capital of the company, it is not thereby constituted part of the capital of the company. In the case of an unlimited company the only limit to the liability to contribution is that which is wanted to pay the creditors. In the case of a company limited by guarantee there may be no capital at all, but merely the undertaking of the members to contribute in the case of a winding up. The liability to contribution in a winding up is, therefore, not part of the capital of the company, but it is a statutory liability, independent of and separate from the contractual liability to pay up uncalled capital, though in the case of limited companies the statutory liability is measured by the contractual liability. It is beyond the powers of a company or of its directors to forestall the statutory fund created by this statutory liability and leave little or nothing for distribution among ordinary creditors of the company. Sections 25 and 26 show that the object of the Act was to give creditors information as to this statutory fund, but if the company or its directors can appropriate this in advance by way of mortgage or sale, then such information is but a trap to the unwary creditor. The Companies Clauses Act, 1845, by section 38, gives express power to mortgage future calls, but that Act only applies to companies incapable of being wound up—*e.g.*, railway companies—and the power given, therefore, necessarily deals only with directors' calls; and the very fact of an express provision being considered necessary

to give such power favours our contention. Stirling, J., decided against us on the authority of *In re Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683, 23 W. R. Dig. 45, a decision of Jessel, M.R., which was followed by Kay, J., in *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156. In the *Phœnix Bessemer Steel Co. case*, the point, that on the true interpretation of the statute it is *ultrà vires* the company to mortgage calls in the winding up, was not raised or argued, but the question as to power to mortgage future calls was treated merely as a matter of contract depending on the construction of the memorandum and articles of association, and that, where these are contemporaneous, the articles may explain and supplement the memorandum, as in *Harrison* v. *Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358, and the argument was that when once a contract to mortgage future calls is found to exist, it includes not only directors' calls, but also calls made by the liquidator. In *Ex parte Stanley*, 12 W. R. 894, 4 De G. J. & S. 407, it was held that a provision authorizing directors to borrow money on the security of the funds or property of the society did not enable the directors to mortgage future calls, because it was inconsistent with a provision that the calls were to be made whenever "it shall appear to the directors to be necessary or expedient." In *Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265, though the actual decision was only that the deed in that case did not give any power to charge uncalled capital, yet the observations of James, L.J., show that, in his opinion, the effect of *Stanley's case* was that a charge on future calls was *ultrà vires* and void; and *Stanley's case* was expressly approved of in that case, which is, therefore, certainly no authority that if the deed had contained a power to charge by way of mortgage, the liability of the shareholders in the winding up would be affected thereby. In *In re Sankey Brook*, 18 W. R. 427, L. R. 9 Eq. 721, there was an affirmance under the particular circumstances of the case, of a power to charge, but there the call was made and the time for its payment fixed for a date previous to the winding up, and in *Sankey Brook Co.* (*No.* 2), 18 W. R. 914, L. R. 10 Eq. 381, it was held that the power to mortgage did not extend to the proceeds of a future call. [COTTON, L.J.—I think the question as to mortgaging calls made in the winding up must have arisen in the case of *General South American Co.*, 24 W. R. 891, 2 Ch. D. 337.] In that case the share capital had all been paid up in full, and the question, therefore, was not material; the only point there argued was, whether the debentures were invalid through want of proper registration. The case of *In re Lishman*, 19 W. R. 344, was expressly disapproved of in *Bank of South Australia* v. *Abrahams*. None of these cases deal with the question as to whether it is *ultrà vires* the company, on the true construction of the statute, to mortgage calls in the winding up, but there are cases as to set off, the principles of which are applicable to this question, and which were not cited in *Phœnix Bessemer case*; such are *Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. App. 528; *Black's case*, 21 W. R. 249, L. R. 8 Ch. App. 254; *Webb* v. *Whiffen*, L. R. 5 H. L. 711, all of which show that the statute creates a scheme for the payment of the debts of a company instead of allowing execution to issue against individual shareholders, that the winding-up sections of the Act have in view the payment *pari passu* and equally of all debts due by the company, and that the statutory scheme of administration cannot be altered by any antecedent contract. Further, the cases of *In re Whitehouse & Co.*, 27 W. R. 181, 9 Ch. D. 595; *Ex parte Bradshaw, In re Colonial Trusts Corporation*, 15 Ch. D. 465, 29 W. R. Dig. 40; and *Burgess' case*, 28 W. R. 792, 15 Ch. D. 507, show that the liability to contribute in the winding up is not property or capital of the company, and is not a debt due to the company, and, if so, the company have no right to charge it; and that is really the principle on which the earlier set-off cases proceeded. In the present case all the mortgagees, except one of the Greenwoods, are also shareholders.

They also referred to *Birch* v. *Cropper*, *ante*, p. 401, 14 App. Cas. 525, and *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409.

Sir Horace Davey, Q.C., and *F. Whinney*, for Gautier, the respondent in the first appeal.—The *Phœnix Bessemer Steel Co. case* was decided fifteen years ago, and has always since been followed, and if it be right it covers this point. There have been many cases since in which the question was discussed whether words like "property" and "assets" were sufficient to include property of the company to be called up in the liquidation, and the point as to it being *ultrà vires* of the company was never raised. *The Bank of South Australia* v. *Abrahams* was the case of a call made by the liquidator of a company in liquidation, and though the actual decision was only on the point of construction of the particular deed, yet there are *obiter dicta* which clearly show that it would not have been *ultrà vires* for the company if it had by its memorandum and articles taken power to charge the uncalled capital. In a limited company the liability of a member to contribute in the winding up is exactly the same as the liability while the company is a going concern, and it arises from his contract by subscribing to take shares. Section 38 does not impose any new liability, but only restricts the existing liability; the liability in all cases depends on the contract, but in the case of limited companies members would have been liable to contribute on the footing of partnership, and therefore section 38 limited that, in the case of past members, so as to make them liable only to the extent of the deficiency of the present members. Section 98 provides for the distribution of the assets of a company in the winding up, but the question then arises, What are the assets of a company, and how far have they been anticipated? If the argument on the other side is right, then debentures which give a floating charge on the undertaking while the company is a going concern could not entitle the holders to any priority over other creditors in the winding up; but it has been established in *General South American Co. case*, and in *In re Panama, &c., Mail Co.*, 18 W. R. 441, L. R. 5 Ch. App. 318, that they do. A mortgage of uncalled capital is in the same position as a mortgage on the undertaking. As to the argument that these charges would not appear on the register, and, therefore, that persons dealing with the company would be misled, the same thing would happen in the case of moneys agreed to be paid in advance of calls; the Act of 1862 itself gives no express power to a company to enter into such agreements, but in the model form of articles given in Table A, article 7 does contain such an agreement, and that shows it is a proper thing to be dealt with by contract by the shareholders among themselves; the register would not show the advances made on calls. Again, by the Act of 1867 a company is empowered to reduce its capital, and therefore to reduce the amount a member is liable to pay in the event of a winding up, and section 5 of the Act of 1879, as to the creation of a reserve fund, cannot be reconciled with the argument of the other side as to the effect of the Act of 1862: *Poole's case*, 26 W. R. 823, 9 Ch. D. 322. In *Lishman's case*, in *Ex parte Bradshaw*, and in *Sankey Brook Co.* (*No.* 2) the question as to the power of charging future calls was treated exclusively as a matter of construction on the frame of the articles. In *Sankey Brook Co.* (*No.* 1), the call, though made before the date of the winding up, was not collected till after the winding up, and therefore had to come through the liquidator, and through him alone, and the decision is there-

fore really against the appellants' contention. *Grissell's case, Black's case, Webb* v. *Whiffen*, and *In re Whitehouse & Co.* were cases relating to the setting off of what was due from contributories as such as against what was due to them as general creditors of the company, and did not raise the question as to the rights and liabilities as between third parties and the liquidator; and in those cases the court was only dealing with the principles to be applied in the proper distribution of the fund when ascertained, and not with the question as to what was the proper constitution of the fund. The *dicta* in those cases were *alio intuitu*, and are not applicable to the present case.

Buckley, Q.C., and *Ashworth James*, for the respondent Gotto.—Sections 7—10 of the Act of 1862 show that capital of a company is that which is raised from the shareholders—within a limit if the company is a limited one—unlimited if the company is unlimited. Section 5 of the Act of 1862 provides that the Act is divided into nine parts, and that the subject-matter of the second part (from section 22 to section 38 inclusive) relates to the distribution of the capital of companies under the Act; that shows that the capital of a company is that which is, under the machinery of the Act, applicable for distribution. Section 5 of the Act of 1879 also shows that capital includes that which the liquidator gets in the winding up. There are not two liabilities, but the only liability is that which arises *ex contractu* by all members to pay to the extent of their shares according to whatever is the proper machinery under the Act. The call made by the liquidator in the winding up does not create a new liability: *Williams* v. *Harding*, L. R. 1 H. L. 9, at p. 26, 14 W. R. H. L. Dig. 3; *In re West of England Bank, Ex parte Hatcher*, 27 W. R. 907, 12 Ch. D. 284; *Stone* v. *City and County Bank*, 3 C. P. D. 282, 26 W. R. Dig. 42, and a call made by the directors can be enforced by the liquidator as it is the company in either case who gets it in. The Act says nothing about how directors are to call up the capital, and the proper inference therefore is, that it is left to the company to say how it will proceed in the collection of the capital subscribed for; but after winding up the Act does say that the control of the collection shall be transferred to the liquidator, and his power to make calls is measured by what is unpaid on the shares. Article 7 of Table A contains a power to receive moneys in advance of calls, and that money is not received in payment of shares because it bears interest in the meantime; no injustice is done to persons dealing with the company because the assets of the company are increased by this advance. It is said that to charge uncalled capital would do away with the requirements of section 26, but a creditor has the means of informing himself by means of the register of mortgages which has to be kept under section 43, and which is open to inspection by any creditor or member of the company at all reasonable times.

F. Whinney (*Graham Hastings, Q.C.*, with him), for the respondents, the Messrs. Greenwood and R. M'Ilwraith.—The respondents, the Messrs. Greenwood, have a charge on all the property of the company, as well as on the uncalled capital. F. Greenwood is not a shareholder in the company, and therefore as regards him I claim the benefit of *Smith's case*, 27 W. R. 845, 11 Ch. D. 579.

Giffard, Q.C., and *Haldane, Q.C.*, for the official liquidator, took no part in the argument.

Rigby, Q.C., in reply.—*The Phœnix Bessemer Steel Co. case* is not treated by any of the text writers as settling the law on this point, and it is not even referred to in the last edition (5th ed.) of Lindley on Company Law. That calls made in the winding up are not part of the capital of a company, was not my main argument; I only submit that in the memorandum and articles of this company the power given to mortgage does not cover calls made in the winding up. But my main argument is that, whether calls made in the winding up are part of the capital or not, and notwithstanding the clearest words used in any memorandum or articles of association purporting to give a company power to charge uncalled capital in the winding up, it is *ultrà vires* to do so. It is said that section 38 does not impose but only restricts liability, but that gives the go-by to the cases of unlimited companies and guaranteed companies; in the latter class the liability has no relation to capital, and in the former it is only by means of this section that any liability is imposed, as in the case of a corporation the individual corporators are not liable. It may not be correct to say that section 38 imposes a new liability, but it does impose a liability, different from, or supplemental to, the contractual liability, and all I contend for is that it is not the same liability. A shareholder by subscribing does not contract to pay up the whole amount at once, but only *sub modo et forma*; the contract fixes how the capital is to be called up, and outside that contract there is no power to call it up. But when once a winding up occurs, the contractual liability, which is regulated by the contract, is overridden by the distinct statutory liability which then arises, and which is not and cannot be governed by the memorandum and articles of association. As to section 5 of the Act of 1879, it simply gave a legislative sanction to a practice then common in the case of banking companies, that only a part of each share should be called up, except in the case of a winding up; and this section in reality presents a difficulty to the respondents rather than the appellants, because what the Act of 1879 contemplates is the creation of a real—not a sham—reserve fund, capable of being called up only in the event of a winding up, whereas if the respondents' argument is right as to the effect of the *Phœnix Bessemer case*, then this intention of the Legislature may be evaded and got rid of by the insertion of a clause in the articles giving the directors power to charge the reserve fund. Then as to moneys paid in advance upon shares under article 7, table A—that is, not a power to borrow money, but only to receive payment of moneys in advance, and the moneys are not the less moneys paid up with a view to call because interest may be paid thereon by the company, such interest being only equivalent to the extra dividend the shareholder would receive, and the company might, if they preferred doing so, stipulate that the shareholder who had made advances should receive extra dividend instead of interest. Under section 25 a statement must appear on the register of the amounts paid or agreed to be paid in respect of calls, and the register must therefore show what moneys have been advanced under article 7, table A. That goes to show that the scheme of the Act consistently contemplates that the public may have the means of knowing what remains uncalled of the capital of a company, so as to enable them to judge what credit may be given to the company. As to floating charges it was said that they were charges which only take effect on the winding up of a company, but the case of *Ex parte Bradshaw* shows that such charges may take effect prior to, and independently of, the winding up if the debenture interest be not paid. Then, as to the argument that *Black's case* and other cases of that kind, dealt merely with the question of the distribution, not with the constitution, of the fund, that is not correct; in *Black's case* there was a bargain that persons should have power to intercept, in order to pay themselves, moneys which would otherwise have gone into the statutory fund; it was, therefore, in reality a case of charge by way of contract and not a case of set-off created either by the statutes of set-off or the equitable extension of those statutes.

April 1.—COTTON, L.J.—This is an appeal from the decision of Stirling, J., and the question raised is whether a mortgage of calls made in the winding up is good. The first point that has been raised is this, whether there was any power given by the articles of association and by the memorandum to make a charge on the uncalled capital. In my opinion there was. Let us take the memorandum. It states that one of the objects of the company is to borrow money by mortgage or otherwise, to receive money on deposit, and issue transferable and other bonds and mortgage debentures, and any other securities founded or based upon all or any of the real or personal assets, or on the credit of the company. [His lordship then read article 111, set out above, and continued :—] In my opinion, power is given there to mortgage the uncalled capital.

It was argued on behalf of the appellants that mortgages of uncalled capital were invalid, and *Stanley's case* was relied on as an authority for that. If that argument were to be allowed, it would not only make mortgages on calls which are made in the winding up bad, but it would make any mortgage on future calls made by the directors, before the winding up, bad. In *Stanley's case* the court had not to deal with the case of an express authority being given to mortgage uncalled capital. In the present case there is express power given to mortgage calls not already made. The argument in *Stanley's case* was that there was an implied contract in the debentures there issued, to do whatever might be necessary for the purpose of making them an effectual security, and, therefore, that they must be held to comprise uncalled capital. The view expressed by Turner, L.J., in *Stanley's case*, that to put such a construction on the debentures would interfere with the discretion by the deed of settlement vested in the directors as to making a call, does not, in my opinion, apply to a case like this, where there is in express terms power to mortgage calls not made at the time when the mortgage was granted.

But then it was said that calls which are made after the winding up has commenced, are not to be considered as part of the capital of the company. I cannot agree with that. It was said that the "liability to contribute to the assets of the company" in the 38th section of the Act is something which is entirely different from a call made by the directors before the winding up, and that a call made after the winding up has commenced, is not to be considered as a call of part of the capital of the company. In my opinion, that is wrong as regards a case like this. We are considering the case of a call made in the winding up of a company limited by shares—that is to say, not either a company limited by guarantee or an unlimited company. That which can be called for in the winding up, and only in the winding up, in the case of an unlimited or of a guarantee company, may not be, and I think is not, considered as, part of the capital of such company. But in the case of a company limited by shares, although there is a special provision (section 38, sub-section (4)) as to what is to be done when there is a winding up, yet that is merely giving the power to call for that part of the capital of the company which has not been called up. It is true that there is a difference in the liability to, and in the means of providing for, calls, when the company is being wound up, and when it is not being wound up. If the company is not being wound up, then the power of the directors to call the uncalled portion of the capital is different in terms from that which is the power of the liquidator. Of course, in an ordinary company there is generally only a certain part of the capital called up, and there are usually restrictions put on the time within which the calls shall be made; but, when the company is wound up, all that is done away with as regards the liquidator, and the call is not payable to the directors of the company which is being wound up, but it is to be paid to the liquidator, and he is freed from those restrictions which exist when the company is a going concern, and he is able to call for the amount which still remains unpaid in respect of the shares which each of the shareholders is called upon to pay. Although it is very true that what was said by Jessel, M.R., in *Whitehouse's case*, as to there being a new liability created by section 38, is strongly in support of the argument urged upon us by Mr. Rigby, yet, in my opinion, it was with reference to an entirely different question—namely, the right really of set-off—and although I think the actual decision of Jessel, M.R., in *Whitehouse's case* was right, yet, in my opinion, he spoke erroneously, unintentionally, as regards what was called for by the liquidator, in describing it as a thing which accrued to the liquidator, and not a sum which was really due to the company. The true view, in my opinion, of the ground on which set-off is prevented is that stated by Mellish, L.J., in *Black's case*.

Webb v. *Whiffin* was also referred to, and Lord Cairns' judgment in that case was much relied upon on behalf of the appellants. It was said that Lord Cairns described calls in the winding up as being a fund set apart in order to be specially appropriated to pay debts which were still due in the winding up. But what he was there dealing with was as to whether calls made on past shareholders settled on the "B." list, could be appropriated for a particular portion of the creditors, and in reality the expressions used by him are against the argument that calls in a winding up are not to be considered as a part of the capital of the company; he speaks of the Act of 1862 as creating a capital constituted in the shape of a "common fund"; he does not say that the common fund can never be mortgaged; but he says that the sums got from the "B." contributories are not to be set apart and appropriated to a particular part of the creditors, but are to be thrown into the common fund for the payment of all the creditors. He speaks of the common fund as the capital of the company, for he says (L. R. 7 H. L., at p. 734), "As I understand that Act, the relation of creditor and debtor, which is established by the Act, is established only with regard to that which is the common fund or capital of the company." He therefore, in distinct terms, treats that which can only be got at in the winding up as part of the capital of the company, and he uses that expression "capital of the company" again, a little further on, where he says, "But by the Act of 1862 that state of things is entirely swept away. A capital is created, sometimes limited, sometimes without a limit, but that capital is to be made good in the shape of a common fund, and that common fund it is, which is to be the source of payment of every creditor of the company." So that he distinctly treats that which is called up in the winding up, and called for from the "B." shareholders, as part of the capital of the company.

In my opinion, the Act of 1879, which was referred to by Sir Horace Davey, is not to be disregarded. Section 5 of that Act enables a reservation to be made of part of the capital of the company, which is only to be called up if there is a winding up. That distinctly recognizes that which is called up, and can only be called up, when there is a winding up, as part of the capital of the company; and that, I think, is what this is.

Whether or not there is anything in the Act to prevent it being mortgaged is another question which we have to consider, but, in my opinion, there is no good ground for saying that a call made by a liquidator in the winding up is not a call made of part of the capital of the company, in a limited company like this. As I have already said, there may be certain companies in which the calls that are made cannot in any way be considered as part of the capital of the company; but

here we have to deal with what, in my opinion, is part of the capital of the company.

Although Mr. Rigby in his opening, very much put his case upon the ground that this was not part of the capital of the company, yet he afterwards relied on what we must consider as a more serious objection—viz., whether there is anything in the Act which prevents a mortgage being effectually made of capital which is to be called up by the liquidator in the winding up. He said that this is prohibited by the Act. Now in the Act of 1862, which we have to consider, and it must depend upon that, there is nothing in terms negativing the right to mortgage these calls which are a part of the assets and capital of the company—namely, that capital which, when the winding up commences, has not already been called up. Then, as there is nothing in terms expressly preventing the directors of a company from mortgaging that portion of their capital—I have expressed my opinion that it is really to be considered as part of the capital of the company which has not been already called up—is there anything like a necessary implication in the Act to prevent a company—the directors — from effectually mortgaging that part of their property if, as I think it is, it is to be considered as part of the capital? Now what is relied upon? It is said that this part of the capital of the company—namely, calls made by the liquidator—ought to be collected and applied equally in payment of all the unpaid creditors, and for that, sections 98 and 133 of the Act are relied on. But then the question arises. What are to be considered assets of the company? The assets of the company which are by those sections expressed to be dealt with, must mean that portion of the capital which the directors have not actually dealt with before the winding up commenced, and would include, in the case of a mortgage, the equity of redemption, which is the property of the company. The liquidator must get in the property, but the only portion which can be looked upon as a fund in the winding up for paying the creditors will be that portion—the equity of redemption—which remains the property of the company subject to the performance of all the obligations which the directors may have properly thrown upon this part of the property of the company. Therefore, although the assets must be applied by the liquidator rateably in payment of all the creditors then unpaid, yet this portion of the capital is not assets in the sense in which that is to be done—namely, free assets, assets which can be dealt with by the company in payment of debts without having regard to those who have a mortgage—if it is an effectual mortgage—on this portion of the property of the company. It is said that though there is no express provision in the Act to prevent this being done, yet that the general object of the Act will be defeated if this is effectual. Well, I think myself that it might be better, perhaps, if there had been some prohibition against the mortgaging of calls which have not been paid, but that has not been done, and, in my opinion, as the company has power to deal with its assets, and as there is nothing to prevent the company from dealing with this portion of its assets by mortgaging, it would be wrong to introduce such a restriction merely from our view, or the view of anyone, that the objects of the Act—that is, the paying of all creditors equally—would be better carried into effect by preventing this property from being mortgaged. If the Legislature had intended that that should not be done, I think they would have expressly so enacted, but they have not done so. I think we ought not to introduce into the Act that which would interfere seriously with the disposal by the company of that which, in my opinion, is its property, and which, in this case, has been dealt with by the company by way of mortgage.

I do not think that section 43 of the Act is to be disregarded in this case, because, although it is true that various cases have decided that a mere power to mortgage will not of itself enable a mortgage of unpaid calls to be made, yet I think that section 43, when rightly construed, requires the directors to make a list of all mortgages, including the mortgages which they have created over their uncalled or unpaid capital when the winding up commences. Again, I think that the Companies Clauses Consolidation Act of 1845, giving the power to mortgage unpaid calls, is not to be disregarded. By section 38 of that Act express power is given to mortgage that portion of the capital which is not called up. It is very true there was no winding-up Act with reference to such companies, but there was a power for a creditor to obtain execution, by *scire facias*, against unpaid calls, and I do not know that there was any means of letting creditors know that a mortgage had been made. There was no necessity to make that known, but yet it would have been better for creditors if they had got some means of knowing that unpaid calls had been mortgaged; and though that is no authority on this Act, yet it has this bearing, that as the Act of 1862 does not expressly prevent mortgaging unpaid calls, and as we see the Legislature did expressly authorize it with regard to companies under the Act of 1845 it may be assumed it is not inconsistent with the objects of the Act of 1862.

Then have the decided cases, which we are bound to follow, laid down that there can be no mortgage of unpaid calls in the winding up? There is said to be no authority which we ought to follow, but, as far as I can see, the decided cases are against the appeal. One cannot disregard what was said by Sir George Jessel, M.R., in the case of the *Phœnix Bessemer Steel Co.*, where he treated it as undoubted that there could be a good mortgage like this, because what he says is, "The first question is whether a company can mortgage future calls"—that was a call in the winding up—"There can be no doubt that the power can be given to a company by the articles of association." I agree that, as far as we can see, the point was not particularly argued, but the late Master of the Rolls treats it as undoubted that if power is given by the articles of the memorandum, there can be a mortgage effectually made of this part of the capital. Then there is the case of *Howard* v. *Patent Ivory Co.*, where all the previous cases were considered by Kay, J., and he followed the decision in the *Phœnix Bessemer Steel Co. case*. But it does not stand there only, because, although those cases were not decided by the Court of Appeal, and if we thought them clearly wrong we should not be bound by them, yet the point has frequently arisen in cases before the Court of Appeal as to whether, in particular cases, there has been an effectual mortgage of the unpaid calls, and yet in none of those cases was anything said contrary to the view subsequently taken by Sir George Jessel, but the ground of the decision has always turned, where the mortgages have been held to be ineffectual, on this, that there was not sufficient power given by the articles to enable the mortgage to be made. In the case before the Privy Council, which cannot be disregarded, of the *Bank of South Australia* v. *Abrahams*, it was held that the mortgage debentures were not effectual to mortgage unpaid calls; but that decided simply, not that it could not have been done if the articles were sufficient—if the power given was sufficient—but that, having regard to the power given, and the terms in which it was given, that power would not include a mortgage of unpaid calls. Then there was the decision of James, V.C., in the *Sankey Brook Coal Co.'s case* (No. 2). It was there held that under a power to mortgage or charge the works, plant, implements, and effects of the company a mortgage might be effected of calls already made but not yet paid, but not a mortgage of a call not yet made. If James, V.C.,

in that case had thought that there was no power in a company to mortgage future calls, he would not have dealt with it in that way—namely, that there was no power by the particular articles to mortgage, but he would have said that, whatever might have been the power given by the articles, no effectual mortgage could have been made.

In my opinion, therefore, it is right to hold that there is nothing in the Act of 1862, either expressly or by necessary implication, to prevent an effectual mortgage being made of calls unpaid at the time when the mortgage was made—calls not then made, but which might afterwards be made, by the liquidator in the winding up.

As regards one of these mortgages, there was some special question raised which Stirling, J., has given no decision upon, and, therefore, it would not be right for us to give any opinion on that point.

I ought, however, to mention this, that some of these mortgagees were shareholders, and it is said that we ought not to allow these mortgages to be effectual in their favour, because to do so would go against the provisions of the Act of Parliament as to set-off. I think we ought not to consider this as a case of set-off. In *Black's case* there was a contract that the future calls on the shares of a particular shareholder were to be set off against moneys due to the shareholder, and that was clearly a case of set-off, but here that is not the case. The charge in the present case is not a charge only on the particular calls to be made on the particular shares held by the person who was the creditor; it is a general charge on all the unpaid assets, a mortgage generally of all unpaid calls, which, if my view is correct—and I believe the other members of the court agree with me—is effectual; and, in my opinion, the mortgage cannot be treated as bad simply because one or most of those who claim under the mortgage happen also to be, as regards part of the assets mortgaged, persons themselves bound to provide calls. It seems to me that their calls and the calls of other shareholders are well and effectually bound by this mortgage. In my opinion, the appeal fails.

LINDLEY, L.J.—In order to decide the question raised by this appeal, it is necessary to study the Companies Act, 1862, and the Acts amending it, and in particular those portions of them which relate to capital, to calls, to the liabilities of members, and to the collection and distribution of assets in the event of a winding up. The sections which relate to capital are sections 8 (sub-section 5), 12, 14, and 26. It is plain from these sections that what is meant by the capital of a company, having its capital divided into shares, is the nominal capital mentioned in the company's memorandum, or articles of association, as the case may be. This is the sum which the directors are empowered to raise by issuing shares, and which those who take shares agree to pay, to the extent of the nominal amount of the shares which they respectively hold. A power conferred by the articles of a company to call up, or to mortgage, or otherwise deal with, its capital extends to its nominal capital and (unless restricted in terms) to the whole of such capital. But such a power does not extend to other moneys which, although raisable in the event of a winding up, form no part of the capital of the company. The sections which relate to calls and to the liabilities of members in respect of their shares are sections 7, 9 (sub-section 4), 16, 38, 75, 101, 102, and the Companies Act, 1867, s. 25. The general effect of these sections is to render each member liable to pay the full amount of his shares, and in the case of unlimited companies and companies limited by guarantee to pay a further sum in the event of a winding up, but only in that event. This liability is in the nature of a specialty debt due to the company accruing, in respect of each share held, from the time of its acquisition, and it is a liability which in the case of companies limited by shares can only be discharged by payment in cash, unless an agreement to the contrary is duly registered. The sections which relate to the collection and distribution of assets in the event of a winding up are sections 94, 95, 98, 101, 102, 133. All actions which have to be brought in order to get in the distributable assets, are brought by the liquidator in the name of the company—section 95, sub-section 1—and although he is empowered to take proceedings in his own name when it is inconvenient to use the name of the company—section 95, sub-section 7—he ought not to adopt this form when there is no necessity for doing so. The form of procedure is, however, immaterial as regards the rights and liabilities sought to be enforced, as was held in *Ex parte Kintrea*, 18 W. R. 197, L. R. 5 Ch. App. 95. The assets when got in, are distributable *pari passu* amongst the unsecured creditors of the company, and members of a limited company cannot set-off money due to them from the company, against moneys which the liquidator is empowered to collect for the payment of the debts of the company.

A careful study of the foregoing enactments will be found to warrant the following inferences:—(1) That uncalled-up capital on any share is money which its holder is bound to the company to pay to it when required by the proper authority. The right to require payment of this money is vested in the company, and when payment is required the amount payable is a debt due to the company in all cases, whether the payment is required before or after liquidation. (2) That the Companies Act, 1862, does not say when or by whom the uncalled-up capital is to be called up before the company is in liquidation. The Act leaves this matter to be regulated by the company's articles of association. But after a liquidator is appointed, he is the person to exercise the power of calling it up. (3) That directors can only make calls at such times, after such notices, and of such amounts, as are prescribed in the articles of association, but liquidators are not bound to observe the articles as regards these matters; liquidators both can and must collect the assets which it is their duty to distribute as speedily as circumstances will permit. (4) That the Act contains no clause forbidding mortgages of assets, although every mortgage withdraws from the unsecured creditors that which, but for the mortgage, would be distributable among them in a winding up. So far from forbidding mortgages, the Act of 1862, s. 43, requires limited companies to keep a register of all mortgages and charges on their property, from which it is obvious that such mortgages were contemplated. The members are left to decide for themselves what powers of mortgaging they will confer on their directors. All mortgages and charges by limited companies under powers conferred by their articles ought, I apprehend, to be registered under section 43, whether what is mortgaged or charged is, at the date of the mortgage or charge, existing property of the company, or property which the company has only a power of acquiring and of equitably charging.

There being no prohibition in terms against mortgaging uncalled-up capital, is such a transaction forbidden by necessary implication—*i.e.*, are there provisions in the Act to which full effect cannot be given if such a transaction is upheld? I can find none. Those moneys which are payable only on a winding up, and which by the Act are excluded from the capital of the company, are never under the control of the directors, and cannot, I apprehend, be dealt with in any way by them. Those moneys form a statutory fund, which only comes into existence when the company is in liquidation—that is to say, when the powers of the directors have ceased. But uncalled-up capital is in a totally different position. The liability to pay it up does not depend on the contingency of liquidation.

The power to call it up can be exercised by the directors, and all money raisable in respect of it is an asset of the company. When calls are made by directors, it is the capital which they call up; and where calls are made by liquidators, it is capital that they call up, so long as there is capital to call. In ordinary limited companies they can require payment of nothing else; in other companies they can, and it is unnecessary to distinguish the calls in respect of capital from calls in respect of further liability. But the proposition that calls made by the liquidators of an ordinary limited company are not calls of capital, but of other moneys payable by statute, seems to me very paradoxical, and to be a proposition which leads to the strange conclusion that members of such companies are under two liabilities and not one—viz., one liability to pay up the capital, and another to pay up a sum equal to it, with, I suppose, a substitution of the latter liability for the former in the event of a winding up. This view is, I think, erroneous, and the language of the Companies Act, 1879, to which I will refer presently, is inconsistent with it. *Webb* v. *Whiffin* appears to me to be rather in favour of, than opposed to, the view which I take of this matter. On a winding up it is the liquidator's duty to get in and distribute the assets of the company, including all uncalled-up capital, if it is required. But what are assets of the company, which the liquidator can get in and distribute, depends on what alienations, charges, or incumbrances have been validly made or created before the winding up began. If the company has mortgaged or charged its property, or any debt due to it, or any money which, although not a debt, the directors had the power of requiring payment of, there is nothing in the statute which entitles the liquidator to disregard such mortgage or charge. Those who contend that the liquidator, although bound to regard mortgages of specific property and floating charges, is at liberty to disregard charges on uncalled-up capital, are bound to show why these last charges are less valid than the first. Reliance is placed on the statutory enactment prohibiting set-off, and on the cases relating to that subject; and unquestionably there are passages in some of the judgments in those cases which, if taken as starting points and made the basis of further reasoning, might lead to a conclusion different from that at which I have arrived. I allude more particularly to *Black & Co.'s case* and *Whitehouse's case*. But the proper starting point is the statute itself. The exposition of it given in those and other cases is valuable; but it must never be overlooked that there is a section in the Act (section 101) expressly forbidding set-off in the winding up of limited companies, and that this express prohibition is the basis of the reasoning in the cases in question. In *Whitehouse's case* Jessel, M.R., criticized the reasoning of the Court of Common Pleas in *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175, on the ground that the court there was wrong in treating a call made by the liquidator in a voluntary winding up as a debt due to the company. But with deference to Sir George Jessel, it appears to me that on this point he was himself mistaken. The decision in *Brighton Arcade Co.* v. *Dowling* was, in my opinion, clearly erroneous, because, although the call was a debt due to the company, the statute, properly construed, prohibited the allowance of the set-off in cases of voluntary winding up as well as in cases of winding up by the court or subject to its supervision. I have thought it desirable to call attention to this matter as, although the decision in *Whitehouse's case* is, in my opinion, quite correct, some of the observations in it are, I think, themselves open to comment, and are opposed to conclusions at which I have myself arrived.

Having now dealt with the Act, and the decisions most opposed to the validity of mortgages of uncalled capital, it is necessary to refer to the authorities in which such mortgages have been held valid. The *Phœnix Bessemer Steel Co.'s case* and *Howard* v. *The Patent Ivory Co.* are distinct authorities in their favour. But there are many other cases in which the courts have taken for granted that such mortgages would have been valid if the regulations of the company had authorized them in sufficiently plain language. *In re Sankey Brook Coal Co., Ex parte Bradshaw In re Colonial Trusts Corporation, Bank of South Australia* v. *Abrahams, Stanley's case*, paved the way for these by treating the question as one of construction only. Further, article 7 of Table A, relating to the prepayment of uncalled capital, shows that uncalled-up capital may be anticipated, and the fund for distribution in the event of winding up be thereby reduced. Members who prepay the amounts which may be called up on their shares are not liable to pay them up again in the event of a winding up. This was decided in *Poole, Jackson*, and *Whyte's cases*, and this case goes far to show that calls made by the liquidator in winding up a limited company are in respect of uncalled capital, and not in respect of a liability to contribute to some other fund. The Companies Act, 1879, s. 5, enables a limited company to divide capital into two parts, one of which shall only be called up in the event of a winding up. When the capital of a company has been so divided, that part which can only be called up in the event of a winding up ceases to be subject to the control of the directors, and cannot, I apprehend, be charged or disposed of by them. Whether such part can be prepaid need not be discussed. The language of this enactment, however, again supports the view that calls made by the liquidator of an ordinary limited company in course of winding up are made in respect of capital and not in respect of some statutory fund more or less distinguishable from it. The Companies Clauses Consolidation Act, 1845, expressly enables companies governed by that Act to mortgage unpaid-up capital. Such a mortgage would, I apprehend, prevail against a judgment creditor of the company who was proceeding by *scire facias* against a shareholder whose shares were not fully paid up, and such a mortgage would equally prevail against a liquidator making calls in winding up a company governed by the same Act, and capable of being wound up under the Companies Act, 1862. This shows that there is nothing contrary to public policy in allowing companies with limited liability to mortgage their unpaid-up capital. It is true that there is no such express power given in the Companies Act, 1862, but this is accounted for by the fact that the Act in question leaves powers of mortgaging and other powers of directors to be regulated by the company's articles of association. The omission of express power to mortgage unpaid-up capital affords, therefore, no sufficient ground for negativing such power. In conclusion, I can find nothing in the Companies Act, 1862, or subsequent Acts amending it, expressly or by necessary implication, prohibiting limited companies from mortgaging their unpaid-up capitals; nothing to show, in the view hitherto taken and daily acted upon, and according to which such mortgages are valid even as against creditors in a winding up—nothing which would justify the court in holding the mortgages in this particular case invalid. Finding nothing to prohibit them, and an article expressly authorizing them, I am of opinion that they are valid, and that the appeal ought to be dismissed with costs.

LOPES, L.J.—With regard to the main point raised in this case, whether future calls can be mortgaged where such mortgage is authorized by the memorandum and articles of association, it is to my mind difficult to distinguish in principle this case from *Black's case* and *Whitehouse's case*.

It is said those decisions are based on a question of set-off, and are not applicable to the case of a mortgage on future calls. Mellish, L.J., no doubt, in *Black's case* does base his judgment on section 101 of the Act of 1862, a section which prohibits in limited companies a set-off; but Lord Selborne does not, in my opinion, rest his judgment on that section, but rests it rather on the ground that when a winding up comes, all the creditors are to be paid, and in the first instance *pari passu*. I will not refer again to the many passages in that judgment which to my mind are of importance. I will satisfy myself by merely referring to the very clear and comprehensive summing up of his opinion which is to be found at the end of the judgment: "I am clearly of opinion that it is not competent for any persons whatever, by any antecedent contract, to alter the administration of the assets of the company under such a winding up. I am not at all sure that, on the construction of this particular contract, it is necessary to hold that there has been any attempt to do so; but even if there was an attempt, my judgment would be that that attempt is necessarily ineffectual, because it would be an attempt, by private agreement, to get out of and override an Act of Parliament."

Now I cannot help thinking that Lord Selborne, when he used those words, intended to express an opinion that there could be no anticipation of future calls in any case so as to alter the administration of the assets in a winding up.

But it is said that the Act of 1862 does not prohibit these mortgages. That is true, but I do not think it has been suggested that there is anything in the Act which authorizes such mortgages; but it is to be observed that in the Companies Clauses Act, 1845, where it was intended that a mortgage of future calls should be authorized, there is an express power given to mortgage future calls. Now it has been argued that the anticipation of the fund out of which creditors are to be paid before that fund is created, is contrary to the policy of the Act and inexpedient. I cannot help saying that I feel there is weight in that argument. But it is said, with truth, that the *Phœnix Bessemer case* and *Howard* v. *The Patent Ivory Co.*, if correctly decided, govern the case now before the court. With regard to the *Phœnix Bessemer case*, and I think I may say with regard to *Howard's case*, the point we have now to consider was scarcely, if at all argued. The late Master of the Rolls (Sir George Jessel), in the *Phœnix Bessemer case*, seems to have assumed the power to mortgage. *Black's case* was decided in 1872, the *Phœnix Bessemer case* being decided in 1875, and it is remarkable that in the *Phœnix Bessemer case*, *Black's case*, which was decided three years before, was not cited. Neither, again, in *Howard's case*, which was decided in 1888, was *Black's case* noticed. The late Master of the Rolls seems to have assumed the power, and given no reason for the conclusion at which he arrived. Now the *Phœnix Bessemer case* has no doubt been acted upon for some fifteen years, and so far as I know it has not been impeached by any other decision. I feel the weight of this, and I need not say that I feel the weight of the judgments which have just been delivered, and the reasons given in those judgments. The judgments have been delivered by very learned judges, who are much more conversant with company law than I am. I assent, therefore, to the judgments which have been delivered, but, I add, with great hesitation, for the reasons which I have given.

Appeal dismissed.

Solicitors, *Drake, Son, & Parton; Maples, Teesdale, & Co.; Lane, Monro, Soutter, & Slack; G. M. Clements.*

From Q. B. Div. June 18.

HOBBS & CO. v. HUDSON & CO. (a.)

Practice—Interrogatories — Penal action — Fraudulent removal of goods by tenant—Action by landlord for double value—11 *Geo.* 2, *c.* 19, *s.* 3.

An action brought by a landlord under 11 *Geo.* 2, *c.* 19, *s.* 3, *to recover double the value of goods fraudulently removed to avoid distress is a penal action, and the plaintiff cannot administer interrogatories to the defendants.*

Decision of the Queen's Bench Division (ante, p. 639) *affirmed.*

Jones *v.* Jones, 37 *W. R.* 479, 22 *Q. B. D.* 425, *approved.*

Appeal from the decision of a divisional court (Grantham and Charles, JJ.), reported *ante*, p. 639.

The plaintiffs were landlords, and brought an action under 11 Geo. 2, c. 19, s. 3, to recover against the defendants double the value of goods which it was alleged the tenant had fraudulently removed to avoid distress, and which it was alleged that the defendants had wilfully and knowingly aided the tenant in removing.

The plaintiffs sought to administer interrogatories, but leave was refused by a master, and on appeal Hawkins, J., referred the matter to the Divisional Court who upheld the master's decision.

The plaintiffs appealed.

W. Graham, for the appellants.

Duke, for the respondents.

The arguments used and cases cited were the same as in the court below.

Lord ESHER, M.R.—In my opinion *Jones* v. *Jones*, 37 W. R. 479, 22 Q. B. D. 425, was perfectly right. We have to decide the case on the construction of the statute, 11 Geo. 2, c. 19, s. 3, and we have to say whether that statute inflicted a penalty or whether it merely gave the person aggrieved compensation for the wrong he had sustained. If the action is a penal one, then, according to the decision of this court in *Martin* v. *Treacher*, 34 W. R. 315, 16 Q. B. D. 507, interrogatories cannot be administered. I founded my judgment in that case on the remarks of Alexander, C.B., in *Orme* v. *Crockford*, 13 Price, 376, and the decision in *Adams* v. *Batley*, 35 W. R. 437, 18 Q. B. D. 625, is in no way opposed to it. The statute gives the plaintiff a right to recover double the value of the goods removed, and he can recover this, not only from the tenant removing them, but also from any person aiding or abetting him in the removal. Can there be any doubt but that that is a penalty and not merely compensation? In my opinion it is plain that the action is a penal action, and therefore that interrogatories cannot be administered.

LINDLEY, L.J.—I am of the same opinion. The application is made for leave to administer interrogatories to the defendants, and it is contended that this is not a penal action, and therefore that leave ought to be granted. The question turns on the construction of the Act, and when I come to examine it I cannot help seeing that it is penal and nothing but penal. When it is seen that persons assisting the tenant to remove the goods are also to be held liable for double the value, and when regard is had to the summary process of recovery given by the Act where the amount is less than £50, it becomes plain that it is a penalty, and not any mere compensation which is given to the landlord by the statute. The action is therefore a penal action, and leave to administer interrogatories must be refused.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

LOPES, L.J.—The sole question to be decided is whether this is or is not a penal action. It is brought under an Act of Parliament which, in my opinion, imposes a penalty and does not give compensation. Therefore, in my opinion, leave to interrogate cannot be granted. The defendant cannot, when the action is a penal one, be forced to put upon oath his objection to answer interrogatories administered to him by the plaintiff. I agree that *Jones* v. *Jones* was rightly decided, and that this appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Bonner, Wright, Thomson, & Co.*

Solicitors for the respondents, *Law & Worssam.*

From Q. B. Div. June 4.

In re EEDE (A SOLICITOR).
Ex parte DAVY. (*a.*)

Solicitor—Striking solicitor off rolls—Practice—Appeal—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

An appeal will lie to the Court of Appeal against an order of the court striking a solicitor off the rolls under section 32 *of the Solicitors Act*, 1843.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Mathew, J.).

A charge having been made against the solicitor under section 32 of the Solicitors Act, 1843, that he had improperly and knowingly suffered his name to be made use of upon the account of or for the profit of an unqualified person named Vague, knowing him not to be duly qualified, the matter was investigated by a committee of the Incorporated Law Society, and the charge was reported to be proved. Upon this report the Divisional Court ordered the solicitor to be struck off the rolls.

The solicitor appealed.

Willis, Q.C., and *Pollard*, for the appellant.

Hollams, for the Incorporated Law Society, took a preliminary objection.—This is a criminal matter, and there is no appeal. Section 32 of the Solicitors Act, 1843, which deals with solicitors acting with unqualified persons, gives the court power to imprison the unqualified person for a year. The court has held that such unqualified person, if so imprisoned, is a criminal prisoner: *Osborne* v. *Milman*, 35 W. R. 397, 18 Q. B. D. 471; and cannot appeal; *In re Grayston*, 4 Times L. R. 772. [He also cited *In re Lamb*, 37 W. R. 665, 23 Q. B. D. 477; *Mellor* v. *Denham*, 27 W. R. 505, 5 Q. B. D. 467.] The offence, if criminal, as regards the unqualified person, must also be criminal as regards the solicitor, and the difference in the penalties cannot affect the nature of the offence.

Willis, Q.C., was not called upon to argue.

Lord ESHER, M.R.—It seems to me that the Legislature knew perfectly well at the time this Act was passed that the court had a disciplinary power over solicitors as its officers, which it exercised in a particular way—namely, by suspending them from practice, or striking them off the rolls. The exercise of this disciplinary power has never been held to be a criminal cause or matter. But, with regard to unqualified persons, they are not in any way under the discipline of the court, and therefore the Legislature devised a specific punishment for them. They are treated as criminals and sent to prison, and it is easy to see that in their case no appeal could be allowed. But there is a broad distinction between the case of an unqualified person thus sent to prison, and the case of a solicitor struck off the rolls by an exercise of the disciplinary power of the court. The one is a criminal, and, as such, cannot appeal here, the other is not a criminal, and can appeal. I think, therefore, that this is not a criminal cause or matter, and that the solicitor is entitled to appeal.

LINDLEY, L.J., concurred.

The appeal was then heard and dismissed on the merits.

Solicitor to the Incorporated Law Society, *E. W. Williamson.*

Solicitors to the appellant, *Burgess & Cozens.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

From Q. B. Div. [and Q. B. Div.] May 9, 22.

STOY *v.* REES. (*a.*)

Practice—Writ of summons—Indorsement of "address of plaintiff"—Business address—R. S. C., 1883, *ord.* 4, *r.* 1; *Appendix A., Part I., Form* 1.

The "address of the plaintiff" to be indorsed upon a writ of summons under ord. 4, *r.* 1, *must be the plaintiff's place of residence, and not his place of business.*

Appeal from chambers.

The indorsement of the plaintiff's address on the writ of summons was as follows:—"Who resides at 145 and 146, Palmerston-buildings, Old Broad-street." This was the place where the plaintiff carried on his business, his residential address being in Surrey.

On the defendant taking out a summons to set aside the writ, on the ground that the indorsement of the address was incorrect, the master made no order. On appeal, Hawkins, J., held that the indorsement was bad, but gave the plaintiff leave to amend.

The plaintiff appealed.

Scarlett, for the plaintiff.—Ord. 4, r. 1, says that "the address of the plaintiff" is to be indorsed on the writ. The defendant relies on Form 1 in Appendix A., Part I., where the words are "the said plaintiff, who resides at," &c.; but residence does not necessarily mean where a man sleeps. The chief object of requiring the address to be given is that the defendant may know where to go for the purpose of settling with the plaintiff. It is not necessary to give the plaintiff's private address. This indorsement would have been sufficient under the old practice: *Yardley* v. *Jones*, 4 Dowl. 45; *Ablett* v. *Basham*, 5 E. & B. 1019, 4 W. R. C. L. Dig. 202. See also *Attenborough* v. *Thompson*, 6 W. R. 135, 2 H. & N. 559. In the case of an action by a partnership firm, for which no separate form is provided, it would be impossible to give a private address.

John Chester, for the defendant.—The framers of the rules intended to draw a distinction between "place of business" and "place of residence." Rule 1 of order 4, which requires "the address" of the plaintiff to be given, speaks of the "place of business" of the solicitor, and rule 2, which applies to a plaintiff suing in person, speaks of his "place of residence." The form shows that the expression "address" in the rule means place of residence: *Mee* v. *Denbigh*, 27 SOLICI-

(*a.*) Reported by F. G. RUCKER and W. F. BARRY, Esqs., Barristers-at-Law.

TORS' JOURNAL, 617; *In re A Solicitor*, 33 SOLICITORS' JOURNAL, 301. The case of partners suing is provided for by ord. 7, r. 2; the expression in that rule "places of residence" shows that "residence" means where a man lives, and not where he carries on business.

GRANTHAM, J.—I am of opinion that, looking at the language used, we must assume that those who framed the rules intended, by the use of different words, to express different meanings, and that the form which requires a statement of where the plaintiff "resides" means something different from where he carries on business. To hold in accordance with the view of the plaintiff, would be to open a door to much fraud in the way of fictitious addresses.

The appeal must be dismissed.

VAUGHAN WILLIAMS, J., concurred.

From this decision the plaintiff appealed.

May 22.—*Scarlett*, for the plaintiff.

Ashton Cross, for the defendant.

The COURT (Lord ESHER, M.R., and FRY and LOPES, L.JJ.) held that the decision was right, and dismissed the appeal.

Appeal dismissed.

Solicitor for the plaintiff, *Canwarden*.

Solicitor for the defendant, *C. Rogers*.

High Court of Justice.

Chan. Div. Kay, J. — June 21.

Ex parte SCOTTISH ECONOMIC LIFE ASSURANCE SOCIETY (LIMITED). (*a*.)

Company—Insurance—Payment out of deposit—Amalgamation—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *s.* 3—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7.

In order to entitle a life assurance company to receive back the deposit made by them under section 3 *of the Life Assurance Companies Act*, 1870, *the sum of* £40,000 *required by that section to be accumulated must have been accumulated out of the premiums received on the policies of the company.*

Where, therefore, the S. Assurance Co. had entered into an agreement for amalgamation with the M. Co., who had, for the security of their then policy-holders, accumulated a sum considerably exceeding £40,000, *and the policy-holders of the S. Co. had accepted the liability of the M. Co., but had not abandoned the liability of the S. Co.,*

Held, that, before the S. Co. could become entitled to receive back the deposit made by them, an accumulation of £40,000 *must be made out of the policies of the M. Co. in addition to the amount already accumulated by them.*

Petition.

In this case a question arose as to the right of an assurance company to the return of a deposit made under section 3 of the Life Assurance Companies Act, 1870. That Act, by section 3, provides that every company commenced to carry on the business of life assurance shall be required to deposit the sum of £20,000 with the Accountant-General, to be invested by him as therein mentioned, and that the Accountant-General "shall return such deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to £40,000." The Scottish Economic Life Assurance Society, upon being formed for the purpose of life assurance business, made the deposit of £20,000 as required by the Act. Subsequently, the society entered into an agreement for amalgamation with the Scottish Metropolitan Life Assurance Co. The amount of the policies for which the Economic Society was liable was about £260,000, and this liability was taken over by the Metropolitan Co. The Economic Society, which was in liquidation, had not entitled themselves to receive the deposit out of court, as they had not accumulated the required £40,000. The Metropolitan Co., however, had accumulated £100,000. The policy-holders in the Economic Society had (with very few exceptions) agreed to accept the liability of the Metropolitan Co. as if their policies had been originally issued by that company, and a memorandum to that effect had been indorsed on their respective policies. The memorandum, however, did not in terms contain any abandonment by the policy-holders of their rights against the Economic Society, as provided in section 7 of the Life Assurance Companies Act, 1872. The amalgamation having been duly sanctioned by the Court of Session in Scotland, a petition was now presented by the Metropolitan Co., the Economic Society, and the liquidators of that society, asking that the deposit, which had been invested in India Three and a Half per Cent. Stock, might be transferred and paid to the Metropolitan Co.

Renshaw, Q.C., and *Methold*, for the petitioners.—Your lordship has jurisdiction to make the order: *In re The Colonial Mutual Life Assurance Society*, 30 W. R. 458, 21 Ch. D. 837; sections 3 and 14 of the Act of 1870; and section 7 of the Act of 1872.

KAY, J.—I will allow the petition to stand over generally, but will express my opinion on the matter now, as the facts are all before me. [His lordship referred to section 3 of the Act of 1870.] The words "accumulated out of premiums" are essential words. I think that they mean that the company should have carried on its life assurance business so prosperously as to have accumulated out of the premiums of that life assurance business the sum of £40,000. It appears that the Metropolitan Co. has accumulated £100,000. The meaning of that is, that the business of that company is such that its directors consider £100,000 a proper sum to set apart for the security of their policy-holders. The form of the memorandum indorsed on the policies of the policy-holders in the Economic signifies their acceptance of the liability of the Metropolitan Co., but does not signify any abandonment of the liability of the Economic, and this petition, being for payment out to the Metropolitan of the £20,000 deposited by the Economic, it seems to me that there are serious objections to it. In the first place, the accumulation made by the Metropolitan was not made out of the premiums on the policies in the Economic.

In the second place, the Metropolitan seems to have thought before the amalgamation took place, and before they took over this additional liability of £260,000, that this large sum of £100,000 was a proper sum to meet their liability on the policies for which they were then liable. They do not, therefore, satisfy the letter of the Act of 1870, which is that before the Accountant-General pays out the £20,000 there must be an accumulation of £40,000 by the premiums on the policies of the particular company by whom the deposit was made, which in this case is the Economic.

The petitioners do not satisfy the letter, and to my mind they do not satisfy the spirit, of the Act, because there has been no accumulation in respect of or to meet

(*a*.) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

the policies in the Economic. Before the £20,000 can be so paid there must be an accumulation of £40,000, which may now be made out of the premiums of any or all of the policies in the Metropolitan, in addition to the fund set apart to answer the liability of the Metropolitan in respect of their policies existing previously to the amalgamation.

Solicitors, *Travers Smith, Braithwaite, & Robinson.*

Chan. Div. Chitty, J. — March 26.

In re SMITH, PINSENT, & CO. (*a.*)

Costs — Taxation — Abortive sale — Costs — General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *r.* 2 (c); *Schedule I., Part I., r.* 2; *Schedule II.*

Solicitors are not bound to wait to be paid for their services in respect of an abortive sale when it is unlikely that the property will be again put up for sale for some years, and are entitled to have their costs taxed under rule 2 (c) *of the General Order under the Solicitors' Remuneration Act,* 1881.

Adjourned summons to review taxation.

Solicitors were employed by trustees for sale under a will to sell certain property by auction in 1886, at which only a very small portion of the property was sold. The solicitors sent in their bill of costs in accordance with Schedule II. of the Solicitors' Remuneration Act, 1881, which, *inter alia,* included the costs of the abortive sale.

The portion of the property unsold in 1886 was again put up for sale by auction in 1889, when only one lot out of eleven was sold, after which it was determined not to put up the property for sale again.

The taxing master only allowed the scale charge for the part actually sold, and disallowed the costs and disbursements connected with the attempted sale of the remaining lots.

The taxing master stated: "There is provision in the Solicitors' Remuneration Act, 1881, for the allowance of scale charges when property is not sold at the auction, but sold subsequently. To allow the items objected to according to Schedule II. might give the solicitor twice or thrice the amount he would be entitled to under the scale if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period the scale charge when the property is disposed of, and in addition the charges provided under rule 2" (*i.e.,* rule 2 of Schedule I., Part I.).

R. F. Norton, for the solicitors, cited *In re Dean,* 32 Ch. D. 209, 34 W. R. Dig. 185, as an authority that the costs of the solicitors must be dealt with under rule 2 (c). The money required had been raised by mortgage.

CHITTY, J.—As the money required has been raised by mortgage, it is unlikely that the property will again be put up for sale for some years to come; the solicitors are not bound to wait to be paid for their services in respect of the abortive sale which has already occurred, and the matter must be remitted to the taxing master to tax the items disallowed in accordance with rule 2 (c) of the General Order. If the same solicitors are employed at a future time to conduct a sale which is successful, they will not be paid twice over, but on a *quantum meruit* basis, and not on the scale charge; if, however, they ask to be paid on the scale charge, they will have to bring into account what they have already received. The costs of this application will be costs in the taxation.

Solicitors, *Field, Roscoe, & Co.,* for *Smith, Pinsent, & Co.,* Birmingham.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Chan. Div. North, J. — June 28.

In re HIRST'S MORTGAGE TRUST. (*a.*)

*Mortgage—Power of sale—Sale of surface, reserving minerals—*25 & 26 *Vict. c.* 108—*Service of petition on mortgagor.*

Where mortgagees apply to the court for liberty to sell, with a reservation of the mines and minerals in the land sold, the mortgagor must be either served with the petition or made a co-petitioner.

Petition.

This was an application to the court by mortgagees for leave to dispose of lands comprised in the mortgage, reserving the minerals. The mortgage was a mortgage in fee of lands situate in the county of York, and was dated in 1886. It contained no power of sale. In 1888 it was transferred to the petitioners. The land had been found suitable for selling in building lots, and that it would be most advantageous for all parties to retain the minerals for sale separately, and the petitioners asked the court for leave to exercise the power of sale conferred by the Conveyancing Act, 1881, with a reservation of the minerals.

The petition was served on no one.

Swinfen Eady, for the petition.—There is no necessity to serve the petition on anyone: *In re Beaumont's Mortgage Trusts,* 19 W. R. 767, L. R. 12 Eq. 86; *In re Wilkinson's Mortgaged Estates,* L. R. 13 Eq. 634, 20 W. R. Dig. 78. [NORTH, J., referred to *In re Palmer's Will,* L. R. 13 Eq. 408, 20 W. R. Dig. 94.]

NORTH, J.—I am of opinion that the mortgagor ought either to be made a co-petitioner or be served with this petition. If the former course is adopted, I will make the order as desired. If the latter, the order may go on production of a consent brief to the registrar.

Solicitors, *Taylor, Hoare, & Box,* for *Heath & Blenkinsop,* Warwick.

Q. B. Div. (Denman, A. L. Smith, and Charles, JJ.) — July 1.

MASON & BARRY (LIMITED) *v.* COMPTOIR D'ESCOMPTE. (*b.*)

Practice—Letters of request in lieu of commission—Examination of witnesses abroad by special examiner—Ord. 37, *rr.* 5, 6A.

An examination of witnesses abroad before a special examiner, ordered under rule 5 *of order* 37, *is not an ordinary commission so as to prevent the issuing of letters of request in addition thereto under rule* 6A *of the same order.*

This was an appeal from an order of Lawrence, J., at chambers, dismissing an application for letters of request to a French tribunal to insure certain documents which were in the possession of a foreign court being produced at the examination of certain witnesses abroad.

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

(*b.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Bigham, Q.C., and *Tindal Atkinson*, for the appellants.—We have got an order for the examination of witnesses abroad before a special examiner, and we want to examine, amongst others, the officers of a foreign court. It is necessary for our purpose to insure the production of certain documents which are now in the custody of that court. The simplest way of obtaining them is by letters of request, to which we are clearly entitled.

Finlay, Q.C., and *Hollams*, for the respondents.—The defendants have already got a commission to examine witnesses abroad under rule 5, and under rule 6A they can only obtain letters of request in lieu of a commission, there is no precedent for granting both, and the result can only be to create unnecessary delay.

Tindal Atkinson, in reply.—The witnesses are being examined before a special examiner, and no writ of commission has been issued; the defendants, therefore, are entitled to the letters of request.

DENMAN, J.—This case has given us a great deal of trouble, and must be carefully considered. I think the court ought to allow the letters of request to issue. Mr. Finlay took the objection that ord. 37, r. 6A, has the words "in lieu of a commission," and that the rule is therefore inapplicable where a commission is in full play. That objection, which is one *strictissimi juris*, we should be bound by if it applied, but I think Mr. Tindal Atkinson has distinguished this case from the ordinary case of commission, because, as he has pointed out, it is the case of an appointment of an examiner by request on a special examination. It is impossible to say that the documents sought to be obtained would not probably be of great importance, and I think that every assistance should therefore be given.

A. L. SMITH, J.—I think these letters of request ought to go. The application might, I think, have been made earlier, but the importance of the case is sufficient to justify the present application.

CHARLES, J.—The objection to this order is as technical as possible. The difficulty raised is got over when it is shown that this is not an ordinary commission, but a special examination by agreement under rule 5 of order 37; therefore ord. 37, r. 6A, can be acted on. Whether we should act on it or not depends on whether we think these documents material, and on the affidavits I cannot say that they will not be.

Appeal allowed.

Solicitor for the plaintiffs, *Michael Abrahams.*

Solicitors for the defendants, *Lyne & Holman.*

Q. B. Div. (Denman and Charles, JJ.) June 23.

PURE SPIRIT CO. v. FOWLER. (a.)

Practice — Security for costs — Plaintiff company in liquidation—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.

The fact of a plaintiff company being in liquidation is a reason for believing, in the absence of evidence to the contrary, that it will be unable to pay costs if the action is unsuccessful. Therefore, in such case, the defendant is entitled to security for costs under section 69 *of the Companies Act*, 1862.

Appeal from the refusal of Lawrance, J., to order the plaintiffs to give security for costs.

The plaintiffs, a limited company, sued a shareholder for calls. The shareholder had commenced an action in the Chancery Division against the company to set aside a contract on the ground of fraud. The company was in liquidation. The defendant applied for an order that the plaintiffs should give security for costs. The master and the judge refused to make an order.

The defendant appealed.

J. Henderson, for the defendant.—The company being in liquidation, the defendant is entitled to have security for costs under section 69 of the Companies Act, 1862: *Washoe Mining Co.* v. *Ferguson*, 14 W. R. 820, L. R. 2 Eq. 371; *City of Moscow Gas Co.* v. *International Financial Society*, 20 W. R. 394, L. R. 7 Ch. App. 225. These cases ought to be followed rather than *Accidental and Marine Insurance Co.* v. *Mercati*, 15 W. R. 88, L. R. 3 Eq. 200.

Alfred Lyttelton, for the plaintiffs.—This is a matter of discretion, in which the court will not interfere with the judge's order.

DENMAN, J.—I am of opinion that the fact of a plaintiff company being in liquidation is of itself a reason for believing, in the absence of evidence to the contrary, that the assets will be insufficient to pay costs. This opinion was expressed by Jessel, M.R., in *Northampton Coal, Iron, and Wagon Co.* v. *Midland Wagon Co.*, 26 W. R. 485, 7 Ch. D. 500. Here there is no evidence to the contrary, and therefore the plaintiffs must give security for costs.

CHARLES, J., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Johnson, Budd, & Johnson.*

Solicitors for the defendant, *Merrick & Co.*

Q. B. Div. (Cave and A. L. Smith, JJ.) June 12.

HICKLEY v. GREENWOOD. (a.)

Bill of sale—Insufficiency of description of goods—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *and Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

Stock comprised in a bill of sale had been described in the schedule to the bill as follows:—"Roan horse, 'Drummer,'" "brown mare and foal," "three rave carts."

Held, that the horse and mare were sufficiently specified within the requirements of the Bills of Sale Acts, and that, in the absence of evidence showing want of identification of the particular carts, the expression "three rave carts" would be a sufficiently specific description.

Carpenter v. Deen, 23 *Q. B. D.* 566, *and* Witt v. Banner, 36 *W. R.* 115, 20 *Q. B. D.* 114, *distinguished.*

Appeal from his Honour Judge Lushington, in the county court of Surrey, sitting at Farnham.

The action was brought by the plaintiff as grantee under a bill of sale from one Tuck to recover from the defendant a roan horse, a brown mare, and three "rave" carts* bought by the defendant from Tuck and claimed by the plaintiff under the bill of sale.

The defendant maintained that the said horse, mare, and carts were not so specifically described in the bill of sale as was required by the Bills of Sale Acts, 1878 and 1882. The judge upheld this objection, on the ground

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

* "*Raves*" are two frames of wood laid on or attached to the top of a wagon or cart, and projecting on all sides beyond the body of the vehicle so as to enable it to carry a larger weight of hay, &c.

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

that he was bound by the decision of *Carpenter* v. *Deen*, 23 Q. B. D. 566, and gave judgment for the defendant, against which judgment the plaintiff now appealed.

The bill of sale, dated the 11th of January, 1889, was made between Edward Tuck, described as a beerhouse-keeper and carman, at Aldershot, and Stephen Hickley, the plaintiff, a coal merchant, of the same place, and purported, in consideration of £40 advanced by Hickley, to assign to him "all and singular the several horses, carts, chattels, and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £40 and interest thereon at the rate of five per cent. per annum." And Tuck further covenanted that he "would duly pay to the said Stephen Hickley the principal sum aforesaid, together with the interest then due on the 11th day of April next, and that, if the said principal sum and interest should not then be paid, then that he would pay interest on the said sum by equal half-yearly payments on the 11th day of July and the 11th day of January in every year until the whole of the said sum of £40 shall be fully paid."

The bill was attested as follows:—"C. Bateman, clerk to Mr. R. Eve, solicitor, Aldershot."

The schedule described the horses and carts as follows:—"Roan horse, 'Drummer,' brown mare and foal," "3 rave carts."

Tuck had paid five instalments, amounting to £14, up to December, 1889. The plaintiff subsequently discovered that the two horses (the foal was not claimed) and the carts had passed into the possession of the defendant, from whom he claimed their return or £27, the remainder due under the bill of sale.

The defendant alleged that he bought four carts from Tuck, and that there was no evidence that three out of the four carts purchased by the defendant had been recognized by the plaintiff as the subjects of the bill of sale. One witness of the plaintiff said he recognized two carts.

The judge, however, upon upholding this particular objection of the defendant as to want of specification against the bill of sale, declined to hear evidence of misdescription and want of identification tendered by the defendant.

De Colyar, for the plaintiff.—The defendant bought the horses and carts a fortnight after the execution of the bill of sale. The county court judge felt he was bound, under *Carpenter* v. *Deen*, that the description given did not amount to an inventory. That case does not apply to this, where the animals and goods described are the only ones of the kind belonging to the grantor of the bill, and are therefore sufficiently distinguished.

G. G. Greenwood, for the defendant.—There is not a sufficient "business description" of the goods given, such as would be given were they put up for sale. That is the criterion laid down by Lord Esher, M.R., in *Witt* v. *Banner*, 36 W. R. 115, 20 Q. B. D. 114. The plaintiff did not show that the three rave carts were the only goods of that description in his possession. The mare should have been denoted by a name: *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794. *Carpenter* v. *Deen* applies in every respect. The attesting witness ought to have given his address at Aldershot. There is an ambiguity in the bill of sale as to what interest is to be paid should the whole sum and five per cent. interest not be paid on the first day named, nor does it state what instalments are to be paid at the half-yearly dates.

CAVE, J.—I am sorry to have to decide that this case must go down again to the county court for trial. It has reference to a class of bills of sale which I feared had ceased to exist. The bill of sale here is a loan, not by a money-lender, but by a coal merchant to his neighbour. It is to secure £40 at the moderate interest of five per cent., and is as honest a transaction as one could wish, and it is almost shocking to hear such a transaction assailed by a number of technical objections such as have been already too frequently pressed, and perhaps unduly encouraged, against money-lenders exacting high interest on hard terms. The courts ought not to encourage frivolous objections against any class of money-lenders, such as insufficiency of actual address of the attesting witness, when it was shown that letters similarly addressed had reached the witness so described. Or, again, that there is no provision for payment off of the loan by stated instalments. The only objection of any substance is that there is a want of specific description of the goods secured under the bill of sale. To answer such an objection it must be shown either that from the nature of the description given in the bill of sale, the goods could not be specified, or from the evidence in the particular case that the goods could not be more particularly specified or could not be identified. In one case cited (*Witt* v. *Banner*) the description given was obviously illusory. The security as described under the bill of sale in that case was a floating security of so many pictures or frames out of a large stock. Such a description—namely, "450 oil pictures in gilt frames"—could not be in any sense an exact one specifying any particular set of pictures or frames.

In the other case cited, that called the *Milch Cows case* (*Carpenter* v. *Deen*), there was more difficulty in coming to a decision, as is shown by the fact of one Lord Justice, and that perhaps the one member of the court more familiar with cattle, dissenting from the judgment. No doubt that case is binding on us, but it may be pointed out that the grantor of the bill there, was a dairyman with a large number of milch cows out of which he could have more specifically described those upon which the loan was secured. Here we have a beer-house-keeper and small farmer with no large stock either of horses or cattle. The first thing secured is described as "A roan horse, 'Drummer.'" It cannot be said that this horse, from the description given, could not be identified when it has the additional advantage of having a name. Then "a brown mare and foal" could be very easily identified. The words "three rave carts," in the absence of evidence to the contrary, might certainly be a sufficient description. If every description of something given without specifying any individual name for it, by which it could be marked off from a genus or class of things, is to be held insufficient, you would have to prove the identity of every article made the subject of security. The question in each case is whether, considering the nature of the goods, and the circumstances of the case, the specific goods are sufficiently described so as to be identified. If it is said that there is no evidence of identity, evidence must be produced to show the lack of identification. If the defendant here can show that there were several rave carts in possession of the grantor, and that you could not tell which were secured under the description given, that might do to take the carts out of the bill of sale; but we have no such evidence here because the county court judge has preferred to uphold the objection first, without receiving the evidence which the defendant tendered to prove the lack of identification and insufficiency of the description. In the absence of such evidence we should hold that the description here given, is of such a nature that the articles sold could be specifically identified, but evidence having been tendered to show lack of identification, and not having been heard, the case must go down for hearing on that question.

A. L. SMITH, J., concurred.

Solicitor for the plaintiff, *R. Eve*, Aldershot.

Solicitors for the defendant, *Johnson, Weatherall, & Sturt*, for *Potter & Crundhall*, Farnham.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 18.

Ex parte COLQUHOUN.
In re CLIFT. (a.)

Bankruptcy—Solicitor—Counsel's fees—Payment.

On application by a barrister for an order that the trustee in bankruptcy of a solicitor might be directed to pay certain counsel's fees alleged to have been received by him in respect of the bankrupt's bills of costs as a solicitor in certain matters, it was contended that payments had been made by the bankrupt to the applicant on general account, which included the fees claimed, and also that an agreement had been come to between the trustee and the clients, whereby a lump sum was accepted in settlement of the bills of costs, exclusive of fees to counsel.

Held, that the matter must be referred to the registra. to inquire what fees had been received by the trustee, and whether any of such fees had been paid by the bankrupt to the applicant either specifically or generally, the applicant to be at liberty, on the registrar's finding, to raise before the court the question whether it was competent for the trustee to enter into an arrangement with a client of the solicitor to receive a less sum than was claimed by a bill of costs after deducting counsel's fees.

Application that the trustee in bankruptcy might be directed to pay certain barrister's fees amounting to £114 9s. out of a sum of £391 received by such trustee in respect of the bankrupt's bills of costs as a solicitor in certain matters.

The applicant, J. S. Colquhoun, had been employed for a number of years by the bankrupt, who was a solicitor, as his junior counsel, and there had been a running account between them as to fees, the bankrupt having made payments from time to time on general account.

It was alleged by the applicant, however, that the £114 9s. now claimed were his fees in the particular matters in respect of which the trustee had received the £391, and that no part of such fees had been paid him.

Yate Lee, in support of the application, referred to *Re Hall*, 2 Jur. N. S. 1076, as laying down the principle that if a bankrupt solicitor received fees prior to the bankruptcy, counsel was entitled to prove for them, but if such fees were collected by the trustee after bankruptcy they must be paid in full to counsel.

Cantley and *Herbert Reed*, for the trustee.—It is very doubtful whether some of the payments made by the bankrupt on general account to the applicant did not cover these fees. The applicant cannot produce any proper statement of what fees are due to him or what have been paid. As a matter of fact the trustee has only collected £4 9s. Although the bills of costs sent into the clients included the fees, the trustee has accepted a lump sum in settlement of the bills of costs exclusive of counsel's fees.

CAVE, J.—I shall refer this matter to the registrar to inquire in the first place what, if any, of the fees of Mr. Colquhoun referred to in the notice of motion have been received by the trustee; and secondly, whether any, and, if so, which, of such fees have been paid by the bankrupt to the applicant, either specifically or generally. As at present advised I think that if the trustee has accepted a lump sum from the client in settlement of the whole bill of costs then a proportionate amount of the sum received ought to be paid counsel on account of his fees. But if the trustee, in coming to a settlement with the client, expressly excluded counsel's fees, then he has not received any payment on account of such fees. The point will remain open for argument, however, on the registrar's finding on the inquiry, and the applicant will be at liberty, if he thinks fit, to raise before me the question whether it is competent for the trustee, if he has done so, to agree with the client of the solicitor that the trustee receive a less sum than is claimed by a bill of costs after deducting counsel's fees mentioned in such bill in settlement of the claim against such client of the solicitor.

Case referred accordingly.

Solicitors for the applicant, *Elwes & Sharpe.*

Solicitor for the trustee, *H. S. Holt.*

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Probate. March 11.

In the Goods of COPE (DECEASED). (a.)

Probate—Intestacy—Grant to Chief Official Receiver in Bankruptcy—Administration bond—Sureties dispensed with.

W. H. C. died an infant, unmarried and intestate. The father of the infant was a bankrupt. The Chief Official Receiver in Bankruptcy, being the duly-appointed trustee under the bankruptcy of the father's estate, applied for administration.

The court, after directing the father to be cited, granted administration to the Chief Official Receiver, on his giving the usual administration bond, without the usual sureties.

Motion on behalf of Robert Palmer Harding, the Chief Official Receiver in Bankruptcy, for a grant of administration to the estate and effects of William Hobson Cope, deceased, and to dispense with sureties to the administration bond.

The deceased died on the 17th of February, 1889, an infant, intestate and unmarried, his sole property consisting of a policy of assurance for £100 on his own life, and leaving his father next-of-kin, him surviving. On the 5th of December, 1888, a receiving order had been made against the father, who was subsequently adjudicated a bankrupt, the Chief Official Receiver being appointed trustee of the estate. On a prior application the court directed the motion to stand over in order that the father might be cited. The citation was then personally served on him, but no appearance was entered.

Muir Mackenzie, for the official receiver, in support of the motion, referred to *The Solicitor of the Duchy of Cornwall* v. *Canning*, 28 W. R. 278, 5 P. D. 114, and *Cleverly* v. *Gladdish*, 10 W. R. 265, 2 S. & T. 335.

HANNEN, P., allowed the motion, and dispensed with sureties to the administration bond on the authority of *The Solicitor of the Duchy of Cornwall* v. *Canning*.

Motion allowed.

Solicitor, *The Solicitor to the Board of Trade.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. June 9, 10, 23.

RENDALL v. BLAIR. (a.)

Charity—Dismissal of schoolmaster—Action to restrain dismissal—Consent of Charity Commissioners—Condition precedent—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.

Section 17 *of the Charitable Trusts Act,* 1853, *applies only to actions or proceedings whereby administration of the trusts of a charity is sought; but where an action is brought merely to enforce common law rights or obtain equitable relief in respect of such rights, or to enforce an individual equitable right not relating to the administration of the trusts of the charity, the section does not apply even though a question relating to the charity may incidentally be decided.*

A schoolmaster, having received notice of dismissal from persons claiming to be the trustees or managers of a charity school, brought an action for an injunction to restrain them (on the ground that they were not duly appointed trustees or managers within the trust deed) from dismissing him, and from appointing anyone else in his place, and from ejecting him from the school-house. The plaintiff had not, before commencing his action, obtained a certificate from the Charity Commissioners under section 17 *of the Charitable Trusts Act,* 1853.

Held (reversing the decision of Kay, J.), *that, even in the case of an action to which section* 17 *does apply, the obtaining of a certificate under that section is not a condition precedent to bringing the action, and that such an action ought not to be at once dismissed at the hearing if the certificate has not been previously obtained, but that the hearing ought to be allowed to stand over to see if the certificate can be procured.*

Held, by Bowen *and* Fry, L.JJ. (Cotton, L.J., *dissenting*), *that the present action was one coming within the class (above described) to which section* 17 *does not apply; that an action is not taken out of that class by the mere fact that a question relating to the charity may incidentally be decided; and that, even though such an action should be ultimately found to involve the decision of something further, which might bring it within the scope of the section, it would be time enough for the court, when that occurred, to bring the section into application; all they have to do at the time the case comes before them is to judge whether the action, as it is then presented to them, is one to which the section applies.*

Held, by Cotton, L.J., *that, as the plaintiff based a part of his claim upon the trust deed, and the present action might, therefore, involve a decision as to the proper administration of the trusts, it concerned or related to the charity within the meaning of section* 17, *and, consequently, the certificate of the Charity Commissioners ought to be obtained.*

Observations in Glen *v.* Gregg, 30 *W. R.* 633, 31 *W. R.* 149, 21 *Ch. D.* 513, *as to* Attorney-General *v.* Sidney Sussex College, Cambridge, 15 *W. R.* 162, 21 *Ch. D.* 514, *note* (1), *explained.*

Appeal from Kay, J.

The plaintiff was, or had been, headmaster of a national school at Allerton Bywater, in Yorkshire. The defendants were the vicar of the parish and the other managers of the school. In September, 1888, the managers gave the plaintiff three months' notice of dismissal, and in the following December the plaintiff, without obtaining the certificate or consent of the Charity Commissioners under section 17 of the Charitable Trusts Act, 1853, commenced this action for an injunction to restrain the defendants from dismissing him from his office, and from electing or appointing anyone else thereto, and from ejecting the plaintiff from the school-house or premises occupied by him in virtue of his office. The defendants complained that the plaintiff refused to give up possession of the school-house, and they counterclaimed for the repayment by him of expenses incurred by them in consequence of such refusal, and of the moneys received by him as school pence. The school-house had been built on land conveyed, under the Acts for the conveyance of sites for schools, to the Archdeacon of Craven and his successors, in trust to be used for the purposes of a school.

Section 17 of the Charitable Trusts Act, 1853, provides that "before any suit, petition, or other proceeding for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken by any person whomsoever, there shall be transmitted by such person" to the commissioners "notice in writing of the proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper," and that the commissioners may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, . . . and that "(save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any court or judge, except upon and in conformity with an order or certificate of the" commissioners: "Provided always that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

The Conveyance of Sites for Schools Act, 1841 (4 & 5 Vict. c. 38), enacts (by section 17) that "no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees of the said school."

The conveyance of the site for the school contained a clause providing that "the selection, appointment, and dismissal of the school teachers and their assistants shall be in all respects under the control and management of the incumbent for the time being of the said new parish of Allerton Bywater, his licensed curate, if the minister shall appoint him to be a member of the said committee, and of four other persons being *bonâ fide* members of the Church of England, to be nominated annually by the said incumbent to act with him in the management aforesaid."

By his statement of claim the plaintiff alleged that (for reasons which it is unnecessary to specify here) the defendants, other than the incumbent Blair himself, had not been duly appointed managers of the school, but that their appointment was invalid.

By paragraph 11 of the statement of claim the plaintiff said that if the defendants, other than Blair, *were* duly appointed managers or trustees of the said school, they did not properly dismiss him, as their discretion was not exercised *bonâ fide* or at all, and that in purporting to dismiss him they were actuated by indirect or collateral motives, being under the influence of Blair and wishing to further his private ends in respect of matters unconnected with the conduct of the school, and not essential to the good government thereof.

Kay, J., held that the present action related to the trusts of the charity, and, being therefore within section

(a.) Reported by R. H. DRANE, Esq., Barrister-at-Law.

17, could not be commenced without the leave of the commissioners, which must be obtained before action brought. He therefore dismissed the action, with costs.

The plaintiff appealed.

E. Cutler, Q.C., and *H. Lynn*, for the appellant.—This is not a charity case at all. [The court held that this point, not having been raised in the court below, could not now be taken.] Assuming, then, that this is a charity, first, the action is not within section 17 of the Charitable Trusts Act, 1853, and therefore the consent of the commissioners is not required; and, secondly, if the action is within that section, it is not essential to obtain that consent before the action is commenced, but the case ought to be allowed to stand over in order that the consent may be obtained now. Actions like this brought by individuals merely to enforce common law rights, or to obtain equitable relief in respect of such rights, are not within this section: *Holme* v. *Guy*, 25 W. R. 390, 547, 5 Ch. D. 901; *In re Lister's Hospital*, 4 W. R. 156, 6 De G. M. & G. 184; *Glen* v. *Gregg*, 30 W. R. 633, 31 *Ibid.* 149, 21 Ch. D. 513; *Attorney-General* v. *Sidney Sussex College, Cambridge*, 15 W. R. 162, 21 Ch. D. 514, note (1). *Brittain* v. *Overton*, 32 W. R. 27n, 25 Ch. D. 41n, will be relied on by the other side, but as was pointed out by Jessel, M.R., the plaintiff there, being in the position of an object of the charity, asked for administration in order to get the benefit of the charity. [BOWEN, L.J.—Will you consent to have your action dismissed with costs if you fail at the hearing to prove that the defendants are strangers to the trust?] Yes, we agree to that. Another point is that the deed conveying the site provided that the appointment and dismissal of the school teachers should be under the control of the trustees or managers. That power having been exercised once by the appointment of the plaintiff, that appointment could not be revoked and another made.

They also referred to section 13 of the Charitable Trusts Act, 1860.

Renshaw, Q.C., and *Decimus Sturges*, for the respondents.—The real question is, whether this is a "suit" "for obtaining relief" "relating to any charity" or not. Clearly it is. [FRY, L.J.—Would the Act apply to an action by a baker against charity trustees for the price of bread supplied?] The plaintiff is suing to restrain us from ejecting him from his office and the school-house, which he is entitled to occupy only by virtue of his office, and surely that is a matter which concerns or relates to the charity. Then he also asks the court to interfere in the administration of the charity by restraining the defendants from appointing a new schoolmaster, and the leave of the commissioners is clearly necessary in such a case, and before action brought: *Braund* v. *Earl of Devon*, 16 W. R. 1180, L. R. 3 Ch. App. 800. [BOWEN, L.J.—Is the leave of the commissioners a condition precedent to bringing an action? The section does not say no action shall be maintained without that leave, but that no action shall be entertained or proceeded with by the court. He referred to *In re Markwell's Legacy*, 2 W. R. 217, 17 Beav. 618.] The section says that notice must be sent to the commissioners before any suit is commenced. [They referred to *Attorney-General* v. *Sidney Sussex College, Cambridge; Glen* v. *Gregg*; and *Holme* v. *Guy*. FRY, L.J., referred to *In re London, Brighton, &c., Railway Co., Attorney-General* v. *The Haberdashers' Co.*, 18 Beav. 608, 2 W. R. Ch. Dig. 71, 3 W. R. Ch. Dig. 12, 79; *In re Bingley Free School*, 2 W. R. 433, 2 Drew. 283; and *In re Jarvis's Charity*, 7 W. R. 606, 1 Dr. & Sm. 97.] In *Holme* v. *Guy* the defendant was treated as a complete stranger to the charity, but this is an entirely different action, involving the construction of the deed of trust of the charity. In *Holme* v. *Guy* Jessel, M.R., referred with approval to Lord Hatherley's observations in *Braund* v. *Earl of Devon*. The question here involved is who is to administer the funds of the charity. [FRY, L.J.—Is there any case in which the consent of the commissioners has been required in an action as to a question of contractual relation between the parties?] No doubt if a plaintiff could contrive to bring this as a common law action he might evade the difficulty of getting the commissioners' leave altogether. [BOWEN, L.J., referred to *Attorney-General* v. *Dean and Canons of Manchester*, 18 Ch. D. 596, 29 W. R. Dig. 36.]

Cutler, Q.C., in reply.—On the language of the section the machinery which the commissioners are to originate is quite inapplicable to a case of this sort. In *Holme* v. *Guy*, James, L.J., said the 17th section of the Act was never intended to interfere with the rights or powers of the trustees of a charity in their character as owners of the property or as masters who are employing servants. The question involved in *Holme* v. *Guy* related to the charity fully as much as the question here does. Gross injustice would result if a plaintiff in a case like the present had to incur the delay of getting the commissioners' permission before bringing his action.

Cur. adv. vult.

June 23.—COTTON, L.J.—This is an appeal by the plaintiff, whose action was dismissed by Kay, J., on the ground that he had not obtained the previous consent of the Charity Commissioners under the 17th section of the 16 & 17 Vict. c. 137. Now at present I do not consider the question as to whether that consent was required, but I cannot agree with the view which has been expressed by Kay, J., that the action ought to be dismissed because that consent had not been obtained before the action was commenced. No doubt the terms of the 17th section do show that the consent ought to be applied for before the action is begun. But it does not say that if the consent is not obtained then the action must be dismissed, but only that it shall not be proceeded with until that consent is obtained. It would be wrong, I think, especially having regard to the decisions which were quoted to us, to dismiss the action without giving the plaintiff an opportunity of getting the consent and directions of the Charity Commissioners, simply on the ground that he had not applied for such consent and directions before the action was commenced. No doubt it might save some difficulties and some costs if the rule were established that there must be this consent before any action could be commenced. But, in my opinion, the course of the decisions, which we ought not to disturb lightly, has been this—that that consent may be obtained after the petition, or after the action, has been commenced, though of course, if it cannot be obtained, the result will follow which Kay, J., thought he could at once arrive at—namely, that the action will be dismissed. Therefore, so far as that goes I cannot agree with the view expressed by Kay, J.

But then we come to this question, as to whether the consent of the Charity Commissioners is required. Of course, if it is not, the appellant need not go to the Charity Commissioners, which I think he ought to have an opportunity of doing, notwithstanding that it was not done, as it ought to have been done, before the action was commenced. Section 17, I think, only requires consent where the administration of a trust is in some way required; and if I could agree with my learned brothers in thinking there was no administration of a trust here required, I should say the consent need not be applied for at all. As far as I understand the views of my learned brothers, they think it is a mere action by a person claiming, by contract with the managers of this charity, to enforce that contract, and prevent anything being done in violation of it. If it was the case of a mere tradesman claiming as against the managers of the charity,

and seeking to enforce his rights under a contract made with them, I should say that the 17th section of the Act did not apply to such a case as that. But is that so? I think that is all the plaintiff will ever get, if he ever gets anything; but I do not think we can say—at least I cannot—that that is all he has claimed by his statement of claim. Why? Because he does not in his statement of claim refer to his contract as giving this right, but, as I understand, he refers to the deed of trust under which this school is held, and says, in effect, "Having regard to the trusts of that deed, and the fact that I have been appointed schoolmaster of this school, I have a right under the trusts of this deed to have the possession of this school-house." That is really seeking to a considerable extent to obtain a decision of the court on the proper administration of the trusts of this deed.

Now the plaintiff has undertaken not to base his claim on anything except this—that those who dismissed him (namely, the vicar and the trustees appointed by the vicar) were not, as regards the trustees or managers appointed by the vicar, duly constituted managers, and that they ought to be looked upon as mere strangers. That undertaking I understand he is prepared to give, which will cut out so much of his statement of claim as is contained in the eleventh paragraph, and, to a slight extent, modify the prayer. Still, to some extent he does claim, as I understand it, that by his appointment as schoolmaster under the trusts of the deed he has a right, as a person claiming under the trusts of that deed, to retain possession of that school-house.

As the parties have not been able to settle it, the case calls for our decision. My opinion is, that, having regard to what he has claimed (not what he is entitled to—a man is entitled to proceed on what he thinks his rights are) it will be open to him to enter into the discussion as to the proper administration of the trusts of this school. Therefore, in my opinion, though I believe both my learned brothers think differently, it is necessary that he should apply for and obtain, if the action is to go on, the consent of the charity commissioners.

BOWEN, L.J.—It is with much diffidence that I take a different view from that entertained by Cotton, L.J., whose experience on this class of subjects, as, indeed, on most others, is much greater than my own. But I am of opinion that on the true construction of the Charitable Trusts Act, 1853, section 17, the consent of the commissioners is not necessary, either for the originating, or for the prosecuting, of this action. Speaking broadly, I think, that this section does not deal with or touch actions which are brought to enforce common law rights, whether such rights arise out of contract or out of tort, or out of common law duty I ought to say. I think also that it does not apply to suits by individuals whose object is solely to obtain equitable relief in respect of common law rights, and I think, lastly, that this action at this stage, so far as we can judge of it at this stage, falls within the class of cases to which I have already said that, in my opinion, this section does not apply.

Now, in order to construe the section, we must examine carefully the words of it; and it is apparent from the initial language that actions at common law are not within the scope of the section, which applies simply to suits, petitions, or other proceedings for obtaining relief, order, or direction concerning or relating to any charity. Those were not, at the date of this statute—1853—apt words for dealing with or describing common law actions, and it follows, in my opinion, that no common law action, or, in other words, no action brought solely to enforce a common law right, whether such right arises out of contract or out of common law obligation or common law duty, is within the section. That view is in accordance with what I understand, though I am not sure that the language goes quite as far, would have been the view of the late Master of the Rolls, according to his judgment in *Holme* v. *Guy*. But as soon as you have advanced thus far in the construction of the section, it seems to me that reason and logic oblige you to go a step further. It is obvious that in the examination of the question of common law rights, matters may be inquired into which really do concern the charity, or opinions may be expressed by the court which govern, so far as the decision between the parties can govern—or may govern—the actions of those who are bound to administer the charity; because the decision may involve the construction of a section of the Act of Parliament, or may involve a declaration as to the common law rights of the parties. Nevertheless that does not operate to bring common law actions within the scope of the section, from the language of which they are omitted; and the mere fact, therefore, that incidentally in the action may be decided a question which concerns a charity is not enough apparently to bring the action within the provision of this Act of Parliament. But if that is so, must we not go a step further and ask ourselves whether it is possible that the Legislature can have enacted such an anomaly as not to require the consent of the commissioners for actions for enforcing common law rights, but to make the obtaining their consent a necessity in such equitable suits as are merely instituted for the purpose of obtaining relief with regard to common law rights. Is it possible that such a construction of the statute can be reasonable? That would lead to the singular conclusion that, although a man was not obliged to obtain the consent of the commissioners before prosecuting an action for breach of contract, he was obliged to obtain the consent of the commissioners before he came to the Court of Chancery, or that which formerly was the Court of Chancery, to appeal to the equitable jurisdiction of the High Court to prevent the breach. It would lead to this curious conclusion—that although a man was not obliged to obtain the consent of the commissioners before instituting an action for trespass, in which action the sole question would be his title to possession under the deeds of trust, he would nevertheless be obliged to obtain the consent of the commissioners before he obtained an injunction to prevent the trespass being committed. That would be a curious anomaly, and one which, unless constrained by the language of the Legislature, the court would scarcely adopt.

But, on turning to the language of the section and reading it carefully, it seems to me that the scope of the section is indicated with sufficient precision to enable one to see that the Act of Parliament does not authorize such anomalies, and that, on the contrary, the consent of the commissioners is only to be obtained in cases where administration of a trust is sought. This is a Chancery section. This is a Chancery statute. It was intended to cure the mischief of strangers instituting suits when the Charity Commissioners were the proper persons really to form an opinion on the subject; and the language is carefully confined to suits, petitions, or other proceedings for obtaining relief, order, or direction concerning or relating to any charity or the estate, funds, property, or income thereof. This language of the section seems to me to show it is only in cases where administration is sought that the consent of the commissioners becomes necessary, because the remedial provision introduced is that notice is to be given to them of the suit, and such particulars as may be required from time to time for extending the nature and the objects of the suit; and the board, if they think fit, thereupon may do—what? By an order or certificate signed by their secretary, they may authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, and they may by such order or certificate require and direct any such proceeding so authorized by them in respect of such charity to be delayed during such period

as seems proper, while the section further provides that every such order and certificate is to be in such form and may contain such statement of particulars as the board shall think fit. Now is it possible that a section framed in those words is a section by which the Legislature intended to deal with individual common law rights, or any relief which was sought simply in respect of them? In the first place be it observed that that would be to place the Charity Board in the remarkable position of a court without appeal upon the subject of common law rights—that a man who had a claim against a charity which he could only enforce, or the apt relief in respect of which was an injunction in regard to a threatened wrong, in the Court of Chancery, would find himself absolutely at the mercy of an irresponsible board. Such legislation is possible, but I think we ought not to assume, without the clearest language, that Parliament intends to destroy the common law rights of her Majesty's subjects by placing them at the mercy of an irresponsible tribunal, or irresponsible department of the State. I think, therefore, that the true construction is that this does not apply to suits whose object is merely to obtain equitable relief in respect of common law rights any more than it applies to common law rights.

Then comes the question, what is this suit? And I begin by observing that, in considering the question whether the consent of the commissioners is necessary or not, we can only judge of the suit as it appears at the stage at which we embark on the inquiry. I do not say it is probable—I do not think it is—but it is possible that a suit which at one stage appears to ask for relief which falls solely within the category of that relief which I have said is not intended to be affected by the statute, may, nevertheless, at the hearing, turn out to be a suit which involves something further, and which might bring it within the scope of the section. I do not think it is likely, but still it is possible. We have only got to examine the suit as it is presented to us at the present moment. What is it? The plaintiff is a certificated teacher who was appointed headmaster of the National school of Allerton by the incumbent. The language of the deed which applies to him is this:—"It is hereby declared that the selection, appointment, and dismissal of the school teachers shall be in all respects under the control and management of the incumbent and his curate and of four other persons to be nominated annually by the incumbent." The selection, appointment, and dismissal of the teachers is to be in all respects under his control and management. And the 17th section of the 4 & 5 Vict. c. 38, if it applies to it, as it appears to do, provides that "no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act, shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees." Now the claimant has been appointed by the incumbent, and he claims still to hold his office on the ground that those who dismissed him are not regularly-appointed trustees—are trustees who are so-called trustees, who profess to act under a valid appointment when valid appointment there is none. But it strikes me that the plaintiff's case really is one of contract only or of common law right. He may be entitled, so long as he is an authorized school teacher, to hold the schoolhouse, but it is in virtue of the appointment which he holds from the trustees, which is really a contractual employment by him to teach. He is simply enforcing here, or seeking to enforce, what he considers to be his common law right, not to be dismissed by those who have not employed him, and to hold premises which he has received from persons who are authorized to deal with the possession, against the unlawful and unauthorized usurpation of those who are strangers to together in the matter. That is his case. It may be that, incidentally, the question whether these defendants are trustees of the school, may be decided. We cannot help that, nor can the plaintiff help it. He is dealing with his masters, or with those who profess to be his masters. He declares that those who are seeking to exclude him from these premises are not the persons who are lawfully entitled to possession. The common law question, although incidentally it may involve the construction of a deed, may incidentally involve only the question whether the trustees who are seeking to oust him are really properly appointed. But, as I said before, in the earlier part of my examination of the statute, the mere fact that such questions incidentally arise does not seem to me to bring the case within the section.

For those reasons I think that the learned judge below was wrong in holding that this action in its present form, and as presented at this moment, was an action which fell within the 17th section of the Charitable Trusts Act of 1853, or which required the consent of the Charity Commissioners. Should a case ever arise in which an action at any stage does not seem to require the consent of the Charity Commissioners, but in respect of which subsequent investigation shows it is an action of a different kind from that shape which it took when it was first launched, then would come the moment for applying the section.

With regard to the second point, although it would not be absolutely necessary for the purpose of this case to decide it if the first point I have dealt with is decided as I think it ought to be decided, nevertheless, having regard to the view of Cotton, L.J., I think it would not become me not to express an opinion upon the second point—namely, whether, supposing the consent of the commissioners was necessary, it would be right to dismiss the action altogether. Therefore, upon that second point I entirely agree with the Lord Justice. It does not seem to me that the proper course would be, if an action appears to the learned judge at the hearing to be an action which falls within section 17, to dismiss it altogether. On the contrary, I think the court ought to allow it to stand over to see if the consent of the commissioners can be obtained. Now, first of all I come to that conclusion upon the language of the section. We are all of us familiar with the way in which Acts of Parliament are drafted when it is intended to prevent actions being waged at all, or writs being issued, unless some condition precedent has been fulfilled. The language of such sections we are all familiar with, and there is no reason for the use of any obscure language by the draftsman if the Legislature desires to enact such laws. But this section is not framed in the way in which sections are framed when it is intended that some preliminary steps shall be taken before the action is maintainable at all. On the contrary, both from the way in which it is broken and from the absence of the usual words, as also from the presence of words which seem to me to indicate that the absence of the consent of the commissioners is only a bar to the court's dealing with the action, and not a bar to the original institution of the suit—on all those three grounds—I come to the conclusion that this section enables the court, in such cases as I have indicated, to allow the action to stand over in order that the blot which has occurred may be cured if possible. In the first place, the section only begins with the enactment: "Before the suit shall be commenced there shall be transmitted notice in writing to the board." But it abstains altogether from saying that the action is to be dismissed if no such notice is transmitted. On the contrary, it only indicates that, save as hereinbefore provided, no suit, petition, or other proceeding shall be entertained or proceeded with by the court—that is to say, the enactment is directory. It directs what ought to be done. Unless the duty is complied with by the

litigant the court must hold its hand. But it does not oblige the court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which, as a matter of course, ought to be obtained in the first instance, is obtained at last. That, to my mind, is the scope of the section, and I cannot help here saying that if my view of the earlier point is correct, it adds additional weight to this conclusion on the second point, because, if the only cases with which the section is intended to deal are cases which affect the administration of the trusts of a charity, the entire, or substantially the entire mischief, which used to arise, may be prevented if the court is clothed with the power of staying the action until the proceeding has been had which ought to be had in the first instance.

If the matter rested upon logic and reason only that would be my conclusion; but in looking back through the books we find a mass or a considerable number of authorities which show that the court has taken the view of the section on this second point, which Cotton, L.J., and myself both take, and has been satisfied with letting actions stand over to obtain the consent of the Charity Commissioners when such consent had not been obtained in the first instance. I will simply name the cases in which such procedure has been had: *In re Markwell's Legacy; In re London, Brighton, and South Coast Railway Co., Attorney-General* v. *Haberdashers' Co.; In re Bingley Free School; In re Chelsea Waterworks Act*, 4 W. R. 28; and *Attorney-General* v. *Dean and Canons of Manchester*, a case which went to the Court of Appeal, though I do not know that the point was brought before the attention of the court afterwards. One case, and one only, was said to be inconsistent with this view—namely, the case of *Glen* v. *Gregg*, in which it was said that the dilatory action taken by Lord Chelmsford as Lord Chancellor had been afterwards disapproved by the Court of Appeal. On examination of Lord Chelmsford's decision in the *Sidney Sussex College, Cambridge, case* it does not appear to me that it is that portion of Lord Chelmsford's decision which is disapproved of by the court in *Glen* v. *Gregg*, but the action taken by the Lord Chancellor in a case in which, *ex concesso*, the consent of the Charity Commissioners was required, in deciding to allow such consent to be waived, and to proceed with the action although such consent had not been obtained. In doing that Lord Chelmsford was enabling the parties by consent to waive a bar which was instituted for the benefit of the public and for the protection of charities. I think the Court of Appeal might well consider that such action by the Lord Chancellor was not to be justified upon the ordinary principles of law; and I think it is to that, that the court are directing their criticism in *Glen* v. *Gregg*. It does not appear to me that *Glen* v. *Gregg* in any way decides, or was intended to decide, that in a case in which the consent of the commissioners was required, but had not been obtained, the court might not cure a blot by allowing the action to stand over. On these grounds I think that the learned judge below was incorrect in the view he took of this action, which I regret to think is going to be waged further, because nothing but disaster can come of it. Nevertheless, if the plaintiff desires it, I think he is entitled at our hands to a declaration that the learned judge below proceeded on an erroneous construction of the Act of Parliament. The case must go back to be tried out, and if it is to be tried out to the detriment and ruin of the plaintiff, he brings it upon his own head. The costs of the hearing below and of this appeal ought, I think, to be borne by the respondents.

FRY, L.J.—I have had the benefit of discussing this question with my learned brothers, and the judgment of Bowen, L.J., throughout so completely expresses the views which I entertain that I shall only add one word of explanation. It is this—that in insisting emphatically as he has done upon the view that the 17th section of the statute in question, does not refer to common law rights and to legal or equitable modes of enforcing those common law rights, he does not, as I understand, intend to imply that an individual equitable right, not relating to the administration of the trusts of the charity, would be any more within the 17th section than a legal right. In my opinion it is not any more within it. In my opinion the section relates exclusively to administration.

BOWEN, L.J.—I agree with that. With regard to the costs, Fry, L.J., has pointed out to me that my language may be misinterpreted. I do not think that the costs of the hearing necessarily ought all to be borne by the respondents, but only such costs as were either caused or thrown away by reason of this point being taken.

Appeal allowed.

Solicitors for the appellants, *Baker & Nairne.*

Solicitors for the respondents, *Vincent & Vincent*, for *North & Sons*, Leeds.

From Q. B. Div. June 16.

BRISTOL TRAMS AND CARRIAGE CO. (LIMITED) v. MAYOR, &c., OF BRISTOL. (a.)

Local government—Tramway—Paving—Right of road authority to alter pavement—Difference between company and road authority—Reference to arbitration—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 33.

The defendants, who were the road authority, gave notice to the plaintiffs, a tramway company, of their intention to re-lay the whole of the roadway of certain streets, along which the plaintiffs' tramways were laid, including the part between the tramway rails, with a particular kind of pavement, and for this purpose to take up the existing pavement. The plaintiffs objected, and brought an action for an injunction to restrain the defendants from interfering with the pavement between and contiguous to their tramway rails until the matter in difference had been settled by a referee nominated by the Board of Trade under section 33 *of the Tramways Act*, 1870.

Held, that, as the defendants were acting under the general powers vested in them as road authority of altering and improving the roads, section 33 *was not applicable, and an injunction could not be granted.*

Reg. *v.* Croydon and Norwood Tramways Co., 35 *W. R.* 299, 18 *Q. B. D.* 39, *distinguished.*

Appeal from the judgment of the Divisional Court (Denman and Vaughan Williams, JJ.).

The action was for an injunction to restrain the defendants from interfering with the plaintiffs' tramways, and the pavement contiguous thereto, so far as maintainable by the plaintiffs, until the matter in difference had been settled by a referee appointed by the Board of Trade under section 33 of the Tramways Act, 1870.

The plaintiffs were authorized by the Tramways Orders Confirmation Act, 1879 (42 & 43 Vict. c. cxciii.), to construct certain tramways in Bristol, and by clause 1 of the provisional order (set out in the schedule to the Act) the provisions of the Tramways Act, 1870, except where expressly varied, were incorporated. The plaintiffs constructed the tramways, and paved with granite setts so much of the roads, along which the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tramways were laid, as lay between the tramway rails and eighteen inches on each side. The plaintiffs were, under section 28 of the Tramways Act, 1870, bound to keep this part of the road in repair at their own expense.

In 1889 the defendants, who were the urban sanitary authority, and, as such, have vested in them by section 149 of the Public Health Act, 1875, the control of the streets, gave notice to the plaintiffs of their intention to take up the granite setts and to pave with wood the whole of the roadway of two streets within their district along which the tramways had been laid, including the parts between the tramway rails. The plaintiffs, alleging that the wood pavement was unsuitable for their tramways, objected, and applied to the Board of Trade for the appointment of a referee under section 33 of the Tramways Act, 1870, to settle the difference. The defendants, having given notice of their intention to proceed with the work, the plaintiffs brought this action, and applied at chambers for an *interim* injunction in the terms above set out. The application was referred to the court, and by consent the hearing was taken as the trial of the action.

The Divisional Court (Denman and Vaughan Williams, JJ.) were divided in opinion. Denman, J., being of opinion that the plaintiffs were entitled to the injunction sought, and Vaughan Williams, J., being of the contrary opinion.

Vaughan Williams, J., having withdrawn his judgment, judgment in the action was entered for the plaintiffs.

The defendants appealed.

Philbrick, Q.C., and *H. Sutton*, for the defendants.—The defendants are the "road authority" as defined by section 3 of the Tramways Act, 1870. Section 32 reserves to the road authority the power to break up and open the roads. By section 57 the tramway company have only a right of user over the road; and section 60 preserves the power of the road authority to alter or improve the roads. The Act, therefore, leaves the general powers of the road authority untouched. Section 33 only applies to something which is required to be done with respect to the tramway either by the tramway company or by the road authority under the Act, and does not apply to any works of the road authority done upon the roads under their general powers. In *Reg.* v. *Croydon and Norwood Tramways Co.*, 35 W. R. 299, 18 Q. B. D. 39, the tramway company were purporting to exercise their statutory powers, and the corporation were trying to control them, and so section 33 was held to apply. Here the defendants are exercising their general common law powers as road authority.

Rigby, Q.C., and *R. S. Wright*, for the plaintiffs.—The case comes within section 33. The taking up the granite setts and laying down wood is an "interference in relation to the tramway." It interferes with the part of the road upon which the horses work. The plaintiffs object to the wood pavement on the grounds that the expense of maintaining it will be much greater than in the case of granite setts, and that it will be much more unsuitable for the horses. The granite pavement already laid down is work which "ought reasonably to satisfy the road authority" within section 33. There is, therefore, a difference which must be determined by a referee under section 33. The road authority have power to do what they think fit to the road, subject to a reference under section 33 as to whether or not they are acting reasonably. Section 32 reserves the powers of the road authority subject to their exercising those powers reasonably. *Reg.* v. *Croydon and Norwood Tramways Co.* is strictly in point. The words in section 33, "by virtue of this Act," refer to the words immediately preceding, "promoters or lessees," and do not govern the whole section.

Philbrick, Q.C., replied.

Cur. adv. vult.

June 16.—Lord ESHER, M.R.—The plaintiffs have asked for an injunction to prevent the defendants, who are the road authority, from interfering with that part of the road that lies between the tram rails and eighteen inches on each side, until the matter in difference should be settled by a referee appointed by the Board of Trade. The road authority, it seems, have come to the conclusion that it is for the public advantage that the roads in question should be paved with wood. The question turns upon the true meaning of section 33 of the Tramways Act, 1870, as construed in connection with certain other provisions of the Act. It is necessary, in order to arrive at the true meaning of the section, to go through various other sections. The Act begins by defining in section 3 the meaning of the word "road." It means any carriageway being a public highway, and the carriageway of any bridge forming part of or leading to the same. The terms "local authority" and "road authority" are also defined. Then section 4 states who may obtain provisional orders authorizing the construction of tramways, and such persons are referred to in the Act as "the promoters." Then follow several sections which deal with the mode in which provisional orders may be obtained, and which it is not material to notice. Then come certain sections relating to the construction of tramways. Section 26 gives power to the promoters from time to time for the purpose of making, maintaining, and renewing any tramway to open and break up any road, subject to certain regulations and conditions. One condition is that the promoters shall not open, or break up, or alter the level of any road, except under the superintendence and to the reasonable satisfaction of the road authority. There we have the words "reasonable satisfaction of the road authority" mentioned for the first time. Then the section deals with what may frequently arise—namely, where the road is crossed by a railway or other tramway on the level; the work at the point of crossing must then be done under the superintendence and to the reasonable satisfaction of the railway or tramway company. These are all matters in which differences may arise between the promoters and the road authority or other companies. Section 27 provides that the promoters are to reinstate the road in as good a condition as that in which it was before it was broken up. Up to this point the promoters are given certain privileges with regard to the roads, subject to the control of the road authority. Section 28 then imposes an obligation upon the promoters to maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid, as lies between the rails of the tramway, and if there are two tramways not more than four feet apart, the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails on each side of the tramway; and in case the promoters neglect to do so, the road authority may, after seven days' notice to the promoters, do the necessary works, and recover the expense from the promoters. Section 30 gives the promoters power where necessary to alter the position of any gas or water mains or pipes, &c., and before laying down any tramway in a road in which any mains or pipes, &c., may be laid, the promoters must, whether they contemplate altering the position of any such mains, pipes, &c., or not, give seven days' notice to the owners of their intention to lay down or alter the tramway. Even though the promoters do not intend to alter the position of the mains, &c., the owners may think that it is necessary to do so, and they must

then give notice to the promoters to lower or otherwise alter the position of the mains, &c., and any difference as to the necessity of any such lowering or alteration shall be settled in manner provided by the Act for the settlement of differences between the promoters and other companies or persons. That section gives the promoters power to interfere with the mains, pipes, &c., belonging to other persons. Section 32 then provides that nothing in the Act shall take away or abridge any power to open up the roads or any other power vested in the local or road authority with regard to them, or in any person or company for the purpose of laying down, repairing, altering, or removing any main, pipe, &c., subject to certain restrictions. That seems to be the only restriction placed upon the power of the road authority with regard to the roads—namely, that they must not interfere with the tramway unreasonably.

Up to this point I cannot see anything that interferes with the right of the road authority to do what they think right in the interests of the public. Is there anything in section 33 to interfere with that right? The section provides that "if any difference arises between the promoters or lessees on the one hand, and any local authority or road authority," or any company, body, or person, "on the other hand, with respect to any interference or control exercised or claimed to be exercised by them or him, or on their or his behalf, or by the promoters or lessees by virtue of this Act in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person." Pausing there, it is argued that the words "by virtue of this Act" refer and are confined to the words immediately preceding, "promoters or lessees." The word promoters, however, is defined in section 4, and to call them promoters by virtue of this Act seems to me to be unintelligible. It seems clear to me that the words refer to any difference that may arise with respect to any interference or control exercised or claimed to be exercised by the parties in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person. The words "by virtue of this Act" refer to the whole sentence. The section goes on: "or with respect to the propriety of or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party." In the former part of the section the governing words are "by virtue of this Act." The words in the latter part of the section, "regulated by or comprised in this Act," seem to me to refer to and to govern each of the differences which may arise and which are enumerated in the latter part of the section. It follows that the only matter to be referred under this section is a difference arising with respect to any interference or control by virtue of the Act mentioned in the first part of the section, or arising with respect to those things, regulated by or comprised in the Act, mentioned in the second part of the section. That construction makes the section consistent with section 60, which provides that nothing in the Act shall take away or affect any power of the road authority to widen, alter, divert, or improve any road. The contention put forward on behalf of the tramway company would most materially affect the power of the road authority to alter or improve the road. Section 61 reserves this power of the local authority or police to regulate the traffic along the whole road, whether on or off the tramway, and section 62 reserves the right of the public to the full use of the road. The power of the road authority to alter the road is not affected by section 33, but is an absolute power. The corporation in the present case propose, in the public interest, to lay down wood pavement instead of granite setts. Why should the question whether or not that is reasonable be referred to an engineer appointed by the Board of Trade? He cannot judge as between the public and the tramway company. His province would only be to say whether certain works were properly done. The argument must go this length, that if once a certain kind of pavement has been put down, which was a proper pavement at the time, the road authority can never alter the pavement on that part of the road which the tramway company are bound to keep in repair without the sanction of a referee appointed by the Board of Trade. I cannot accept that view. The difference in the present case has not arisen under the Act. The difference has arisen between the corporation acting under their general powers as road authority and the tramway company. Therefore, I have come to the conclusion that the power of the road authority to alter the road, and every part of the road, as they propose to do in the present case for the advantage, as they think, of the public is not controlled or limited by this Act. I agree, therefore, with the judgment of Vaughan Williams, J., and I think that this appeal should be allowed.

Lindley, L.J.—I am of the same opinion. The question in the present case is whether the defendants, who are the road authority, can be controlled in the exercise of their power of maintaining the road, and whether the tramway company are right in contending that the acts of the road authority, when acting in the interests and for the benefit of the public as regards the repair and maintenance of the roads, can be controlled by an engineer or other referee appointed by the Board of Trade. I do not intend to go through the sections of the Tramways Act, 1870. I agree entirely with what has been said by the Master of the Rolls. Having regard to section 60, I cannot agree with the construction placed by Denman, J., upon section 33. Section 60 says that "nothing in this Act shall take away or affect any power which any road authority . . . may have by law to widen, alter, divert, or improve any road." The words "nothing in this Act" are, no doubt, themselves controlled and limited by other parts of the Act to this extent, that the tramway company have a right to have their tramway on the road. Still, section 60, in conjunction with other sections, reserves to the road authority the power to alter and improve the road. There does not seem to me to be anything in the Act controlling the road authority, in the exercise of that power, in the way asked for here. It is said that the case is governed by *Reg.* v. *Croydon and Norwood Tramways Co.* There is this vital distinction between the two cases. In the present case the road authority, acting under their general powers as road authority, on behalf of the public desire to alter the road. In that case the tramway company, purporting to act under their statutory powers, interfered with the road. I cannot see that that case is any authority for the proposition advanced in this case. I think that the view of the Act taken by Vaughan Williams, J., is correct, and that the appeal should be allowed.

Lopes, L.J.—The corporation are laying down the whole roadway, including the part on which the tram lines run, with wood pavement in substitution for granite setts. Such pavement is to be laid at the expense of the corporation, and the corporation have given notice to the tramway company of their intention. The tramway company ask for an injunction to restrain the corporation from so doing until there has

been a reference under section 33 of the Tramways Act, 1870, to the Board of Trade. The question is, whether the corporation are entitled so to act before and without any such reference?

I am of opinion the tramway company are not entitled to an injunction. They rely on section 33 of the Tramways Act, and unless they can bring themselves within that section they have no case. Sections 32 and 60 of the Tramways Act in most clear and unmistakable terms show that the Legislature intended that the road authority should continue to possess all the powers which they possessed before 1870, subject only to the restrictions contained in section 32. But do the tramway company bring their case within section 33? I think not. Section 33 gives a reference when there is a difference with respect to an interference or control exercised or claimed to be exercised by virtue of the Act—*i.e.*, the Tramways Act. To be the subject-matter of a reference it must be something done or claimed to be done by virtue of the Act, or something regulated by or comprised in the Act. The corporation here are not doing anything by virtue of the Act nor anything regulated by or comprised in the Act, but are exercising powers outside the Act and vested in them independently of the Act. In *Reg.* v. *Croydon and Norwood Tramways Co.* the corporation were seeking to exercise statutory control over the tramway company in relation to work of the tramway company, and there was a question whether such work was such as ought reasonably to satisfy the local authority. There was plainly a difference falling within the words of section 33. That case, therefore, is distinguishable from this. I agree with the judgment of Vaughan Williams, J., and think this appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Walter Webb & Co.*, for *Stanley, Wasbroughs, & Doggett*, Bristol.

Solicitors for the defendants, *Robins, Burges, & Co.*, for *D. T. Burges*, Bristol.

From Q. B. Div. June 10.

GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES. (*a.*)

Inland revenue—Income tax—Life assurance company—Annuities paid out of profits or gains—5 & 6 Vict. c. 35, s. 102, schedule D., r. 4.

A life insurance company, which, in addition to its ordinary business, carries on the business of selling annuities for a lump sum, is not entitled to deduct the amount paid in respect of such annuities from its gross income for the purpose of assessment to income tax, but such annuities are liable to income tax in the hands of the company as sums payable out of profits and gains within the meaning of 5 & 6 Vict. c. 35, s. 102.

Decision of the Queen's Bench Division, ante, *p.* 480, 24 *Q. B. D.* 500, *affirmed.*

Appeal from the decision of a divisional court (Pollock, B., and Hawkins, J.), reported *ante*, p. 480, 24 Q. B. D. 500, where the facts are fully stated.

The Gresham Life Assurance Society, in addition to the ordinary business of a life assurance society, is in the habit of granting annuities, the consideration for which is a lump sum paid down.

They claimed, for the purpose of assessment to income tax, to deduct from their gross receipts the amount annually paid by them in fulfilment of these annuity contracts.

The Commissioners of Income Tax refused to allow the deduction, and stated a case for the opinion of the Queen's Bench Division.

The Divisional Court upheld the decision of the commissioners, and the Gresham Life Assurance Society appealed.

Sir Horace Davey, Q.C., Lumley Smith, Q.C., and *W. Fooks*, for the appellants.—The society carries on the business of selling annuities, and its profits and gains are its receipts after subtracting the expenditure necessary to obtain those receipts. The sums paid annually by way of annuities are part of such necessary expenditure, and are not annuities payable out of such profits and gains.

They cited *Last* v. *London Assurance Corporation*, 32 W. R. 702, 12 Q. B. D. 389.

Sir Edward Clarke, S.G., and *Danckwerts*, for the Crown.—These annuities are payable out of the profits and gains of the society within the meaning of section 102, and schedule D., rule 4, of 5 & 6 Vict. c. 35, *Alexandria Water Co.* v. *Musgrave*, 11 Q. B. D. 174, 31 W. R. Dig. 90. The object of the Act was to facilitate collection of income tax, and the society, when it has paid the tax, will be able to deduct it from the annuity paid to each annuitant.

Lumley Smith, Q.C., replied.

Lord ESHER, M.R.—In my opinion this case is governed by the rule of construction which we laid down in *Alexandria Water Co.* v. *Musgrave* as applied to rule 4 of schedule D., which is the rule now in question. It cannot be denied that this society is carrying on the business of selling annuities—that is to say, that it grants annuities in return for the payment down of a lump sum. Now what is the profit of this business on which the Goverment is entitled to receive income tax? If it were not for section 102 and schedule D., rule 4, there can be no doubt that the income on which the society would be assessed would be the difference between what they receive as the receipts of the business and what they spend in order to obtain those receipts. That is the way in which an ordinary tradesman's net profit is arrived at. Now the receipts of this business would be principally the lump sums paid by the annuitants, and the expenses of obtaining those receipts would include not only the wages of clerks and ordinary office expenses, but also, without doubt, the amounts which the society has to pay each year in respect of such annuities. The balance, therefore, would be the sum on which, if it were not for section 102 and schedule D., rule 4, the society would have to pay income tax. But that section and that rule lay down an entirely different principle for the purpose of getting at the sum on which income tax is to be paid. That would, no doubt, be an immense hardship to the society if it were not for the compensatory clauses enabling them to deduct the amount of income tax on annuities paid by them from the annuities when paid to their annuitants. The section and rule do not alter the amount received by the Government, they only alter the method of collection, and oblige the society to collect the tax for the Government instead of the tax collector. In spite of the compensatory clauses, in some cases no doubt there will be hardship, but that must not prevent us from putting a construction on the Act. All taxing Acts are, to some extent, tyrannical, and impose greater burdens on some people than on others.

In the *Alexandria Water Co.'s case* we held that, for the purpose of assessment and liability to income tax, profits and gains meant the trade receipts, and that, in making up the debit side of the account, annual interest on the money must not be taken into account. It is true that but for the section and rule such

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

annual interest, and, in the present case, these annuities, would be taken into account, but the rule says that no deduction shall be made on account of any annual interest or any annuity or other annual payment, and as we have held in the *Alexandria Water Co.'s case* that annual interest, although paid out, must not be deducted from the gross receipts; so now we must hold that the sums annually paid by the society as annuities must not be deducted from their receipts, but that income tax must be paid upon such sums by the society. For these reasons I think that the Divisional Court was right, and that this appeal fails.

Lindley, L.J.—I confess that I have had some doubt as to the proper construction of section 102, but I have come to the conclusion that the Divisional Court was right. The case really turns on section 102 and rule 4 of schedule D. of the Act of 1842, and the construction put upon them by this court in the case of the *Alexandria Water Co.* v. *Musgrave*. It is obvious that the principles laid down by that section and rule for ascertaining the balance liable to income tax are widely different from those which are ordinarily employed in ascertaining the net profit of a trade. I think that the words "profits and gains" used in the section and rule mean not the net profit after deducting losses and expenses, but the credit side of the account—the trade receipts, and, therefore, that these annuities are payable out of profits and gains which are brought into charge by virtue of this Act. It is true that they are not paid out of the net profits of the concern, but I think they are paid out of profits and gains within the meaning of the Act, and are therefore chargeable, and cannot be deducted from the amount on which income tax is payable. That is the construction put upon the rule in the *Alexandria case*, and, therefore, having regard to that case, I think the Divisional Court was right, although, as I have said, I feel some doubt about it.

Lopes, L.J.—But for the remarks of my brother Lindley I should have said that I had no doubt that the judgment appealed from was right. I entirely agree in the view taken by the Master of the Rolls. No doubt, if it were not for the rule and section, the appellants would be entitled to deduct these payments in ascertaining their profits, but a different principle of assessment and a different machinery for collection is given by the Act. The question is as to the meaning in the Act of "profits and gains." In my opinion the phrase means not net profits but trade receipts, and this view is strengthened by reading section 102. I can see nothing harsh or unreasonable in this construction. No doubt the society are made primarily liable for the payment of income tax on these annuities, but they have full authority to deduct the amount paid on each annuity when they are paying it to the annuitant. Our decision is in accordance with the *Alexandria Water Co.* v. *Musgrave* and the principles there enunciated, and therefore I think that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *R. L. Devonshire.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. Chitty, J. — April 23.

Corporation of Bacup v. Smith. (a.)

Local government—Apportioned expenses—"Owner"—Validity of notice—Receiver appointed in action—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 2, 4, 150.

A receiver of rents and profits appointed in an action is not within the term "owner" in section 4 of the Public Health Act, 1875.

Adjourned summons.

The urban authority of the borough of Bacup, in July, 1886, served upon one Hitchen (a receiver of the rents and profits of certain premises appointed in an action) a notice under section 150 of the Public Health Act, 1875, requiring him to level and make good part of a road upon which the said premises abutted. The notice was not complied with, and the urban authority executed the works mentioned in the notice, and the expenses were apportioned, and notice of the apportionment served upon Hitchen, who repudiated all liability. In consequence thereof a demand for payment was served upon him in accordance with section 257 of the Act.

The urban authority, having obtained leave to do so, brought this action by way of originating summons against the trustees of the will of the testator whose estate was the subject of the action in which Hitchen had been appointed receiver, for an account of what was due to them as urban authority in respect of the apportioned expenses, and that their charge on the premises might be enforced by a sale in default of payment.

Upjohn, for the plaintiffs, the urban authority, argued that the receiver was within the definition of the term "owner" in section 4 of the Act.

He referred to *Eddleston* v. *Francis*, 7 C. B. N. S. 568; *Peek* v. *Waterloo Board of Health*, 12 W. R. 252, 2 H. & C. 709; *Cook* v. *Montagu*, 20 W. R. 624, L. R. 7 Q. B. 418; *Mayor, &c., of St. Helens* v. *Kirkham*, 34 W. R. 440, 16 Q. B. D. 403.

Byrne, Q.C., and *Warrington*, for the defendant.—A receiver appointed in an action is neither agent nor trustee for any other person within section 4.

Upjohn replied.

Chitty, J.—It is admitted that no charge has been created unless the notice was a good one. Whether it was good depends on section 4 of the Public Health Act, 1875. This is a defining section, and in the long list of terms there given the word "owner" occurs, and it is defined as "the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether in his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." The notice here was served on the receiver appointed in an action, by the court. Now, a receiver is not in the position of agent for other persons, nor is he a trustee. He is appointed by order of the court. He is responsible to the court, and cannot obey the orders of any party to the action, and in no sense can he be said to be the agent of the parties at whose suit, or at the suit of one of whom, he has been appointed. Now, I am not at liberty to change the words used in this section—agent or trustee—so as to make them include a person who has not this capacity.

(a.) Reported by V. de S. Fowke, Esq., Barrister-at-Law.

To do so would be to usurp legislative power. And it is to be borne in mind that what I have to construe is itself a defining section, which, in order to avoid ambiguity, defines the term in question with the object of making its meaning clear. Mr. Upjohn ingeniously argued that the words "whether on his own account or as agent or trustee for any other person" in the section should be considered as in brackets, so as to make the term "owner" equivalent to any person who is in receipt of the rack rent, but he had to admit that, if this were the meaning of the language used, it could not be said that a mere rent collector was an "owner" within the section, because it is clear from the authorities and the other sections of the Act that whoever is "owner" within this clause, is personally liable. It is argued that I am to read these words in brackets as having been inserted with the view of extending the case of owners to persons who would not otherwise come within it. Mr. Upjohn wants me to expand these words so as to make them include some other person not within the clause, but I cannot adopt this construction. Therefore, upon the construction of this clause, I hold this notice was not a good notice.

Curiously enough, the defendant's contention that a receiver appointed by the court does not come within the words used in this section receives additional force from legislation—viz., the Act to amend the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), which, by section 2, defines "owners" by the same words as those used in the Act of 1875, with this remarkable difference, that after agent or trustee are inserted the words, "or as receiver or sequestrator appointed by the Court of Chancery, or under any order thereof," and for the purposes of this Act it was, of course, held that a receiver came within the term "owner." But this Act was repealed by the Act of 1875, so that at this date the Legislature, having before it the wider definition of this Act, left these words out of the definition in this latter Act.

And there is this, too, which shows even more strongly that the Legislature's attention was directed to the terms of this definition, for in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which immediately preceded the Nuisances Removal Act, 1855, there is (section 250) a definition of "owner" which does not include a receiver or sequestrator; the definition being expressed like the other, except that the words "receiver and sequestrator appointed by the court" are omitted.

And the Legislature did so advisedly, because great hardship might have been caused thereby to a receiver or sequestrator, who is not always appointed in a suit to which the owner of the premises affected is a party, for instance, in the case of a mortgage by a tenant for life of his life estate, suppose the mortgagee procures the appointment of a receiver, and then the tenant for life dies. Under the construction which is contended for, the receiver would be "owner" within the Act of 1875, and, as such, he would be personally liable, though without any fund to look to for his indemnity. I hold, therefore, that the notice given in this case was bad. I may add that the Legislature has provided for the service of the notice under section 267, by posting it on the property itself.

Solicitors, *Woodcock, Ryland, & Parker*, for *Woodcock & Sons*, Haslingden; *Torr, Janeways, Gribble, & Oddie.*

Chan. Div. North, J. — July 5.

In re Edge's Patent. (*a.*)

Patent—Petition for revocation of patent—Action for damages in Queen's Bench Division—Application to transfer petition to Queen's Bench Division—R. S. C., 1883, *ord.* 49, *r.* 3.

The court will order a transfer of a petition for revocation of a patent to the Queen's Bench Division to be heard by the judge at the same time as an action for damages before a judge and jury in respect of the same subject-matter.

Petition.

This was an application for the transfer to the Queen's Bench Division of a petition for the revocation of a patent for "Blue," taken out by one of the defendants, in order that the petition might come on for hearing with the action of *Edge* v. *Harrison*, which was an action, set down for trial by a judge and jury, for an injunction to restrain the defendants from selling their "Blue" as plaintiff's "Blue," and from representing it as Edge's Blue, and also claiming damages for conspiracy and fraudulent sale.

Bousfield, for the petitioner.—It is convenient for all parties that this petition should come on at the same time as the trial of the action. It is a cause or matter within ord. 49, r. 3.

T. M. Goodeve, in opposition.

North, J.—I am of opinion that it is convenient and for the benefit of all parties that this petition should come before the judge who tries the action, and subject to the consent of the President of the Queen's Bench Division I make the order for transfer.

Solicitors, *Indermaur & Brown*, for *R. & R. C. Winder*, Bolton; *Hare & Co.*, for *T. & R. C. Radcliffe*, Blackburn.

Chan. Div. North, J. — Jan. 29, 30.

Smithett v. Hesketh. (*b.*)

Mortgage — Foreclosure — Redemption — Successive incumbrances—Jointure—Priorities—Successive periods for redemption—Conveyance to trustees—Conveyancing Act, 1881 (44 & 45 *Vict.* c. 41), *ss.* 15, 25—*Conveyancing Act*, 1882 (45 & 46 *Vict.* c. 39), *s.* 12.

In a foreclosure action the plaintiffs were first and second mortgagees under two mortgages made in 1841; a jointress, whose jointure was charged upon the estate by a settlement made in 1845, was the third incumbrancer; the plaintiffs were also fourth mortgagees under a mortgage made in 1868; and there were a number of subsequent incumbrancers whose priorities were not ascertained and who had not proved their securities.

An order was made that the jointress should have six months to redeem the plaintiffs as first and second mortgagees; that, if she did not redeem, the subsequent incumbrancers should have one period of three months to redeem; but that, if she did redeem, the plaintiffs, as fourth mortgagees, should have a period of three months to redeem, subject to the jointure, and the subsequent incumbrancers should have a further period of three months in which to redeem. Liberty was given to

(*a.*) Reported by Francis T. Duka, Esq., Barrister-at-Law.

(*b.*) Reported by J. Trustram, Esq., Barrister-at-Law.

redeeming parties to apply to have a conveyance made to trustees instead of to the party named in the order.

Doble *v.* Manley, 33 *W. R.* 409, 28 *Ch. D.* 664, *and* Parry *v.* Parry, *Seton on Decrees, vol.* 2, *part* 1, *4th ed., p.* 1146, *followed.*

Action.

This was an action for foreclosure of mortgages on the Haldon Estate, settled by Lord Haldon's Estate Act, 1885.

The plaintiffs were the first mortgagees for £85,000 and interest secured by two mortgages to them made in 1841. The third incumbrance was a jointure of £1,500 a year, charged upon the estate in favour of Dowager Lady Haldon, the widow of a former tenant for life, by a settlement made in 1845. The fourth incumbrance was a mortgage to the plaintiffs made in 1868, to secure £15,000 and interest, of which sum £3,200 had been paid off.

There were a number of subsequent incumbrances, the priorities of which had not been ascertained. Subject to these mortgages the estate was vested in trustees.

The defendants to the action were Dowager Lady Haldon, a number of subsequent incumbrancers, Lord Haldon, who was the tenant for life, the Hon. Laurance William Palk, who was the tenant in tail in remainder, an infant, and the trustees of the estate.

Cozens-Hardy, Q.C., and *Bramwell Davis*, for the plaintiffs.—In case the jointress redeems the plaintiffs as first and second mortgagees, the plaintiffs, as fourth mortgagees, ought to have a further period commencing from the determination of the period allowed to the jointress, given to them for redeeming her. The tendency of the court is to give one period of redemption only, but this is a special case: *Doble* v. *Manley*, 33 W. R. 409, 28 Ch. D. 664; *Platt* v. *Mendel*, 32 W. R. 918, 27 Ch. D. 246; and *Coleman* v. *Llewellyn*, 35 W. R. 82, 34 Ch. D. 143. The defendant incumbrancers who have not proved their securities or shown their priorities are not entitled to successive periods for redemption. The plaintiffs also ask for a direction that, in case the jointress redeems, the estate may be conveyed to trustees: Conveyancing Act, 1881, s. 15; Conveyancing Act, 1882, s. 12; and that on the plaintiffs redeeming the jointress by paying her back what she has paid, with her costs and arrears of jointure, they may regain the priority in respect of their debt of £85,000 and what they will have paid her for arrears of jointure and costs, over the future payment of the jointure, which they originally had in respect of their debt of £85,000. [North, J.—With respect to the conveyance to trustees, let the order be in the usual form, with liberty to apply to have the conveyance made to trustees instead of the party named in the order. That will not deprive you of the benefit given by Conveyancing Acts, and I shall have control over the way in which it is worked out.]

Herbert Lake, for Lady Haldon.—If Lady Haldon redeems them, the plaintiffs, as fourth mortgagees, can only redeem her subject to her annuity. The order in this case should be the same as that made in *Parry* v. *Parry*, Seton on Decrees, vol. II., Part I., 4th ed., p. 1146.

Frank Evans, for a defendant incumbrancer.—I ask for a sale of the property. [North, J.—I cannot direct a sale now. There is no evidence of the value of the property. But the parties can hereafter apply for a sale at any time until foreclosure.]

E. S. Ford, Dauney, F. Thompson, and *Henry Terrell*, for other defendant incumbrancers.

Chadwyck Healey, for the infant tenant in tail in remainder.

Vernon Smith, for the trustees.

North, J.—The tendency of the court now is much greater than it was to prevent foreclosure suits continuing for years, with successive opportunities for redemption given to the parties; ordinarily it gives one period in the first instance and no more.

The case which lays down what I understand to be the law on the subject at present, is *Doble* v. *Manley*, where Chitty, J. said "that he had consulted with Kay and Pearson, JJ., and that they were all unanimously of opinion that where the defendants did not appear, one time only should be fixed for redemption, whether the statement of claim alleged that they were entitled, or only that they 'claimed to be entitled,' to incumbrances. To fix several successive periods was to make a decree as between co-defendants, which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the court would have to consider whether he was entitled to them." Now to apply that case to the present; in that case the defendants did not appear; in the present there are a good many defendants, at any rate, that do appear, and some request to have successive foreclosures. Then, to apply that judgment, it is for them to show that they are entitled to this. If they can make a case showing it right that successive periods be given, the court can do it; but as it was put in the case cited, they are the persons to point out why it should be done; and, I think, to entitle them to such an order they must put the court in possession of materials upon which it can make the order they ask. In the present case there are a great number of defendants, and their priorities are not admitted, and the mortgagees have not proceeded to prove their securities. I disclaim altogether the duty, if each had proved his security, to proceed to sort them out, and to make a decree giving successive periods for redemption, based upon my investigation of their respective securities. Of course, I could not do that. No doubt, if one had the dates, *primâ facie*, in the absence of anything else, that would be their order of priority; but it would not always be so, because there may be tacking, or consolidation, or something of that kind. It is impossible for me now to make any declaration as to the priorities of the parties.

Then I have asked in vain for any authority showing that I can direct an inquiry as to what their priorities are, and, when that has been answered, can make, on further consideration, for the first time, a decree for foreclosure according to the priorities so ascertained by an inquiry in chambers. I am not in a position to do it. The case relied on by counsel for the later incumbrancers seems to me, as far as I can judge from such a slight examination as I can give it here, to be an authority directly against their contention instead of in favour of it.

This is a case in which I ought to adopt the general practice of the court at the present day, in the absence of special circumstances, and not to give the defendants separate periods for redemption. As, however, the plaintiffs, in their capacity of fourth mortgagees, ask for a period of redemption—and as that is what all those behind them wish (except that it is not going so far as they want), and it is for their benefit, because it gives them longer time—I will give the plaintiffs a further period of three months, and give the subsequent mortgagees a third period of three months.

As regards the right of the plaintiffs to redeem the jointress if she pays them off, I do not see my way to giving such a special direction as Mr. Cozens-Hardy asks for, and for this reason. If the plaintiffs are redeemed the jointress will have paid them £85,000; she will then stand in the position of first mortgagee; she will then have the right to have the first mortgages assigned, I will not say necessarily to any party she may name, because difficulties may arise if they are assigned to a

person outside the suit. But her right to have the charges kept alive in some way is clear, and it is not necessary at present to consider how. But, assuming the charges are kept alive for the benefit of the jointress, when she has paid them off, then the plaintiffs come forward again as fourth mortgagees, and ask me to direct that the first and second mortgages shall be transferred to them, or some nominee of theirs, by the jointress, subject to their paying to her all that she has paid to redeem the first and second mortgages, and also, of course, her own costs and all arrears of her jointure, but without making any provision for the jointure itself; and it is said that she will be in the same position as now, she will be jointress subject to the £85,000. But as the jointress has a right to redeem in priority to the fourth mortgagees, she might then have a right to say, "Hand back to me what you have compelled me to transfer to you, and transfer it to me." That may go on from time to time, and I do not see the end of it.

What the plaintiffs are entitled to as fourth mortgagees is to have a transfer by the jointress of all the property to them subject to her jointure, in the same way as was decreed in the case of *Parry* v. *Parry*, with respect to an annuity, which seems much the same thing. It is said it would be a hardship on the plaintiffs, who have the two first mortgages, to put the jointress over them. Supposing that the jointress had commenced proceedings for foreclosure and redemption, she might have redeemed the present plaintiffs as first and second mortgagees, and then the plaintiffs, as fourth mortgagees, would be entitled to redeem her. It may be that in that case she would have to transfer to them, and to part with the securities which they, calling on her to redeem, were entitled to call for. But then she might be in a difficulty, because she was the person who, as plaintiff, had set the ball rolling. In the present case it is the plaintiffs who have done that, and if they insist on their right to take away from her the property she has acquired by redeeming them, it seems to me they can only do it subject to the charge in her favour which is admittedly prior to them. Therefore, I do not see my way to make any order as between them, excepting that upon the plaintiffs, as fourth mortgagees, paying to the jointress all that shall be found due upon taking the accounts, which will include all arrears, then she shall convey to them subject to the jointure.

If the jointress does not redeem, she will be foreclosed; there will then be an account of what is due to the plaintiffs on all their mortgages, and the others will be foreclosed unless they pay in three months; so there will be a second period in that case instead of a third.

Solicitors, *Wood, Biggs, & Nash*, for *H. M. James*, Exeter; *Lake, Beaumont, & Lake; G. S. & H. Brandon; Burrows, Barnes, & Pears; C. B. Dalton; J. C. Stogdon; Finney, Thomas, & Co.; E. J. Rickards; Carlisle, Unna, & Rider; Simpson, Hammond, & Richards.*

Chan. Div. Kekewich, J. } Feb. 15, 24, 28.

Duncan v. Dixon. (a.)

Infant—Settlement—Voidable contract—Infants' Relief Act, 1874.

An infant of eighteen years of age, by an ante-nuptial contract, settled certain reversionary interests. After attaining twenty-one she gave notice to the trustees of her desire to rescind the settlement, on the ground that it was void under the Infants' Relief Act, 1874.

Held, that the contract was only voidable—i.e., *valid until repudiated—and not void, and that it was not within the Infants' Relief Act*, 1874.

Trial of preliminary questions of law.

In this action the plaintiff, Alice Margaret Alexandrina Duncan (or Dixon), claimed a declaration that an ante-nuptial contract of marriage, dated the 21st of January, 1878, in the Scotch form was void, and that the property comprised therein ought to be reconveyed and transferred to her. The defendants were George Dixon, the husband, the trustees of the settlement, and an infant son of the marriage.

By the deed in question certain property of the husband, and a reversionary interest in real and personal estate together with a sum of money belonging to the wife, were settled upon trust for the plaintiff for life for her separate use, remainder to the husband should he survive, with remainder to the children of the marriage.

The plaintiff on the 24th of April, 1878, intermarried with George Dixon, being then eighteen years old, having been born on the 14th of December, 1859.

On the 2nd of August, 1883, a decree was pronounced by a Scotch court dissolving the marriage at the instance of the husband.

In 1884 the plaintiff recovered judgment in a Scotch court against the trustees of the settlement for arrears of the income up to the date of the dissolution of the marriage.

In September of the same year the plaintiff gave notice to the trustees of the settlement that she repudiated and disaffirmed the settlement, on the ground that she was an infant at the date of it, and domiciled in England.

On the 13th of November, 1888, the writ in the present action was issued, seeking the declaration above stated.

The following preliminary questions of law were set down for decision, and now came on for hearing:—

1. Whether the marriage contract was, as against the plaintiff, void *ab initio*.

2. Whether the said contract was, as regards the plaintiff, voidable (as distinguished from void) *ab initio* at her instance.

Warmington, Q.C., and *Ribton*, for the plaintiff.—This marriage contract was void *ab initio*, as the plaintiff was an infant when it was entered into, and it could not be ratified after she came of age, as she was under coverture, and also by reason of sections 1 and 2 of the Infants' Relief Act, 1874. Sections 1 and 2 of that Act are as follows:—1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable. 2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. Nor can any act of acquiescence bind the wife, the interests settled by her being reversionary: *Smith* v. *Lucas*, 30 W. R. 451, 18 Ch. D. 531; *Seaton* v. *Seaton*, 34 W. R. 865, 13 App. Cas. 61. Section 1 of the Act of 1874 must be read generally as applying to all the contracts of an infant: *Ex parte Jones, In re Jones*, 29 W. R. 747, 18 Ch. D. 109. The 2nd section also is

(a.) Reported by J. W. Geree, Esq., Barrister-at-Law.

general: *Coxhead* v. *Mullis*, 27 W. R. 136, 3 C. P. D. 439; *Northcote* v. *Doughty*, 4 C. P. D. 385, 28 W. R. Dig. 106; and *Ditcham* v. *Worrall*, 29 W. R. 59, 5 C. P. D. 410.

They cited also *Kingsman* v. *Kingsman*, 29 W. R. 207, 6 Q. B. D. 122; and *Ex parte Kibble, In re Onslow*, 23 W. R. 433, L. R. 10 Ch. 373.

S. Hall, Q.C., and *E. Ford*, for the defendants.—Before 1874 this settlement would have been voidable. That Act makes no difference in the law as to ante-nuptial contracts by an infant. "Voidable," as applied to a contract, means valid until it is rescinded, not invalid until it is confirmed. The *onus* of proof that the contract is cancelled lies on the plaintiff: *Oakes* v. *Turquand*, L. R. 2 E. & I. App. 325, 16 W. R. H. L. Dig. 15. The plaintiff confirmed the settlement by bringing an action on it, and has also received benefits under it. Section 1 of the Act of 1874 deals only with certain specified contracts; the contracts aimed at being those with money-lenders. If all contracts were void under section 1, what was the necessity of section 2?

Warmington, Q.C., replied.

KEKEWICH, J.—On the argument of the point of law, which has now to be decided, the Infants' Relief Act, 1874, was freely criticized. Further consideration has convinced me, not only that the questions then discussed were real and serious, but that there are many others of at least equal difficulty. It is not, however, convenient to discuss the provisions of the Act further than is necessary for the decision before me, and I must not be understood to intimate an opinion on any questions not decided. Nor is it necessary to discuss at length the law respecting infants' contracts independently of the Act. Suffice it to say that such contracts are, with some exceptions or qualifications, which there is no need here to specify, voidable—which term I understand to mean that they are valid until repudiated. It was suggested in argument that "voidable" may equally well signify "invalid until confirmed"; but to my mind that, apart from the ordinary use of language, does not express the technical sense of the word. As regards those contracts which operate as covenants and affect property, I apprehend that you must look back to the date of the contract for the purpose of ascertaining its operation, and, unless there has been a subsequent repudiation within the limits of time and in the manner allowed by law, treat it as binding the property according to the expressed intention of the instrument. For that I have the high authority of Sir George Jessel, who, in *Smith* v. *Lucas*, says: "If, therefore, this is a covenant to settle the future-acquired property of the wife, and nothing more is done by her, the covenant will bind the property. There is no reason, so far as I am aware, for distinguishing a voidable covenant from any other covenant; till it is avoided it is a binding covenant." There are, no doubt, to be found expressions of other judges apparently in conflict with this, as, for instance, the language of Lord Cairns in *Codrington* v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 854, but it must be borne in mind that in cases of that class (to which this also belongs) the *quondam* infant is claiming to repudiate the settlement, and other parties are endeavouring to set up, adversely to that claim, conduct or acts equivalent to ratification. The language of judgments in such cases is directed to those contentions, and must not readily be construed as expressing a difference from Sir George Jessel's statement of the law.

This so far brings the present case within section 1 of the Infants' Relief Act, 1874, that it takes it out of the proviso. In other words, the contract, being voidable, is not by the proviso excepted from the operation of the earlier part of the section. Before considering the earlier part let me put aside the decisions which have been quoted on section 2—decisions mainly directed to the question whether a promise of marriage is a contract within it, and, if so, what is the proper application to such a promise of the provision respecting ratification. I do not say that it was useless to refer to those authorities. I think that the case could not have been thoroughly argued without a reference to them, and at one time I thought that they would throw more light on the question for my decision than they now appear to do. In the result I pass them by with less hesitation because I find it difficult to connect the 1st and 2nd sections of the Act together so as to make a coherent whole, and I do not understand how, if the 2nd section receives the wide construction which was given to it by the Lord Chief Justice in *Coxhead* v. *Mullis*, there is much, if anything, left for the operation of the 1st section. This puzzle, if it be one, I must leave for solution elsewhere or on another occasion.

The contract in this case is what is sometimes termed a marriage contract, but the more familiar description to us is that of a marriage settlement. Is a contract of that character within the purview of the Act? For the present purpose one need not closely distinguish between settlements purporting to operate by way of grant, and settlements operating only by way of covenant. This particular settlement is of the latter kind, and is therefore essentially a contract. It was said that this, and indeed every other contract into which an infant can possibly enter, must be within the statute because it is an Act to amend the law as to contracts of infants, and therefore all contracts of infants must be affected by it. The argument having been advanced, I have thus noticed it; but a branch of law is no less amended because some sub-divisions of it are untouched by the amendments. Take, at a venture, the Trustee Act, 1888, which is stated to be an Act to amend the law relating to the duties, powers, and liabilities of trustees. One would not expect to find every duty, every power, and every liability brought within the purview of the Act, nor is it, in fact, thus extensive.

A more plausible argument was raised on the words "all contracts" with which the first section commences. The next seven words are, doubtless, parenthetical; but, omitting them, and omitting also the exception of contracts for necessaries, it was urged that the particular contracts mentioned were mentioned only as examples, and without any intention to cut down the universality of "all contracts." This argument claimed and derived support from the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the section something which, but for the proviso, would be within it. Therefore, it is said, the section is intended to cover every contract by law voidable, and the contract in question being of that character, the section covers that. The answer to this argument is found in the true construction of the proviso. The meaning of the proviso that the enactment shall not invalidate any contract, &c., is that no contract which the enacting part would by force of language render void, shall be so rendered if it falls within a specified class. It may be, and I think is, difficult to determine precisely what is comprehended in that class, and the difficulty is increased by the sweeping exception with which the section concludes. Still, I think it would not be right to construe the proviso as enlarging the class of contracts falling within the enactment, when it can be fairly and properly construed without attributing to it that effect.

The enactment, standing alone, is, in my judgment—but subject to a remark to be presently made—free from difficulty. The contracts specified are of three classes: (1) contracts for the repayment of money lent; (2) contracts for goods supplied; and (3) accounts stated. To all contracts of these classes the enactment is

expressly applied, and contracts of other classes remain unaffected. That seems to me to be the plain meaning of the language, and I can discern no reason for placing a forced construction on it.

It is said I am not at liberty to follow the bent of my own opinion on this point, and that it has been otherwise decided by judges to whose authority I must bow. I must, indeed, bow to them, and should not hesitate to do so if I thought they had really decided, or even expressed a definite judicial opinion on that point, but I do not. In *Ex parte Jones*, 18 Ch. D., at p. 122, Sir George Jessel used language which, apart from the context, certainly favours the argument which I am rejecting. He says that the words of the Act apply to all contracts of an infant except those which are expressly excepted, and that the words "are of universal application." But he was considering the question whether the words cover trade contracts for the supply of goods as well as those into which a non-trader or a trader, apart from trading, may daily enter; and there was no occasion for him to consider—nor do I think that he did consider—whether contracts wholly dissimilar to those specified in the section were intended to be governed by it. There really is no other authority which can fairly be cited as deciding or expressing a definite opinion on the point. I have already eliminated the cases on the 2nd section, which include *Ex parte Kibble*, but I revert to *Cowhead* v. *Mullis*, to say, first, that although Lord Coleridge (3 C. P. D., at p. 442) notices the argument in favour of the restricted meaning of section 1, he does not either uphold or reject it; and, secondly, that, while applying it differently, because to different language, I venture respectfully to agree with him "that it is better to suppose that Parliament meant what Parliament has already said, and not to limit plain words in an Act of Parliament by consideration of policy, if it be policy, as to which minds may differ, and as to which decisions may vary." I think that the two questions of law submitted to me by consent when the case was last before the court ought to be answered by declaring that the marriage contract set out in the statement of claim was, as regards the plaintiff, voidable as distinguished from void.

Solicitors for the plaintiff, *Bennett & Leaver*.

Solicitors for the defendants, *McKenna & Co.*

Q. B. Div. (Cave, A. L. Smith, and Vaughan Williams, JJ.) June 16, 17; July 10.

NORMAN & Co. v. BINNINGTON & Co. (a.)

Ship—Bill of lading—Excepted perils—Negligence, "whether in navigating the ship or otherwise"—Liability of shipowner.

A bill of lading contained a clause exempting the shipowners from liability for (inter alia) "*misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise.*" *Damage from "rain or from contact with other goods" was also excepted. After the plaintiffs' goods had been shipped upon the vessel, but before the vessel had started on her voyage, the plaintiffs' goods were injured through the master and crew negligently allowing them to be wetted by rain or by wet goods loaded on the top of them.*

Held, in an action to recover from the shipowners damages for the injury to the goods, that the words of the bill of lading absolved the shipowners from liability for damage brought about in negligently navigating the ship, or in negligently bringing about those other losses from which the shipowners had exempted themselves in the bill of lading, and that the plaintiffs were not entitled to recover.

Motion for a new trial, or that judgment be entered for the defendants.

The facts and the bill of lading upon which the action was brought are sufficiently set forth in the judgment of the court.

Bigham, Q.C., and *Joseph Walton*, for the defendants.—The words "whether in navigating the ship or otherwise" refer to perils incurred in navigating the ship or in any other way specified in the bill of lading. There is no ambiguity here, and the words should be construed according to their plain meaning.

They cited *The Duero*, L. R. 2 Ad. & Ecc. 393, 18 W. R. Adm. Dig. 19.

Kennedy, Q.C., and *Percy Morris*, for the plaintiffs.—This negligence is not within the exception; it occurred before the voyage began: *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *Hayn* v. *Culliford*, 27 W. R. 541, 4 C. P. D. 182; *Crow* v. *Falk*, 8 Q. B. 467. Words in a bill of lading or charter-party which are meant to absolve shipowners from liability should be construed against the shipowners, for it was their duty to make clear the exceptions in their favour: *Burton* v. *English*, 32 W. R. 655, 12 Q. B. D. 218, at p. 224; *Taylor* v. *Liverpool and Great Western Steam Co.*, 22 W. R. 752, L. R. 9 Q. B. 546, at p. 549. The words "or otherwise" mean or in doing other acts of a like character with navigation which fall within the duty of persons navigating the ship; an instance would be negligent stoking: *Smith* v. *Hunt*, 54 L. T. N. S. 422, 34 W. R. Dig. 79; *Carmichael* v. *Liverpool, &c., Association*, 35 W. R. 793, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 22 Q. B. D. 727.

They also cited *Ah Kang* v. *Australasian Steam Navigation Co.*, 9 Victorian L. R. 171, and *Gleadell* v. *Thomson*, 56 New York Rep. (C. A.) 194.

Bigham, Q.C., replied.

Cur. adv. vult.

July 10.—The following judgment, in which CAVE and VAUGHAN WILLIAMS, JJ., agreed, was delivered by

A. L. SMITH, J.—This is an action by the shippers of goods against the shipowners upon a bill of lading, for damage to goods after being loaded on board of the defendants' ship The facts are as follows:—

The plaintiffs' goods (cotton-seed cake) were loaded in the hold of the defendants' ship at the port of Galveston, and certain cotton in bales (not the plaintiffs') was also there put on board. It thereupon became necessary to complete the loading of the ship outside of the bar in the outer roads, and for this purpose the ship, with the plaintiffs' goods on board, proceeded outside and there anchored. Other cargo—viz., cotton bales (not the plaintiffs')—was then brought alongside in lighters and loaded in the ship, and the jury have found that the plaintiffs' cake was then damaged by rain water, either by it falling directly through the open hatchway on to the cake, or by reason of wet bales of cotton being then placed upon it, and that there was negligence on the part of those on board the ship in allowing the plaintiffs' cake to be so damaged.

Upon these facts the question arises whether the plaintiffs can maintain an action against the defendants for the damage to the plaintiffs' goods, or whether the defendants are protected by the exemptions in the bill of lading upon which the action is founded. The bill of lading, so far as is material, is as follows:—"Shipped, in good order and condition, to be delivered, subject to the under-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

mentioned conditions, in like good order and well-conditioned, the act of God, Queen's enemies, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, ... loss or damage arising from insufficiency in strength of packages, from sweating, leakage, breakage, rain, spray, rust, decay, from storage or contact with other goods, or from the boilers, steam, or machinery, or from the consequences of any damage or injury thereto, . . . and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatever kind being excepted, and the ship not being liable for any consequences of the causes herein excepted, however caused or originated."

Under the bill of lading the shipowners became bound to deliver the goods at the port of discharge in like good order and condition as when shipped, unless absolved by any of the excepted exemptions.

Charles, J., who tried this case, was of opinion that, inasmuch as the jury had found that the rain or the contact with other wet goods which damaged the plaintiff's goods was permitted by reason of the negligence of those for whose acts the defendants were responsible, that they (the defendants) were not exempted from liability by the terms of the bill of lading, and gave judgment for the plaintiffs. In my judgment there was ample evidence to support the finding of the jury that the damage was occasioned by the negligence of those for whom the defendants were responsible.

It has been held that in construing a clause in a bill of lading exempting a shipowner from liability which is ambiguous and of doubtful meaning, the construction most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exemptions are framed, is to be applied. See *per* Lush, J., in *Taylor* v. *Liverpool and Great Western Steam Co.*, 22 W. R., at p. 753, L. R. 9 Q. B., at p. 549, and *per* Bowen, LJ., in *Burton* v. *English*, 32 W. R., at p. 656, 12 Q. B. D., at p. 224.

I do not understand this to mean that the true canon of construction is not to be applied, but that, when applied, if ambiguity or doubt still exists, the construction is to be in favour of the shipper rather than of the shipowner.

In this bill of lading the shipowners have exempted themselves from damage to the shippers' goods by reason of rain, or of contact with other goods. This is not disputed, but the shippers contended that this exception does not apply, first, to damage done before the voyage has actually commenced, and, secondly, that it does not apply when the damage is brought about by the negligence of those for whose acts the defendants are responsible. As regards this first point I do not agree with it. In my judgment when once a shipowner has received a shipper's goods on board his ship and has by his captain given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions therein, and it is immaterial when the voyage in fact commences.

The case of *Hayn* v. *Culliford* was cited to support this contention, but in my opinion it does nothing of the kind. In that case the bill of lading exempted the shipowner "from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship," and it was held in the Court of Appeal that this clause did not exempt the shipowner from the default of their other agents and servants, and consequently not from the acts and defaults of the stevedore. See judgment of Court of Appeal *per* Bramwell, L.J., 27 W. R., at p. 544, 4 C. P. D., at p. 185. This is all that case decided in the Court of Appeal. I desire to point out the difference between the bill of lading in the present case and in *Hayn* v. *Culliford*. In the present case the words "engineers or other persons in the service of the ship," coming after the words "pilot, master, mariners," were added, as it seems to me, expressly to meet the point taken successfully by the shipper in *Hayn* v. *Culliford*, and it also appears to me that the phrase "whether in navigating the ship or otherwise," was inserted to meet a point also taken in that case but left expressly undecided by the Court of Appeal—viz., whether damage done to goods in stowing them was damage done in "navigating the ship," which my brother Denman in the court below had held not to be so. Moreover, upon the facts of the present case the whole of damage done to the plaintiffs' goods was after they had the been safely stowed in defendants' ship, and not in the process of stowing, as in *Hayn* v. *Culliford*. In my judgment the shipowners, under this bill of lading are *primâ facie* exempted from liability for damage by rain or by contact with other goods after the goods had been shipped, whether the ship had started on her voyage or not.

I now come to the other contention of the shippers—viz., that if the defendants' servants had brought about the rain or contact damage, by their negligence, the simple exception of liability from damage by rain or by contact with other goods would not exempt them. In this I agree, but it is answered by the shipowners that they are exempt by reason of the further exception in this bill of lading—viz., "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, always excepted."

It is upon the construction of these words, "whether in navigating the ship or otherwise," that the decision of this case really depends. Mr. Kennedy says that the words "or otherwise" may mean two things—either (*a*) something akin to navigating the ship; or (*b*) something dissimilar to it; and, that being so, under the rule laid down in the cases above cited (*Taylor* v. *Liverpool and Great Western Steamship Co.* and *Burton* v. *English*) he asserts that the words must be construed in favour of the shippers, and consequently held to mean something akin to navigating the ship. He was unable when pressed to give any intelligible instance of what came under the terms "akin to navigating the ship" which was not covered by the words "in navigating the ship." To read the words "or otherwise" as meaning akin to navigating the ship is to give no meaning, in my judgment, to the preceding words "in navigating the ship." It should be noticed that they are not words enumerating a class with general words following, to which the doctrine of limiting the general words to the class, is ordinarily applied.

To read the words "or otherwise" as including everything besides navigating the ship is to render the words "in navigating the ship" inoperative, but to read the words "whether in navigating the ship or otherwise" as meaning an absolution from liability to damage brought about whether in negligently navigating the ship or in negligently bringing about those other losses or damages from which the shipowners have exempted themselves in the bill of lading, is, in my judgment, the true reading of this bill of lading. By this means the true canon of construction is followed. The natural meaning is given to the words. A meaning is given to every word and no word is rendered inoperative. When this is done there is no ambiguity or doubtful meaning.

The shipowners by the bill of lading contract to carry and deliver the shippers' goods in like good order and condition as when shipped except that they will not be liable for damage thereto brought about either by the negligent navigation of their ship or for any of the losses and damages excepted in the bill of lading, even though brought about by the negligence of those for whose acts they are responsible. It is unnecessary to determine in this case whether the damage accrued to the plaintiffs'

goods was whilst the ship was or was not being navigated.

Our attention was called to a decision given in Australia in the case of *Ah Kang* v. *Australasian Steam Navigation Co.*, in which it was held upon demurrer that the words in a bill of lading, "or under any other circumstances," following the general words of "restraint of princes or rulers, accident, loss, or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, and other servants of the company navigating the ship," did not cover the confiscation of the plaintiff's goods at a foreign port by reason of the omission of the master to insert an entry of them in the ship's manifest as required by the law of the port, a matter wholly dissimilar from any of the exceptions in the bill of lading and in no way excepted therein, as in the present case the damage by rain and contact is. In my opinion this fact distinguishes that case from the present one, and I see no reason to dispute the accuracy of that case, even if it were binding upon us, which it is not.

In my opinion the defendants in this case are exempted under the terms of the bill of lading from the liability sought to be imposed upon them, and judgment should be entered for the defendants, and with costs.

Judgment for the defendants.

Solicitors for the defendants, *W. A. Crump & Son.*

Solicitors for the plaintiffs, *Wynne, Holme, & Wynne*, for *Forshaw & Hawkins*, Liverpool.

Q. B. Div. (Huddleston, B., and Grantham, J.) April 25.

MOXON v. SHEPPARD. (a.)

Solicitor—Practice—Charging order on money paid into court—"Property recovered or preserved"—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

An action having been collusively compromised without the knowledge of the plaintiff's solicitors, and without any provision for their costs,

Held, that money which had, through their instrumentality, been paid into court by the defendant to abide the event, was "property preserved" within the meaning of section 28 *of the Solicitors Act*, 1860, *and that there was jurisdiction to make a charging order thereon.*

Application by the plaintiff's solicitors for a charging order under 23 & 24 Vict. c. 127, s. 28.

The applicants had been solicitors employed on behalf and by the instructions of the plaintiff in an action commenced on September 18, 1889, to recover from the defendant a sum of £96 11s. 3d. On October 11 they applied on behalf of the plaintiff for judgment under order 14, and the master thereupon gave the defendant leave to defend upon the terms of his paying the amount claimed into court to abide the event. The action was subsequently compromised by the plaintiff without the knowledge of the applicants, and without any provision being made as to the payment of their costs, and on February 25 they were informed that such compromise had been effected and they were discharged from their employment. On March 19 the defendant applied to the master to have the action dismissed, and the money repaid to him out of court, producing at the same time a written consent by the plaintiff to an order to that effect. The master refused the order, on the ground of collusion in connection with the compromise between the plaintiff and the defendant. The applicants then applied, under section 28 of the Solicitors Act, 1860, for a charging order upon the money in court. The order was made by the master and affirmed on appeal by Lawrance, J., at chambers.

E. T. Holloway, for the defendant.—The sum paid into court was not "property recovered or preserved" within the meaning of section 28 of the Solicitors Act, 1860. The claim for costs which a solicitor has under that section extends to the property of his own client only: *Berrie* v. *Howitt*, L. R. 9 Eq. 1, 18 W. R. Dig. 128. In *Clover* v. *Adams*, 6 Q. B. D. 622, 29 W. R. Dig. 207, where the plaintiff's solicitor was allowed a charging order on money paid into court by the defendant, the amount so paid in was "recovered or preserved," for the plaintiff could have taken it out of court at any moment, whereas in the present case the money is paid into court to abide the event.

Montague Lush, for the applicants.—The solicitors "preserved" the amount paid into court for the plaintiff, and are therefore entitled to a charging order: *Twyman* v. *Porter*, 19 W. R. 151, L. R. 11 Eq. 181; *Pinkerton* v. *Easton*, L. R. 16 Eq. 492, 22 W. R. Dig. 236.

HUDDLESTON, B.—I am of opinion that this appeal must be dismissed. It was through the instrumentality of the plaintiff's solicitors that the money was ordered to be paid into court to abide the event. While it was in court a collusive compromise was effected by the parties without the solicitors' knowledge, and in order to deprive them of their costs. It is contended that under the circumstances the money was not "recovered" within the meaning of section 28 of the Solicitors Act, 1860. Perhaps it was not, but it was in process of recovery, and but for the collusive proceedings would have been recovered. At all events, it was so much preserved out of the defendant's estate.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitor for the defendant, *N. Bennett.*

Applicants (Messrs. Todd, Dennes, & Lamb) in person.

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

C. C. R. May 12; June 21.

REG. v. WILLIAM PAUL. (a.)

Criminal law—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 4—*Unsworn evidence of girl under thirteen—Conviction on a count for indecent assault—* 24 & 25 *Vict. c.* 100.

The prisoner was indicted under the Criminal Law Amendment Act, 1885, *for an attempt to defile a girl under the age of thirteen years. The child's evidence was, under that section, received, though not given upon oath. In a second count the prisoner was charged with an indecent assault under* 24 & 25 *Vict. c.* 100. *He was acquitted upon the first count, and found guilty upon the second on the evidence of the child.*

Held, that the unsworn evidence was inadmissible on the second count, and the conviction was wrong.

Reg. v. Wealand, 36 *W. R.* 576, 20 *Q. B. D.* 827, *distinguished.*

The prisoner was tried before the Recorder of London at the Central Criminal Court upon an indictment charging him in the first count, under section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), with unlawfully attempting to have unlawful carnal knowledge of Frances Coles, a girl under the age of thirteen years, and in the second count, under 24 & 25 Vict. c. 100, with an indecent assault on the said Frances

(a.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

Coles, then being a young person under the age of thirteen years.

The evidence of Frances Coles was received, though not given upon oath, under the provision in section 4 of the said Criminal Law Amendment Act.

At the close of the case for the prosecution the recorder held that there was no evidence of an attempt to have carnal knowledge, but that the evidence of the girl as to an indecent assault was corroborated by other material evidence implicating the prisoner.

Without the girl's evidence the evidence as to an indecent assault would have been insufficient to justify a conviction.

The counsel for the defence then submitted that as the only charge remaining was the charge of indecent assault, and as there was nothing in the Criminal Law Amendment Act, 1885, to make the evidence of the girl admissible without oath upon a charge of indecent assault, there was no evidence to go to the jury upon that charge, but the case was left to the jury upon the evidence of the girl as well as the evidence of the other witnesses, and they acquitted the prisoner on the first count, but found him guilty on the second count of an indecent assault.

The question reserved for the opinion of this court was whether the evidence of the girl was admissible, and whether the conviction could be supported.

G. Elliott, for the prisoner.

C. F. Gill, for the prosecution, relied on the case of *Reg.* v. *Wealand*, 36 W. R. 576, 20 Q. B. D. 827.

Cur. adv. vult.

June 21.—The COURT (Lord COLERIDGE, C.J., HAWKINS, MATHEW, DAY, and GRANTHAM, JJ.), held that the case was not governed by the authority of *Reg.* v. *Wealand*, inasmuch as in that case the prisoner had been indicted for the full act of felony under section 4, and was found guilty of an indecent assault by virtue of the power given by section 9 in cases of an indictment for felony. Here, however, the first count of the indictment was for the attempt only, and the jury would not have had power to convict of an indecent assault on that count, inasmuch as section 9 applies only in cases of felony. On the other count of the indictment, the evidence of the girl was clearly inadmissible without oath. The conviction was therefore quashed.

Conviction quashed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

Solicitor for the prisoner, *W. Edwin.*

Court of Appeal.

From Q. B. Div. July 2.

MARKS v. BEYFUS AND OTHERS. (*a.*)

Evidence—Prosecution by Director of Public Prosecutions—Public prosecution—Disclosure of name of informer—Prosecution of Offences Act, 1879 (42 & 43 *Vict. c.* 22), *ss.* 2, 7.

In an action for conspiracy to procure the Director of Public Prosecutions to institute a criminal prosecution against the plaintiff, the Director of Public Prosecutions was called as a witness for the plaintiff, and asked to state the name of the informer, and, if he had a statement in writing, to produce it.

Held, that, as a prosecution instituted by the Director of Public Prosecutions is a public prosecution, the question was not admissible.

Attorney-General *v.* Briant, 15 *M. & W.* 169, *approved and followed.*

Appeal from the judgment of Huddleston, B., at the trial of the action with a jury.

The action was to recover damages for an alleged conspiracy on the part of the defendants falsely and maliciously and without reasonable and probable cause to institute a criminal prosecution against the plaintiff or to cause the Director of Public Prosecutions to prosecute him.

Upon the trial the plaintiff called Sir A. K. Stephenson, the Director of Public Prosecutions, who stated that he instituted the prosecution, and on being asked who were his informers, and whether a statement was made to him, and if in writing to produce it, he stated that there was a statement made to him in writing, but he declined to give the names of his informers or to produce the statement unless ordered by the judge, on the ground that it was against public policy and the interests of the public service to do so. The judge declined to order Sir A. K. Stephenson to answer the question or to produce the statement. The learned judge accordingly nonsuited the plaintiff.

The Queen's Bench Division (Lord Coleridge, C.J., and Mathew, J.) refused to grant a new trial.

The plaintiff appealed.

The plaintiff, in person, contended that the learned judge ought to have ordered Sir A. K. Stephenson to answer the question and to produce the statement.

He referred to *The Attorney-General* v. *Briant*, 15 M. & W. 169; *Hardy's case*, 24 State Trials, 751; *Watson's case*, 32 State Trials, 98; *Reg.* v. *Richardson*, 3 F. & F. 693; 42 & 43 Vict. c. 22; 47 & 48 Vict. c. 58.

Cock, Q.C., Winch, Q.C., and *H. Kisch*, for the defendants, were not called upon.

Lord ESHER, M.R.—The ground upon which the objection to answer the question is put is that the prosecution of the plaintiff was a public prosecution, in the sense that it was instituted by what was equivalent to the Government for a public purpose, and, that being so, the grounds for instituting the prosecution ought not, in the public interest, to be disclosed. The first inquiry is whether a prosecution instituted by the Director of Public Prosecutions is a public prosecution. The answer to that inquiry depends upon the provisions of 42 & 43 Vict. c. 22, which created the office of Director of Public Prosecutions. Section 2 of that Act provides that it shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney-General, to institute, undertake, or carry on such criminal proceedings as may be, for the time being, prescribed by regulations under the Act, or may be directed in a special case by the Attorney-General; and the regulations made under the Act show that the Director of Public Prosecutions is to take action when it is required in the public interest. Section 7 of the Act shows that his position is distinguished from and contrasted with that of a private prosecutor, and prosecutions undertaken by him are placed in a different position from prosecutions by private persons. He is, therefore, to institute a prosecution in those cases only in which the Attorney-General thinks it necessary, or in those cases in which he comes to the conclusion that the offence is of such a character that he should do so in the public interest. He is put in the position of a person authorized by the Government to prosecute. In other words, the prosecution is a public prosecution.

The next inquiry is, what is the law as to the disclosure of the names and statements of informers in the case of a public prosecution? The law upon the point

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

has been laid down by Pollock, C.B., in *Attorney-General* v. *Briant*, where he said, in discussing *Hardy's case*, that all the judges gave judgments, "and on all hands it was agreed that the informer, in the case of a public prosecution, should not be disclosed." And further on he said: "The rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. . . . And we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." That is the rule laid down upon the grounds of public policy in the case of a public prosecution, and that rule is applicable to the present case. I do not say that the rule can never be departed from. If on the trial of a prisoner the judge is of opinion that the disclosure of the name of the informer is necessary or right in the interests of the prisoner, then the greater public policy, that an innocent man should not be convicted, must prevail, and the judge would most certainly order the name to be disclosed. With that exception the judge, in my opinion, has no discretion to order the witness to answer the question. That rule applies, not only to the criminal trial itself, but also to all subsequent proceedings; otherwise the privilege would be futile. And, further, in my opinion, even if the witness were willing to give the evidence, the judge ought to prevent him doing so. For these reasons I am of opinion that Huddleston, B., was right in refusing to order Sir Augustus Stephenson to answer the questions, and as, apart from that, there was no evidence to go to the jury, the nonsuit was right. The appeal must therefore be dismissed.

LINDLEY, L.J., concurred.

BOWEN, L.J.—I am of the same opinion. The cause of action alleged is for a conspiracy maliciously to procure the Director of Public Prosecutions to prosecute a criminal charge against the plaintiff, and unless the plaintiff can show that the defendants did procure the Director of Public Prosecutions to prosecute him, he has no cause of action, as, otherwise, there would be no damage to the plaintiff, and damage is essential to the cause of action. That seems to me to be the point of this case, and it is obvious that the plaintiff's case broke down in this essential particular. Unless he was able to obtain the evidence he required from Sir Augustus Stephenson there was no case to go to the jury. The question, therefore, is whether the judge was right in upholding, upon the ground of public policy, the refusal of Sir Augustus Stephenson to disclose the name of the informer. The solution of that question depends upon whether the prosecution of the plaintiff was a public prosecution. In my opinion, if it was a public prosecution, the name of the informer ought not to be disclosed, either on the trial of that prosecution or in any subsequent proceeding. There is one exception, however, to that rule. It may be that, on the trial of the prisoner, if the judge is of opinion that the non-disclosure may tell against the prisoner, he may order the name of the informer to be given.

There remains the question, What is the position of the Director of Public Prosecutions, and what is the nature of a prosecution instituted by him? When one looks at sections 2 and 7 of 42 & 43 Vict. c. 22, and at the regulations made under that Act, it seems to me obvious that a prosecution instituted by him is a public prosecution. The judge was, therefore, right in refusing to order the questions to be answered, and in doing so he acted upon the rule laid down by the Court of Exchequer in *The Attorney-General* v. *Briant*, founded upon the decisions in *Hardy's case* and in *Watson's case*. The judge had no discretion in the matter. Upon the question being put he was bound, even though the witness did not claim the privilege, to intervene and prevent the question being answered. Whether the Director of Public Prosecutions can claim privilege as an officer of State, and upon that ground can refuse to answer the questions, does not arise in the present case.

Appeal dismissed.

Solicitors for the defendants, *Beyfus & Beyfus.*

From Q. B. Div. June 30.

FILBURN *v.* PEOPLE'S PALACE AND AQUARIUM CO. (*a.*)

Tort — Mischievous animal—Elephant—Injury—Liability of owner.

The plaintiff was present at a public performance given by the defendants, when an elephant which was being exhibited by them attacked and injured him. The jury found that the elephant in question was not an animal dangerous to man, and that the plaintiff did not bring the attack upon himself.

Held, that the defendants were liable, as elephants belonged to the class of animals dangerous to man, and a person who kept an animal of that class was liable for injury done by it.

Appeal from the judgment of Day, J., in favour of the plaintiff at the trial of an action to recover damages for personal injuries.

The plaintiff was present at a public performance given by the defendants, when an elephant belonging to and which was being exhibited by them attacked the plaintiff and injured him. The jury found (1) that the elephant was not a dangerous animal to man; (2) that the defendants did not know him to dangerous; and (3) that the plaintiff did not bring the attack on himself. Day, J., upon these findings, entered judgment for the plaintiff.

The defendants appealed.

Lockwood, Q.C., and *Cyril Dodd, Q.C.*, for the defendants.—The finding of the jury that this elephant was not dangerous to man takes it out of the class of dangerous animals. Elephants in many countries are tamed, and used as beasts of transport. They stand in a different position from animals *feræ naturæ*, such as lions, tigers, bears, wolves, &c., which are never tamed. Some elephants being wild and some being tame, there is no presumption that they are *feræ naturæ*, and therefore, on the first finding of the jury, the defendants are entitled to judgment.

They referred to *Rex.* v. *Huggins*, 2 Lord Raym. 1,574, at p. 1,583; *Fleeming* v. *Orr*, 2 Macqueen, 14; 1 Hale P. C. 430.

Montague Lush, for the plaintiff, was not called on.

Lord ESHER, M.R.—The only difficulty I have had in this case is to see whether a formula could be laid down which would be applicable to this and other cases. According to the law of England, animals for this purpose may be divided into two classes. The first class consists of those animals as to which, if a person chooses to keep one of them, he does so at his peril, and it is not necessary or material to prove that he knew the particular animal he keeps to be dangerous. The other class consists of animals which are not, as a class, of a dangerous nature, though particular individuals of that class may become dangerous. If a person keeps an animal of this class, he is not liable for injury done by it unless he knew that the particular animal was dangerous. How can one determine to which of these two classes any particular kind of animal belongs? Some animals are known by everybody not to be of a

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

dangerous nature in any country. They may be *feræ naturæ* in the sense that they are not the subject-matter of property until reduced into possession, but they are not *feræ naturæ* in the sense that they are dangerous. The law accordingly recognizes that such animals are not dangerous. There is another division of animals which the law recognizes as not being of a dangerous nature in England. For instance, there are horses, oxen, dogs, and others which I do not pretend to enumerate. These have come to be recognized by the law as not being of a dangerous nature in England in this way:—Though originally wild, in the course of years the whole race has been so tamed in this country that their progeny in England is now known and recognized as not being of a dangerous nature. On account of that universal knowledge, the law in this country recognizes and assumes that these animals as a race are not dangerous in England. Unless an animal can be brought within one of these two divisions—namely, a race of animal that is not dangerous anywhere, or a race of animal which by cultivation, so to speak, in England is recognized as not being dangerous in England—it falls within the first class, and if kept by anyone it must be kept at his peril.

Applying that principle to the present case, we must inquire under which class the race of elephants come. It is clear that they cannot come under the division of animals not dangerous anywhere. Nor can it be said that elephants have through a long series of years been born and tamed in this country that their progeny has been recognized in England as not dangerous. Therefore the race is not brought within the second class above-mentioned. Accordingly elephants fall within the first class, and whoever keeps an elephant must do so at his peril, and must prevent it from doing any injury, and his knowledge of the dangerous or mischievous character of the particular elephant that he keeps is immaterial. The first question, therefore, which the learned judge asked the jury was immaterial, and the defendants are liable for the injury done by the elephant, as the plaintiff did not by his conduct bring the injury on himself, and the judgment must be affirmed.

LINDLEY, L.J.—I am of the same opinion. The last case upon the subject is *May* v. *Burdett*, L. R. 9 Q. B. 101, the case of a monkey, where knowledge of the mischievous nature of the monkey was averred in the declaration; but that case does not seem to me to assist the defendants. Unless it can be shown that elephants as a class are known and recognized as not being dangerous in this country the defendants cannot succeed. I agree with the judgment of the Master of the Rolls, and I think that the appeal should be dismissed.

BOWEN, L.J.—I am of the same opinion. It seems to me that the broad principle which governs this case is that laid down in *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. If a person brings on to his premises something not naturally there which is likely to do mischief he takes the risk, and he must keep it at his peril, and the law holds him responsible for any damage which ensues. The subject of dangerous animals is a branch of the law which is covered by that proposition. The application of that proposition has been uniformly recognized in the text-books and cases from the time of Lord Hale (1 Hale P. C. 430) and Lord Holt (*Mason* v. *Keeling*, 12 Mod. 332) down to the present time. People must not be wiser than the experience of mankind. If, according to the experience of mankind, certain animals are dangerous as a class, though individual members of that class have been tamed, the person who keeps an animal of that class must take the risk of its doing any mischief. Elephants still remain as a class wild in their nature and untamed, though there may be individuals of that class which are brought to a degree of tameness amounting to domestication. Everyone knows when dealing with an elephant that he is dealing with an animal which, unless it is tamed, belongs to a class which is naturally wild. If, on the other hand, the animal belongs to a class which, according to the experience of mankind, is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on such a footing, then a person may safely keep such an animal, unless he knows that the particular animal which he keeps is likely to do mischief. The broad rule, therefore, as applicable to animals, is that if a person brings on to his land an animal belonging to a class that is likely to do mischief, he must take the risk upon himself of that animal doing mischief. But if the animal belongs to a class which is not likely to do mischief he is not liable for mischief done by it, unless he knows the particular animal to be dangerous. The judgment, therefore, was right, and must be affirmed.

Appeal dismissed.

Solicitors for the plaintiff, *Hamlin, Grammer, & Hamlin*, for *Dunn & French*, Leeds.

Solicitors for the defendants, *Speechly, Mumford, & Co.*, for *Mumford & Johnson*, Bradford.

From Chan. Div. Feb. 5.

In re BLUNDELL.

BLUNDELL *v.* BLUNDELL. (*a.*)

Administration—Costs—Executors' right of indemnity—Persons standing in executors' shoes—Subrogation—Relative rights against the estate of creditors standing in executors' shoes and persons to whom those creditors had been ordered to pay costs of proceedings taken by such creditors for the benefit of the estate.

In an action to administer the estate of a testator, the conduct was given to a company who were large creditors. The company, having taken out a summons with the approval of the judge to recover from the solicitors who had acted for the executor a sum of money received by them out of the estate for their costs, were ordered to pay the solicitors their costs of the summons, which was dismissed; the company were shortly afterwards ordered to be wound up by the court, and had no means of paying the amount. A small sum, not enough to pay in full either the company's or the solicitors' costs of the summons, remained in court to the credit of the action.

Held (reversing the decision of North, J.*), that the solicitors were entitled, by subrogation to the right of the company (who stood in the shoes of the executor), to be indemnified out of the estate, and, as the company had been ordered to pay costs to the solicitors, the latter had a right to be paid such costs out of the fund in court, prior to the right of the company to be paid thereout their own costs of the same proceedings.*

Appeal from North, J.

Thomas Blundell died in 1882, and an order directing the usual accounts of his estate was made in November, 1884. The testator's son, the defendant, G. T. Blundell, alone proved the will.

In January, 1885, the conduct of the action was given to the Bavarian Brewery Co. (Limited), who were large creditors of the estate. The present appellants, Messrs. Bower, Cotton, & Bower, had for some time acted as solicitors to the executor, and had been paid by him out of the estate their costs to the amount of £1,148 14s. 9d. A balance of over £2,000 was subsequently found due from G. T. Blundell on his accounts, but, he having become bankrupt, no part thereof was ever paid.

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

The costs of the Bavarian Brewery Co. of the action were paid in pursuance of an order of the 26th of April, 1887, made upon the further consideration.

Directly after that order, the Bavarian Co., with the approval of the judge in chambers, took out a summons in their own name for an order against Messrs. Bower, Cotton, & Bower to refund the sum of £1,148 odd paid to them as aforesaid, but this summons was dismissed, with costs, by Stirling, J. (40 Ch. D. 370, 37 W. R. Dig. 190). None of those costs were, however, paid, and the company having, on the 16th of June, 1888, been ordered to be wound up, there was no probability of their being paid out of the company's assets. A small sum (under £200) remained in court in the action, but out of that £35 13s. 6d. was due to the receiver.

Under these circumstances Messrs. Bower, Cotton, & Bower gave notice of motion that the costs ordered to be paid to them as aforesaid might be declared a charge on the fund in court in priority to all other claims, and that they might be at liberty to apply for payment out of that fund of such part of those costs as they could not obtain from the brewery company. The only costs in the action in fact remaining unpaid were those incurred by the company in their summons against Bower, Cotton, & Bower (which alone exceeded what would be left of the fund in court after the receiver had been paid what was due to him), and the costs of the same summons payable by the company to Messrs. Bower & Co. (which also exceeded such residue of the fund).

The official liquidator of the company accordingly took out a summons for payment of the balance due to the receiver, and for taxation and payment out of the residue of the costs of all parties, and payment of the balance (if any) to himself as liquidator of the company.

The motion came on for hearing on the 20th of December, 1889.

North, J., held that the liquidator of the Bavarian Brewery Co. was entitled to the balance of the fund in court, in payment of the company's costs of the summons against Messrs. Bower, Cotton, & Bower, in priority to the right of that firm to be paid the costs the company had been ordered to pay them.

Messrs. Bower, Cotton, & Bower appealed.

Cozens-Hardy, Q.C., and *Levett*, for the appellants.—The summons in respect of which both these sets of costs were incurred was a proceeding commenced by the Bavarian Brewery Co., not for their own benefit, but for the benefit of Blundell's estate, and as they had been substituted for the executor in having the conduct of the action, we ought, by subrogation to them, to have the benefit of their right to indemnity: *In re Gorton, Dowse* v. *Gorton*, 37 W. R. 341, 40 Ch. D. 536. If, in the winding up of a company, an action brought by the liquidator against another person fails, the defendant's costs must be paid out of the assets in priority to the costs of the winding up: *In re Home Investment Society*, 28 W. R. 576, 14 Ch. D. 167; *In re Bank of Hindustan, China, and Japan, Ex parte Smith*, 16 W. R. 170, L. R. 3 Ch. App. 125. Again, if an action is brought by leave of the court against a company in liquidation, and is successful, the claimant is entitled to have his costs paid in full out of the assets of the company in priority to the costs of the liquidator, though the liquidator had leave to defend: *In re Trent and Humber Shipbuilding Co., Bailey and Leetham's case*, 17 W. R. 1079, L. R. 8 Eq. 94. In *In re Dominion of Canada Plumbago Co.*, 32 W. R. 425, 27 Ch. D. 33, Pearson, J., whose decision was upheld on appeal, followed *In re Home Investment Society*, and declined to follow *In re Dronfield Silkstone Coal Co.* (No. 2), 31 W. R. 671, 23 Ch. D. 511, in which Chitty, J., had taken a somewhat different view. In the present case there was a personal order against the liquidator to pay the costs, though with a right to indemnify himself out of the company's assets. The principle was enunciated by James, V.C., in *Bailey and Leetham's case*. The Bavarian Co. could not, except as representing Blundell's estate, have sued us. As between two parties, one of whom has been shown to be right and the other wrong, the former ought to have his costs in priority to the latter. The person wrongly attacked ought not to be postponed to the person who has wrongly attacked him. Why should the liquidator be paid his costs of his mistaken application before the present appellants, as the successful party, are paid theirs?

Everitt, Q.C., and *E. Ford*, for the liquidator.—What the appellants are really asking for is, not subrogation, but direct payment out of the assets in priority to all other claims. The cases cited on behalf of the appellants are all distinguishable, on the ground that in each a winding-up order had been made before the costs were incurred. In *In re Home Investment Society* the liquidator acted *mero motu* at his own peril, without the direction of the court. Subrogation would only apply to their right to work out their indemnity. Suppose a trustee had, for the benefit of his estate, done what we did, could his successful antagonist take the whole of a small estate to pay his costs, leaving nothing for the trustee or anyone else? A lien for costs has never been interfered with. An order for payment of costs to a party personally does not take away the solicitor's lien for his costs: *Ex parte Bryant*, 1 Madd. 49. The appellants elected to look to the company for their costs, and cannot now have them out of the estate. [LINDLEY, L.J., referred to *Ex parte Garland*, 10 Ves. 110, and *In re Johnson, Shearman* v. *Robinson*, 29 W. R. 168, 15 Ch. D. 548. LOPES, L.J.—You put the appellants to expense by your improper proceeding.] Every step here was taken with the sanction of the court. The principle on which liquidators or trustees in bankruptcy (as held in *In re Angerstein*, 22 W. R. 581, L. R. 9 Ch. App. 479) are made to pay costs personally is that, where they act without the sanction of the court, the other parties are not to be bound to look only to an insolvent estate for their costs; but that principle does not apply here. [LINDLEY, L.J.—Have executors priority as to costs over persons to whom they have been ordered to pay costs?] If they have done their duty they take priority over everyone else.

Cozens-Hardy, Q.C., in reply.—The judge said he would take care, in case there were enough to pay our costs as well as those of the company, that the money went into our pockets before being applied in payment of the creditors generally. The only question was as to priority between us and the company, and surely the better equity is that of the party to whom the other party has been ordered to pay costs.

COTTON, L.J.—This is an appeal from an order of North, J. It has been fully argued, but if there were any authorities, bearing directly on the question, I should have liked to consider them before giving judgment. It is conceded, however, on both sides that there is no direct decision on the point raised by the appeal, though several cases have been referred to which show what it would be right to do if it could be done consistently with principle. The judge, in the administration action of *Blundell* v. *Blundell*, gave the conduct of that action to the brewery company, which is now unfortunately being wound up. That company made a claim against the solicitors, who are Mr. Hardy's clients, seeking to have a certain sum paid into court to the credit of the action. It is admitted that every step taken by the brewery company in prosecuting that claim was taken with the approval of the judge, and rightly taken, and that is shown by the form of the order giving the company the costs of the proceedings. The pro-

ceedings ultimately failed, and the appellants obtained an order against the brewery company for the payment of their costs of those proceedings. The company has, however, gone into liquidation and unfortunately it has no assets, and the question now is whether the appellants are not entitled to be paid those costs out of the assets of Blundell's estate in priority to the costs of the brewery company in this matter, which costs have not yet been paid. There is no question as to the costs of the brewery company incurred in getting in assets of the estate, all those costs having been already paid to them. It is simply this, whether these solicitors are entitled by way of indemnity to be paid these costs out of the estate in priority to the claims of the company.

The order made by the judge, which was, I think, in rather an unusual form, allowed the brewery company to take proceedings in its own name against Messrs. Bower & Cotton in respect of a claim made against them on behalf of the estate. That order had the effect of substituting the brewery company for the executors, and, therefore, as regards this question of indemnity, we must treat the brewery company as standing in the shoes of the executors, with this additional fact, that every step taken by the company in their conduct of this action was approved by the judge.

It was contended that the appellants could not enforce their claim to an indemnity out of the estate, because they elected to take an order simply against the brewery company. But I do not think that fact ought to prevent their enforcing any right of indemnity they might have had against the estate. It was not a case of election at all. A great many of the cases referred to, do show a right of such a nature, and cases were cited where a liquidator who was liable to pay costs, and get them out of the estate, has been held entitled to pay the costs out of the estate directly to the person against whom he has been litigating.

But it is said that it is unreasonable, independently of the question of election, that there should be a claim against the company personally (if I may so describe it), and also a claim by way of indemnity out of the assets of the estate. I think that objection fails, because there are numerous examples of such claims—there is, for instance, the case of executors who are authorized to carry on the trade of their testator, and to apply either the whole or a portion of the estate for that purpose. There the persons dealing with the executors are in no sense creditors of the testator—they are at law creditors of the executors. But it is well established that, although this is so, the persons dealing with the executors, in addition to their right against the executors personally, are entitled to such indemnity as the executors might have against the estate. If the amount of the estate allowed to be employed in the trade is limited, then their claims in respect of the indemnity will be also limited. I only refer to this to show that it is not unreasonable that the appellants in this case should raise a claim against the brewery company, as standing in the shoes of the executors, personally, and also, by way of indemnity, as against Blundell's estate.

There is in this case the difficulty that these solicitors can only claim by getting the benefit of the indemnity to which the company would have been entitled if they had paid these costs, which they have not done.

If the company had paid the costs to the successful litigants, they would have been entitled to indemnity out of the estate in respect of any costs paid by them to the solicitors: but here the company is claiming against this estate in respect of its own costs. Although North, J., does not in so many words decide that the company would be entitled to such an indemnity, yet in my opinion, as they commenced their proceedings under the authority of the court, and every step in those proceedings was taken by the company with the sanction of the court, if they had paid the costs to the appellants, they would have been entitled to say to the court which was administering the estate of the deceased, "Not only ought we to be paid out of the estate the costs incurred by us, but also the costs which have been paid by us to the successful litigants." Then the solicitors who succeeded in the litigation would be entitled to the benefit of the company's right of indemnity. But the costs have not been paid. However, it is no unusual mode of proceeding for the person or estate liable to indemnify another for a payment made by him, to make a payment directly in discharge of the original liability. That is, in fact, generally the best way of getting rid of the liability of indemnity. Therefore I do not think that the non-payment of the costs by the company prevents the solicitors from claiming by way of indemnity.

But the question remains, which of the two would have a prior right to be indemnified from the costs which have been incurred. The order is that the company do pay the costs of Messrs. Bower & Cotton. As between those two parties—the company and Messrs. Bower & Cotton—which is entitled to priority? Surely those to whom the others were ordered to pay costs. As that order against the company stands, not having been questioned within the time allowed, we have to say what is to be done, now that the company is being wound up.

My view of carrying out to a legitimate extent the benefit of indemnity to which the company would have been entitled, and in priority to any claim which the creditors would have against the assets, is to give the solicitors the right to stand in the shoes of the company against those assets. I think, therefore, the order made by North, J., must be reversed, and that there must be a direction that the sum be ordered to be paid to the liquidators of the company must be paid to the appellants here.

It has been suggested that the appellants cannot have any claim against assets of the estate, which ought to go to the payment of creditors. But we really have not got to consider that question, because the question here only arises between the two parties who incurred the costs of the litigation raised against the one by the other of them, which failed, and I myself feel no difficulty at all as regards the priority of the right to indemnity over the right of creditors of the estate.

The court has power to direct what is right to be done in the winding up of estates, and in approving the proceedings taken against the solicitors by the company, it no doubt acted for the best with a view to increasing the assets of the estate.

Unfortunately, the claim made was unsuccessful, but that cannot take away the right to indemnity against costs incurred with the sanction of the judge, and which must, accordingly, be presumed to have been properly incurred, and though the claim failed, I cannot say that it was an unreasonable one.

LINDLEY, L.J.—The question we have to decide is how to dispose of a sum of about £170 standing in court to the credit of the action of *In re Blundell*. All the costs of everybody incurred in producing that fund have been paid long ago, and the estate has been cleared of every liability, and this sum represents the net balance.

The difficulty which arises is attributable to a certain legal proceeding which I will deal with shortly. It was supposed by the persons interested in Blundell's estate that certain gentlemen — Messrs. Bower & Cotton —were indebted to that estate, not legally, in the sense that they could be sued for the debt at common law, but on the ground that there were certain equitable demands upon them arising out of breaches of trust, and that, if proceedings were taken, a sum of £1,100 odd could be got in for the benefit of the estate. The principal creditors of the estate, the brewery company,

who had obtained the conduct of the proceedings, accordingly took out a summons with a view to get in this supposed asset, and got the leave of the judge to fight out the question with Messrs. Bower & Cotton. The result was that the summons was dismissed, with costs. The company, however, acted, we are told, with the approval of the court, and nobody suggests that they did anything wrong, and that brings us to the question what is to be done about the costs of that summons. The company, on the one hand, are entitled to be indemnified out of the estate for all the costs properly incurred by them in the proceedings on that summons, and, on the other hand, the solicitors were ordered to be paid their costs by the company. It is to be observed that Messrs. Bower & Cotton have a legal right against the company which could be followed up by *fi. fa.*, or other proceedings. But Messrs. Bower & Cotton say that they have more than that—they say that they are entitled in equity to be paid out of this fund in court. How do they make that out? It appears that their equitable right to stand as creditors of the estate is got at in accordance with the principal on which *Ex parte Garland* and similar cases were decided, and which were carefully reviewed by Sir G. Jessel, M.R., in *In re Johnson*. They do not claim to be *cestuis que trust* of the fund, but they claim to be entitled to be paid out of it through the right of the brewery company to be indemnified out of it for what they pay. There are two claimants, and two only upon this fund, and as between those two one has been ordered to pay the costs of the other. That, to my mind, settles the point of priority. The authorities most closely bearing upon this point are the cases of winding up referred to by Mr. Hardy and Mr. Levett, and taking them as guides and applying the principle of those cases, in good sense and in equity it seems to me that Messrs. Bower & Cotton have priority over the company.

LOPES, L.J.—I have nothing to add. I quite agree with the rest of the court. The principle applicable to the decision is one which was introduced by the *Home Investment Co.'s case* and the series of cases ending with the *Dominion of Canada Plumbago Co.'s case*.

Solicitors, *Bower, Cotton, & Bower; W. Foster.*

App. Bankruptcy. Feb. 14, 28.

In re PERKINS.

Ex parte MEXICAN SANTA BARBARA MINING CO. (*a.*)

Bankruptcy—Secured creditor—Obligation to give up security — Company — Lien on shares of debtor— Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 168.

A debtor against whom a bankruptcy petition had been presented by a company had previously obtained judgment against a registered shareholder of the company, under which the defendant shareholder had been declared to be a trustee of some of the shares standing in his name in favour of the debtor. The articles of association of the company provided that the company should "have a first and paramount lien on all shares for all moneys due to the company from the registered holder thereof, or other the persons for the time being entitled thereto as against the company." The registrar dismissed the petition, on the ground that the company declined to declare that they held any security for their debt from the debtor.

Held (reversing the registrar's decision), that, as the company were not bound to recognize trusts of their shares, the debtor was not "a person entitled to the shares as against the company," and, therefore, that they were not "secured creditors" of the debtor within the meaning of sections 16 *and* 168 *of the Bankruptcy Act*, 1883, *since they had no lien upon the shares registered in the name of a person declared to be a trustee for the debtor.*

Appeal from Mr. Registrar Giffard dismissing a petition in bankruptcy presented by the company against Perkins.

In 1889 the debtor Perkins had commenced an action against one J. M. Dickey and the company, claiming from Dickey certain shares and debentures of the company, of which Dickey was the registered owner. Judgment was given on the 8th of April, 1889, in the action, by which Dickey was declared "trustee in stock or shares for three-fifths of the agreed partnership share of profits of which Dickey was entitled to one-fifth," and it was adjudged that the present debtor, as plaintiff in that action, should "recover against the defendant Dickey shares and debentures in the Mexican Santa Barbara Mining Co., amounting to £23,408, and costs to be taxed," but the action as against the company was dismissed with costs. These latter costs, taxed at £129 3s. 9d., were the debt on which the company founded the present bankruptcy petition. Dickey had in May, 1888, executed transfers to other persons of all the shares standing in his name, but the company had refused to register these transfers on the ground that Dickey was indebted to them, and took their stand upon the following articles of association:—

"16. The board may, without assigning any reason, decline to register any transfer of shares made by a member who is indebted to them, or, so long as the amount of the shares has not been fully called up, to a person not approved by them."

"20. The company shall have a first and paramount lien on all shares and on the dividends thereon for all moneys due to and liabilities subsisting with the company from or on the part of the registered holder or holders thereof or other the person for the time being entitled thereto as against the company, either alone or jointly with any other person or persons, including calls for which resolutions shall have been passed by the board, but which may not have become due and payable, and may enforce such lien by forfeiture and sale of the shares on which such lien may attach."

The registrar held that, by reason of the lien which the company had on the shares as against Dickey, they were "secured creditors" within the meaning of sections 16 and 138 of the Bankruptcy Act, 1883, and as such must amend their petition by stating that they held security which they were willing to give up for the benefit of the creditors of the debtor, or to put a value on. This the company declined to do, and the registrar thereupon dismissed their petition.

The company now appealed.

Barnes, Q.C., and *Yate-Lee*, for the appellants.—The debtor is not, within the meaning of clause 20 of the articles of association, "a person entitled to the shares as against the company," because Dickey is the only legal owner of the shares known to the company, therefore the company are not "secured creditors" of the debtor within section 6 (1) and section 168 of the Bankruptcy Act, 1883. The company cannot take cognizance of the debtor's rights against Dickey. Secondly, there are no shares on which the judgment in favour of the debtor against Dickey can take effect, because Dickey had, previous to the judgment, executed transfers of all the shares standing in his name to third persons.

Poley, for the respondent.—Dickey has been declared

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

a trustee of the shares of which the respondent debtor is in equity the owner. Therefore the company have a lien on his equitable interest in those shares, and are secured creditors within the Act; and they ought to have declared, under section 6 of the Bankruptcy Act, 1883, that they held such security, and were willing to give it up or have it valued. The transfers by Dickey, not having been registered, do not defeat the equitable title of the debtor to these shares: *Roots* v. *Williamson*, 36 W. R. 758, 38 Ch. D. 485.

Yate-Lee replied.

Cur. adv. vult.

Lord COLERIDGE, C.J.—This is a bankruptcy petition presented by the Santa Barbara Co. against the debtor, and it is founded upon a judgment debt of £129. In their petition the company stated that they held no security for their debts upon the debtor's estate, and the answer was that they were really secured creditors of the debtor, because he was the *cestui que trust* of certain shares in the company which stood in the name of one Dickey, and that, as between himself and Dickey, the debtor had a right to a transfer of these shares. If the shares were transferred to him they would greatly overtop the debt which he owed to the company, and by their articles of association the company were entitled to a lien upon shares in respect of a debt due to them from the shareholder. This was the ground, as I understand it, upon which the registrar refused to make a receiving order. I am unable to agree with the registrar's view upon two grounds. In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and *cestuis que trusts* in respect of the shares of companies. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that if we were to throw any doubt upon that rule we should make the carrying on of their business by joint-stock companies a very serious question, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves. I think, therefore, that, although there may have been transactions which, if they were settled as between Dickey and his *cestui que trust* Perkins, would give the latter rights as against the company, yet, till those transactions have been settled, and as long as Dickey and Perkins remain in the situation of trustee and *cestui que trust*, those transactions cannot be treated by the court as creating any relation between the company and the debtor which the company were bound to regard. The second ground arises, as I think the Master of the Rolls has already pointed out, on the very words of section 168 of the Bankruptcy Act, 1883. If the company have any security at all it is a lien upon the shares held by Dickey, and section 168 says that "secured creditor means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." Here the lien of the company, which is their only security, is upon the shares standing in the name of Dickey, and it is sought to make that lien a security for a debt to the company, not from Dickey, but from the debtor. Now, the shares are not, so far only as the company can regard them, the property of the debtor, and they cannot therefore be security for a debt due from him to the company. They may be security for a debt due to the company from Dickey, but with that security we have nothing to do now. It seems to me, therefore, that the registrar was wrong in refusing to make a receiving order, and on those two short grounds his judgment must be reversed.

Lord ESHER, M.R.—The company presented a bankruptcy petition against the debtor on the ground that he owed them a debt of £129 which he had neglected to pay. His answer to the petition is, "It has been decided by a court of competent jurisdiction that I am in equity entitled to a certain number of shares in the company, the value of which greatly overtops the company's claim for £129. It has been declared by that court that I am the *cestui que trust* of those shares, and that Dickey is a bare trustee of them to me." In answer to that the company says, first, "You may be the *cestui que trust* of those shares; a court of competent jurisdiction may have declared that you are, but we know nothing about you. We are legally entitled to take no notice of you, and we have a right to treat you as if you were a *cestui que trust*, and, although you may have a right which in some way or other you can enforce to become a shareholder in the company to the extent of £23,000, we are entitled to make you a bankrupt if you do not pay the £129." In the second place the company says, "Dickey, who is said to be your trustee, owes us money, and therefore we have a lien on our shares which stand in his name, and we insist on that lien." The debtor replies, "If you have a lien on the shares as against Dickey you are secured creditors, and you must either value your security or give it up for the benefit of the creditors." To this the company answer, "That lien does not make us secured creditors of you, Perkins, within the meaning of section 168 of the Bankruptcy Act, 1883."

With regard to the first point, I confess I have a great desire to overrule it, if I could, because to say to a man, "We admit that you are a *cestui que trust* of the shares; we admit the man in whose name they stand is a bare trustee for you; we admit, therefore, that you must ultimately be entitled to shares in our company to a large amount; nevertheless, we have a right to make you a bankrupt for a smaller sum," does seem to me a very wrong thing. But it is said that the company have a legal right to do this, because it is necessary for the protection of companies that they should not be bound to recognize trusts affecting their shares. So far as I understand the law now that I have considered it, it does give the company power to do this. Therefore the first ground of objection to the bankruptcy petition fails, because the first step which the debtor must take is to show that he is a *cestui que trust* of shares. The law has given the company the right to say, "We do not care whether you are a *cestui que trust* of shares or not; if you are we have the right to take no notice of you." I agree that that is the law, though I think it is hard law; but we have nothing to do with the question of hardship.

Then comes the other question, which was the ground of the judgment of the registrar. I doubt whether the first point was really argued before him; at any rate, it was not the point upon which he based his judgment. He held that the company had a lien as against Dickey upon the shares which stood in his name. In virtue of that lien the company declined to consider the claim of the debtor upon the shares. If the matter had stood upon the Bankruptcy Act of 1869 I should have been very much inclined to say that that lien was a security in the hands of the company against any claim which the debtor might have upon them, and to hold that they were creditors holding security for their debt. I should have been inclined to say that they had a security in fact and in law. But then the Act of 1869 has been altered by the Act of 1883, and some effect must be given to the alteration. The alteration is in the definition of a secured creditor contained in the Act. Section 168 defines a secured creditor as meaning "a person holding a mortgage, charge, or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor." The words

"from the debtor" have been added to the definition contained in section 16 of the Bankruptcy Act, 1869. We must give effect to those words. The question here is not whether this lien is a security to the company as against Dickey, but whether it is a security for a debt due to the company from the debtor? I think it cannot in fairness be said to be a lien in respect of a debt due to the company from the debtor, and therefore, although in one sense it is a security in their hands, it is not such a security as makes them secured creditors of the debtor within the meaning of the Act. This new definition shuts that lien out. Therefore, although I agree with the registrar that the company had a lien, I cannot agree that that lien, which was a lien against Dickey, was such a lien as made them "secured creditors" of the debtor, for the lien as against Dickey was not a security for a debt due to them from the debtor. I think, therefore, that we ought to disagree with the registrar's decision, and to hold that a receiving order must be made.

FRY, L.J.—I am of the same opinion. The debtor owed the company £129 upon a judgment. Dickey was a shareholder in the company, and he had been declared by a competent court to be a trustee of some of those shares for the debtor. It is said that, under these circumstances, the company have a lien on the shares for the £129 which is due to them from the debtor. Reliance is placed upon the 20th clause of the company's articles of association, which provides that "the company shall have a first and paramount lien on all shares and on the dividends thereon for all moneys due to and liabilities subsisting with the company from or on the part of the registered holder or holders thereof, or other the person for the time being entitled thereto, as against the company." It must be, and indeed is, conceded that the debtor is not the registered holder of these shares.

The only question, therefore, is, was he "a person for the time being entitled thereto" as against the company? In my opinion he was not. The policy of the Companies Act, as has been already pointed out by the Lord Chief Justice, is to free companies from any obligation to take notice of trusts. As against Dickey, no doubt the debtor was the person entitled to the shares, but as against the company, Dickey, and not the debtor, was the person entitled, because they knew nothing of the litigation between him and Dickey, and the court is not bound to know anything of that litigation, which has been determined as between him and Dickey. It may be said that some meaning must be given to the words "other the person for the time being entitled thereto as against the company." In my opinion these words can be satisfied in other ways. One obvious meaning of the words would include the executors or administrators of a deceased shareholder, or the trustee in bankruptcy of a bankrupt shareholder, or any person who might have obtained a judgment from a court of competent jurisdiction against the company, whether in an action or in proceedings under section 35 of the Companies Act, 1862, that he was entitled as against the company to be registered as the holder of shares. All those persons would come within the meaning of clause 20. In my judgment the words do not include the *cestui que trust* of shares, however clear the trust may be, however certain the right of the *cestui que trust*, because the company are not bound to take notice of trusts.

The present case illustrates, as it seems to me, the expediency of that rule. The position of the debtor as against Dickey is not free from complication. He has obtained a judgment that Dickey is his trustee of certain shares; but the company claim to have a lien on the shares for a very large sum of money as against Dickey. Whether that claim is well or ill-founded I know not. The company have the absolute right, under clause 16 of the articles of association, to refuse to register any transfer of the shares so long as any money is due to them from Dickey, without giving any reason for their refusal. Other persons have lodged transfers of the shares with the company, and insist that those transfers have priority. All these questions have been raised and discussed.

It appears to me, therefore, that the particular circumstances of this case strongly illustrate the expediency of adhering to the general rule which the Lord Chief Justice has stated. But I base my decision on the broad general ground that the debtor is not "a person entitled as against the company" to these shares, and not upon the particular circumstances of the case, although I have used them by way of illustration. I think, therefore, that a receiving order should be made.

Appeal allowed.

Solicitors for the appellants, *Francis & Johnson.*

Solicitor for the respondent, *E. Kimber.*

High Court of Justice.

Chan. Div. Kay, J. — June 21; July 2.

In re PARSONS.

STOCKLEY *v.* PARSONS. (*a.*)

Married woman—Separate property—Contingent title— Spes successionis—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 57), *s.* 5.

J. S. by his will left property to trustees upon trust for his daughter, E. B., for life, with an ultimate remainder, upon failure of issue of E. B., to "such person or persons as, at the time of the failure of the preceding trust, would be my next of kin and entitled to my personal estate under the statutes for distribution of the personal estate of intestates if I had then died intestate." J. S. died in 1879; *E. B. died in* 1886 *without having had any issue. E. P., who would have been one of the next of kin of J. S. if he had died at the same time as E. B., and who was married before the commencement of the Married Women's Property Act,* 1882, *made her will in* 1887, *and died in* 1889, *leaving her husband her surviving.*

Held, that the property first accrued in title and interest to E. P. on the death of E. B. in 1886, *and that by section* 5 *of the above-mentioned Act, E. P. was entitled to it for her separate use, and that it passed by her will.*

In re Beaupré's Trusts, 21 *L. R. Ir.* 397, *dissented from.*

Adjourned summons.

This was an originating summons taken out by the executor of the will of Mrs. Elizabeth Parsons, asking for the decision of the court whether one-third of a legacy of £1,600 to which the testatrix was entitled under the will of John Stockley was disposed of by the will of Mrs. Parsons, or belonged to her husband in his marital right.

John Stockley, by his will, left £1,600 to trustees upon trust for his daughter Eliza Bird, remainder to her husband for life, remainder for her children and issue, "and if there should be no child or other issue of my said daughter who shall attain a vested interest in the said trust moneys, funds, and securities, then the same

(*a.*) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

shall be in trust for such person or persons as, at the time of the failure of the preceding trust, would be my next of kin and entitled to my personal estate under the statutes for distribution of the personal estate of intestates if I had then died intestate, and in the proportions in which they would be so entitled."

John Stockley, the testator, died in 1879. Eliza Bird died on the 21st of May, 1886, without leaving any husband or having had any issue.

One of the next of kin of John Stockley, if he had died at the same time as Eliza Bird, was Elizabeth Parsons. She married in 1857, made a will dated in 1887, and died on the 10th of September, 1889, leaving a surviving husband. The plaintiff proved her will.

The question arising for decision on these facts was, whether a contingent title to the legacy in question had accrued to Elizabeth Parsons before the passing of the Married Woman's Property Act, 1882,—in which case the legacy would not be her separate property, and consequently would not pass by her will—or whether her title to the legacy first accrued after the passing of the Married Woman's Property Act, 1882, in which case the legacy in question would, by virtue of section 5 of that Act, be her separate property, and would, consequently, pass by her will.

Townsend, for the summons, referred to *Smart* v. *Tranter*, 37 W. R. 213, *ante*, p. 530, 43 Ch. D. 587.

Ingle Joyce, for Mr. Parsons, the husband of the testatrix.—The executors are trustees of the fund for the husband. Mrs. Parsons had a "contingent title" before the commencement of the Act of 1882, and therefore, by section 5, could not dispose thereof by will after the passing of the Act. The real next of kin of the testator, who died in 1879, were, until the death of Miss Bird in 1886, entitled to the fund contingently: *Reid* v. *Reid*, 34 W. R. 332, 31 Ch. D. 402; *In re Beaupré's Trusts*, 21 L. R. Ir. 397. [KAY, J.—I decided *Smart* v. *Tranter* as if the lady had no separate estate; in the Court of Appeal it appeared that she died possessed of separate estate of a trifling amount. This is mentioned in 59 L. J. N. S. (Ch.) 363, but not in the *Law Reports*.] *In re Goods of Amelia Price*, 35 W. R. 596, 12 P. D. 137.

Upjohn, for the defendants claiming under the will of the testatrix.—Persons who would be presumptive next of kin of John Stockley when the *propositus* died had no interest before the death of the *propositus*. Could the defendants have maintained an action before the death of the *propositus* in order to protect the fund? [KAY, J., referred to *Joel* v. *Mills*, 3 K. & J. 458, 6 W. R. Ch. Dig. 91, 114.] *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251, in which case reference is made to *Smith* v. *Attorney-General*, in Chancery, 1777; *Clowes* v. *Hilliard*, 25 W. R. 224, 4 Ch. D. 413; *Carleton* v. *Leighton*, 3 Mer. 671; *In re Thompson and Curzon*, 33 W. R. 688, 29 Ch. D. 177; *In re Tucker, Emanuel* v. *Parfitt*, 33 W. R. 932; *In re Hobson, Webster* v. *Rickards*, 34 W. R. 195; *Kekewich* v. *Manning*, 1 De G. M. & G. 187; *Baynton* v. *Collins*, 33 W. R. 41, 27 Ch. D. 604; *Meek* v. *Kettlewell*, 1 Hare, 464, 1 Ph. 342. In section 5 of the Act there are no such words as expectancy or possibility; the word is "title." During the life of the *propositus* there was no title, but only a possibility. The testatrix, therefore, became entitled to the fund for her separate use after the death of Eliza Bird in 1886, and had power to make a will disposing of it: *In re Cuno, Mansfield* v. *Mansfield*, 43 Ch. D. 12.

Ingle Joyce replied.

Cur. adv. vult.

July 2.—KAY, J., delivered the following written judgment:—[After stating the facts above set out, his lordship continued:—] It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis* or hope of succeeding to his property.

The law is the same when there is a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person. During his life no one can say, I have a contingent estate or interest as possible heir or next of kin. Just as in the first case no one can have more than an expectation or hope of being heir or next of kin.

It makes no difference that the limitation is not to the actual heir or next of kin, but to the persons who would be heir or next of kin if the ancestor were to die at some future time. Until that time arrives there is no one who can say he has anything beyond a hope or expectation.

For this reason, in a suit to administer the estate you could not make such possible heir or next of kin a party, nor is there any case in which he has been allowed to sue to protect the estate or has been recognized as having an interest, except that in proceedings in lunacy against the ancestor he is permitted to be before the court. The reason for that is thus stated by Lord Eldon in *Ex parte Clarke*, Jac. 589:—"The principle which leads the court to call for the next of kin or the heir-at-law of lunatics is to receive from the persons probably entitled that assistance in the protection of the property which persons having such expectant rights will be likely to afford, but the inquiry is not to be considered binding."

The object of the Married Women's Property Act, 1882, was to benefit women who had married before the passing of the Act by giving them a separate estate in property to which they might become entitled during the coverture after the passing of the Act. It excepts all property their "title to which, whether vested or contingent," accrued before the Act. To give a wide meaning to "contingent title" would narrow the operation of the statute. But, without straining the words in either direction, can a possible next-of-kin of a person who is to be supposed to die at a future time, be said to have a "contingent title," or is it not the proper view that he has no title at all, nothing but an expectation or hope which is not recognized in law as any title?

While the *propositus* is living, every relative he has in the world is a possible next-of-kin; can each one say that he has a contingent title? He may have sons, brothers, and nephews. Can the nephew (living the sons and brothers) say, "I have a title"? If he cannot, then the brother cannot, nor the son. A *spes successionis* is not a title to property by English law. Why should this meaning be given to it in the statute in order to deprive a married woman of her right to separate property? I suppose the object of excepting a title accrued before the Act was in order not to take from the husband any advantage which he might then have. Possibly the exception goes further than is necessary for this purpose, but if that is its main object it would be contrary to the spirit of the enactment to construe the words so as to include an expectation of the wife in which the husband could not have any interest.

Now let me see how far this view of the law is supported by authority.

In a note at page 219 of the 8th edition of Watkins on Conveyancing it is said, in effect, that there are two classes of possibilities — namely, possibilities coupled with an interest "such as contingent remainders, executory devises, springing or shifting uses; the other bare or naked possibilities, such as the hope of inheritance entertained by the heir. . . . The

former class may, perhaps, with more propriety be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility, it is a present interest and may be devised: *Perry* v. *Phelips*, 17 Ves. 173, 182. On the other hand, the expectancy of an heir apparent, during the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation."

The statute 8 & 9 Vict. c. 106, s. 6, makes a possibility coupled with an interest assignable at law, but not a mere possibility.

In *Smith* v. *Attorney-General*, cited 6 Ves. 255 and 15 Ves. 133, 136, it was decided that an heir apparent during the life of his ancestor, though the ancestor is a lunatic who cannot recover, could not have a bill to perpetuate testimony in order to prove that he was heir apparent, and could not—as the *verus heres* might—have the writ *de ventre inspiciendo*. [His lordship then referred to the case of *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251, and read from the judgment of Lord Eldon, at page 260, the passage commencing "The case of *Smith* v. *The Attorney-General* went upon this—that the next of kin of the lunatic had no interest whatever in the property," and ending on page 261 with the words "they could not qualify themselves as to any interest in the subject itself"; and proceeded:—] Nothing can be more clear and emphatic than these words of Lord Eldon, and I know of no case in which the law so laid down has been departed from or doubted.

Then, has an expectant heir or next of kin any greater interest under a limitation to the heir or statutory next of kin of a living person?

In *Meek* v. *Kettlewell* it was held that an assignment by deed of a mere possibility was only a contract, and, being voluntary, could not be enforced in equity. The possibility there, was the hope of succession as one of the next of kin of H. M., under a limitation by will in trust for the next of kin according to the statute, in case she left no issue. While H. M. was living, one of her possible next of kin made this assignment. H. M. died without issue, and the suit was instituted after her death to enforce the assignment. Wigram, V.C., said that the assignor "at the time of the assignment had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor)," and he dismissed the bill.

This was affirmed by Lord Lyndhurst, who said, "The assignment of an expectancy such as this is cannot be supported unless made for a valuable consideration." That is a direct decision that the expectant next of kin take no greater interest under a limitation to next of kin than they would by the hope of an actual succession.

In *Clowes* v. *Hilliard* Sir George Jessel, M.R., had before him a case in which the limitation was identical with that which I have to deal with. A testator had left his residuary estate for the benefit of his three daughters and their issue, with an ultimate gift if all of them died without issue "in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the Statutes of Distribution in case I had then died intestate." The testator died in 1869. While the daughters were living and unmarried, some of the persons who would be next of kin of the testator, if they had all died unmarried, brought an action for administration of the estate, as possible and presumptive next of kin entitled under the ultimate limitation. A demurrer was allowed on the ground that they had not sufficient interest to maintain the suit. Yet the veriest scintilla of interest will entitle a person to maintain such a suit, as is shown by such cases as *Joel* v. *Mills*, and *Cosser* v. *Radford*, 1 De G. J. & S. 585. The Master of the Rolls said:—"These plaintiffs, who claim to be some of the testator's possible next of kin, are in the same position as persons claiming to be next of kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next of kin of a living person, or of a person dying at a future period, it is the same thing, there is no difference. You cannot predicate of anyone that he will be a member of the class." Later, he criticizes *Roberts* v. *Roberts*, 2 Ph. 534, where Lord Cottenham made a difference between a widow and next of kin; and, noticing *Davis* v. *Angel*, 10 W. R. 722, 4 De G. F. & J. 524, he says, "It is a decision that nothing less than an interest will allow a man to maintain a suit."

That decision (*Clowes* v. *Hilliard*) follows what was laid down in *Meek* v. *Kettlewell*, that possible next of kin have no greater interest during the life of the *propositus* under a limitation to his statutory next of kin than they would have in property which they hoped to take by succession to him, and shows that the same law applies where a time is fixed for the supposed death of the *propositus*, not the date of his actual death.

I have referred to this very familiar law, and the authorities upon it, because I am asked to follow a decision of eminent judges in Ireland, which it is said governs the case now before me, *In re Beaupré's Trust*. The facts in that case were as follows: By marriage settlement, in 1830, £20,000 was settled in trust for the wife for life, then husband for life, then children of wife by any husband, and in default of such children "in trust for such person or persons as, according to the statutes for the distribution of the estates and effects of intestates in Great Britain, would at the time of such failure of issue as aforesaid have been the next of kin of" the wife "if she had departed this life intestate and without having been married." The husband died in 1862, the wife in 1885, without having had issue. One of her next of kin, Lady Nugent, had married in 1860, without settlement, and her husband was adjudicated bankrupt in 1881. The contest was between Lady Nugent and the assignees in bankruptcy of her husband; the question being, whether or not the share which belonged to Lady Nugent had become her separate property under the Married Women's Property Act, 1882, or whether her title had accrued before that Act, in which case the share belonged to her husband's assignees. It was decided, first by the Master of the Rolls in Ireland, and on appeal by the Lord Chancellor of Ireland, with the concurrence of Fitzgibbon, Barry, and Naish, L.JJ., that Lady Nugent's title had accrued before the Married Women's Property Act, 1882, and that accordingly she had no separate estate, but that her share of the fund belonged to the assignees in bankruptcy of her husband. The Master of the Rolls said, "Till the class is ascertained it was argued there was no title in anyone, not even a contingent title, within the statute. No authority for this proposition was referred to, which is a startling one, and if it be well founded it would apply to many cases besides the present, cases in which no question of next of kin would arise, such as where property is left to or settled upon the children of A. B. living at a particular time, answering a particular description, or the like, since the class cannot be ascertained till the event happens." He then cites the language of Cotton, L.J., in *Reid* v. *Reid*:—"There must be an accruer of title after, and not before, the passing of the Act, and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder." "And, of course, also," the learned Master of the Rolls adds, "whether vested or contingent." The Master of the Rolls then considers whether Lady Nugent had a contingent title to the fund before the Act, the policy of which he states to be, in the case of

a previous marriage, to oust the marital right only in respect of property acquired after the Act in such a manner that it could not have been contemplated as part of the consideration of the marriage, or dealt with by husband and wife, or either of them, before the Act. He seems to consider that if the instrument under which the title accrued had been executed after Malin's Act (20 & 21 Vict. c. 57), Lady Nugent's title would have come within the description in that statute: "Every future or reversionary interest, whether vested or contingent." The Lord Chancellor, on appeal, treats *Reid* v. *Reid* as having decided that, if a woman married before the commencement of the Act had before that time acquired a title of any kind to any property, such property is not made her separate property by section 5 of the Act, though it falls into possession after the passing of the Act. His lordship then says:—"The title of the next of kin, under the settlement of the 4th of June, 1830, was a title in contingency and in remainder; their right to a contingent interest was hardly disputed"; and later on, after dealing with the maxim *Nemo est heres viventis*, he says:—"The settlement of the 4th of June, 1830, created a contingent limitation in favour of a class of persons who are of kin to the tenant for life and capable of being ascertained. In my opinion they had a right contingent on their surviving the tenant for life under the marriage settlement, which is the foundation of their title." Fitzgibbon, L.J., concurs in the conclusion, "though not without doubt." Lady Nugent, he says, "could have parted with her title by assignment, or dealt with it as she pleased, as an existing and accrued title, though contingent as to its actual enjoyment; her title deed is now the settlement of 1830." The word "title" in section 5 he treats as including "every kind of property"; and he concludes by saying that Lady Nugent's title "accrued when the settlement was executed." Barry, L.J., agrees, and Naish, L.J., also, the latter saying:—"It appears to me as much a contingent title as if the limitation had been to such of the nephews and nieces of Sophia Southwell as shall be living at her death."

If this were an English authority I could do nothing but follow it; but decisions of the Irish courts, though entitled to the highest respect, are not binding on English judges. If, therefore, I cannot agree, I am bound to decide according to my own judgment.

I confess I am unable to come to any conclusion except one which is contrary to this decision. I cannot help feeling great hesitation in opposing my opinion to that of so many eminent judges; but I must say that, if it were not for this authority, I should have no doubt whatever about the right conclusion according to the English cases I have referred to. After all, the opinion I express is not so much mine as that of the judges who decided those cases.

The point of difference, to state it shortly, is this: *Nemo est heres viventis* should be construed literally. There is no such character in law as the heir of a living person or as his statutory next of kin. There is a wide difference for this reason between a gift to such of the "children," or "nephews," or even "kindred" of A. who shall be living at his death, and a gift to those who shall then be his statutory next of kin. During A.'s life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund: see *per* Lord Hatherley, 3 K. & J. 474. Some or all of them might be made defendants in an action to administer the trust. Neither of these things can be done where the gift is to statutory next of kin. They have no existence whatever in law while the *propositus* is living. No one can as possible next of kin even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel.

As I have pointed out, the learned judges in Ireland treat the word "title" in section 5 as equivalent to "interest," citing Cotton, L.J.'s words in *Reid* v. *Reid* to the same effect; with this I respectfully agree. One who has no interest whatever in property can hardly be said to have a title. But I have mentioned abundant authority to prove that no one can have any "interest" as heir or next of kin in the ancestor's lifetime. The familiar cases to which I have referred were not quoted, but I cannot suppose that they were not present to the minds of the learned judges whose judgments I have been considering.

In *Reid* v. *Reid* the Court of Appeal refused to accept the decisions upon the ordinary covenant in a marriage settlement, to settle other or after-acquired property of the wife, as a guide in determining what should be excluded under the word "title" from the operation of the 5th section of the Married Women's Property Act, 1882. Cotton, L.J., adopted Wickens, V.C.'s remark in *In re Clinton*, 20 W. R. 326, L. R. 13 Eq. 295, that cases of that class must be approached with the presumption that the object of that covenant was to exclude the husband, whereas the object of the peculiar language of section 5 was to confine its operation to property in which the husband at the commencement of the Act had not any interest. Everyone must, I think, agree in the reasonableness of this view, as it follows that, if under a covenant to settle any property to which the intended wife is "contingently entitled" at the time of the marriage such a possibility as this which I am considering were included, it would not necessarily be within the words "contingent title" in section 5. But, so far as I know, no such possibility has ever been held to be included in such a covenant, and I confess I should have no difficulty in deciding that it could not be. For, suppose the trust to have been declared before the marriage for the statutory next of kin of A., and that A. did not die till after the determination of the coverture by the death of the husband subsequently to the passing of the Act, and that the widow was one of A.'s next of kin under the statute at his death, I should imagine it would be held without hesitation that the intended wife had not at or before the coverture any interest whatever, and, therefore, her husband could have none by reason of the coverture, and consequently the words of such a covenant, though they might include all property to which the intended wife had a contingent title at the date of the settlement, would not comprise such a possibility as this.

In *Atcherley* v. *De Moulin*, 2 K. & J. 186, 4 W. R. Ch. Dig. 134, a marriage settlement contained a covenant to settle, which the court held included all property to which at the date of the settlement the wife was "entitled." At that date the wife was contingently entitled under a bequest to all the daughters of her father living at his death who should attain twenty-one or marry. The father died in 1854. This daughter had married in 1846, and her husband had died in 1851. Lord Hatherley held that "although she had the transmissible contingent interest she had nothing during the marriage which could be called property to which she was entitled." The word "entitled" might be large enough to include a "contingent interest," but, upon regarding the whole of the settlement, he thought in that case it did not.

In *Mackenzie's Settlement*, 15 W. R. 662, L. R. 2 Ch. App. 345, where the covenant included anything to which the wife was entitled at its date, and she was then entitled in reversion after the death of her mother to a share of Consols, and her mother died during the coverture, Turner, L.J., said, in effect, "that if she was entitled contingently the covenant would reach it" *à fortiori*, as she had a vested reversionary interest.

This was followed in *Cornmell* v. *Keith*, 24 W. R. 633, 3 Ch. D. 767, where the interest was in remainder

expectant on the death of the wife without issue. This contingent reversionary interest was bound.

It appears, therefore, that the courts have hesitated to hold the word "entitled" in such a covenant to include a contingent reversionary interest under such a limitation, as "to the children of A. living at his death," though now that would probably be held to be included. But this, so far as I know, is the furthest extent to which the construction of that peculiar covenant has gone.

I am bound to follow the English decisions to which I have referred.

I must hold that the property in this case first accrued, in title and interest, to Elizabeth Parsons on the death of Eliza Bird on the 21st of May, 1886, and that, by section 5 of the Married Women's Property Act, she was entitled to it for her separate use, and that it passed by her will dated in 1887.

Solicitors, *Samuel Price & Son; Ullithorne, Currey, & Villiers*, for *Roche*, Daventry.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 26.

MUMFORD *v.* COLLIER. (*a.*)

Mortgage—Attornment clause—Validity—Landlord and tenant—Bill of sale—Bills of Sale Act, 1878, *s.* 6—*R. S. C.*, 1883, *ord.* 14.

An attornment clause in a mortgage of real property is effectual to create the relation of landlord and tenant between mortgagee and mortgagor, and is not avoided by section 6 *of the Bills of Sale Act*, 1878, *except as regards the power of distress which would otherwise be an incident of the tenancy.*

Therefore, where, by a mortgage deed, the mortgagor had attorned tenant to the mortgagee at a rent equivalent to the mortgage interest, and that interest was in arrear,

Held, that the mortgagee was entitled to obtain judgment under order 14 *in an action for ejectment against the mortgagor.*

Appeal from chambers.

By an indenture of mortgage of the 25th of March, 1884, the defendant mortgaged to the plaintiff certain freehold premises, together with the "steam-engines, boilers, fixed and movable machinery, plant, implements, and utensils now in or hereafter to be fixed or placed upon or to be used in or about the said premises," to secure a sum of money and interest. The deed contained a clause in the usual form by which the defendant attorned tenant of the mortgaged premises to the plaintiff at a rent equal to the mortgage interest.

The interest being in arrear the plaintiff commenced this action, the claim indorsed on the writ being for possession of the mortgaged premises "of which premises the defendant was tenant at will to the plaintiff under an indenture of the 25th day of March, 1884, which tenancy was duly determined by notice expiring the 18th day of May, 1890." The defence was, that the attornment clause was void under the Bills of Sale Acts. The master gave judgment for the plaintiff under order 14. The defendant appealed to the judge, who referred the appeal to this court.

Hansell, for the defendants.—An attornment clause in a mortgage deed is a bill of sale within section 6 of the Act of 1878. It is inserted in order to give the mortgagee a power of distress by way of security for the debt, and the rent is made payable as a mode of providing for the interest on the debt. Being a bill of sale it is void altogether for want of registration and for divergence from the form in the schedule to the Act of 1882: see section 9.

He cited *In re Willis, Ex parte Kennedy*, 36 W. R. 793, 21 Q. B. D. 384; *Davies* v. *Rees*, 34 W. R. 573, 17 Q. B. D. 408; *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506.

C. C. Scott, for the plaintiff.—The Bills of Sale Acts do not affect real property. The attornment is made a bill of sale by section 6 only with respect to "any personal chattels which may be seized or taken under such power of distress." Except as to the power of distress the bill of sale is good; it may be good in part and bad in part. *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310. In *Daubuz* v. *Lavington*, 32 W. R. 772, 13 Q. B. D. 347, it was decided that a mortgagee suing upon his attornment clause was entitled to judgment under order 14.

He also referred to *Hall* v. *Comfort*, 35 W. R. 48, 18 Q. B. D. 11.

Hansell replied.

Lord COLERIDGE, C.J.—We have here to contribute a fresh chapter, or rather section, to the already voluminous literature dealing with the Bills of Sale Acts. The precise point which is raised in this case seems one which has not been raised before. In an ordinary deed of mortgage given as a security for money advanced, there is an ordinary clause of attornment creating the mortgagee landlord and the mortgagor tenant; nothing is said about distress or seizure, but of course the ordinary incidents of the relation of landlord and tenant arise, and the landlord has the power to distrain for non-payment of rent. It does not follow that words which, under certain circumstances, would bring the transaction within the mischief of the Bills of Sale Acts are therefore for all purposes void. But it is said that the words of the Act of 1878 have made an attornment clause of this kind void; they have made it, it is said, a bill of sale, and therefore, because it is not registered and is not in the form prescribed by the later Act, this document is void. It is true that if it be a bill of sale it is void. Now it certainly is not within the mischief of the Acts; what the object of this legislation was and what documents come within the mischief of the Acts was clearly pointed out by Lindley, L.J., in *In re Willis*; and this document does not come within it. It is not within the definition of "bill of sale" in section 4 of the Act of 1878, but it is said that it is within section 6. But what that section enacts is that such a document as is there described "shall be deemed to be a bill of sale . . . of any personal chattels which may be seized or taken under such power of distress." Therefore, granted that the attornment reserves the rent for the purpose of further security, and granted that under it goods are seized, then the attornment shall be deemed to be a bill of sale as to those goods and if not in conformity with the Acts shall be void. But here section 6 has no application whatever and the ordinary relationship of landlord and tenant is created.

Looking at the purposes of the Act it is difficult to understand the proviso to section 6. There have been decisions on it and the courts have said that an attornment clause in a mortgage deed creating the relationship of landlord and tenant is within the mischief of the Acts, but that if the mortgagee enters and then re-demises the property to the mortgagor, that is not within the mischief; once a mortgagee is in possession he is within this proviso and is protected. That is a very fine distinction but it is so decided and there it is: *In re Willis*. But that has nothing to do with this case, which can be properly decided on the body of the section without reference to the proviso, which does not affect it.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

There are no cases which hold in terms that this attornment clause is void. It is said that there are cases which hold it in principle. It is said that as it would be bad as to goods seized under it, it is bad altogether. The answer is clear, and to my mind conclusive. The scope of the Bills of Sale Acts does not include real property; it is directed at ownership of personal property, because a man gets credit as being the owner of personal chattels when they are in reality under the control of some other person. The Acts say that the world shall know the real position of a man who has given to another the control over his personal property. They were never intended to interfere, and do not by their terms interfere, with real property. It is real property which is affected here; therefore I think that the master made the right order, and that the appeal must be dismissed.

WILLS, J.—I am entirely of the same opinion. The argument for the appellant is quite intelligible, and it is this—in no mortgage can an attornment clause any longer be supported, because it comprehends a security over personal chattels, and therefore, being incapable of being framed in the statutory form, is void. That is a very strong proposition, and it is scarcely to be supposed that the Legislature would adopt legislation which would affect nearly every security ever given by words whose meaning was not plain and obvious.

The attornment clause has two parts; it first creates the relationship of landlord and tenant, and then it gives a power of distress as incident thereto. In so far as it creates the relationship of landlord and tenant it relates to real property; in so far as it gives a power of distress over personal chattels it has been held to be a bill of sale, and therefore void. But I cannot think that as creating the relationship of landlord and tenant it is struck at by the Act. Is it within the words of the Act? I think not. [His lordship then read section 6, and continued:—] It is only so far as it creates the right to seize goods that it is to be deemed a bill of sale—not otherwise. I do not know why these words should be thought to go beyond that, and to declare that the attornment clause is to be deemed to be a bill of sale as to the other part of it also. That would be wholly beyond the purview of this legislation. *In re Burdett* is not decisive of this matter, but it has a considerable bearing upon it. There the security was good as to the gas engine because it did not belong to the class of property to which the Act applies. In this case the same is true of the relationship of landlord and tenant created by the attornment clause; it is not within the Act. I therefore entirely agree with the judgment of the Lord Chief Justice.

Appeal dismissed.

Solicitors for the defendant, *Davidson & Morris.*

Solicitors for the plaintiff, *Snow, Snow, & Fox.*

Q. B. Div. (Vaughan Williams and Lawrance, JJ.) } April 28; May 23.

CLARK *v.* SONNENSCHEIN. (*a.*)

Practice—Referee—Motion to set aside findings—Judgment ordered by referee—Judgment entered—Power of court to enter judgment for other party—R. S. C., 1883, *ord.* 36, *r.* 52.

The court has power, in a reference under section 57 *of the Judicature Act,* 1873, *not only to set aside the judgment ordered by an official referee to be entered for one of the parties, although such judgment has been entered accordingly, but also to enter the judgment for the other party instead of sending the case back to the referee to be re-heard.*

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Application, on behalf of the defendant, to set aside the finding of an official referee, and the judgment ordered by him to be entered.

This action was for commission and expenses due to the plaintiff as a traveller for the defendant, and it had been referred under section 57 of the Judicature Act, 1873, to an official referee.

The referee found for the plaintiff, and he directed judgment to be entered for the plaintiff, and judgment was entered for the plaintiff accordingly.

The defendant appealed to the Divisional Court to set aside the findings of the referee and the judgment ordered by him. The decision of the referee was reversed by the court, and an application was then made on behalf of the defendant that, instead of sending the case back to the referee to be reheard by him, judgment should be entered by the court for the defendant, notwithstanding the judgment ordered by the referee to be entered for the plaintiff.

Houghton, for the defendant.

Channell, Q.C., and *Heather*, for the plaintiff, contended that under the circumstances, the court had no power to enter judgment for the defendant, but could only send the case back to the official referee to be reheard.

Cur. adv. vult.

May 23.—The judgment of the COURT was read by

VAUGHAN WILLIAMS, J.—We have already stated that we think that the judgment of the referee is wrong in fact and cannot be supported by the evidence. The question arises as to what judgment we ought to give. Can we order judgment for the defendant, or are we bound to remit the matter for rehearing before the referee, or can the court, if satisfied that it has all the necessary materials before it, not only set aside the judgment ordered by the referee, but also order judgment for the defendant? We think we can. Originally, under the rules of 1875, the referee had no power to enter judgment, and *Dyke* v. *Cannell*, 31 W. R. 747, 11 Q. B. D. 180, makes it clear that under ord. 36, r. 34, of the R. S. C., 1875, which is similar to ord. 36, r. 52, of the present rules, the court before judgment has power, on the motion of either party, and not merely in cases where the referee being in doubt has submitted a question to the court, to decide any question referred to the referee on the evidence taken before him. Cave, J., in that case says that the rule authorizes the court to decide the question referred, on the evidence taken before the the referee, either with or without any additional evidence as the court may direct. Now is this power of the court inapplicable in cases where the referee has ordered judgment to be entered under the power conferred on him by rule 50 of order 36?

We think that the rule applies even though judgment has been ordered by the referee to be entered, and has been entered accordingly.

In the first place, it is plain that, although the judgment entered by order of the referee is in form the judgment of the court which ordered the reference, yet the Divisional Court retains control over the judgment. For the motion to set aside the judgment is, in the Queen's Bench Division, to the Divisional Court, and we think that the meaning of this rule is not to limit in any way powers that the Divisional Court previously had under ord. 36, r. 52, but to prevent any doubt which might otherwise have arisen as to the power of the Divisional Court to review that which in form was its own judgment, and to negative the possible supposition,

which might otherwise have arisen, that the appeal from the decision of the referee must be to the Court of Appeal.

Judgment for the defendant.

Solicitors for the plaintiff, *Heather & Sons.*

Solicitors for the defendant, *Powell & Rogers.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 16.

MAW v. JONES. (a.)

Master and servant—Damages—Wrongful dismissal—Apprentice—Measure of damages.

By a deed of apprenticeship, under which the plaintiff bound himself as an apprentice to the defendants, it was provided that if, during the term of apprenticeship, the plaintiff showed want of interest in his work, it should be lawful for the defendants to cancel the deed upon giving him a week's notice. The plaintiff was dismissed, without notice, on a false charge of misconduct. In an action for wrongful dismissal the judge directed the jury that they were not bound to limit the damages to the value of the week's notice which he had lost.

Held, that, as the defendants had not acted under the clause which empowered them to dismiss on the ground of want of interest, there was no misdirection.

Motion for a new trial.

The plaintiff bound himself as apprentice to the defendants to learn the business of a draper for the term of four years from May, 1887, and the defendants covenanted to instruct the plaintiff and provide him with food and lodging during that term. It was provided by the deed of apprenticeship that if, during the term, the plaintiff showed want of interest in his work it should be lawful for the defendants to cancel the deed upon giving him a week's notice. In October, 1888, the defendants dismissed the plaintiff without notice, assigning misconduct as the ground of dismissal.

The plaintiff brought an action for wrongful dismissal in breach of the apprenticeship deed. The defendants pleaded justification, at the same time paying forty shillings into court, and it was agreed between the parties that the value of a week's notice would not have exceeded this amount. The action was tried before Manisty, J., and a jury. The jury found that the plaintiff had not been guilty of the misconduct imputed, but that the defendants would have been justified in dismissing him with a week's notice on the ground of want of interest in his work. The judge then directed the jury that they were not bound to limit the damages to the value of the week's notice which the plaintiff had lost, although they might take into consideration the fact that the defendants would have been justified in dismissing him with a week's notice. The jury returned a verdict for the plaintiff, with £21 damages.

Channell, Q.C., and *Wedderburn*, for the defendants.—The loss of a week's notice was the only damage sustained by the plaintiff. A servant improperly dismissed without notice can only recover a month's wages: *Hartley* v. *Harman*, 11 Ad. & E. 798. Except in the case of breach of promise of marriage, damages for matter of aggravation cannot be given in an action of contract.

McCall and *J. F. K. Cleave*, for the plaintiff, were not called upon.

Lord COLERIDGE, C.J.—I am of opinion that there was no misdirection in this case. It has been contended that, the deed having provided that the defendants might dismiss the plaintiff at a week's notice if he showed want of interest in his work, and the jury having found that he did show such want of interest, the damages to which he is entitled for wrongful dismissal are ascertained at the value of the week's notice which the defendants omitted to give. If the defendants had dismissed the plaintiff on the ground of such want of interest, intending to act under the clause which empowered them to dismiss him on that ground, the dismissal, apart from the want of notice, would not have been wrongful, and in such case the defendants' contention that the measure of the damages was the value of the week's notice would have been good. But the defendants did not dismiss him on that ground. In this indenture the law implies a condition that the master shall not dismiss the apprentice wrongfully, and here the defendants have done so. Then what is the measure of the damages for the breach of that condition? The plaintiff was entitled to recover for all the damage flowing naturally from the breach, and in considering what that would include, the jury might take into account the difficulty that the plaintiff, as a discharged apprentice, would have in obtaining employment elsewhere. The judge told the jury that, as the defendants had not acted under the notice clause, fair damages for the wrongful dismissal must be given; but, at the same time, he told them that they might take into consideration the fact that the defendants would have been justified in dismissing the plaintiff under the notice clause. In the opinion of the jury, after taking into account that the boy was not an industrious boy, the fair damages were £21. In my judgment the direction was perfectly right and the verdict sensible.

MATHEW, J., concurred.

Motion dismissed.

Solicitor for the plaintiff, *W. Rawlins.*

Solicitors for the defendants, *Pearce, Jones, & Co.*

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 13.

BOOTH v. FERRETT. (a.)

Common lodging house—Unregistered—Charitable institution—Common Lodging Houses Acts, 1851 (14 & 15 *Vict. c.* 25) *and* 1853 (16 & 17 *Vict. c.* 41).

A lodging house was established and maintained, not for any primary purpose of gain, but for the accommodation of the poorest class of persons, partly with a charitable and partly with a religious object. It was not open to everybody, but only to such persons and at such times as the proprietor thought fit.

Held, that it was not a "common lodging house" within the meaning of the Common Lodging House Acts, 1851 *and* 1853.

Case stated by Mr. Lushington, metropolitan police magistrate.

It was proved, and not contested, that the appellant Mr. Booth had in and from October, 1889, opened and kept open a Salvation Army "refuge" at 272, Whitechapel-road, for the reception of male lodgers to sleep in one common room for one or more nights, and to be supplied with food in it, and another common room at an inclusive charge of fourpence per night, for bed, supper, and breakfast. Notice to register the house under the Common Lodging Houses Act, 1851, was given by the Commissioners of Police to the appellant; but in spite of such notice the house remained open and continued unregistered. There was accommodation in the house for 100 men, and as many as 69 were on one night found sleeping in the room. The lodgers were of the class of poor persons who frequent the registered com-

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

mon lodging houses. The sum of fourpence a night was reduced, and even entirely remitted in some cases, at the discretion of the person in charge, who also had the power to refuse admission to those he thought could pay more.

The magistrate held that the house was a common lodging house, and convicted the appellant, but he also found as a fact that the house was established and maintained not for any primary purpose of gain, but for the accommodation of the poorest class of persons only, partly with a charitable and partly with a religious object.

The question for the court was whether, under the circumstances, the house was a common lodging house within the meaning of the Common Lodging Houses Acts, 1851 and 1853.

Willis, Q.C., and *Colam*, for the appellant.—This is not a common lodging house within the meaning of the Act. The regulations affecting common lodging houses would seriously fetter such institutions as these. The Legislature intended only to deal with lodging houses the keepers of which received all who applied and made a charge.

R. S. Wright, for the respondent.—The magistrate was right. Whether or not a lodging house is a common lodging house is a question of fact for the magistrate to decide. The phrase "common lodging house" is intended to distinguish between a lodging house where all are admitted, and a private lodging house. Upon sanitary considerations it makes no difference whether the object was profitable or charitable.

Lord COLERIDGE, C.J.—I am of opinion that this appeal must be allowed. In the absence of any definition of "a common lodging house," it is necessary to consider what are "common lodging houses" within the meaning of the Act. It is clear that they are not all odging houses, but only "common lodging houses." It appears to me, looking at the scope and intention of the Act, that such an institution as this—a charitable institution, not carried on for purposes of profit or gain, not open to all comers, but only on such terms and conditions as the managers may direct—is not within these Acts of Parliament, which contain extremely stringent regulations, highly proper for the purposes of the institutions, which appear to be intended, where all persons are received for purposes of gain. Such lodging houses being kept for the purpose of profit, it is reasonable to assume that the keepers, so that they do not violate the law, will endeavour to make as much money as possible, and that, therefore, injury or danger to the public may result from the houses being overcrowded or kept without regard to sanitary conditions; and therefore Parliament established certain regulations highly proper for such houses, which appear to have been intended by the Act. It cannot be said that this institution comes within the notion that anyone would entertain of a "common lodging house." According to ordinary understanding, a lodging house open to all comers, and kept for the purposes of profit, would seem to be the kind of lodging house intended by the Act. A magistrate of intelligence has already held, in the case of a female lodging house, that it does not come within the Act, and there has been no attempt to reverse that decision. It is for those who desire to bring such institutions as these within the Act to show that they come within it. They certainly do not come within my idea of a "common lodging house." On the whole, therefore, I think that this conviction was wrong, and must accordingly be set aside.

MATHEW, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Ranger, Burton, & Mathews.*

Solicitor for the respondent, *Solicitor to the Treasury.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) — Feb. 13.

Ex parte SMITH.
In re SMITH & SONS. (*a.*)

Bankruptcy—Rejection of proofs—Appeal—Three orders made in county court—One notice of appeal and one deposit—Fees—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 39—*Bankruptcy Rules*, 1886, *r.* 131.

On appeal to the county court judge from the rejection by the trustee of three proofs tendered against the bankrupt's estate, three orders were drawn up affirming the trustee's rejection. An appeal was brought from the decision of the county court judge to the Divisional Court in Bankruptcy, only one notice of appeal being duly stamped and one deposit lodged on the appeal.

Held, that the court could not hear the appeal until the additional payments had been made, and that the case must stand over in order that the necessary requirements might be complied with.

Appeal against three orders made by his Honour Judge Bristowe in the county court at Nottingham by which he affirmed the rejection by the trustee in the bankruptcy of three proofs tendered against the bankrupt's estate.

Sidney Woolf, Q.C., and *McCullagh*, for the appellants.—The trustee rejected proofs tendered against the bankrupt's estate by three persons named Smith. The county court judge has affirmed that rejection and in consequence this appeal is brought. [CAVE, J.—How is it that three appeals are joined together?] The county court judge really pronounced one order, though I admit three orders were drawn up. It is practically the same point which has to be decided in each case. [CAVE, J.—That may be, but in any event you are depriving the Government of certain fees. Here is one notice of appeal which bears a 5s. stamp on it. You are depriving the Government of 10s. in the first place by this course.] The appellants are willing to pay the fees.

E. C. Willis, Q.C., for the trustee in bankruptcy.—Only one deposit has been paid on this appeal. By the course adopted the appellants have got off paying two deposits of £20 each.

CAVE, J.—That cannot be allowed. It looks very much as if what has been done has been tried as an experiment, and, if so, it is one to which the court cannot consent. The additional money must be paid, and the case must be adjourned in order that that may be done. We cannot hear the appeal as it stands now, and it must go to the bottom of the list.

A. L. SMITH, J., concurred.

Order accordingly.

Solicitor for the appellants, *H. Runney.*

Solicitors for the trustee, *Lee, Ockerby, & Everington*, for *E. Fraser*, Nottingham.

Prob. Div. & Adm. Div. Admiralty. — June 10.

"THE ISLE OF CYPRUS." (*b.*)

Practice—Interrogatories—Collision.

Two vessels, The A. *and* The B., *came into collision, and, in consequence of the collision*, The A. *sunk, and*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

(*b.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

many of those persons on board her who would have been material witnesses on her behalf were drowned. Subsequently the owners of The A. *instituted an action of damage against* The B., *for the recovery of the damages they had sustained, and, before delivering their statement of claim, caused interrogatories to be administered to the owners of* The B., *interrogating them respecting the circumstances of the collision. The owners of* The B. *refused to answer certain of such interrogatories, which, if answered, would have supplied the same information as was contained in their preliminary Act.*

The court, taking into consideration the difficulty the plaintiffs would have in obtaining evidence in support of their claim if the interrogatories were not fully answered, made an order requiring the owners of The B. *to file a further and better answer.*

This was an action of damage instituted on behalf of the owners of the steamship *Cleddy* against the steamship *Isle of Cyprus* to recover for the damage sustained by *The Cleddy* on the 29th of December, 1889, when the two vessels came into collision in the English Channel, and in consequence of the collision *The Cleddy* sank, and the crew of *The Cleddy* had to take to their boats, one of which, containing eleven hands, including the watch on deck, capsized and was lost with all hands.

An appearance in the action as defendants was entered on behalf of the owners of *The Isle of Cyprus*, and leave to interrogate them having been granted, the following interrogatories were, before the delivery of the statement of claim, administered to them on behalf of the plaintiffs:—

1. Is it not the fact that a collision occurred between the steamship *Cleddy* and the steamship *Isle of Cyprus* about 0.30 a.m., or at some other, and what, time on the 20th of December, 1889, in the English Channel off the Isle of Wight?

2. Did not the said steamship *Isle of Cyprus* at the time of the said collision belong to you or some of you? Who were the managing owners of the said steamship?

3. Upon what course or courses was the *Isle of Cyprus* in the half-an-hour preceding the said collision? If there were any changes of course during that period, what were such changes, and at what time or times did such changes respectively take place? If more than one change, what were such changes respectively, and how long before the collision did such changes respectively take place?

4. Was not one, and which, of the mates of *The Isle of Cyprus* in charge of the watch at the time of, and for some and what time, before the collision? What number of hands had he on deck in his said watch, and where were they stationed respectively?

5. Was not the master of *The Isle of Cyprus* below until shortly before the said collision? How long before the said collision did he come on deck? What called his attention and brought him on deck? How long after he got on deck did the said collision occur? How far from *The Isle of Cyprus* was *The Cleddy* when he got on deck, and how did *The Cleddy* then bear from *The Isle of Cyprus?* How was the helm of *The Isle of Cyprus*, and how was the telegraph pointer standing; at what speed were her engines working when he got on deck? What orders did he give to the helm and engines after he so got on deck?

6. Was the helm of *The Isle of Cyprus* altered in any way, and what way, and by whose and what orders, after *The Cleddy's* lights were sighted, and before the said master came on deck. If so altered, once or more than once, how was *The Isle of Cyprus* heading by compass immediately before such alteration, or each of such alterations respectively, and to what extent did the heading of *The Isle of Cyprus* alter under each of such alterations of her helm? State how *The Cleddy* bore from *The Isle of Cyprus* just before each of such alterations. What light or lights of *The Cleddy* were seen from *The Isle of Cyprus* whilst the latter was on the said courses, and each of them? When, and at what distance, did such lights, and each of them, come into view?

7. How was *The Isle of Cyprus* heading by compass at the time of the said collision? About how far from the stern was *The Cleddy* struck?

8. How were the engines of *The Isle of Cyprus* working at the time of the said collision—ahead or astern, and, if astern, how many revolutions had they made astern before the collision from the last order astern?

9. What was the bearing and distance of St. Catherine's Light at the time of the collision?

10. After the said collision did *The Isle of Cyprus* make any water, and, if so, how much, and where? How long did *The Isle of Cyprus* remain near the place of collision? Were any boats of *The Isle of Cyprus* put into the water to go to the assistance of *The Cleddy*, and, if not, why not? How soon after the said collision was *The Cleddy*, or the lights of *The Cleddy*, lost sight of by those on board *The Isle of Cyprus?*

The defendants are required to answer all and each of the above interrogatories, and, so far as the matters interrogated to are not within their personal knowledge, to inquire of their agents or servants, and to answer according to the best of their knowledge and belief upon the information acquired by such inquiries.

The four first of the above interrogatories were answered by one of the defendants, but in regard to the remaining interrogatories, the same defendant deposed in his affidavit in answer as follows:—I object to answer the remaining interrogatories, upon the grounds that the matters inquired into are not sufficiently material at the present stage of the proceedings; that the said interrogatories are exhibited unreasonably and vexatiously; and that they are oppressive and unnecessary, and are an attempt to obtain that part of the defendants' case which the defendants only know from information or documents which are privileged.

The plaintiffs now moved the judge in court for an order directing that the defendants should file further and better answers to the plaintiffs' interrogatories.

Barnes, Q.C., for the plaintiffs.—The information which the plaintiffs will obtain from the interrogatories being fully answered will be most material to them, and necessary at this stage of the suit owing to so many of the crew of *The Cleddy*, who otherwise would have given evidence in support of the plaintiffs' claim, having lost their lives. Moreover, interrogatories similar to those in the present case were held admissible in the case of *The Radnorshire*, 5 P. D. 172, 29 W. R. Dig. 73, where an attempt was made to set them aside on the ground that they were exhibited unreasonably and vexatiously.

Raikes, for the defendants.—The practice of not in any case permitting interrogatories to be administered in collision suits when the information sought to be obtained is substantially the same as will be disclosed in the preliminary acts, was laid down in *The Biela*, 24 W. R. 524, and though modified to some extent since the case of *The Radnorshire*, so far as to allow of the exhibition of interrogatories in cases where there are special reasons for such a course, is still applicable in ordinary cases like the present.

BUTT, J.—These interrogatories must be answered. It is not usually the practice in damage suits in the Admiralty Division to give in the affidavit in answer, information which is to be found in the preliminary acts, but the plaintiffs desire to have the answers of the defendants on oath, and I think that in this case, having regard to the special circumstances that so many of the plaintiffs' crew, who otherwise would in all probability

have been witnesses for the plaintiffs, have been drowned, the interrogatories left unanswered must be answered fully.

Solicitors for the plaintiffs, *T. Cooper & Co.*

Solicitors for the defendants, *Waltons, Johnson, & Bubb.*

Court of Appeal.

From Chan. Div. April 24, 25.

In re JODRELL.

JODRELL *v.* SEALE. (*a.*)

Will—Construction—Bequests to persons named for life and then to their children—Children of illegitimate relatives described as testator's "cousins"—Residuary gift to "relatives hereinbefore named" who were entitled to vested transmissible interests.

A testator, after giving legacies upon trust for several persons, each of whom he described as his "cousin," for life, and afterwards for their respective children, and giving legacies direct to two of his cousins, J. and H., and to three of his nieces, directed the residue of his estate to be equally divided amongst such of "my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained" should become entitled to a vested transmissible interest in any part of his property. One of the cousins, J., predeceased the testator, and the testator subsequently revoked by codicil the legacies to the three nieces. Some of the persons described as "cousins," to whom legacies had been left on trust for life were not legally cousins, being descended from illegitimate children of the testator's grandmother. H. was the only legitimate relative mentioned nominatim *in the will who took a vested transmissible interest under it.*

Held, reversing the decision of Stirling, J., (ante, *p.* 267), *that "relatives hereinbefore named" included persons whom the testator had himself mentioned in his will, and described as the children of his "cousins," whether such cousins were in fact cousins in the strict legal sense or not, and although he had not mentioned such children in his will by any of their names, and that such children were accordingly entitled to participate in the residue as well as H.*

Appeal from the decision of Stirling, J., reported *ante*, p. 267).

The Rev. Sir E. R. Jodrell, by his will dated March 28, 1868, appointed executors, and gave specific bequests to his wife and to his cousins, Richard Jennings and the Rev. Charles P. P. Jodrell by name.

Then, after giving his general, real, and personal estate to his executors upon trust, after payment of debts and funeral and testamentary expenses, for the benefit of his wife during her life, and after her death for sale and conversion, and upon trust out of the proceeds thereof to set apart and pay the legacies specified in the ensuing part of his will, with a direction to marshal in favour of charities, he gave a number of bequests as follows:—

(1) To such one or more of the children of "my late cousin, Major Edward Jodrell, other than his eldest son," as should be living at the death of the testator's wife, and should attain twenty-one; (2) in favour of the children of "my cousin, the Rev. Henry Jodrell," other than his eldest daughter, who should be living at his wife's death and attain twenty-one; (3) in favour of "my cousin, Mary Bishop," for life, and after her death for her children surviving her and his wife, and attaining twenty-one; (4) in favour of "my said cousin, Richard Jennings," and his wife during their lives, and after the death of the survivor for their children surviving them and his wife, and attaining twenty-one; (5) in favour of "my cousin, Louisa Buller," for her life, and after her death for Charles Seale Hayne, if he should survive her and the testator's wife; (6) in trust for "my niece, Emily Higgins," if she should survive his wife and attain twenty-one; (7) in favour of "my two nieces, Mary Champagné and Blanche Champagné," if they should respectively survive his wife and attain twenty-one; (8) upon trust for "my cousin, Major George King," for life, and after his death for his children who should survive him and the testator's wife and attain twenty-one; (9) upon trust for "my cousin, Georgiana Forde," for life, and after her death for such of her children as should survive her and his wife and attain twenty-one; (10) upon trust for "my cousin, Emily McDonnell," for life, and after her death for such of her children as should survive her and his wife and attain twenty-one.

The 37th clause of the will was as follows:—"As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females for their separate use respectively, and without power of anticipation."

By a first codicil dated March 11, 1871, to his will, the testator revoked the bequest in favour of his nieces Mary and Blanche Champagné. By a fifth codicil dated July 26, 1882, he appointed Alfred Jodrell and R. E. Jennings executors of his will, revoked the bequest to his niece, Emily Higgins, and directed that it should fall into his residue, and declared that none of those three nieces should participate in the division of his residuary estate.

The testator died on November 12, 1882, and his widow on March 1, 1888, and an originating summons having been then taken out to ascertain who were the persons entitled to the testator's residuary estate, an inquiry was directed as to which of the persons named in the first thirty-six clauses of the will were his relations.

The chief clerk certified that Charles Seale Hayne was the testator's first cousin once removed; that Louisa Buller and Charles P. P. Jodrell both died in the testator's lifetime; that Major George King, Georgiana Forde, and Emily McDonnell (who were all dead) were descended from illegitimate children of the testator's grandmother; and that the other persons named in the will as cousins were so in the strict sense.

Stirling, J., held (1) that "transmissible" meant "capable of transmission" after death, and that, consequently, persons having only life interests were not entitled to participate in the residue; and (2) that "relatives hereinbefore named" meant only legitimate relatives hereinbefore mentioned by name.

From the latter part of that decision four sets of persons interested in divers of the aforesaid bequests appealed.

Romer, Q.C., Moulton, Q.C., and *W. B. Trevelyan,* for some of the appellants.

Vaughan Hawkins and *Swinfen Eady,* for other appellants.

Sir Horace Davey, Q.C., and *Rashleigh,* for other appellants.

Crackanthorpe, Q.C., and *Hadley,* for other appellants, one of whom, though born at the date of death of testator's widow, had not attained twenty-one.

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

Rigby, Q.C., and *Christopher James*, for the respondent, Seale Hayne.

Lyttelton Chubb, for the executors.

The following authorities were cited in addition to those relied on in the court below:—On behalf of the appellants: *Abbott* v. *Middleton*, 7 H. L. Cas. 68, 7 W. R. H. L. Dig. 6; *Occleston* v. *Fullalove*, 22 W. R. 305, L. R. 9 Ch. App. 147; Co. Litt. c. 1, s. 1, p. 3b.; *Ib.* c. 2, s. 30, p. 266; Mill's Logic, c. 2; *Nicholson* v. *Patrickson*, 7 Jur. N. S. 987, 10 W. R. Ch. D. 97; *Emmet* v. *Emmet*, 28 W. R. 401, 13 Ch. D. 484; *Watson* v. *Young*, 33 W. R. 637, 28 Ch. D. 436. On behalf of the respondent: *Edmunds* v. *Fessey*, 9 W. R. 365, 29 Beav. 233. The Lord Chancellor referred to *Wilkinson* v. *Adam*, 1 V. & B. 422, p. 462; and *Allen* v. *Webster*, 6 Jur. N. S. 574, 8 W. R. Ch. Dig. 101.

Lord HALSBURY, L.C.—I am called upon to express an opinion on what is the meaning of this written instrument, and I repudiate entirely for myself the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called upon to interpret. I do not know what the testator meant except by the words he has used. I do not know that the law is intended to afford any presumption whether the testator intends to benefit those who are related to himself in the strict sense, or related to his wife. I do not know that the law presumes that he means to make a provision for those in respect of whom it may be said they are connected by blood, although not in every link of the pedigree by wedlock. The law makes no presumption, I believe, upon the subject, and it would be very strange if it did, because the law will allow a testator, if he chooses to do so in express terms, to make bequests to his wife's relations or to persons who are not his legitimate descendants, and, inasmuch as the law permits both these things to be done expressly, I myself am wholly unable to understand in what way a court of construction is called upon to put particular interpretations upon particular words with reference to any supposed presumption that the law makes either way. For myself I am prepared to look at the instrument such as it is, to see the language that is used in it, to look at the whole of the document, and not at part of it only, and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments, and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments, and am overwhelmed with authorities about what particular judges have thought about other particular instruments, and whether in this or that particular instrument the judge has been sufficiently satisfied that such and such was the meaning of the testator, I confess myself to be in a hopeless state of confusion. In the first place I do not know what mental thermometer there is to ascertain what exact degree of certainty is to be obtained. If the thing is sufficient to establish the meaning, why it is sufficient. And what does that mean? Why, sufficient in the mind of the particular tribunal that has to decide. That there are particular phrases and particular sets of phrases to which the law would attach a particular meaning is true, and when those words are found in an instrument, unqualified and unexplained by anything else, then you must give to those words or to those phrases the meaning which the law has attached to them. And it would be unreasonable if you did not, because you must suppose, in the absence of any other explanation, that the person who has used those phrases or used the particular word, has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *primâ facie* meaning of such an expression.

But now I come to construe the particular instrument, and I do not desire to express my meaning otherwise than in the language of Lord Cairns, who says very truly, I think (in *Hill* v. *Crook*), "If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires." It seems to me that that is a very simple test, and adding only to that the circumstances of the case with which the testator was dealing, in order that you may put yourself as much as you can into the position, and thus dive into the mind of the person who has made the instrument which you are endeavouring to construe, it appears to me you have all the legitimate materials from which you can deduce what was the meaning of the testator.

Now, applying those general observations which are applicable to the interpretation of all instruments, I find that the testator has described a number of persons as his cousins. I do not think the particular word which we have here to construe, the word "relative" occurs in any other earlier part of the instrument than in that residuary clause which we are called upon to construe, and when we do come to the word "relative" in the 37th clause, we must find out what the testator has meant by the word "relative."

Now the first observation that strikes one, is that he has described according to the statement in the residuary gift (I use for the moment the word "described" leaving out for the moment the word "named," which requires separate treatment)—he has described as "relatives" a number of persons in respect of whom his view is that by the provisions that he has made some of them may become entitled to a "vested transmissible interest" in some part of his property "by virtue of the trusts and provisions hereinbefore contained." I find, therefore, that that is the first guide to the interpretation which I am called upon to make, and I find, therefore, that the word "relative" is used as a general word applicable to some of the persons whom he has "hereinbefore" described.

Now with reference to Major King, Georgiana Forde, and to Emily McDonnell the observation applies. I take those as examples, though I believe there are more—those are persons who are not cousins in the strict sense which is insisted on by the other side. They are persons, all three of them, with respect to whom the bar sinister would prevent the actual application in strictness of that language. Then did he mean that they were to be persons who were to come within that other description—that they were persons who might become entitled to a vested transmissible interest in any part of his property? With respect to Major King the provision is that after the death there should be a trust for one or more of his children who shall survive him and the testator's wife and shall have attained or shall attain the age of twenty-one years. And I think that formula is repeated with respect to each of them. Did he mean those persons? Did he mean those persons when he spoke of his "relatives"? I confess for myself I cannot entertain the smallest doubt that they were in his mind as "relatives." The whole framework of the will, looking at it (I say nothing for the moment about the codicil), seems to me to point in that direction, and that direction only, and, without repeating the same class of observations, I may say the same about that person who is described as his niece. He has, therefore, to use the language of Lord Cairns, given me a dictionary whereby I find that his wife's relative, the niece, and his illegitimate cousins, are his relatives. Under those circumstances, I am in a position to construe what he meant when I refer to the 37th clause and find that he says that he directs his

real and personal estate not effectually disposed of "to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females for their separate use respectively, and without power of anticipation."

Now, so far I have been able to explain satisfactorily to my own mind what he meant, and the Miss Champagné's being referred to in the 10th clause of the 5th codicil, to which I will refer for another purpose presently, seems to me to raise no question of doubt at all.

Now (having satisfied myself that he used the word "relatives" in the extended sense to include the wife's relation and those who are related in the way I have pointed out) the next question that is raised is, whether it was only those persons whose Christian and surname was inserted that he referred to, and that depends upon the true construction to be given to the word "named" —"hereinbefore named." I confess that I have been a little puzzled to know in what way this will was to be construed if that strict construction of that word "named" was to be given. Remembering that the will and the codicil are to be read together, I really do not know in what way more than one of the provisions of this will could be given effect to. But when I come to see what the effect of the opposite construction is, and I find that the 37th clause of the will contemplates the division "equally amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions" and so forth, and I find that at the date of the codicil there was only one person who had satisfied the description (putting the limitation upon the language used by the testator that is insisted upon on the other side), it seems to me that not only must one assume the testator not to have known the meaning of the particular words that he was employing, but that, while assuming he did know, as he must have known, the position of his family, he was reiterating the statement that the residuary estate was to be divided with all this particularity among such of his "relatives hereinbefore named" and so on, at a time when he must perfectly well have known that there was but one single person who could have satisfied that description.

Now, is it reasonable in construing the whole of an instrument and looking to the mind of the testator at that time, and assuming him to be aware of the meaning which he had himself previously attached to the language which he had used, and to the fact that he contemplated at that time a division, and a proportionate division which was impossible in the events that had happened, to give such a construction to this instrument as, it appears to me, if I were to give it, would completely frustrate the intentions of the testator as exhibited by the language which he himself had used, and, by reason of some supposed overwhelming necessity, to attach a peculiar technical meaning to words which it is not denied under some circumstances, and with a sufficient context, may bear a meaning which will give full effect to every part of the testator's complete testamentary disposition? Under those circumstances, I cannot entertain a doubt that I am unable to follow the decision of the learned judge below. I think that the decision was erroneous, and must be reversed.

With reference to that very small point that was last argued before us, I can only say that I should have been very sorry to suppose that some technical rule which the learned judges have adopted for the convenience of administration could be supposed to overrule a testator's intentions. If I ascertain what the intention of the testator is, I am bound to follow it, and I can only understand the language of the learned judges by introducing words which are not in the judgment quoted to us, certainly—that one must artificially suppose that the testator remembers what a very inconvenient thing it would be to keep a class open, and that therefore you cannot attribute to him the intention which nevertheless some of the learned judges say he obviously had. That is a feat in logic which I have a little difficulty in following. It is enough for me to say that I think Mr. Crackanthorpe's answer is complete, and on that point also I think the judgment must be the other way.

LINDLEY, L.J.—This will is long, and is made longer by the addition of five codicils, but if one addresses one's mind to the will for the purpose of ascertaining the intention of the testator from the language which he has used in the will and the codicils, it appears to me that the conclusion is not difficult to get at. In truth, in this case, as in so many others, the difficulty arises when you look away from the document which you have to construe—when you look into cases, that is to say, which have been decided on other documents more or less like the one before you. I do not propose to deal with decided cases at all. It may be that there were expressions in those which made the judges come to conclusions which we (or I) cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common form—whether deeds, wills, or mercantile documents. They are valuable guides, but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed before. Look at the words; avail yourself of such evidence as is legitimately admissible to see what the testator has said, and expound it as best you can with reference to what is legitimately before you. Now we have got to consider what the real meaning is of the 37th clause of this will. In order to do that one must look far beyond clause 37. You must look at the whole will and all the codicils too, and when you look at the whole will, you see this. First of all the testator gives certain small legacies—some to persons who are relations, some to servants and others who are not relations. Then he creates a trust fund, which consists of the bulk of his property. He vests that in trustees, and he tells the trustees what they are to do. He sub-divides it into sums of considerable amount—£5,000, £5,000, £2,000, and so on; and he gives those sums, or tells the trustees to hold those sums in trust for persons whom he describes as his "cousins," as his "nieces," as "children of his cousins," and "children of his nieces." I do not think any other word of relationship is used.

Then he says, by clause 37, "As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females to their separate use respectively, and without power of anticipation." What does he mean by that? He has not said that the rest of his property is to be equally divided amongst his relatives simply. He has said nothing of the sort. If he had, a difficulty would arise which would be a formidable one, but it is "my relatives hereinbefore named," and I cannot agree at all with the construction, which was put upon this will, giving no meaning to those words "hereinbefore named." On the contrary,

those words appear to be the key to the whole thing. When we bear in mind that in point of fact some of the persons called cousins were not cousins (some of them were illegitimate); when we bear in mind that some of the persons he calls "my nieces" were not his nieces (they were his wife's nieces), the importance and the necessity of introducing some such expression as "hereinbefore named" becomes apparent, and it becomes obvious that you cannot, without doing violence to the language, treat those words as superfluous. In other words, you cannot treat the expression "my relatives hereinbefore named" as equivalent to "my relatives." You must look at whom he has heretofore named as relatives. Now he has referred to them as relatives in two ways. He has referred to some of them by their names. He has referred to others of them in this way: he has called them children of persons whose names he gives. Are the children of persons, whose names he gives, not "hereinbefore named" within the true meaning of this clause? I cannot come to that conclusion. You may name a class. You may name a person by calling him the son of his father, just as well as by calling him John Thomas; and to say that this expression, "relatives hereinbefore named," excludes all those relatives who are before referred to as children of persons named, would lead to a conclusion which I will show presently appears to me to be entirely contrary to his manifest intention. Now that conclusion is arrived at by looking out of the will into the fifth codicil.

At the date of the fifth codicil, if the construction put upon this will by Stirling, J., is right, the only person who could take the residue was Mr. Charles Seale Hayne. Now, when the testator made his fifth codicil he excluded from the persons amongst whom the residue was to be divided, three persons called "nieces" in his will; and, having excluded those, there is only one, according to Stirling, J., who can take his residue. But by the fifth codicil he confirms his will. What does that mean? It means he repeats at the date of his fifth codicil that his residue is to be divided amongst a class of people. How is that language apt to a state of things where the whole goes to one? There being an alternative construction which will let in a number of people whom he has already called or designated as the children of relatives, and treated as relatives, is it consistent with the language of his fifth codicil, when he again directs his residue to be divided amongst those persons to exclude the whole of them, and to give the whole of the property to one person? That conclusion appears to me to be so startling, and so at variance with what he has said in his fifth codicil, that I unhesitatingly reject it. That leaves us in this position, that he means by the 37th clause of his will to include, and not to exclude, those relatives whom he has named by referring to them as a class, and it appears to me that that is the true view and the true construction of this will. The case does not stop there, because he goes on:—"Such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." That language is perfectly applicable to these children. They are all described as children who shall attain twenty-one and shall survive his wife (I think that occurs in all). I do not say that that is conclusive, because the same words are applicable to some of the persons named—not as to all, but as to some. Then it goes on: "And as to such of them as are females." Mr. Rigby relies upon the word "are." It seems to me the true answer to that is to be found in the clause. Recollect the clause is a direction to the trustees. It says, in substance, the trustees are to divide the residue "amongst such of my relatives," and so on, "and as to such of them as are females for their separate use." When does that mean? What period does the expression "are" refer to? Does it mean when he makes his will? Obviously not. Does it mean when he dies? No. Does it mean when the division has to be made? It appears to me obviously that it does, and it is not doing violence to the word "are" to say that what he means is that you are to divide my property among certain persons, "and as to such as are females"—that is, those whom you find to be females then. That appears to me, I confess, to be the true construction of this will, and I cannot myself entertain any doubt about it until I confuse myself by looking at other decisions. That I decline to do.

With respect to the point raised by Mr. Cockburn-thorpe, it appears to me that he is right on that—that is to say, that the one child born and *in esse* at the date of the testator's widow's death, but who had not attained twenty-one, will on attaining twenty-one take a share. I think he is right. Therefore, it seems to me that we should, if the Lord Chancellor and my brother Bowen acquiesce, make a declaration to this effect:—Declare that according to the true interpretation of the testator's will and codicils, the testator's residuary estate has become divisible between such persons and children of persons mentioned or referred to by the testator as were or are referred to by him as his "relatives," and as survive his widow, and as have attained or shall attain twenty-one. Then we must add—"with the exception of the persons expressly excluded by his will." Some are expressly excluded, and, of course, they cannot take.

BOWEN, L.J.—I am of the same opinion, and should add nothing at all to what has been said by the Lord Chancellor and Lindley, L.J., except that as we are overruling the judgment of a very experienced judge, it is rather more respectful to him that I should add a few words embodying my own judgment; but they will be based exactly upon the lines which have been laid down in the judgments of those members of the court who have preceded me. It seems to me, as it seems to them, that all we have to do is to take the words of the will and the codicil, and to examine them by the light of such evidence as is admissible in these cases, and when we have examined the will and the codicil, by the light of that evidence to arrive at the conclusion as to what the testator's meaning is as expressed by him in his will.

In this particular case the words which we have had to construe in the 37th clause of his will—the words "relatives hereinbefore named"—are words which receive, as it seems to me, a construction partly from the will itself and partly from the fifth codicil, which renders, I think, one and only one interpretation a reasonable one. You cannot put a reasonable interpretation upon the codicil unless you assume that by the words "hereinbefore named" in the will the testator intended, not merely such persons as were named by name, but such of his relatives as he had indicated before in the will as "relatives," and by a term appropriate to such a relationship. And I think it also follows that the term "relatives" must be taken, not in the strict legal sense, not in the sense of those who are connected only with the testator by ties which the law recognizes as legitimate, but all those in the previous part of the will who have been in effect called by him relatives, whether the legitimate tie exists between him and them or whether it does not. We were told that it was the law established by authorities that when the testator had used language in his will which designates the persons who are intended to receive benefits from him by the name of a tie which the law recognizes, that, unless you are driven by absolute stress of necessity, you must not include in the class even such persons as might popularly be included in the tie, unless you can see that the tes-

tator in the clearest and in the most unmistakable way has so said. It seems to me that the law as laid down in *Hill* v. *Crook*, 22 W. R., p. 140, by Lord Cairns is the true law, and although I do not disguise from myself that many judges from Lord Eldon's time down to the present—judges of the highest authority and of the greatest learning—have used language (so to speak) of warning, and language that amounts to more than Lord Cairns has said—have used language to the effect that you must, in order to include (under the name which the law usually appropriates to a legitimate tie) persons who stand outside that strict line, find a necessary inference or a very clear intention, yet it seems to me that the only effect one can give to such language is to treat it not so much as a canon of construction as by way of a counsel of caution to warn you in dealing with such cases not to give way to guesses or speculation as to the probabilities of an intention, but to act only on such clear evidence as can lead a reasonable man to a distinct conclusion. But I protest that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end to pause in giving effect to the true interpretation of the law, because, forsooth, the language has not been expressed according to some measure or standard of correct expression which is supposed to be imposed by the law out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it. As soon as you once arrive at your journey's end you have no more to do than give effect to the true construction as you see it. It seems to me that here the true construction of the will must be, that in the term "relatives hereinbefore named" the testator intended to include all those whom he had before treated as relatives, whether he was correct in law in so treating them or not, and the children of those whom he had referred to in the preceding clauses.

Appeal allowed.

Solicitors, *Witham, Lambert, & Roskell; Druces & Attlee; Lowe & Co.; Wadeson & Malleson; Walker & Whitfield; Satchell & Chapple.*

From Chan. Div. Jan. 29.

JONES *v.* WATTS. (*a.*)

Vendor and purchaser—Practice—Discovery—Agreement to accept lease—Agreement for right of way—Right to production of freehold title—Right to prove title bad aliunde—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78), s. 2—*Interpretation Act* (13 & 14 *Vict.* c. 21), s. 4.

J. agreed to grant, and W. to accept, a lease of a house and land, which lease was to contain stipulations for the free use by W. of a drive leading to the house over land not belonging to J., but over which he had, as owner in fee of the house, a right of way. W. failing to perform the agreement, and J. having consequently brought an action against him for specific performance, the defendant, by his defence, denied the plaintiff's title to the house and land, and his title or power to grant the right of way, and alleged in general terms that the house and land were subject to restrictive covenants affecting the enjoyment of them, without specifying in any way the nature of the covenants or of the restriction.

The defendant having taken out a summons for production by the plaintiff of certain deeds relating to the land and house, and certain other deeds relating to the right of way, all of which deeds the plaintiff had scheduled to his affidavit of documents in his possession as documents relating only to his freehold title,

Held (affirming the decision of North, J.), *that the effect of section 2 of the Vendor and Purchaser Act,* 1874, *was to deprive the defendant of the right to the production of the deeds showing the freehold title to the house and land, notwithstanding that, in consequence of the defendant denying the plaintiff's title and failing to perform the agreement, the matter had become a litigious one; but,*

Held (reversing the decision of North, J.), *that, having regard to section 4 of* 13 & 14 *Vict.* c. 21, *the agreement that the defendant should have the free use of the drive during the term of the lease was "a contract to grant a term of years to be derived out of a freehold estate" within the meaning of section 2 of the Vendor and Purchaser Act,* 1874, *and therefore, also, "a contract of sale of land" within the Act; and that the deeds relating to the plaintiff's title to the right of way, therefore, stood upon the same footing as regards that section as his deeds relating to the house and land, and the defendant, accordingly, had no right to production of them.*

Held, further, that, though there was nothing to prevent the defendant from proving aliunde *that the title was bad, and that, if he had raised a definite and specific objection to the title which the court could try he would have had the usual right of a litigant to call for the production of documents material to the issue raised, and which are in the possession of the other party, yet a mere general assertion that the property was subject to restrictive covenants affecting its enjoyment was not sufficiently definite to confer any such right.*

Appeal from North, J.

This was an appeal by the plaintiffs from an order of North, J., for production of certain deeds scheduled to the plaintiffs' affidavit of documents as not privileged, and there was a cross notice of appeal by the defendant as to certain other deeds not included in the order for production.

The application was made in an action for specific performance of an agreement by the defendant to accept a lease agreed to be granted by the plaintiffs.

The statement of claim in the action alleged that Mr. Morgan M. Jones, one of the plaintiffs, was the owner of a piece of land adjoining a residence and property known as "Maindee Hall," in Monmouthshire, and that Mr. Reginald H. Jones, the other plaintiff, was the owner of that residence and property, Maindee Hall; and that prior to the 16th of August, 1888, there had been negotiations between the plaintiffs and the defendant as to letting Maindee Hall, together with the said piece of adjoining land, to the defendant for a term of years. It was further alleged that by various letters which had passed between the parties during the negotiations, it had been mutually agreed by and between the plaintiffs and the defendant that the plaintiffs should grant, and the defendant forthwith accept and execute, a lease of the said piece of land, together with the said Maindee Hall, with the land and premises thereto belonging, for the term of seven years from the 1st of October, 1888, with the option to the defendant to determine such lease at the expiration of the first five years of such time by giving to the plaintiffs, their heirs, &c., twelve calendar months' previous notice in writing, and that possession was to be given on the 1st of December, 1888, and the annual rent was to be £250, to accrue from the time when possession was given and certain stables therein mentioned were completed, and to be payable half-yearly.

The statement of claim went on to allege that "by the same letters it was further mutually agreed by and between the plaintiffs and the defendant that . . .

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

the said lease should contain stipulations for the free use to the defendant of the drive leading to the house, and a stipulation or covenant by the plaintiffs, as regards obstructing branches, to keep the drive in a fit and proper condition"; and it was alleged that the defendant refused to perform his agreement.

The plaintiffs claimed specific performance and damages, or, in the alternative, damages only.

The defendant by his defence denied that he entered into any agreement with the plaintiffs, and, in the alternative, he said that, if there was any agreement, it was not correctly stated in the statement of claim, and the defence went on as follows:—

"9. The plaintiffs have not, nor has either of them, any right or title to, or power to demise the premises comprised in the said alleged agreement, or any of them, and are unable to perform the said alleged agreement on their part, by creating the term therein mentioned. Moreover, the said premises are subject to divers restrictive covenants affecting the use and enjoyment thereof.

"10. The only access to the premises comprised in the said agreement from the high road is over a drive through certain gates standing at the entrance to the drive. It was a term of the said alleged agreement that the plaintiffs should grant to the defendant an easement of the free use of the said drive, and should covenant to keep the said drive in a fit and proper condition, and to clear away all obstructing branches. The said drive and the said gates at the entrance thereof, and the land on which they stand, are not the property of the plaintiffs, who have no right or title thereto or power to demise the same, nor any easement of way or otherwise over the same, nor any right, title, or power to grant any such easement over the same, nor any right or power to keep the drive in a fit or proper condition, or to regulate the same. The plaintiffs are, in fact, unable to give to the defendant a right of access to the house and grounds comprised in the alleged agreement from the public road, or to perform their agreement with respect to the said drive."

The plaintiffs joined issue on paragraphs 9 and 10 of the defence, and also said: "The plaintiffs will also rely on 37 & 38 Vict. c. 78, s. 2, by way of answer to the allegations in the said paragraphs. The plaintiffs have perfect right, title, and power to demise the said premises, and to grant the free use of the drive, and to stipulate or covenant, as regards obstructing branches, to keep the drive in a fit and proper condition."

By an affidavit made in pursuance of an order to make an affidavit of documents in their possession relating to the matters in dispute in the action, the plaintiff M. M. Jones deposed: "I have in my possession or power the documents relating to my freehold title to the property adjoining Maindee Hall. . . . The said documents are set forth in the first schedule hereto"; and the plaintiff R. H. Jones deposed: "I have in my possession or power the documents relating to my freehold title to the Maindee Hall estate. The said documents are set forth in the second schedule hereto"; and both the plaintiffs deposed: "We are advised and believe that all the documents before mentioned respectively relate only to our freehold title to the property out of which the lease, the subject-matter of this action, was to be derived." The plaintiffs objected to produce the documents comprised in the first and second schedule to that affidavit.

The first schedule referred to a "copy deed of covenant relating to tithe, and deeds relating to the freehold title of the plaintiff M. M. Jones, the owner in fee of the piece of land adjoining Maindee Hall."

The second schedule comprised:—

"1. Conveyance in fee, dated the 28th of October, 1873, to William Jones, of the freehold property known as Maindee Hall.

"2. Indenture, dated the 29th of October, 1873, containing a signed and executed covenant by the owner in fee of the soil over which the drive, mentioned in the statement of claim, passes, with and in favour of the said William Jones, his heirs and assigns, and to the effect that the said owner in fee, his heirs and assigns, will at all times thereafter repair and maintain at his and their cost the entrance gates on the Newport and Chepstow road and the said drive, and that the owners or lessees, or other the occupiers, of the said Maindee Hall, and their respective agents and servants, shall at all times thereafter have full and free access for themselves, their horses, carriages, and carts, through the said entrance gates, and along and over the said drive, and all other reasonable use of the same as an approach to the plaintiff's said estate.

"3. Conveyance, dated the 16th of July, 1881, from the said William Jones to the said R. H. Jones of the fee simple of Maindee Hall aforesaid, with the appurtenances thereto belonging, and also with the full benefit and advantage of the covenants and agreements thereto relating contained in the said indenture of the 29th of October, 1873."

The defendant took out a summons for production of the above documents, which was heard before North, J., on the 7th of December, 1889.

North, J., held that the effect of section 2 of the Vendor and Purchaser Act, 1874, was that the defendant had no right to production of the deeds showing the plaintiffs' title to the freehold property, but that that section did not interfere with his right to production of the deeds showing the title of the plaintiffs to the right of way, the agreement as to that, not being a contract to grant a term of years in the drive, and being quite distinct from the agreement to grant a term of years in the property, and that the plaintiffs must therefore produce the second and third documents comprised in the second schedule to their affidavit.

The plaintiffs appealed from the latter portion of this decision, and the defendant from the earlier portion.

Napier Higgins, Q.C., and *Lush-Wilson*, for the plaintiffs.—The plaintiffs are the absolute owners of this right of way, as well as of the freehold property agreed to be granted. The agreement is not separable. This right of way would have passed as appurtenant to the property without any express stipulation as to it; *Thorpe* v. *Brumfitt*, L. R. 8 Ch. App. 650, 655; *Skull* v. *Glenister*, 11 W. R. 368, 16 C. B. N. S. 81. A term of years may be granted in any corporeal or incorporeal thing that lies in livery or grant: Sheppard's Touchstone, p. 268; Bacon's Abridgment, vol. iv., pp. 638-9, Leases (A.). The words of section 2 of the Vendor and Purchaser Act, 1874—"Whether derived or to be derived out of a freehold or leasehold estate"—are evidently chosen with care. The plaintiffs had a freehold right or interest, though less than the whole freehold estate, and, therefore, had a right to grant a term of years out of such freehold right or interest: *Hawkins* v. *Shippam*, 5 B. & C. 221. If the defendant's contention, that when there is litigation the provisions of section 2 do not apply, but that all parties are in that event entitled to discovery of all relevant documents, is correct, a purchaser need only refuse to complete in order to obtain production of documents contrary to the express words of the Act. It is clear on the authorities that a covenant that a person shall have a right of way amounts to a grant: Com. Dig. (Chimin), vol. iii. p. 58. A right of way is an incorporeal hereditament: 2 Black. Comm., p. 35; and, therefore, unless it be merely for a term of years, is freehold. [LINDLEY, L.J.—13 & 14 Vict. c. 21, s. 4, defines the meaning of "land" in an Act of Parliament as including heredita-

ments. That seems to justify the assertion that an easement is an interest in land.] The definition in Lord St. Leonards' Act (section 25) makes land include all tenements and hereditaments and any interest in any tenements or hereditaments. The term hereditament includes, not only lands and tenements, but whatsoever may be inherited: 2 Black. Comm., p. 16; 1 Co. Inst. 6.

They also referred to section 13 of the Conveyancing Act, 1881.

Cozens-Hardy, Q.C., and *Upjohn*, for the defendant.—The defendant is entitled to the production of all the title deeds on the ground that they are incident to the litigation. The contract contained no stipulation as to title, so that the matter rests entirely on the statute. The question is, What is meant by the expression "calling for the title"? That question involves inquiring what the law was previously to the statute. Under that previous law a person who had agreed to take even a very short lease was entitled to require the lessor to show a good title for sixty years and (possibly at a vast expense) to produce the deeds and other evidence required for the purpose. It was to remedy this hardship that section 2 was passed, and not to alter the law as to production of deeds in an action. [COTTON, L.J.—On what issue do you require these deeds?] On the issue raised by paragraphs 9 and 10 of the defence, which raise the issue that the plaintiffs have no title. That issue having been raised, gives the defendant the usual right of a litigant to production of all material documents in his opponent's possession. This is not a mere technical matter, as this drive is the only means of access to the house. An Act which was passed merely to facilitate the transfer of land and amend the law of real and personal property, cannot alter the law as to discovery. [LINDLEY, L.J.—Can you raise by proof *aliunde* the question whether the title is bad?] The true meaning of section 2 is that its provisions are to be read into the contract, and that such stipulations do not prevent a purchaser from raising objections *aliunde*; that is reasonably clear on the older authorities: *Shepherd* v. *Keatley*, 1 Cr. M. & R. 117; *Waddell* v. *Wolfe*, 23 W. R. 44, L. R. 9 Q. B. 515; *Darlington* v. *Hamilton*, Kay, 550, 2 W. R. Ch. Dig. 87. The defendant is insisting on a totally different right from that dealt with in section 2, under totally different conditions, and for a totally different purpose. In *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 15 Q. B. D. 261, 16 Q. B. D. 778, (decided on section 3, sub-section (3), of the Conveyancing Act, 1881), it was held that the plaintiffs were not precluded from taking an objection as to undisclosed restrictive covenants and refusing to complete the purchase, though the covenants were prior in date to the stipulated commencement of title. The operation of sections 1 and 2 of the Vendor and Purchaser Act, 1874, is expressly confined to "the completion of any contract for sale." The Act, at any rate, is perfectly satisfied by shifting the burden of proof from the lessor on to the lessee. It does not prevent the issue being raised, nor does it affect the ordinary law of discovery, as between litigants. Even an express agreement entered into with a company by a shareholder that he shall not be at liberty to inspect the books of the company is not sufficient to prevent an order for production in an action by him against the company: *Hall* v. *Connell*, 3 Y. & C. Ex. 707; *Turner* v. *Bayley*, 34 Beav. 105, 14 W. R. Ch. Dig. 114. As to the argument on the plaintiffs' appeal, this agreement is not a "contract to grant" "a term of years" "out of a freehold or leasehold estate." [LINDLEY, L.J.—Why is not the contract for the lease of the right of way in the same position as the contract for the lease of the land?] The plaintiffs have only an easement; that is an interest, not an estate, in the drive. [LOPES, L.J.—Is not "interest" the same as "estate"?] No. "Interest" is a wider term, and includes "estate." An easement is a limited, definite right of using land; an estate is an unlimited, indefinite right of using it. An easement is a *jus in solo alieno*—a right over another man's land. But a man does not have an "estate" *in solo alieno*, but *in solo suo*. There is no evidence that the right of way is incident to the lease, as being an appurtenance. That must be proved. No doubt Blackstone truly says that a right of way is an incorporeal hereditament, but he does not say it is a freehold estate. The 4th section of 13 & 14 Vict. c. 21, defines "land," not "estate."

Napier Higgins, Q.C., in reply.—The cases cited for the defendant do not apply. His contention would practically repeal the 2nd section of the Vendor and Purchaser Act. The question of production is within the discretion of the court, and where it would involve great inconvenience, production will not be ordered.

COTTON, L.J.—This case comes before us by way of appeal and cross-appeal from an order of North, J. The plaintiffs agreed to grant a lease of a house and land to the defendant for a term of years, and the agreement included a right of way to the house over land belonging to other owners. Two questions arise—first, whether the plaintiffs are bound to produce their title deeds as to the right of way? and, secondly, whether they are bound to produce those referring to the house and land? The judge below decided the first question against the plaintiffs, and the second in their favour. The case depends on 37 & 38 Vict. c. 78, s. 2. The first section of that Act reduces the statutory title, which a purchaser is entitled to require, from sixty to forty years. Then the 2nd section (which is the important one here) provides that, "in the completion of any such contract as aforesaid" (that is, "any contract of sale of land" made after 1874), "and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say, first, under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold." The form of this first paragraph is such as to preclude any question whether an agreement to grant a lease comes within the words "contract of sale of land," for this is clearly "a contract to grant . . . a term of years." Then are the plaintiffs bound to produce these title deeds? Mr. Upjohn argued that the clause was only to prevent the expense which, under the old law, vendors or lessors were put to in having to produce a sixty years' title to the freehold, and that it does not deprive the purchaser of his right to production of documents, when the matter comes before the court. In my opinion, the effect of the clause is that the vendor makes out a good title without producing the deeds which show his title to the freehold.

The question here is whether, without producing his freehold title, the vendor can make out a good title, or whether the intending purchaser, by simply denying that the vendor has a good title, can acquire a right to discovery of documents relating only to the vendor's freehold title. In my opinion, the purchaser cannot by such means entitle himself to production in such a case. But does that prevent him from raising *aliunde* any objection to the freehold title? In my opinion, it does not. It does not prevent his objecting to the title on any distinct and definite ground, and if he does raise a tangible issue as to the title, I think he is entitled to production of documents material to that issue, and which are in the vendor's possession. If the purchaser here had raised a specific objection to the title, he would, in my opinion, have been entitled to the discovery he claims. Has he done

so in such a way as to enable the court to see that there has been any tangible issue raised upon the goodness of the vendor's freehold title which the court can try? The defendant has merely alleged that the premises are subject to divers restrictive covenants affecting the use and enjoyment thereof. That is perfectly general and indefinite, and looks like a mere fishing allegation. If it had been alleged that there was a covenant which restrained the holder from carrying on some particular business, it would have been different, and in that case I think the plaintiffs would have been entitled to have an opportunity of making a further affidavit as to whether they had any documents bearing upon that issue. There has been an argument here on the part of the plaintiffs that to concede the defendant such a right of discovery as I have suggested would entirely defeat the object of this clause of the Act. But I do not think that would be so; for if the vendor has not any documents in his possession, or can say that such documents relate only to his own title, and do not affect the purchaser's claim, he is protected. As regards the title deeds relating to the land, I think the decision of North, J., was right, and that the cross appeal fails.

But then as to the appeal from that part of the decision of North, J., which was against the plaintiffs, if a contract is not a "contract of sale of land," it is not within the 1st or 2nd sections of the Vendor and Purchaser Acts. But Lindley, L.J., has referred to the 4th section of the Act 13 & 14 Vict. c. 21, which shows that a contract for the sale of land does include hereditaments, and a right of way is certainly a hereditament. The 2nd section of the Vendor and Purchaser Act shows that a contract to grant a lease is a contract for sale within the Act, so that the contract is within the Act, even as regards the right of way. That being so, it follows that, no specific objection having been taken to the title of the plaintiffs, they are entitled to rely on section 2. Accordingly, I differ from the judge on that point, and hold that the plaintiffs are entitled to protect themselves both as to the deeds generally and also as to those which give them the right of way.

LINDLEY, L.J.—The plaintiffs here agreed to give the defendant a lease of a house and land, and also of a right of way. We know nothing about that right of way, as to whether it is appurtenant or in gross, nor have we any exact knowledge as to the terms of the contract, which was embodied in a number of letters, but I understand that the correctness of the general effect of them, as appearing by the pleadings, is not disputed. Nothing in that contract makes it incumbent on the plaintiffs to produce their title to the freehold. Under those circumstances the defendant raises this dispute. He calls upon the plaintiffs to produce their title deeds to the freehold, and the question is whether he can compel them to do so. That depends on section 2 of the Vendor and Purchaser Act, 1874, the effect of which is that the lessor is under no obligation to show his title to the freehold, and we must see that in construing it we do not place such a narrow construction on it as to defeat the object of the Act. The preamble recites that it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser. [His lordship then read the general part of section 2, at the beginning of it, and the first heading thereunder, and proceeded:—] How much less is the lessee entitled to? Can he say, "You must produce your deeds, though I cannot call on you to produce your title"? Obviously he cannot. Can he say, "I cannot call on you to produce your title, but I will say you have a bad title, and thus defeat the Act"? I think that the lessee is not entitled to defeat the object of the Act in that way, and that upon that point, therefore, North, J., was right.

As to the appeal of the plaintiffs, I am not sure I quite understand what the view of North, J., was as to the right of way part of the case. It would seem he thought a lease of a right of way was not a lease of land, but the statutory definition of "land" given in 13 & 14 Vict. c. 21, s. 4, makes it include "hereditaments," so that I think no distinction, as regards this question, can be drawn between the right of way and the other property. That, however, does not quite dispose of the case, because Mr. Upjohn contends that the defendant is entitled to prove *aliunde* that the title is bad, in which I agree with him, and that he is entitled to discovery of documents in order to support his case, and he has accordingly put into his pleadings an allegation that there are restrictive covenants affecting the property which interfere with its enjoyment. Now it appears to me that if that were a specific allegation, instead of a general one, the defendant would be entitled to call upon the plaintiffs to make an affidavit distinctly stating whether the documents in their possession affect the defendant's title or only their own. But I regard this allegation as far too indefinite for that purpose. It seems to me to be merely an attempt to fish.

I think, therefore, the plaintiffs' appeal ought to be allowed, and that they are not under any obligation to produce any of their deeds.

LOPES, L.J.—I entirely agree with the opinions of the other members of the court, subject only to this, that I have felt some doubt whether this Act applies to cases where there is litigation, and where the production of documents is demanded under the rules which regulate the right to discovery among litigants, and not under the law regulating the right to production as between vendor and purchaser upon a sale; but I do not dissent from the rest of the court upon this.

Order varied.

Appeal of plaintiffs allowed.

Appeal of defendant dismissed.

Solicitors for the defendant, *Woodcock, Ryland, & Parker*, for *Vaughan & Hornby*, Cardiff.

Solicitors for the plaintiffs, *Watson, Sons, & Room*, for *Overstone Jones*, Newport, Monmouthshire.

From Q. B. Div. (Original Motion) July 30.

ONSLOW v. COMMISSIONERS OF INLAND REVENUE. (a.)

Practice—Appeal—Time for appealing—"Judgment" or "order"—R. S. C., 1883, *ord.* 58, *rr.* 9, 15.

A decision of the Queen's Bench Division *upon a case stated by the Commissioners of Inland Revenue under section* 19 *of the Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *is an "order" and not a "judgment," and an appeal from the decision must be brought within twenty-one days.*

Application for an extension of time to appeal from a decision of the Queen's Bench Division, dated January 21, 1890, upon a case stated by the Commissioners of Inland Revenue under section 19 of the Stamp Act, 1870 (33 & 34 Vict. c. 97). The question was whether the decision of the Divisional Court was an "order," in which case the appeal ought to have been brought within twenty-one days from the date of the decision; or a "judgment," in which case the appeal could be brought within a year.

Danckwerts, for the applicant.

Bosher, for the Commissioners of Inland Revenue.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord Esher, M.R.—I think the time has come when we must determine what is the distinction between the word "order" and the word "judgment." It seems to me that we must adopt the view taken by Cotton, L.J., in *Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342' concurred in as it was by the other members of the court. The Lord Justice in that case said that "in legal language, and in Acts of Parliament, there is a well-known distinction between a judgment and an order. . . . I think we ought to give to the words 'final judgment' in this sub-section (sub-section 1 (*g*) of section 4 of the Bankruptcy Act, 1883), their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established." Bowen, L.J., said that "there is an inherent distinction between orders and judgments," and he went on to say that the words "final judgment" had a proper professional meaning. Obviously, he meant to express his concurrence with Cotton, L.J. The result accordingly is that a judgment is a decision obtained in an action. Every other decision of the court is an order. The language of ord. 58, r. 9, strongly justifies that view, for it says that the time for appealing from any order or decision made "in any other matter not being an action" shall be the same as the time limited for appealing from an interlocutory order under rule 15—namely, twenty-one days. There the distinction is drawn between an order, not made in an action, and a judgment, which is always a decision obtained in an action. That is the true distinction. The present decision, not being in an action, was not a "judgment." It was, therefore, an "order," and the time for appealing from it was limited to twenty-one days. The time, however, under the circumstances would be extended.

Lindley and Bowen, L.JJ., concurred.

Solicitors for the applicant, *Rowcliffes, Rawle, & Co.*

Solicitors for the Commissioners, *Solicitor of Inland Revenue.*

From Q. B. Div. May 5.

Partridge v. General Council of Medical Education and Registration. (*a*.)

Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 11—*Erasing name from Dentists' Register—Discretionary duty—Judicial or ministerial act—Action for wrongfully erasing name.*

Section 11 *of the Dentists Act*, 1878, *provides that a register of dentists shall be kept by the registrar, and sub-section* 5 *provides that every registrar shall in all respects in the execution of his discretion and duty in relation to any register under the Act conform to any special directions given by the General Council.*

The General Council having wrongfully directed the name of a person to be erased from the register on the ground that he had lost his qualification, a mandamus *was issued directing them to restore his name to the register. In an action to recover damages for such wrongful erasure,*

Held, that, as the duty imposed upon the General Council by the Act as to giving directions to the registrar in regard to the register was discretionary, the duty was of a judicial character, and not merely ministerial, and the action was not maintainable without proof of malice.

Appeal from the judgment of Huddleston, B., at the trial, without a jury, of an action for maliciously and unlawfully removing the plaintiff's name from the Dentists' Register kept under the Dentists Act, 1878.

After the passing of the Dentists Act, 1878, the plaintiff obtained a diploma from the Royal College of Surgeons in Ireland as a licentiate in dental surgery, and was entered by the defendants in the Dentists' Register in respect of this qualification.

The Royal College of Surgeons in Ireland granted the diploma on the conditions that the holder would not seek to attract business by advertising or by any practice considered by the college to be unbecoming, and that the diploma would be cancelled on its being proved to the satisfaction of the president and council of the college that he had done so.

In July, 1885, the College of Surgeons in Ireland cancelled the plaintiff's diploma on the ground that he had advertised in connection with his profession, and notified this fact to the defendants. The defendants thereupon, in June, 1886, ordered his name to be erased from the Dentists' Register on the ground that he had lost his qualification.

A *mandamus* was issued, directing the defendants to restore the name to the register on the ground that the fact of losing the qualification was not sufficient reason for erasing the name. The case is reported, *sub. nom. Ex parte Partridge*, 36 W. R. 442, 19 Q. B. D. 467.

The plaintiff's name was restored to the register in September, 1887.

The defendants subsequently held an inquiry under sections 13 and 15 of the Dentists Act, 1878, and ordered the plaintiff's name to be erased from the register on the ground that he had been guilty of "disgraceful conduct in a professional sense" in advertising.

Huddleston, B., found that there was no malice, and gave judgment for the defendants.

The plaintiff appealed.

Waddy, Q.C., and *Lyon*, for the plaintiff.—The act of the defendants in removing the plaintiff's name from the register was merely a ministerial act. They did not profess to hold any judicial inquiry or to act under section 13. They considered that they had no option but to erase the name as the qualification was gone. The court held that they were wrong in that (36 W. R. 442, 19 Q. B. D. 467). The plaintiffs cannot now say that they were acting in a judicial capacity. They professed to act under section 11, and their duties under that section are merely ministerial.

They referred to *Pickering* v. *James*, 21 W. R. 786, L. R. 8 C. P. 489; *Ashby* v. *White*, 1 Sm. L. C., 9th ed., 268; *Cullen* v. *Morris*, 2 Stark. 587; *Toser* v. *Child*, 5 W. R. 287, 7 E. & B. 377.

R. T. Reid, Q.C., and *Muir Mackenzie*, for the defendants.—The grounds upon which the defendants acted in erasing the plaintiff's name are immaterial. If the duty imposed upon them by the Act is judicial, and they acted *bonâ fide*, then they are protected, though they may have acted wrongly. If they acted under section 13, though without holding an inquiry, then their act was clearly judicial. Even if they acted under section 11, inasmuch as they had a discretion to do the act or not—that is, to give special directions to the registrar under sub-section 5 as to the register—their act cannot be considered as merely ministerial.

Waddy, Q.C., replied.

Lord Esher, M.R.—This is an action against the Medical Council for maliciously and unlawfully causing the plaintiff's name to be erased from the Dentists' Register. The learned judge found that no malice was proved, and, indeed, I can hardly conceive how there could possibly be any malice in the defendants towards

(*a*.) Reported by W. F. Barry, Esq., Barrister-at-Law.

the plaintiff. Now the defendants' duty in considering whether they should erase a name from the register on account of alleged misconduct is clear. They ought to inquire carefully whether there is any ground for the complaint. If they come to the conclusion that there is, they ought to communicate with the accused and ask him for an explanation. I do not say that they ought to hear the witnesses, if there are any, in his presence; but at the least they ought to communicate any evidence to him, and ask for his explanation upon it, and if necessary make further inquiries into the matter. Then, and not till then, ought they to decide upon erasing the name. It is quite clear that the defendants upon the occasion in question acted wrongly. They erased the plaintiff's name without holding a proper inquiry, and consequently they were directed by a writ of *mandamus* to restore the name to the register. The question, however, whether such a body as the council has acted rightly in removing the name and the question whether an action will lie against them if they have acted wrongly are two totally different questions. Certain duties are imposed upon the defendants by the Dentists Act, 1878. The defendants in erasing the plaintiff's name were intending to act under the statute. They ought to have acted under section 13, and held a proper inquiry before deciding to erase the plaintiff's name upon the ground of disgraceful conduct in a professional sense. If they acted under section 13 I have no doubt that their act was not a ministerial act but a judicial act. But assuming that they ought to have acted under section 13 and did not, then they acted under section 11, and that being so can their act be called a merely ministerial act when they might have done it or not? I may state that, in my opinion, if the defendants intended to act under the statute, and erroneously acted under a wrong section, they would not be liable in the absence of malice if the act was not merely ministerial.

Assuming, then, that they acted under section 11, in my opinion their act was not a merely ministerial act. The giving an order to the registrar under section 11 depends upon discretion. I think this proposition is good law. When a public duty is imposed on persons which they undertake to perform, and the performance of that duty depends upon the exercise of discretion, the carrying out of that duty cannot be said to be a merely ministerial act, but must be considered for the purposes of protection as a judicial act. The defendants, in the performance of that judicial duty, were protected in the absence of malice.

In the present case, therefore, there being no malice, the defendants cannot be made liable, and the appeal must therefore be dismissed.

FRY, L.J.—The learned judge having properly found that there was no malice, the question arises whether the plaintiff has any cause of action against the defendants. The solution of that question depends upon whether or not the act of the defendants was a merely ministerial act. I agree with the proposition enunciated by the Master of the Rolls that where there is a discretion to perform a public duty imposed upon a person by statute, the duty is a judicial and not a merely ministerial duty. The scheme of the Dentists Act seems to be this. The registrar is the person who is to do all the ministerial acts in regard to the register. By section 11 he is to keep the register, and by section 12 he is to insert any necessary alterations in it. I also think that the registrar has some duties with respect to the register that are not merely ministerial. By sub-section 4 of section 12 he has a discretion in the execution of his duties to act on such evidence as in each case appears to him sufficient. Then when we look at the duties of the General Council in regard to the registrar we see that by section 11 they are to exercise superintendence over him. By section 11, sub-section 2, they have a discretion as to the form in which the register is kept. Then it is further provided by sub-section 5 that the registrar shall conform to any orders made by the General Council under the Act; and it is also provided that the registrar is to conform to any special directions given by the General Council. In my opinion the duty of the General Council in giving these special directions is of a judicial character. The conclusion I have arrived at upon the facts before us is that the General Council were of opinion that the register must automatically follow the qualification—that is to say, that the retention of the qualification was a condition of the name remaining on the register—and that they had power to make the necessary corrections by giving an order to the registrar to that effect. In that opinion they were wrong. But they were exercising superintendence over the registrar, and had a discretion conferred upon them by the statute in giving the order to the registrar. In my opinion there is no duty imposed upon the General Council in connection with the register which is not discretionary in its nature. I think, therefore, that the General Council were acting in the exercise of a discretion vested in them by the statute, and were consequently acting in a judicial capacity. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The defendants in erasing the plaintiff's name from the register acted without malice and *bonâ fide*, but they made a mistake, thinking that they could erase his name simply because his qualification ceased. Under those circumstances can the present action be maintained? It is admitted that the defendants were acting in the discharge of a public duty imposed upon them by statute, and intended to act under the statute. If they acted under section 13, it cannot be denied that they were acting judicially. It is said, however, that they were acting under section 11, and that the duty imposed by that section is merely ministerial. It seems to me that as the defendants have power under the section to give special directions to the registrar as to his duties in connection with the register, and as they have a discretion as to those directions, they are acting judicially in giving those directions. Therefore, whether they, the defendants, were acting under section 11 or section 13 they were not acting merely ministerially, and in the absence of malice cannot be made liable in this action.

Appeal dismissed.

Solicitors for the plaintiff, *Calkin Lewis & Stokes.*

Solicitors for the defendants, *Warren, Gardner, & Murton.*

From Q. B. Div. [and Q. B. Div.] Feb. 1; April 23, 30.

PROUDFOOT *v.* HART. (*a.*)

Landlord and tenant—Lease—Covenant—"Good tenantable repair."

Good tenantable repair is such repair as, taking into account the age, the character, and the locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to want such a house.

Motion to set aside the findings and award and judgment directed to be entered thereon of an official referee.

The action was brought to recover damages for breach of agreement to repair.

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

By an agreement in writing dated the 11th of November, 1885, a dwelling-house and premises situate in Caversham-road, Kentish Town, were let by the plaintiff to the defendant for a term of three years, and the defendant agreed that he would "during the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof."

The action having been tried by an official referee, he reported in favour of the plaintiff, and directed judgment to be entered for the plaintiff accordingly.

Before making his report he stated that, in his view of the obligation of a tenant to do tenantable repair, he ought to re-paper walls when the paper which was on them at the commencement of the tenancy had become worn out, and to re-paint internal woodwork where the paint had been worn off, and to whitewash and clean ceilings, &c.

Morton Daniel, for the defendant, in support of the motion.—The repairs included by the official referee are merely decorative repairs, and do not come within the meaning of the phrase "good tenantable repair": *Crawford* v. *Newton*, 36 W. R. 54.

T. W. Chitty, for the plaintiff.—The premises are to be kept in good tenantable repair. They must first be put into good repair, and then maintained in that condition: *Payne* v. *Haine*, 16 M. & W. 541.

CAVE, J.—My brother Mathew has asked me to state my opinion first, and I do not know how to state it in language other than that which I have used more than once before. "Tenantable repair" to my mind extends to commissive waste undoubtedly. I also thinks that it extends to permissive waste, and that the tenant must not only make good the damage going beyond mere ordinary wear which is done by himself and by his family and servants, but that he must also make good the damage which is done by other causes—such, for instance, as a casual storm that takes off a slate from the roof, or a stone thrown from the outside which breaks a window. All these things seem to me to fall within his obligation to keep the premises in "tenantable repair," and if he neglects to do those things, and the result is that still further damage is caused to the structure, then he must make good that further damage also, because it comes of his not performing his covenant to do "tenantable repairs." With regard to paper, I cannot see how in any case a man can be bound to put new paper on the walls simply because the old paper which was on at the time when he took the house, or which he has subsequently put on the walls, has become worn out. Mr. Chitty has suggested the possibility of paper being required to hold a wall or ceiling together. When a case of that kind occurs it will have to be dealt with, though I can hardly conceive the case of a wall needing a paper to hold it together.

With regard to the ceiling, if it were the case that the ceiling is only held together by the paper, and the tenant were to choose to tear the paper off and let the ceiling fall down, that would undoubtedly be permissive waste. It may possibly be that under those circumstances he would be bound to put up new paper when the old one showed no signs of being able to perform its duty of keeping the ceiling up. With regard to the paint, again, I can only repeat that painting is decoration, and that it is not necessary for the tenant to paint the woodwork inside where it is only required for the purpose of decoration. Where the woodwork as he receives it, is painted, and the paint wears away in the course of his tenancy, and he does not re-paint so that the woodwork underneath perishes from want of the preserving effects of paint, I think again he would be liable on the ground of permissive waste, but so long as no damage is done to the woodwork the mere fact that from lapse of time the paint has worn off does not in such a tenancy as this, call upon him to replace it by fresh paint. So, again, with regard to the whitewashing of the ceilings, we all know that in the ordinary course ceilings get black and have to be whitewashed, and if at the end of such a tenancy as this, the ceilings have become in the natural course of things black, the tenant is not bound to whitewash them. That, again, is a repair which the landlord must do.

The learned referee has thought that if the paper or paint is thoroughly worn out the tenant must re-paper or re-paint. That is exactly the thing he is not bound to do. Where the paper or the paint is thoroughly worn out he is not bound to replace either paper or paint unless his omission has caused damage to the fabric which otherwise is protected by the paper or by the paint. Then he goes on to say: "Cleaning and scouring might suffice in some cases but not in all." The tenant is certainly not bound to clean or to scour when the state of the paper is such as might naturally be expected from ordinary wear during the course of the tenancy. Then, with regard to the whitening of the ceilings, the official referee says that he did not believe the defendant fairly or properly whitened the ceilings or papered the top room. I have already said that under ordinary circumstances he was not bound to whiten the ceilings or paper the top room. He was not bound to do that unless it can be put by some exercise of ingenuity as being permissive waste of the fabric underneath not to do it. Nothing of the kind appears to have been suggested here. The learned official referee seems to have thought that the tenant was bound, because the ceilings were dirty from ordinary wear, to whitewash them and bound also to paper the top room because the paper which was then on it had gone through its ordinary existence and was in such a state that it required to be replaced.

That is, as I have said, not the duty of the tenant under such a lease as this.

I think that we must send this case back to the official referee in order that he may try it again with the light which is now thrown upon it.

MATHEW, J.—I am of the same opinion. I agree with the judgment of my learned brother, and with the reasons which he has given. It may not be easy to give a compendious description of the obligations of a man who has bound himself to keep premises in tenantable repair, because it is not easy to say compendiously what would be reasonable conduct under a great variety of circumstances, but it is very easy to see and to say what such a tenant is not bound to do. He is not bound to repair what is worn out by age. If those simple rules were kept before the minds of the official referees in dealing with each particular case, they would very clearly see whether the repair asked for is analogous to rebuilding or restoration. If the repair which the landlord requires to be done is one of that character, as a general rule the tenant would not be bound to do it.

The plaintiff appealed.

April 23, 30.—*Winch, Q.C.*, *T. W. Chitty*, and *Ernest Pollock*, for the appellant.

Morton Daniel, for the respondent.

The following additional cases were cited: *Belcher* v. *M'Intosh*, 8 C. & P. 720, 2 Moo. & Rob. 186, and *Davies* v. *Davies*, 36 W. R. 399, 38 Ch. D. 499.

Lord ESHER, M.R.—In this case a question has arisen between a landlord and his tenant as to whether the tenant infringed the covenant in his lease to leave the premises in "good tenantable repair." The action was tried before the official referee, who has given a judgment in which he has laid down the principles on which he meant to act, and on which he did act. The Divi-

sional Court have come to the conclusion that some of those principles are incorrect, and that if he acted upon them he must have come to a wrong decision. We are now asked to say that the principles on which he acted are correct, and that the principles laid down by the Divisional Court are wrong. There seem to be three courses open to us. We may agree with the official referee, or with the Divisional Court, or we may say that both were wrong, and lay down some principles for ourselves. The question is as to the true construction to be given to the term "good tenantable repair." It has been held that where a tenant agrees to keep premises in good tenantable repair, and to so deliver them up, he is bound, if the premises are out of repair when he takes possession, to put them into repair, and so keep them and deliver them up. That they were out of repair when he took them does not in any way affect his liability.

Different definitions have been given at different times of tenantable repair. In *Belcher* v. *M'Intosh* the covenant was to put premises into habitable repair and Alderson, B., said it was difficult to suggest any material difference between the term habitable repair and the more common expression tenantable repair. Both must import such a state as to repair that the premises might be used and dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied. In *Payne* v. *Haine* there was a covenant to deliver up in good repair, and it was held that the tenant was bound not to deliver up the premises in the state in which he received them, if they were then in bad repair, but to put them into repair, and so to deliver them up. Parke, B., said that the age and class of the premises, with their general condition as to repair, might be estimated in order to measure the extent of the repairs to be done. "Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor-square," and Rolfe, B., said that the term "good repair" must be construed with reference to the subject-matter, and must differ as that might be a palace or a cottage. In *Mantz* v. *Goring*, 4 Bing. N. C. 451, and *Stanley* v. *Towgood*, 3 Bing. N. C. 4, similar definitions were given. From these it is plain that the test of tenantable repair is not the condition in which the house is when it is taken. If it is then in bad repair it must be left in better, that is to say in tenantable repair, but if when the tenant takes it, it is richly painted and decorated, it is not incumbent upon him to paint and decorate it in exactly the same manner when he leaves it. The age of the house, its position and character, are all material elements in deciding what extent of repair is necessary, and I entirely agree with the definition which my brother Lopes has drawn up: "Good tenantable repair is such repair as, taking into account the age, the character, and the locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to want such a house." That definition appears to me to sum up the definitions given in the earlier authorities, and to contain all the essential elements, and it seems in no way to controvert the decision of this court in *Crawford* v. *Newton*.

It follows, therefore, that the principle on which the official referee acted—namely, that the tenant was bound to re-paper with similar paper and re-paint with similar paint the walls and woodwork which were papered and painted when he took possession—is a wrong principle, and that if he acted on that principle he came to a wrong conclusion. I do not think that the definition we have given differs from the principles laid down by the Divisional Court; if it does, of course, we disagree with those principles. I do not say that the tenant who has to deliver up a house in good tenantable repair need never paint or paper it. It is possible that no reasonably minded man might be willing to take the house if it was not papered or painted, but in every case the extent of the repairs to be done will differ in accordance with the age, the character, and the locality of the house, and the class of tenants who would be likely to take it. The result is, therefore, that we agree with the decision of the Divisional Court whether we agree with their reasoning or not. This matter must go back to the official referee, and the appeal must be dismissed.

LOPES, L.J.—I entirely agree, but as the case is of general importance I will add a few words. I think there is nothing new in the definition of good tenantable repair which I have drawn up. It is the result of the various authorities which have been cited. As to papering and painting, I should say that under such a covenant as a general rule a tenant would not be bound either to re-paper or to re-paint the inside woodwork. Certainly he would not be bound to put paper on the walls similar to that which was there when he came, or to re-paint in an extravagant or decorative manner. If paint is needed to prevent the woodwork from decaying he would be bound to paint, and if through lapse of time the paper and paint were in such a condition of defectiveness that no reasonably minded man could be expected to take the house, then I think he would be bound to re-paint and re-paper so as to put it into such a condition as to satisfy a reasonably minded tenant of the class who might be expected to take such a house. The same remarks apply, I think, to white-washing. Therefore, in my opinion, the principles laid down by the Divisional Court are right, while those acted upon by the official referee are wrong, and the case must go back to him.

Appeal dismissed.

Solicitors for the appellant, *Proudfoot & Chaplin.*

Solicitor for the respondent, *T. R. Apps.*

High Court of Justice.

Chan. Div. Kay, J. — July 18, 19.

MELLERSH v. BROWN. (a.)

Mortgage—Reversionary interest in personal estate—Covenant for payment of principal and interest on a day certain—Arrears of interest—Statutes of Limitation (3 & 4 *Will.* 4, *c.* 27, *s.* 42; 3 & 4 *Will.* 4, *c.* 42, *s.* 3).

By a mortgage deed, dated in 1875, *the mortgagor assigned to the mortgagee a reversionary interest in personal estate, and covenanted for payment of the principal sum and interest thereon at five per cent. per annum on a day certain, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for payment. The mortgagor paid a sum on account of principal, but no interest was ever paid. In an action brought by the transferee of the mortgage for foreclosure,*

Held, that interest was recoverable as damages, and must be calculated from the date of the mortgage deed, at £5 per cent., and was not limited to six years' arrears.

Adjourned summons.

By indenture of mortgage, dated the 24th of April,

(a.) Reported by JAMES H. BAKEWELL, Esq., Barrister-at-Law.

1875, and made between Edward Barrett, of the one part, and George Barrett (the father of Edward Barrett), of the other part, in consideration of £600 lent to him, Edward Barrett assigned to his father all the share or interest of him the said Ed. Barrett whatsoever under three several indentures of settlement, and of and in the securities whereon the same or any part thereof were or might be invested, subject to a proviso for making the assignment void upon payment of the principal sum and interest at 5 per cent. per annum on the 24th of October, 1875. The indenture contained a covenant by Ed. Barrett to pay the principal sum and interest on the last-mentioned day, and a power of sale in default of payment, but did not contain a covenant to pay interest in the event of the principal sum, or any part thereof, remaining unpaid after the 24th of October, 1875.

On the 22nd of June, 1875, Ed. Barrett paid £78 on account of principal. No other payment, either on account of principal or interest, was ever made.

In 1878 Ed. Barrett assigned the same property to the defendant, subject to the above-mentioned mortgage, and notice of this assignment was given to George Barrett by the defendant.

George Barrett died in 1889, and the plaintiff subsequently became entitled by transfer to the mortgage of 1875, and in December, 1889, commenced this action for foreclosure.

The chief clerk found that £397 6s. was due in respect of interest on the principal sum, calculated from the date of the mortgage. The defendant thereupon took out this summons asking that the chief clerk's certificate might be varied by disallowing part of this sum of £397 6s. on the ground that the plaintiff was only entitled to arrears of interest for the six years previous to action.

Marten, Q.C., and *R. Hornell*, for the summons.—There is no express covenant for payment of interest after the 24th of October, 1875, and a covenant will not be implied. Interest will only be given by way of damages: *Cook* v. *Fowler*, L. R. 7 H. L. 27, 22 W. R. Dig. 260; *Mounson* v. *Redshaw*, 1 Saund. 201a, note (r). If the property mortgaged had been land, even though it was a reversion, six years' arrears of interest only could have been recovered under the statute: *Smith* v. *Hill*, 9 Ch. D. 143, 26 W. R. Dig. 146; *Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 1 W. R. 400, 17 Beav. 405. The court has a discretion to limit the damages, and in so doing should follow the analogy of the statutory period: *In re Roberts, Goodchap* v. *Roberts*, 28 W. R. 870, 14 Ch. D. 49; *Ashton* v. *Dalton*, 2 Coll. 565; *Thompson* v. *Drew*, 20 Beav. 49, 4 W. R. Dig. 53; *Bolding* v. *Lane*, 11 W. R. 386, 1 De G. J. & S. 122; *Thomson* v. *Eastwood*, L. R. 2 App. Cas. 215, 25 W. R. Dig. 341; *In re Frisby, Allison* v. *Frisby*, 36 W. R. 603, *ante*, p. 65, 43 Ch. D. 106. This is a case in which the court should exercise its discretion in limiting the damages recoverable.

Renshaw, Q.C., and *Manby*, for the plaintiff, the mortgagee.—The mortgagee is entitled to recover interest at five per cent. from the date of the mortgage as damages. The mortgage is of a reversionary interest in personal estate, and no statute of limitations applies; the statute applies to real property, and cannot be extended by analogy to personal property: *Cook* v. *Fowler*; 3 & 4 Will. 4, c. 42, s. 3; 3 & 4 Will. 4, c. 27, s. 42. There is no case making the law as to a mortgage of realty applicable to a mortgage of personalty: *Smith* v. *Hill*; *In re Kerr's Policy*, 17 W. R. 989, L. R. 8 Eq. 331.

Marten, Q.C., replied.

Kay, J.—There is no doubt that in an action on the covenant in this mortgage the jury would be directed to give damages for non-payment after the day which was fixed for payment, and those damages would be measured by the interest if it was not more than five per cent., and if more than five per cent. the damages would still be at that rate. In this case, in taking the account of what is due on the mortgage, the chief clerk has included that interest in the amount at which the mortgagor may redeem.

It is said that this is wrong, because a limit ought to be set by analogy to the statute 3 & 4 Will. 4, c. 27, s. 42. It is not an analogy between a legal and an equitable debt; no doubt equity follows the analogy which is afforded with respect to a similar claim for a legal debt. But I never heard before that there was any obligation to follow, in the case of personal estate, the analogy of a statute which applies to real estate.

The Legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall be recovered; but with respect to personal estate has not enacted anything of the kind. The result is inevitable that the same rule was not to be observed, and I do not understand how there can be any analogy between the two cases.

The case amounts to this—that the mortgagor admits that he has never paid any interest, and that all these arrears of interest are due from him, and that there has been a judgment for foreclosure against him, but he contends that he is entitled to redeem on paying only six years' arrears of interest.

No authority has been produced for this contention, and there is authority against it in *Smith* v. *Hill*, in which case more than six years' interest was allowed. In *In re Roberts, Goodchap* v. *Roberts*, where the claim was not for realization of a mortgage, but for breach of covenant, a lower rate of interest—viz., five per cent.—than that fixed by the mortgage deed was given by way of damages, although the covenant did not expressly say that interest was to be paid after the date fixed for payment of the principal. Cotton, L.J., said, "We are not deciding now what rate of interest should be allowed in a suit for redemption, but simply on an action brought for breach of covenant to pay the money on a given day." An intimation which, I understand, means that if the mortgagor came asking for redemption, it is possible you might say that he should not redeem without paying interest at the higher rate.

The result is, that there is absolutely no authority whatever for the limitation of interest which the mortgagor has asked for. I see no reason why he should have any indulgence at all.

Summons refused.

Solicitors, *George E. Philbrick*; *J. P. Murrough*, for *R. E. & T. B. Mellersh*, Godalming.

Chan. Div. Kay, J. } Jan. 24.

Serle *v.* Fardell. (*a.*)

Practice — Official referee — Entering up judgment — Motion to set aside judgment — Appeal — Jurisdiction — Judicature Act, 1873, *s.* 57—*R. S. C.*, 1883, *ord.* 36, *rr.* 50, 52*a* (*Rules of December*, 1889).

When judgment has been actually entered up pursuant to a direction of the official referee under R. S. C., 1883, *ord.* 36, *rr.* 50, 52*a*, *it is too late for the unsuccessful party to apply to a court of first instance to move by way*

(*a.*) Reported by James H. Bakewell, Esq., Barrister-at-Law.

of appeal to set aside the judgment; his proper course is to go direct to the Court of Appeal.

Motion.

Upon this action coming on for trial, his lordship had made an order directing that the action should be tried before the official referee under section 57 of the Judicature Act, 1873, "who is to decide what is to be done, and to deal with the costs, and to direct judgment to be entered accordingly."

The official referee made his award, dated the 3rd of December, 1889, and directed "Judgment to be entered for the defendants against the plaintiff, with costs."

Judgment was duly entered accordingly on the 7th of December, 1889.

The plaintiff now moved, under notice dated the 21st of December, 1889, "on appeal from the judgment of the official referee," for an order that such judgment might be reversed, and judgment entered for the plaintiff, or a new trial had, on the ground that the official referee was wrong in point of law in giving judgment for the defendants, and that his findings were against the evidence; and also that the time for appealing against the judgment of the official referee might be extended.

To this motion the preliminary objection was raised that a court of first instance had no jurisdiction to set aside an award of the official referee after judgment had been entered up on it.

Millar, Q.C., and *E. Knowles Corrie*, for the defendants.—This motion is misconceived. Having sent the whole action to the official referee, your lordship divested yourself of all further jurisdiction in the matter; and the judgment that has been entered up is the judgment of the court, from which the plaintiff's only remedy lies to the Court of Appeal. It is too late to impeach the official referee's report after judgment has been entered up on it: *Bedborough* v. *Army and Navy Hotel Co.*, 53 L. J. Ch. 658, 32 W. R. Dig. 161; *Dyke* v. *Cannell*, 31 W. R. 747, 11 Q. B. D. 180.

Marten, Q.C., and *E. Boyle*, for the plaintiff.—Neither of the cases cited applies to the present case, in which judgment has been actually entered up. The court has inherent jurisdiction to set aside a judgment improperly entered.

KAY, J.—The simple question involved in this preliminary objection is whether this court has power to set aside the award of the official referee after the judgment of the court has been entered up on it. If the court itself had directed judgment to be entered up, no one could doubt that it would be too late to apply afterwards to set aside the award. Taking the analogous case of a certificate made by the chief clerk, if the court has made an order on that certificate, it is too late, after that order, to move to vary the certificate. So, in the case of an award made by the official referee, I find no power under the rules to set aside that award after judgment has been entered up. In the present case the official referee decided the questions submitted to him. Under ord. 36, r. 50, of 1883, and ord. 36, r. 52a, of 1889, he directed judgment to be entered up on his findings, and thereupon judgment was entered up; and after judgment had been thus entered this application is made to set aside his findings of the facts, and to enter a different judgment.

The question is whether I have jurisdiction to do that. Under the old practice which existed under the rules of 1875, before the present rules of 1883 came into operation, the opinion of at least one learned judge of the High Court was expressed upon this point in *Dyke* v. *Cannell*. The question in that case was as to the proper course to be adopted by the unsuccessful party to a reference under section 57 of the Judicature Act, 1873, where he desired to question the finding of the official referee, and it was decided that it was proper to move on notice to set aside the findings. There were two motions before the court, one by the plaintiff for judgment on the findings, and the other by the defendant to set aside the findings, and to remit the action to the official referee. The preliminary question was whether this latter motion was a proper course for the defendant to adopt, and the court decided that it was. In giving judgment Mr. Justice Cave, after referring to rule 34 of order 36 of the rules of 1875, which was substantially identical with rule 52 of order 36 of the rules of 1883, said this: "The report of a referee has no effect so long as it remains a report. To produce any result it has to be adopted by the court. If the party seeking to impeach the report does not do so before judgment has been given upon it, he is too late, because after judgment the report has no further value, and it is the judgment, and not the report, that is relied on by the successful party. But so long as the report of the referee is unconfirmed by a judgment of the court, I think it may be impeached. This seems to me to be a natural mode of procedure, and to be that provided for by the rules." Here I have the opinion of a learned judge who had evidently considered the matter very carefully. The effect of it is that, after judgment has been entered, it is too late to move to set aside the referee's report. I confess that seems reasonable. How can the court more formally adopt the report of the official referee than by entering up judgment upon it? And ord. 36, r. 50, of 1883, and ord. 36, r. 52a, of 1889, enable the official referee to do that which otherwise only the court itself could do—namely, to direct judgment to be entered up. That the party dissatisfied with the judgment may go to the Court of Appeal is not for one moment contested; but the question is whether a court of first instance has jurisdiction, when judgment has been entered up on the finding of the official referee to alter this finding and set aside the judgment. In the absence of any rule to that effect, I answer, it has not. It is too late to come and say the finding is wrong after judgment has been entered up on it. It is not denied that the award in this case was regular and proper in form, and that judgment was duly entered up on that award; and if the question is whether, in order to have that judgment reversed, the plaintiff should come here or go to the Court of Appeal, in my opinion he should go to the Court of Appeal.

I refuse the motion, with costs.

Solicitors, *Digby & Liddle; Saffery, Huntley, & Son.*

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) — July 2, 3.

READ v. JOANNON. (a.)

Bill of sale—Debenture of incorporated company—Necessity of registration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 17.

Debentures of an incorporated company are not bills of sale which require registration under the Bills of Sale Act, 1878, *and are specially exempted under the Bills of Sale Act* (1878) *Amendment Act*, 1882.

Appeal from the City of London Court.

The plaintiff was a debenture-holder of the Cigarette Supply Co. (Limited). The defendant was a judgment creditor of the company. The sheriff having seized and sold certain goods of the company, the plaintiff claimed them under his debenture for £1,500, and an interpleader issue was directed. The judge held that the debenture was a bill of sale within the Bills of Sale Act, 1878, and

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

was not affected by the Act of 1882. He therefore gave judgment for the defendant, on the ground that the debenture was void for want of registration as against an execution creditor.

The plaintiff appealed.

Bassett Hopkins (*H. Kent* with him), for the plaintiff.—It was held by Pollock, B., in *Debenture-holders of John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332, that the debentures of an incorporated company are not void as against execution creditors for want of registration under the Act of 1878; but if they were bills of sale under that Act they are specially exempted from its operation by section 17 of the Bills of Sale Act, 1882, for it is provided by section 3 of the latter Act that so far as possible the two Acts shall be read as one.

Dickens, for the defendant.—Before the Act of 1882 debentures were clearly bills of sale and subject to the regulations of the Act of 1878. The words of section 4 are "any agreement by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred," which clearly includes such a debenture. The question is whether the law is altered by the Act of 1882. Section 17, which is supposed to create the exemption, is strictly limited in two ways, in the first place it only applies to cases within "this Act"—that is to say, it does not affect cases dealt with by the Act of 1878, and in the second place it applies only to debentures of mortgage and loan companies, for the words "or other incorporated company" mean other company of the same kind: *Jenkinson* v. *Brandley Mining Co.*, 35 W. R. 834, 19 Q. B. D. 568. The necessity for putting in such an exemption was that debentures could not be in the statutory form provided by the Act of 1882. The question was decided in this sense in *Jenkinson* v. *Brandley Mining Co.*, and the case of *Ross* v. *Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43, is not an authority against it, because there the dispute was between grantor and grantee.

He also cited *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215, and *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260.

Bassett Hopkins in reply.

Lord COLERIDGE, C.J.—This is certainly an example of the occasional truth of Lord Westbury's famous observation, that he wished there were no cases, for if one looks at the Act of Parliament by itself, nothing, as it seems to me, could be plainer. No doubt, if there have been decisions on the point, whether by a court of appeal or by a court of co-ordinate jurisdiction, we have no right to disregard them, but must construe the Act according to the interpretation which the judges have put upon it. But I have carefully looked at the judgments in the cases which have been cited to us, and so far as I can see there is not one of them with which our present judgment in any manner conflicts. The question is whether a debenture of an incorporated company requires registration as a bill of sale. I am of opinion—and I think it right to say that my opinion does not stand alone, but is supported by that of a judge of much greater authority than myself, whom I have had the opportunity of consulting—that such debentures are not bills of sale, and are not struck at by either of these Acts of Parliament—that they never were within the Act of 1878, and are expressly exempted from the operation of the Act of 1882. I agree in theory with much of the argument for the defendant—that, for certain purposes, the Acts of 1878 and 1882 must be read separately. The Act of 1882 provides that where it is necessary to read them separately they shall be so read; but the Act does not provide that in every respect they shall be treated as different Acts; on the contrary, it expressly enacts that, as far as possible, they shall be read as if they were one Act. The Act of 1882 expressly exempts debentures from its operation, and it was necessary for the defendant's counsel to give some effect to that exemption. The effect which he proposed to give to it was this. He said that whereas the Act of 1878 required a bill of sale to be registered, the Act of 1882 required it to be registered in a particular form, that a debenture could not be in the statutory form, and that consequently it was necessary to exempt debentures from the operation of the provisions affecting the form; but he said that the effect of section 17 went no farther, but left the necessity of registration, apart from the question of form, exactly as it stood under the Act of 1878. My answer to that argument is twofold. In the first place, I asked in vain for a case or *dictum* which said in terms that debentures of incorporated companies were bills of sale requiring registration under the Act of 1878. No such case was produced. Cases were indeed cited, from certain *dicta* contained in the judgments in which, it was argued that the judges who decided them must have so thought. Whether they thought so or not, they certainly did not so hold, and, so far as I am aware, no case can be produced in which it has ever been held that a debenture of an incorporated company—a perfectly well-known instrument—was a bill of sale within the Act of 1878. Therefore the first broad answer is, that even if the Acts of 1878 and 1882 are to be read separately to the extent contended for, still the argument fails, the earlier Act having no application to such debentures.

But, secondly, there is a still more conclusive answer. Section 17 of the Act of 1882 expressly provides that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company and secured upon the capital, stock or goods, chattels and effects of such company." Now I pass by with respectful difference the *dictum*—for it is no more than a *dictum*—of my brother Grove, that an incorporated company in that section must mean a company incorporated for the purpose of mortgage or loan, or for some other purpose *in pari materiâ*. I do not agree with that *dictum*, and in that disagreement I do not stand alone, because one of my learned brothers in the other division has twice treated the section as applying to debentures of incorporated companies generally. I am, therefore, not without authority in saying that that *dictum* is not to be taken as law. "Nothing in this Act shall apply to any debentures." It seems clear, when one looks at the language of section 3 of the Act of 1882, that even if debentures had originally been within the operation of the Act of 1878, section 17 is quite sufficient to take them out of that operation, because section 3 requires that the two Acts shall, as far as is consistent, be construed as one Act, so that the words of section 17, "nothing in this Act," really mean that "nothing in this Act, or in the principal Act, shall" apply to debentures.

I have therefore come to the conclusion that the decision of the learned judge in the court below was wrong, and that this appeal must be allowed.

WILLS, J.—I am of the same opinion, and I agree with my lord, upon consideration, that debentures of an incorporated company are not, and were never intended to be, within the operation of the Act of 1878. But assume that the defendant is right on that point, and that such a debenture was within the Act. It seems to me that this case has been a very signal illustration of the danger, which it is almost impossible to escape, when an Act of Parliament has once become so overladen with decisions as this has been—namely, the tendency to fly at once to the cases without looking at the words of the statute itself, for when the language of the Act of 1882 is seriously looked at, this case, to my mind, becomes absolutely free from doubt. Section 8 of the Act of 1878 said that every bill of sale to which that Act applied should be registered. That section has been in

terms repealed, though there is the authority of the cases of *Swift* v. *Pannell*, 31 W. R. 543, 24 Ch. D. 210, and *Casson* v. *Churchley*, 53 L. J. Q. B. 335, 32 W. R. Dig. 26, for saying that that repeal does not extend to absolute bills of sale, but is confined to bills of sale given by way of security only. But this debenture, if it is a bill of sale at all, is a bill of sale given by way of security only, as to which there is no possibility of contending that section 8 of the principal Act has not been repealed. But, if so, then the only enactment requiring a bill of sale of this description to be registered is section 8 of the Act of 1882. But the moment that is conceded section 17 clearly applies, for I entirely agree with what my lord has said with reference to the impossibility of adopting the view taken by Grove, J., that "other incorporated company" means other incorporated company *ejusdem generis* with mortgage and loan companies. Then, if so, there is an express enactment that nothing in the Act of 1882, including section 8 of that Act, shall apply to such debentures as this.

Appeal allowed; leave to appeal refused.

Solicitor for the plaintiff, *Hatt.*

Solicitors for the defendant, *G. Kebbell & Miller.*

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 20.

West Ham Union *v.* Guardians of St. Giles-in-the-Fields and St. George. (*a.*)

Poor law—Settlement of pauper wife—Derivative settlement of husband—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

E. C., a pauper, was the wife of one A. C., who had deserted her and could not be found. A. C. had not acquired any settlement for himself. A. C., born in 1857, *was the legitimate son of J. C., who was born in* 1825 *in the Edmonton Union, and had not acquired any settlement for himself before his son A. C. was twenty-one years old.*

Held, that, upon the authority of the Reigate case, ante, *p.* 295, 14 *App. Cas.* 466, *the court were bound to hold that, under clause* 3 *of section* 35 *of the Divided Parishes Act*, 1876, *E. C. took the settlement of her father-in-law, J. C., as being the parentage settlement of her husband, A. C.*

Case stated by the justices of the county of London at quarter sessions.

The pauper, Elizabeth Crawley, aged thirty-two, was the lawful wife of Albert Crawley, who had deserted her and could not be found. Albert Crawley was born within the West Ham (the appellant) Union in 1857, and had not acquired any settlement for himself. Albert Crawley was the lawful son of James Crawley, who was born within the Edmonton Union in 1825, and had not acquired any settlement before his son Albert was twenty-one years old.

The justices held that upon these facts the pauper's settlement was in the appellant, the West Ham Union, but stated the case for the High Court.

Philbrick, Q.C., and *Forrest Fulton*, for the appellant union.—The pauper's settlement was that of her father-in-law, being derived through her husband, who had acquired no settlement of his own. Albert Crawley, the pauper's husband, therefore, retained the settlement of his father under section 35 of the Divided Parishes Act, 1876. That section applies to all persons who have been "children under sixteen" and who have not since acquired a settlement of their own. Section 35 does not abolish derivative settlements altogether in the case of children under sixteen and females deriving a settlement from their husbands. The wife here derives a settlement from her husband, but he, having never acquired a settlement of his own, comes under the 3rd clause of the section as "any child in this section mentioned who shall not have acquired a settlement for itself." Such child, after sixteen, retains its parent's birth settlement. This is the effect of the decision in the *Reigate case*, *ante*, p. 295, 14 App. Cas. 466.

Poland, Q.C., and *Buckmaster*, for the respondents.—The pauper takes her husband's first settlement in the appellant union. Such a reading of the words "child under sixteen" would apply to any person, and would do away with the effect of the section intended to abolish derivative settlements. The *Reigate case* does not apply here. The *Bridgnorth case*, 31 W. R. 938, 11 Q. B. D. 314, applies, and is not overruled by the *Reigate case*. The 3rd clause of section 35 provides that a child when over sixteen shall be deemed to be settled in the parish in which he or she was born, if he or she has acquired no other settlement, and the settlement of the parent can only be found by inquiring into that parent's derivative settlement.

Philbrick, Q.C., in reply.—It is admitted that the quarter sessions could not go on to inquire into James Crawley's derivative settlement, but they can into Albert's derivative settlement. The section only provides against a double derivative settlement being inquired into.

He cited *Dorchester Guardians* v. *Poplar Guardians*, 36 W. R. 706, 21 Q. B. D. 88.

Lord Coleridge, C.J. — I should have had no difficulty in coming to a clear decision on this case had not the decision of the House of Lords in what is called the *Reigate case* been binding upon us. It is, however, more important that people should know what the law has been decided to be than that they should be made aware of the merits of any particular case. It is of great importance that families should not be unnecessarily divided. That was the object of recent legislation. Looking at section 35 of the Divided Parishes Act, 1876, under the light of the decision in the House of Lords, one can only say that although the word "child" apparently only refers to a child under sixteen, being legitimate, yet it must be taken to apply to a legitimate child over sixteen, and that any person coming under that description who has not acquired a settlement for himself must be taken to be included under the provisions of that section. And, again, it must be taken that such a child over sixteen, being legitimate, does not come under the words "no person" at the beginning of the section; so that a person coming within this description of child shall be deemed to derive a settlement from another person though the section says that "no person shall be deemed to have derived a settlement from any other person" except in the cases mentioned—viz., being a child under sixteen, &c. The section has been so construed by the highest tribunal, and we must therefore accept this construction. In the case, then, of this female pauper taking the settlement of her husband, who had acquired no settlement except a birth settlement unless he derived one from his father, the House of Lords says that he must be deemed to derive a settlement from his father although the section of the Act seems to say the opposite. A man must be taken, then, to have a settlement by parentage so long as that settlement is not in itself a derivative settlement; and it follows that a pauper over sixteen, being legitimate, and not having himself since that age acquired a settlement, but whose father has a non-derivative settlement, himself acquires that father's

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

settlement. The pauper here, therefore, must be deemed to acquire James Crawley's settlement, and this appeal must be allowed and the order of the justices be amended to that effect.

WILLS, J.—I am of the same opinion. Apart from the judgment of the House of Lords in the *Reigate case* I should have thought that the husband of the pauper could not under the Act have derived a settlement from his father. The House of Lords, however, upon the facts of three cases before them, have put a different construction upon the effect of this section 35, and Lord Watson's judgment sums up the law upon the subject. His first four statements of the law do not apply to this case, but his fifth statement does, where he says, "subject to these provisions and limitations the effect of section 35 is to reserve to children the same rights in relation to parentage which they possessed under the then existing law."

The present case being taken as stated, we can only apply the existing law to it. The facts are that Albert Crawley, the pauper's husband, had a birth settlement, having acquired no other, which settlement would *primâ facie* be his, but then it is found that his father had a settlement. If so, and if that is all that is known, the children of that father who had not acquired a settlement for themselves must be taken to retain the same right, as they had before this Act passed, to derive a settlement from their father; and upon this state of facts Albert Crawley's settlement would be that of his father. On the grounds stated, in accordance with Lord Watson's judgment, this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Hillearys & Co.*

Solicitor for the respondents, *A. C. Crownin.*

Privy Council.

Dec. 13. 17, 1889; Feb. 1, 1890.

BOOTH v. RATTÉ. (a.)

River—Riparian owner—Erection of wharf in navigable river—Damages.

A riparian owner is entitled to damages for any unauthorized interference with the flow of the stream on which he has erected a floating wharf and boathouse, the said erections not obstructing the navigation.

This was an appeal from a decree dated the 29th of June, 1887, of the Court of Appeal for Ontario, affirming a decree of the Divisional Court, dated the 6th of March, 1886, which reversed a decree of Proudfoot, J. (11th of November, 1885).

The facts are stated in their lordships' judgment.

Bompas, Q.C., and *Gore*, for the appellants.—The respondent has not made out his title to access to the river. At any rate, as regards the wharf and boathouse he was a mere trespasser, and these were an obstruction to the rights of navigation reserved to the Crown by the patent of the 24th of December, 1850. (See also 23 Vict. c. 2, s. 35, as incorporated in the Revised Statutes of Ontario, c. 23, s. 47).

They referred to *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, 35 W. R. Dig. 71; *Child* v. *Starr*, 4 Hills New York Rep., 369; *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300, 12 W. R. C. L. Dig. 119; *Attorney-General* v. *Terry*, 22 W. R. 395, L. R. 9 Ch. App. 423.

(a.) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

Jeune, Q.C., and *Rubie*, for the respondent, were not heard.

The judgment of their lordships, Lord HALSBURY, C., Lord WATSON, Sir BARNES PEACOCK, and Sir RICHARD COUCH, was delivered by

Sir RICHARD COUCH.—The suit to which this appeal relates was brought by the respondent in the Chancery Division of the High Court of Justice of the Province of Ontario against the appellants, who are severally owners of saw mills in the city of Ottawa, on the Ottawa river. It was first heard by one judge who dismissed the suit. On an appeal to the Divisional Court, that court set aside his judgment and gave judgment for the plaintiff, and ordered that it be referred to one of the masters of the court to inquire and state the amount of the damages the plaintiff had sustained, and the amount of such damages for which the defendants were respectively liable. The defendants appealed to the Court of Appeal for Ontario, which court dismissed their appeal, and they have appealed to Her Majesty in Council.

The plaintiff has a floating wharf and boathouse on the Ottawa river, about half a mile below the saw mills of the defendants. The wrongful acts complained of are thus described in the judgment of the Chancellor of the Divisional Court:—"The evidence very clearly establishes that the defendants are wrong-doers who from their mills allow sawdust, blocks, chips, bark, and other refuse to fall into the River Ottawa, and thereby pollute the water and impede navigation. This refuse accumulates in great floating masses, substantial enough occasionally for a man to walk upon, and the tendency of the currents and the prevalent direction of the winds bring these masses in front of the plaintiff's property up to his boathouse and wharf and the banks of his lot. Deposits of sawdust are thus by degrees formed before his property, and they result not only in fouling the water, making it offensive both to taste and smell, but produce from the gas generated underneath the surface frequent explosions, which are disagreeable and sometimes dangerous. It is thus proved that the plaintiff sustains special injury beyond the rest of the public by this unauthorized interference of the defendants with the flow and purity of the stream. He is injured in the personal enjoyment of the property and the river, and he is injured in the business which he follows of hiring and housing pleasure boats."

No evidence was given for the defendants. The defence they relied upon was that the plaintiff had no title to maintain the action. The root of the plaintiff's title is a grant from the Crown under the Great Seal of the Province of Canada, dated the 24th of December, 1850, to Joseph Aumond, of a piece of land in the town of Bytown, by the following description:—"Being composed of water lot number one in letter O in the aforesaid town of Bytown, being butted and bounded as follows, that is to say, commencing where a stone monument has been planted on the west side of Metcalfe-street, at the south-east angle of the said water lot; then north 23° 30′ west, three chains more or less to where a monument has been planted on the north-east angle of the said water lot, south 66° 30′ west, four chains ten links more or less to a point in the Ottawa river two chains distance from the shore: then southerly parallel to the general course of the shore to a point in the northern limit of Cathcart-street produced on a course of south 66° 30′ west distant two chains from the aforesaid shore of the River Ottawa; then north 66° 30′ east six chains ninety-six links more or less to the place of beginning." The power of the Crown to grant water lots in harbours and navigable rivers, subject to the public right of navigation, in Upper Canada was declared by the Act 23 Vict. c. 2, s. 35, Canada Statutes. Aumond appears to have sold portions of the water lot to different persons, and

by a deed dated the 2nd of November, 1866, he sold and conveyed to Amable Prevost, amongst other lands, water lot number one, more particularly described in the deed from the Crown, excepting certain portions of the lot sold and conveyed by several conveyances to other persons who are named. By a deed dated the 23rd of July, 1867, Prevost sold and conveyed to the plaintiff part of the water lot granted by the Crown to Aumond, by the following description of the boundary towards the river:—"Thence along the northerly line of Cathcart-street in a westerly direction to the water's edge of the River Ottawa, thence along the said water's edge down the stream in a northerly direction to the line of Bolton-street." It will be observed that here the boundary on the river side is called the water's edge, whilst in the Crown grant the boundary of the land granted is two chains from the shore, and the contention of the defendants at the original hearing and in the appeals was that the plaintiff was not entitled to the two chains.

Before the conveyance to the plaintiff was executed he was put in possession, by Prevost, of the subjects which were to be conveyed to him, and constructed a floating wharf and boathouse, in size sixty feet long shore and sixteen feet wide, and moored it to the bank of the river. In 1874, or about that time, he increased the size of the wharf and boathouse to 140 feet in length, by forty feet in width. It draws four or four and a half feet of water, and floats chained at each end. There is no evidence as to the depth of the water at the side or in front of it. The plaintiff has from the time when the wharf and boathouse was first placed there, occupied it without any question or objection by either the Crown or Prevost, and by means of it has been doing a very considerable business as a letter of boats, &c.

This is not a case of a stranger taking possession of part of the two chains. The plaintiff moored the wharf to the bank where he thought fit, by virtue of his purchase, and had possession. The expression "along the water's edge" may either signify the line which separates the land from the water, or a water space of greater or less width, constituting the margin of the river. The description in the conveyance is capable of being explained by possession, and it appears to their lordships that the possession which, in this case, has followed upon the conveyance is sufficient to give the plaintiff a good *primâ facie* title to the whole of the two chains as against Prevost. Even if he had not such a title, and occupied only by the permission of Prevost, that would be sufficient to entitle him to maintain the action. No question arises in this case as to the wharf and boathouse being an obstruction to the navigation, but it may be noticed that the Chancellor in his judgment in the Divisional Court says:—"Here all the tendency of the evidence as to the position of the plaintiff's bank, the bay there formed at a distance of 700 feet from the main channel, the great width of the Ottawa, its ample facilities for shipping apart from the comparatively narrow strip where the plaintiff's wharf is moored, the fact that the plaintiff has thus occupied the property in question for over twenty years, all strongly suggest that he has done nothing detrimental to river and navigation, but that on the contrary his wharf has been a benefit to the boating public." So from being an obstruction to navigation, the maintenance of a floating wharf of that kind is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner the plaintiff would be at liberty to construct such a wharf, and would be entitled to maintain an action for the injuries to it which are complained of.

For these reasons their lordships agree with the Divisional Court and the Court of Appeal that judgment should be given for the plaintiff, and they will humbly advise Her Majesty to affirm the judgment of the Court of Appeal and dismiss this appeal. The costs will be paid by the appellants.

Solicitors for the appellants, *Bompas, Bischoff, Dodgson, & Coxe.*

Solicitors for the respondent, *Pritchard & Sons.*

Court of Appeal.

From Chan. Div. July 17.

WINDHILL LOCAL BOARD OF HEALTH *v.* VINT. (*a.*)

Contract — Illegality — Highway — Prosecution for obstructing highway—Agreement for withdrawal—Stifling a prosecution—Specific performance.

There can be no valid agreement for the withdrawal of a prosecution where the offence is a matter of public concern, because, even though there may be no injury to the public in the particular case, the determination of what ought to be done in such a matter ought not to be withdrawn from the ordinary administration of the law and taken into the hands of private individuals. Such an agreement amounts to stifling the prosecution—i.e., putting a stop to it otherwise than in the ordinary course of law, and is none the less a diversion of the course of justice, though the terms of the contract be in fact such as to carry out the object of the prosecution.

At the trial of an indictment brought by a local board against certain persons for obstructing a highway, an agreement was come to that the defendants should restore the highway within seven years; that in the meantime the indictment should lie in the office; and that when the defendants had carried out their undertaking to restore the highway the board should consent to a verdict of "Not guilty." The terms were approved by the court. The defendants not having restored the highway within the agreed term, the board brought an action for specific performance of the agreement.

Held (affirming the decision of Stirling, J.), *that the prosecution in the present case was in respect of a matter of public concern; that the effect of the agreement was to put an end to that prosecution in a manner not depending on the ordinary course of the administration of justice; and, consequently, though the agreement was not entered into in consideration of any personal benefit to the prosecutors, it was illegal, and could not be enforced.*

Keir *v.* Leeman, 6 *Q. B.* 308, 9 Ib. 371, *followed.*

Appeal from Stirling, J.

The defendants were indicted on the prosecution of the plaintiff board at the Leeds Summer Assizes in 1880 for obstructing a highway called Gaisby-lane, in the district of the plaintiff board, by digging and excavating a stone quarry to a great depth, the whole width of the roadway. The defendants pleaded "Not guilty," though they had no real defence to the prosecution. An agreement was then come to between the parties, and a written memorandum, dated the 4th of August, 1880, was signed by their respective solicitors and initialled by counsel, whereby it was agreed (subject to the approval of the court), (1) that the defendants should within seven years from that date restore Gaisby-lane between specified points, and give it a minimum width of ten yards; (4) that on those and certain other conditions, the board would concur in the necessary steps for stopping up the footpath; and (5) that the indictment should lie in the office as a security for the observance of the terms agreed upon, and that such terms

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

should, if required by either party, be embodied in a deed to which the plaintiffs, the defendants, and one George Vint were to be parties, and that as soon as the terms of the agreement had been complied with, a verdict of "Not guilty" was to be consented to by the board. At the trial the court approved of the terms, and ordered the indictment to lie in the office. The terms were accordingly embodied in a deed dated the 9th of November, 1880, which contained a covenant by the defendants to restore Gaisby-lane within seven years from the 4th of August, and to make the road of the stipulated width. At the end of the seven years the defendants had not restored the highway, and the board brought this action to enforce specific performance of the covenant.

Stirling, J., held that the covenant was based on an illegal consideration, and could not be enforced, and though he absolved the parties from any unlawful intention, he considered he was bound by the principle laid down in *Keir* v. *Leeman*, 9 Q. B. 371, at p. 395.

The plaintiffs appealed.

Graham Hastings, Q.C., Bardswell, and *R. S. Wright,* for the appellants.—The question is whether the consideration is illegal. There was really no stifling of a criminal prosecution here, and as that is the test of illegality the consideration was not illegal: *Wallace* v. *Hardacre*, 1 Camp. 45; *Williams* v. *Bayley*, L. R. 1 E. & I. App. 200, 14 W. R. H. L. Dig. 4. "Stifling" implies a corrupt bargain. Here there was no personal benefit to the prosecutors. *Fallowes* v. *Taylor*, 7 T. R. 475, is a clear decision in our favour. Other cases are *Coppock* v. *Bower*, 4 M. & W. 361; *Keir* v. *Leeman*, 6 Q. B. 308 (and in the Exchequer Chamber), L. R. 9 Q. B. 371, which is the case mainly relied on against us. This road is vested in the board, and they might have brought a civil action: *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904. [*Sir H. Davey, Q.C.*, referred to *Wallasey Local Board* v. *Gracey*, 35 W. R. 694, 36 Ch. D. 593.] In *Ex parte Dobson*, 11 W. R. 330, it was held that where an order had been made directing the criminal prosecution of a bankrupt for misdemeanour, under the Bankruptcy Act, 1861, the court would stay such proceedings on payment of an adequate sum to the assignees. Indictments for obstruction and non-repair, though in form criminal, are really civil proceedings—so much so that an Act has been passed to allow parties to give evidence in such cases. The principle underlying all the cases is that an agreement is illegal where the object of the prosecution which is to be stopped is to punish the offender. Here the object is not to punish the offender, but simply to enforce the law. Upon conviction for obstruction of highways a nominal fine is sometimes imposed, and if the defendant satisfies the court that he is about to remove the nuisance, the court may order the writ to be suspended, or to lie in the office for a certain time to give the defendant an opportunity of removing the nuisance himself: Short and Mellor's Crown Office Practice, p. 235. Again, in Chitty's Criminal Law, 2nd ed., at p. 429, it is stated that on an indictment for neglecting to repair a highway the defendant may confess, and upon affidavit that the way is repaired, may submit to a small fine. In *Reg.* v. *Paget*, 3 F. & F. 29, Wightman, J., held that on an indictment for obstructing a highway, where it appears that the obstruction has been removed, there is substantially an end of the proceeding, its object having been attained. There was nothing in the intention of the agreement here so contrary to the policy of the law as to make it inadmissible. There would have been nothing illegal in the plaintiffs dropping the prosecution. The agreement was under seal, so that no consideration was necessary. Was there, then, anything illegal in agreeing to do something which they had an unquestionable right to do without an agreement? Not unless the purpose or effect was to thwart the object of the law. [FRY, L.J., referred to *Hall* v. *Dyson*, 17 Q. B. 785.] Stirling, J., decided against the plaintiffs with reluctance, feeling the hardship of their case, but he thought he was bound by *Keir* v. *Leeman*. There, however, the facts were very different from those of the present case; besides that, the offence there was much more serious. The object of the law in prosecutions for obstructing highways is not to punish the offender, but to get the obstruction removed. The agreement was really no more than an agreement to ask the court for a stay of proceedings, in order that the object of the prosecution might be brought about in a reasonable way. In every case from 1774 to 1884 the test applied by the judges has been whether the effect of the agreement in question was to "stifle the prosecution." The reason why a prosecution must not be stifled is that, if once dropped, it cannot be taken up again—*nemo bis vexari potest*. That reason does not apply here, as, the obstruction being a continuing nuisance, anyone can prosecute as long as it lasts. [LOPES, L.J., suggested that the proper course would have been to have let the offender be found guilty, and then to have postponed judgment, and if he abated the nuisance within a reasonable time, to have then inflicted a nominal fine.] The agreement is illegal only if the object or effect is to prevent the law being carried out: *Johnson* v. *Ogilby*, 3 P. Wms. 277. There must be an intention to do something wrong: *Collins* v. *Blantern*, 1 Sm. L. C., 9th ed., at p. 398. [LOPES, L.J.—Is not the reason of the thing that it is considered inexpedient to stop the course of the law where a public right is involved?] There was no stopping the course of the law here.

They also referred to *Edgcombe* v. *Rodd*, 5 East, 294; *Beeley* v. *Wingfield*, 11 East, 46; *Reg.* v. *Hardey*, 14 Q. B. 529; *Fisher* v. *Apollinaris Co.*, 23 W. R. 460, L. R. 10 Ch. App. 297; and *Flower* v. *Sadler*, 10 Q. B. D. 572, 31 W. R. Dig. 45.

Fischer, Q.C., Sir H. Davey, Q.C., and *R. C. Glen,* for the respondents, were not called on.

COTTON, L.J.—This is an appeal from the decision of Stirling, J., that the action be dismissed on the ground that the agreement sued upon was an illegal one, and that it was an agreement to stifle (to use the word that is so commonly used) a prosecution.

I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here; because this was clearly a prosecution on a public matter—a matter which concerned the public. It was an interference with the public highway in a very serious manner; and this agreement was made to postpone the prosecution for a considerable time, and that could, of course, only be done with the consent of the judge. There was an agreement that, upon certain acts being done by the defendants who were prosecuted, the prosecutors would not object to a verdict of "Not guilty." Now, how was the course which was adopted, dealt with and defended by the counsel for the appellants? As I understood Mr. Graham Hastings' argument, he said that if there was no money received for the private benefit of the prosecutor, such an agreement was not illegal. It was said on the other hand by Mr. R. S. Wright (and I think that was the more reasonable argument) that such an agreement would not be illegal unless the agreement had for its object the preventing effect being given to the law or preventing the object of the prosecution being attained. It is impossible, to my mind, to accede to Mr. Graham Hastings' argument. But I go further, and say that I cannot accede to the argument addressed to us by Mr. Wright. I put it to him whether he could find any

authority in favour of such an agreement being legal, and he very fairly admitted that he could not. But he said that what was stated in his argument, which I have referred to, must be the reason of the thing. To my mind the reason of the thing goes deeper than that: it is this—that the court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution where the offence is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals, even if they are a *quasi*-public body like the plaintiffs here, but ought to be left to the due administration of the law, and to the judges who can determine what in the particular case ought to be done. I think that is independent of the question whether in the particular case there can be or cannot be any injury to the public; but the administration of the law and the object which the law has in view, cannot be taken out of the hands of the judge, and put into the hands of a private individual. That, to my mind, is illegal.

I will not go into the authorities, but many of them have been referred to. They do not lay down that view definitely, I agree; but that must be the object, and that must be the principle upon which the cases are decided. I think I need hardly refer to the case of *Keir* v. *Leeman*; but it is laid down there that stifling a prosecution for a public object is illegal, and that must be upon the principle I have referred to, even though in the individual case it could be shown, or would be shown, that there is no injury to the public in taking the administration of the law out of the hands of those to whom it is committed—namely, the judges—and putting it into the hands of a private individual to determine what shall be done in the particular case. Here it was also argued that there was not a stifling of the prosecution; but I think that stifling (one need not go to the words) does mean this:—the preventing the prosecution which has been instituted being conducted in the ordinary course. I think here this certainly does so; because, not only does it postpone it, but there is an agreement by the prosecutors that certain things shall be done—I will not enter into the question whether that is all that ought to be done or not—and if certain things are done, the prosecutors, who have taken the matter into their hands, would not object to a verdict of "Not guilty."

In my opinion, the decision of Stirling, J., was right, and the appeal must be dismissed.

FRY, L.J.—In this case the contract provided that the indictment which was pending should lie in the office (in the language of the agreement) for the term of seven years, and that when the terms of the agreement were fulfilled a verdict of "Not guilty" should be consented to by the local board. In my judgment, that means an agreement to stifle the prosecution—that is to say, an agreement to put an end to it in a manner which does not depend upon the ordinary course of law. It is to put an end to it, in a certain contingency, by consent.

Now I confess it appears to me that the law upon this point is determined by the case of *Keir* v. *Leeman*. That lays down this principle (which I take to be one of general application) that where the matters of indictment are matters of public concern, they are not the subject of compromise. To use the language of the learned judge in the Court of Queen's Bench: "These are matters of public concern, and therefore not legally the subject of a compromise." A similar thing was held in the same case when it came before the Court of Exchequer Chamber, and the Lord Chief Justice of the Common Pleas in delivering judgment in that court, says: "The offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence." I think, therefore, the whole inquiry is this—whether the subject of the indictment in the present instance is a matter of general public concern. That question, it appears to me, must be answered in the affirmative. Therefore, upon the principle of that case, it appears to me that the decision of Stirling, J., was correct.

But then two arguments are addressed to us. It is said that that principle does not apply where the benefit secured by the agreement is a benefit secured to the public by the contracting party, and not to some private individual whom he desires to favour. I am of opinion that no such exception can be made. If that exception were valid it would seem to follow that a prosecution for manslaughter, or, for aught I know, for murder, could be validly compromised with the prosecutor on agreement that the defendant pay £1,000 to the Chancellor of the Exchequer, because that would be a consideration for the public benefit. But I do not think the prosecutor is at liberty to weigh the advantage to the public in continuing the prosecution, against the advantage of some sum of money being paid to the public, or against something else which is to be done, and that he has no right to put those two things into the balance, and determine in favour of the one as against the other.

Then it is argued by Mr. Wright that there is another exception to the rule, and it is this, that if the stipulation in the contract is to the same effect as the object of the prosecution, or, in other words, if the object of the prosecution is carried into effect by the terms of the contract, the contract is valid, and the compromise is good. It must be admitted that no case can be produced in support of this contention, nor does it appear to me to be sound in principle; because the result of it is to remove from the ordinary administration of the law by the court, the decision of a question which was pending before it.

Now, to illustrate it by the present case, if this case had taken the ordinary course it would have been for the learned judge before whom the defendants might be brought, to pass sentence, to determine what was to be done with them, and if he thought a serious outrage had been done to public rights he might have shown his sense of the impropriety and wrongfulness of the defendants' conduct by fine or by imprisonment. Now that whole power which would be vested in the judge before whom, after the adjournment, the case might come, is taken away from that judge (so far as the contracting parties could take it) by one of them consenting that a verdict of "Not guilty" should be entered. We have, therefore, a case in which a contract is entered into for the purpose of diverting—I may say perverting—the course of justice; and, although I agree in this case it was entered into with perfect good faith and with all the security which could possibly be given to such an agreement, I nevertheless think that the general principle applies, and that we cannot give effect to the agreement, the consideration of which is the diverting the course of public justice.

For these reasons I think the appeal fails.

LOPES, L.J.—I entirely agree with the judgments which have been delivered, and have but a very few words to add.

As a general principle it may be stated that it is the duty of every prosecutor, where the public are interested, to prosecute either to conviction or to acquittal. Again, it may be stated as a general principle that it is inexpedient to stop the course of the law in a criminal matter where a public right is involved—that it is inexpedient to take out of the hands of the law, and commit to an individual, the determination of what is to be done in a particular case. Now, those being general principles, with regard to the present case I have only to state that, in my opinion, this case falls

well within the decision of *Keir* v. *Leeman*, and I shall satisfy myself by merely citing the words at the end of Lord Denman's judgment. He says:—"But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Now there can be no doubt that in the present case the offence was of a public nature, and, in my opinion, the consideration for the agreement which was entered into was the consent to an acquittal in the future, which seems to me, in effect, to be a stifling of a prosecution. I think that the agreement in question was against public policy and illegal, and that, therefore, the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W. & J. Flower & Nussey*, for *Killick, Hutton, & Vint*, Bradford.

Solicitors for the respondents, *Jaques, Layton, & Jaques*, for *Lancaster & Wright*, Bradford.

From Chan. Div. April 2.

TUCKER *v.* NEW BRUNSWICK TRADING CO. OF LONDON. (*a.*)

Injunction — Undertaking as to damages — Damages sustained by others than parties restrained.

As a general rule, where an interim *or interlocutory injunction is granted, the undertaking as to damages should not be limited to the damages sustained by the party restrained.*

An action was brought against A., B., and the C. Co. for an injunction to restrain the C. Co. from confirming by general meeting certain agreements between them and the other defendants. An interim *injunction having been granted, A.'s counsel asked for the usual undertaking as to damages, and plaintiff's counsel replied that it would, of course, be given. B. did not appear, not having been served with notice of the motion for the injunction. In drawing up the order the registrar limited the undertaking to damages sustained by the C. Co. (as being the only parties restrained by the injunction), and the order was passed and entered in that form. A. and B. having appealed, and asked that the undertaking might be extended to damages sustained by them respectively,*

Held, that, A. having asked for an undertaking, and the plaintiff's counsel having assented, the order must be set right by extending the undertaking to damages sustained by A., but that B., not having applied for or been promised an undertaking, could not now get it extended to damages incurred by him, for that, the court having no power to order an undertaking to be given (an undertaking being merely a condition which the court has power to impose upon the granting of an injunction), the court cannot extend such an undertaking subsequently in the way proposed, as the party might, if asked at the time, have preferred to forego his injunction.

Held, further, that A. ought to have applied to the judge below to set the order right, even after it has been passed and entered, as not correctly expressing the effect of the judgment pronounced, and consequently no order as to the costs occasioned by the appeal would be made.

Appeal from Chitty, J.

The plaintiff was a shareholder in the defendant company, and it appeared that, in reliance upon certain agreements, he had given a guarantee for the company. He had since brought this action against them, and against J. T. Matthews, Lamplough & Co., and the Bank of Montreal, for an injunction to restrain the company from confirming at a general meeting either an agreement of the 26th day of February, 1890, between C. E. Lamplough, J. T. Matthews, W. Lamplough & Co., and the defendant company, or another agreement of the same date between the said defendant company and J. T. Matthews, and also for an injunction to restrain Matthews and the defendant company from registering either of the two last-mentioned agreements in Canada as a document affecting or dealing with any landed property of the company in Canada.

The plaintiff having applied *ex parte* for an injunction, Chitty, J., refused such application, but gave leave to serve short notice of motion, which was accordingly served on the company and on Matthews, and when the motion came on Chitty, J., ordered it to stand over for a week, granting an *interim* injunction till then, against the company only. On behalf of Matthews the usual undertaking as to damages was asked for, and the plaintiff's counsel replied that of course it would be given.

The registrar, however, drew up the order in such a way as to limit the undertaking to damages sustained by the defendant company, though the question whether it ought not to extend to damages sustained by Matthews was discussed before him.

When the motion came on again, it was directed to stand over, without any further order being made, and a petition to wind up the company was now pending.

Matthews and Lamplough & Co. appealed from the order granting the *interim* injunction so far as it limited the plaintiff's undertaking to damages sustained by the company, and asked that it should be extended to include damages sustained by them or either of them.

Stokes, for the appellants.

Alexander Young, for the plaintiff.—Such an undertaking is always limited to damages sustained by the person against whom the injunction is granted, and that is the meaning of the phrase "the usual undertaking." In any case the Court of Appeal could not now extend it, because they cannot compel an undertaking to be given, and the plaintiff would have chosen to forego the injunction rather than give the extended undertaking. Moreover, the appeal is an entirely useless one, Matthews having suffered no damage. [COTTON, L.J.—In that case you will not have to pay anything.]

Stokes, in reply.—Lamplough & Co. are parties to the agreement, and are damnified by the injunction as much as the defendant company. They ought, therefore, to be protected by the undertaking, which is always given in such cases: *Chappell* v. *Davidson*, 8 De G. M. & G. 1. As to Matthews, counsel gave the undertaking orally, and the registrar was, therefore, clearly wrong in his case. As to Lamplough & Co., they had not been served, so that the order was *ex parte* in their case, and they ought not to be prejudiced. Can a plaintiff, having got all he wants, refuse to pay the stipulated price for it?

COTTON, L.J.—This is an appeal under somewhat unusual circumstances. An application was made by the plaintiff for an injunction, which was granted on the terms of "the usual undertaking" being given as to damages. Both the company and Matthews appeared at the hearing of the motion, and counsel for Matthews applied for the usual undertaking, and the plaintiff's counsel assented. But the order was drawn up and passed with an undertaking only as to damages sustained by the company. I think that was wrong. Matthews' counsel applied for the usual undertaking as to damages, and the plaintiff's counsel said of course it would be given. He assented as to both the company and Matthews, and, accordingly, when the

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

order was drawn up, the undertaking ought to have been made to apply to damages sustained by both of those parties. Therefore, what we have now to do is this—we do not allow the appeal, but we set the order right, the order as drawn up not expressing the order as really made.

Then, as to the appeal of Lamplough & Co., in my opinion they cannot get the order as drawn up altered in their favour, because we ought not to impose on the plaintiff any undertaking which he did not actually give. If a defendant applies for an undertaking, the plaintiff has the option of declining to give it, with the result that he will not get his order. The court only makes the undertaking a condition of granting the injunction; if the plaintiff declines to give it, the court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking. Therefore, as regards Lamplough & Co., we cannot, in my opinion, impose this undertaking on the plaintiff, because he might say he did not care to have the injunction on such terms. I think that, as a general rule, an undertaking ought not to be confined to damages sustained by the person against whom the injunction is granted. In Pemberton on Decrees, 4th ed., p. 435, it is said that "the undertaking applies to all the defendants, although one or more only may be restrained." Mr. Pemberton does not give any authority for that statement, but I think it is a correct statement of the practice.

Then, as regards costs, I think if the judge himself had been applied to, he might have set the matter right; for though the order had been passed and entered, he had jurisdiction to correct it as not rightly expressing the order he had made. Extra costs have no doubt been caused by coming to this court, and I think, therefore, that we should give no costs on either side.

LINDLEY, L.J.—I agree. As regards Matthews there is no difficulty, as he asked for an undertaking and got it, and it was by a mere misapprehension on the part of the registrar that the order as drawn up did not extend the benefit of the undertaking to him. An undertaking is the price of an injunction, and if a man gets an injunction he must pay the price of it.

As regards Lamplough & Co. there is more difficulty. They did not ask for an injunction, and Mr. Young says if it had been put to him he would not have taken the injunction at the price. I think, therefore, that in Lamplough & Co.'s case this must be regarded as a step which cannot be set right.

As to the costs, I agree with Cotton, L.J.

LOPES, L.J.—I am of the same opinion.

Order as drawn up varied.

Solicitors for the appellants, *Parker, Garrett, & Parker.*

Solicitors for the respondent, *Kearsey, Hawes, & Walsh.*

From Chan. Div. March 28.

BUCKLE *v.* FREDERICKS. (*a.*)

Covenant—Restrictive covenant—Covenant not to carry on the trade of retailer of wine, spirits, or beer—Sale at refreshment bar of theatre—Injunction.

The lessee of a theatre, for the purpose of facilitating egress therefrom, bought a plot of ground adjoining it, which (as he had notice) was subject to a covenant against carrying on the trade of a retailer of wine, spirits, or beer, and upon that plot he built an annexe to the theatre containing a staircase and exits from the theatre. He also put up on each floor or landing of the annexe, a refreshment bar, at which any person paying for admission to see the theatrical performances could purchase wine, spirits, and beer to be drunk on the premises, but which was not otherwise open to the public.

Held (affirming the decision of Kekewich, J.*), that the lessee's conduct amounted to carrying on the trade of a retailer of wine, spirits, and beer, and was a breach of the covenant which must be restrained by injunction.*

Jones *v.* Bone, 18 *W. R.* 489, *L. R.* 9 *Eq.* 674, *distinguished.*

Appeal from Kekewich, J.

This was an appeal by the defendant from an order of Kekewich, J., restraining him until the trial of the action from carrying on at the Theatre Royal, Stratford, Essex, the business of an innkeeper, victualler, or retailer of wine, spirits, or beer. The defendant was the lessee of the Theatre Royal, and had purchased from one Purkis, in June, 1887, a plot of land adjoining it, upon which he had built an addition to the theatre containing a staircase for the purpose of providing additional exits in case of fire or other emergency. He had also put up on each floor or landing a refreshment bar, at which wine, spirits, and beer were sold, for the convenience of persons visiting the theatre. There were, however, no means of access to these bars except by going into the theatre while a performance was going on, and that could only be done by paying the usual charge for admission, which varied from sixpence to two shillings.

The plot of land in question had formed part of a building estate subject to restrictive conditions, one of which was that no house for the sale of beer, wine, or spirituous liquors should be erected, nor should the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer be carried on upon any lot. Purkis had purchased under the conditions and covenanted to observe them. The defendant's licence entitled him to sell beer, spirits, and wine in the theatre.

The action was brought by purchasers of other lots for an injunction to restrain the defendant from carrying on the trade aforesaid upon the plot purchased by him from Purkis, and it was not disputed that he had notice of the covenant at the time of such purchase.

Kekewich, J., held that the defendant was committing a breach of the covenant, and accordingly granted an *interim* injunction in the terms above mentioned.

The defendant appealed.

Haldane, Q.C., and *Lyttleton Chubb*, for the appellant.—There is no sale to the public here. The refreshment bars are merely for the convenience of persons attending the performances at the theatre. The case is analogous to the supplying of liquors at a club to the members, which surely would not be an infringement of a covenant like this, merely intended to prevent the establishment of anything in the nature of a public-house.

They referred to *Jones* v. *Bone*, 18 W. R. 489, L. R. 9 Eq. 674.

Marten, Q.C., and *Swinfen Eady*, for the respondents.—In the case of a club there is really no sale of the liquors: *Graff* v. *Evans*, 30 W. R. 380, 8 Q. B. D. 373. The present case is governed by *Bishop of St. Albans* v. *Battersby*, 26 W. R. 679, 3 Q. B. D. 359; and *London and Suburban Land and Building Co.* v. *Field*, 16 Ch. D. 645, 29 W. R. Dig. 66, but the covenant here is more comprehensive, and exactly applies to the breach. *Jones* v. *Bone* is distinguishable on the ground that the defendant there was carrying on a new sort of business which had sprung up since the covenant was made, and was therefore not within its purview.

Haldane, Q.C. replied.

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

COTTON, L.J.—In this case Kekewich, J., has granted an injunction to restrain the defendant from carrying on the trade of a victualler, or a retailer of wine, spirits, or beer, in a building annexed to the Theatre Royal, Stratford, the building being on a plot of ground which is subject to the restrictive covenant in question. The defendant, who is the proprietor of the theatre, in order to provide better egress from it, pulled down an adjoining house, and erected a building of considerable height, which provided exits from the different floors. But then he arranged so as to provide also upon each floor the means of selling refreshments, wine, spirits, and beer, to persons visiting the theatre. Having regard to the prices charged for admission, I think there was in this case a carrying on by the defendant of the trade of a retailer of wine, spirits, and beer. He contends that he is not carrying on that trade, but the business of a theatrical manager, and that the supplying of refreshments is merely incidental to that business. But, in my opinion, he, at any rate, carries on the sale of refreshments in such a way as to be a substantial part of the business of carrying on the theatre, and I cannot say he is not carrying on the "trade of a retailer of wines, spirits, and beer." In my opinion, we ought not to restrict the plain meaning of these words—we must not strike out from the covenant the words which forbid that. Then it was said that the case of *Jones* v. *Bone* governs this case in favour of the defendant. I do not understand that James, L.J., decided that there was in that case no breach of the covenant, but only that there was not such a breach as ought to be restrained by an injunction; and he points out the distinction between the new sort of business carried on by the defendant and that against which the covenant was directed. The present case is, moreover, a very different one, as the defendant is not (as in that case) selling beer in bottles not to be opened on the premises, but is selling it to be drunk on the premises. In my opinion, we need not go into the question whether the public could get into this building without paying sixpence or a shilling. I think the appeal fails.

LINDLEY, L.J.—The defendant here claims under a conveyance containing the restrictive covenant which we are considering, and which is divisible in fact into two stipulations. One of those stipulations is as follows:—"No public-house, beerhouse, or house for the sale of beer, wine, or spirituous liquors shall be erected." That refers to the class of buildings to be erected. Then there was this: "Nor shall the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer be carried on upon any lot." Now, the defendant is, in fact, selling by retail on his lot, wine, spirits, and beer every night in the year, except Sundays, to such of the public as choose to pay the sixpence for going into the theatre. If that is not carrying on the trade of a retailer of wine, spirits, and beer I should like to know what is. There is no doubt he would have been a trader under the old bankruptcy law. It is said he is only carrying on the business of a theatre proprietor, and that this trade is only ancillary to that. That may be quite true, but still he is carrying on the trade. It appears to me, therefore, that, upon the construction of this covenant, he is doing what he is forbidden by it to do.

Then it is contended that this case is governed by *Jones* v. *Bone*. I do not think it is. In that case, grocers having become entitled, in consequence of an alteration in the excise law, to sell wine in bottles, it was considered that by doing so the defendant there was not carrying on the trade of a "seller by retail of wine, beer, spirits, or spirituous liquors" within the covenant, which was not directed against such a trade as that carried on by the defendant in that case. Mr. Haldane says this covenant was not intended to apply to such a case as the present. But draftsmen put in general words to cover cases which do not occur to their minds at the time, and it seems to me that the draftsman here has put in general words which cover the present case.

LOPES, L.J. — There are three refreshment bars attached to the defendant's theatre, to which the public can obtain admission by paying sixpence. No doubt it may be said his chief trade is that of carrying on the theatre; but a man may carry on several trades at the same time and place. Do the facts here bring the case within the words of the covenant? Is the defendant carrying on the trade of a retailer of wine, spirits, and beer? I think he is, and I much doubt whether it is not the most profitable part of his business. I think myself that the facts here are within both the letter and the spirit of the covenant. Cases have been referred to, but I think this question must be decided on the construction of this covenant, and that none of the cases assist us. I think this appeal fails.

Appeal dismissed.

Solicitors, *M. B. King; Russell & Co.*

From Q. B. Div. July 23.

CLARK *v.* SONNENSCHEIN. (*a.*)

Practice—Referee—Motion to set aside findings—Judgment ordered by referee—Judgment entered—Power of court to enter judgment for other party—R. S. C., 1883, *ord.* 36, *r.* 52.

The court has power, in a reference under section 57 *of the Judicature Act,* 1873, *not only to set aside the judgment ordered by an official referee to be entered for one of the parties, although such judgment has been entered accordingly, but also to enter the judgment for the other party, instead of sending the case back to the referee to be reheard.*

Decision of the Queen's Bench Division, ante, *p.* 717, 25 *Q. B. D.* 226, *affirmed.*

Appeal from the decision of a divisional court (Vaughan Williams and Lawrance, JJ.) reported *ante*, p. 717, 25 Q. B. D. 226, where the facts are fully stated.

Channell, Q.C., and *Heather*, for the appellant.

Houghton, for the respondent.

The COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.), without calling on counsel for the respondent, dismissed the appeal and affirmed the judgment of the Divisional Court.

Solicitors for the appellant, *Heather & Sons.*

Solicitors for the respondent, *Powell & Rogers.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

App. Bankruptcy. July 11.

Ex parte HEPBURN.
In re SMITH. (*a*.)

Bankruptcy—Leasehold interest—Mortgage by sub-demise—Assignment by mortgagee to trustee for himself—Disclaimer by trustee in bankruptcy—Vesting order—Exclusion of mortgagee and his assignee—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 55, *sub-section* (6).

Where a mortgagee by sub-demise has, after the bankruptcy of the lessee, assigned his mortgage to a trustee for himself, he is still liable to have an order made against him at the instance of the lessor under section 55, *sub-section* (6), *of the Bankruptcy Act,* 1883, *excluding him from all interest in, and security upon, the demised property unless he elect to take an order vesting the property in him, subject to the bankrupt's liabilities in respect thereof at the date of the filing of the petition.*

Such an assignment in trust is, as between the mortgagee and the landlord, absolutely void.

Appeal from Cave, J., in bankruptcy.

In February, 1884, Smith mortgaged certain leasehold property to Messrs. Hepburn by sub-demise to secure £2,000 and interest. In the following year Smith was adjudicated a bankrupt.

In March, 1890, the trustee in the bankruptcy gave notice to Messrs. Hepburn that he intended to apply under section 55, sub-section (3), for leave to disclaim the lease.

On the 16th of April Messrs. Hepburn, by a deed of assignment, transferred the mortgage to one Adcock, a clerk, to hold the same in trust for the assignors.

On the 17th of April the trustee, by leave of the registrar, disclaimed the lease.

On the 2nd of May the original lessor served notice of motion on Messrs. Hepburn and upon Adcock for an order, under section 55, sub-section (6), that each of them should be excluded from all interest in and security upon the demised property unless Messrs. Hepburn should within a limited time elect to take an order vesting in them the whole of the property comprised in the original lease to Smith, subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date when the bankruptcy petition was filed.

Cave, J., on the 12th of June, made the order against Messrs. Hepburn, and declined to order that the property should be vested in Adcock, who was willing to accept it, subject to the liabilities.

From this order Messrs. Hepburn appealed.

Cozens-Hardy, Q.C., and *Yate Lee*, for the appellants.—This order cannot be made against Messrs. Hepburn, but only against Adcock, although we admit that he is a mere nominee of Messrs. Hepburns'. The words in section 55, sub-section (6), "person claiming under the bankrupt, whether as underlessee or as mortgagee by demise," must include the transferee of a mortgage; the person meant is the person in whom the lease is vested—that is, Adcock, not Messrs. Hepburn. When Messrs. Hepburn transferred the mortgage they had a perfect right to do so; they were then under no legal liability to the original lessor: *Cox* v. *Bishop*, 5 W. R. 437, 8 De G. M. & G. 815. The Legislature did not intend to give the landlord this great benefit by means of the bankruptcy of his lessee—the substitution of a solvent for an insolvent tenant. This deed of assignment was not a mere sham; it intended to operate as it actually operated—as a transfer of the legal estate: *Fagg* v. *Dobie*, 3 Y. & C. Ex. 96.

Woolf, Q.C. (*A. T. Lawrence* with him), for the respondent, the lessor.—Messrs. Hepburn have all the equitable interest, and are therefore mortgagees by demise within sub-section (6). It follows the order was rightly made: *In re Finley*, 37 W. R. 6, 21 Q. B. D. 475. [He was stopped by the court.]

Lord ESHER, M.R.—In this case the landlord has claimed the interference of the court of bankruptcy, and asks that a similar order should be made in his favour to the one which was made in *Finley's case*, and that that order should be made against Messrs. Hepburn as the sub-lessees. Unless the case is altered by means of the conveyancing plan which has been adopted, it is governed by *In re Finley*. The question, therefore, is, is that plan to succeed? To allow it to succeed would be to uphold that which has no effect whatever except to defeat the Act of Parliament and to take away the rights which it gives to the landlord. Where that is to be the only effect of a document this court will regard it as a sham, and will treat it as absolutely void. I will alter the words of Alderson, B., in *Fagg* v. *Dobie*, and instead of the word "fraudulent" will use the word "sham." "If a party assign nominally only, retaining the beneficial possession all the time, it is a sham, because whilst he assumes to do one thing, he really does another." That seems to me exactly to describe this case. I think, therefore, that Cave, J., was right, and that this appeal must be dismissed.

LINDLEY, L.J.—I also think that this ingenious attempt ought not to succeed. Of course, in a sense, it is legitimate; the parties to the deed meant what they said. But the object was to make an instrument which should not affect the parties to it, but which should take away rights which the landlord would otherwise have. Will this court give effect to that? The effect as between the parties is absolutely nil. If you look through the transaction you see that the real position is that the Messrs. Hepburn still remain the mortgagees, and have all the interest except such as a bare trustee has. Is this to be treated as a genuine assignment to Adcock leaving out of sight the real intention of the transaction? It is like the case of a shareholder assigning his shares to a trustee for himself in order to get rid of his liability. Sub-section (6) says that the court may make an order vesting the property in "any person entitled thereto," and Messrs. Hepburn are in reality persons entitled thereto. I think the order of Cave, J., was right.

BOWEN, L.J.—I am of the same opinion. One may start with the premiss that the landlord has rights under this section. If that be so, those rights cannot be defeated by an assignment to a trustee in trust for the assignor. Such a deed, as against the landlord, is a mere sham, and is absolutely void.

Appeal dismissed.

Solicitors for the appellants, *Hepburn, Son, & Cutcliffe.*

Solicitors for the respondent, *Barlow & James.*

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

From Q. B. Div. May 16.

SNOWDEN *v.* BAYNES. (*a*.)

Master and servant—Negligence of person to whose orders the plaintiff was bound to conform—Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1, *sub-section* 3.

A workman sought to recover compensation from his employer under section 1, *sub-section* 3, *of the Employers' Liability Act,* 1880, *for injury caused by reason of the negligence of a person in the service of his em-*

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ployer, to whose orders the plaintiff at the time of the injury was bound to conform and did conform, it being alleged that the injury resulted from his having so conformed. It appeared that on a certain morning the plaintiff was ordered to do a piece of work by S., a carpenter in the service of the defendant. The plaintiff was bound to obey the orders of S. as to what work he should do, but S. had no authority to specify any particular place where the work should be done. In the evening the plaintiff was working overtime at the piece of work in a shed which was his usual place of work. S., in stacking timber in the same shed, negligently let fall a beam which injured the plaintiff.

Held (*affirming the judgment of the* Queen's Bench Division, *ante*, p. 558), *that the plaintiff was not entitled to recover.*

Appeal by the plaintiff from the decision of a divisional court (Pollock, B., and Wills, J.) ordering judgment to be entered for the defendant, *ante*, p. 558.

The facts of the case and the arguments sufficiently appear in the report of the proceedings below.

Cock, Q.C., and *J. F. P. Rawlinson*, for the plaintiff.

A. J. Walter, for the defendant.

Lord ESHER, M.R.—I am of opinion that the appeal fails. In order that the plaintiff might succeed it was necessary that he should show that Sellick had authority to decide what work he should do, and where, and at what time. There is no evidence that Sellick had any authority to say where the plaintiff should work, or to order him to work overtime. The appeal must be dismissed.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Judge & Priestley.*

Solicitor for the defendant, *E. Hodgskin Peach.*

High Court of Justice.

Chan. Div.
Chitty, J. } July 17, 22.

SHEPHERD *v.* HIRSCH, PRITCHARD, & CO. (*a.*)

Practice—Service of writ of summons—Partnership—Dissolution unknown to plaintiff—Foreign partner out of the jurisdiction—Service on manager at place of business within the jurisdiction—R. S. C., 1883, *ord.* 9, *r.* 6; *ord.* 16, *r.* 14.

For the purposes of service under ord. 9, *r.* 6, *and ord.* 16, *r.* 14, *a partnership which has been dissolved before the commencement of the action without the knowledge of the plaintiff must be treated as still subsisting.*

Ex parte Young, 30 *W. R.* 330, 19 *Ch. D.* 124, *considered.*

Service on one partner when within the jurisdiction effected under either branch of ord. 9, *r.* 6, *is good service on all the partners, although the partnership is a foreign partnership and all the partners reside and are domiciled out of the jurisdiction.*

Pollexfen *v.* Sibson, 34 *W. R.* 534, 16 *Q. B. D.* 792, *followed.*

Russell *v.* Cambefort, 37 *W. R.* 701, 23 *Q. B. D.* 526, *discussed.*

Motion.

This was a motion to set aside the service of a writ under the following circumstances:—

The plaintiff carried on business at Lagos, on the west coast of Africa, and the defendants, Hirsch, Pritchard, & Co., were his London agents, the defendant Hirsch being a French subject, and residing in France.

It was assumed that the defendant Pritchard was within the jurisdiction when the writ was served. He was also a British subject, but (*semble*) from the language of the judgment his nationality was immaterial.

On the 25th of April, 1890, the plaintiff issued a writ against the defendants claiming an account and consequent relief.

This was served on the 23rd of April, 1890, on James Merritt, the defendants' manager, at their place of business in Fore-street, London.

On the 11th of July the defendant Hirsch moved to set aside the above service on four grounds, viz.:—

(1) That the partnership was dissolved at the time of action brought;

(2) That the plaintiff knew of such dissolution;

(3) That ord. 9, r. 6, does not apply to a foreign partnership.

(4) That the place of service was not the defendants' place of business, but only a warehouse.

Of these (1) was proved at the hearing, (2) was held not proved, and (4) was subsequently abandoned.

Levett, for Hirsch.—I take all the above points, though I contend that (2) is unnecessary, as the proviso in ord. 16, r. 14, only applies where the plaintiff had notice of the dissolution. If he had no notice the proviso must be stuck out, in which case the rule becomes the same as ord. 16, r. 10, of the Rules of 1875, under which *Ex parte Young*, 30 W. R. 330, 19 Ch. D. 124, was decided. As to the third point, see *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526; *Pollexfen* v. *Sibson*, 34 W. R. 534, 16 Q. B. D. 792; and *Davies* v. *André*, *ante*, p. 437, 24 Q. B. D. 598.

Romer, Q.C., and *Theodore Ribton*, for the plaintiff.—Ord. 16, r. 14, was altered to meet *Ex parte Young*. Previous to the alteration the point was arguable, but it is so no longer: *Vide* Lord Selborne's remarks in *Ex parte Young*, 30 W. R., at p. 331, 19 Ch. D., at 131, and Cotton, L.J., 30 W. R., at p. 331, 19 Ch. D., at p. 134.

Levett, in reply.—The business must be going on at the time of service. Mr. Merritt had not, in fact, at the time of service, the management of any partnership business, because the partnership was gone. The principle of law underlying substituted service—viz., that it is likely to come to the notice of the person sought to be served—must be considered. Then Hirsch is a foreigner, and within *Russell* v. *Cambefort*. *Pollexfen* v. *Sibson* is really overruled by that case, except as to service on the individual partner who was served within the jurisdiction, a point scarcely requiring authority.

CHITTY, J., after stating the facts as above, proceeded:—Now Hirsch says, and it is proved, that he is a foreigner resident and domiciled in France and out of the jurisdiction of this court, and that at the time the writ was issued the Fore-street business was carried on by him alone. Ord. 9, r. 6, provides, *inter alia*, that where a firm is sued, service on the manager at the principal place of business within the jurisdiction is good service on the firm. In interpreting that rule regard must be had to the principles of international law, and if the question were open to me I should have to consider whether, according to those principles, a State allowing foreigners to carry on business here may not demand from them, in return for the protection afforded by the laws of the State, submission to the ordinary rules of service on their

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

manager here. I am precluded from considering this point by *Russell* v. *Cambefort*. In that case the three members of the firm were all foreigners residing out of the jurisdiction, and service effected on their manager in England was held bad; and similarly where a foreigner residing out of the jurisdiction is sole proprietor, the service would be bad.

If these were the only facts my decision would be in favour of Mr. Hirsch. The additional facts are as follows:—[His lordship here went at length through the evidence, and after holding that the firm had been dissolved before action brought, but that the plaintiff had no knowledge of such dissolution, proceeded:—]

Now I come to the argument on ord. 16, r. 14. It is said that the proviso at the end of that rule was added to meet the decision of the Court of Appeal in *Ex parte Young*. As the order stood without the proviso there was a question of construction raised which is stated by Lord Selborne in *Ex parte Young*. On this point he expressed no opinion, merely saying he was not convinced by the argument. Cotton, L.J., however, held that the rules apply to persons who, at the time the action was commenced, were partners in an existing firm, and not to persons who have been partners in a firm which has been dissolved. Brett, L.J., was of the contrary opinion. He discussed the point at length, and held the service good.

Now when the proviso was added to the rule in question, the Rule Committee knew of this decision, which was given on the 28th of November, 1881, and of the doubts expressed by the Lord Chancellor and the differing opinions of the Lords Justices on the point whether the partnership must be a subsisting one or not, and under these circumstances they added this proviso, which provides affirmatively for the case where the plaintiff knows at the commencement of the action that the partnership is dissolved. It does not in terms provide for the case where he does not know of such dissolution, but it is impossible to read the proviso, which is a proviso in a rule relating to partnership actions, without seeing that the case was supposed to be included in the rule apart from the proviso.

Then Mr. Levett argues that there must be a continuing partnership for the rule to apply. He says that if there are three or more partners and one goes out, the rule applies to the partnership thus continued (though that, I may observe, is in fact a "new" not a "continuing" partnership), but that when there are only two partners, if one goes out the partnership is at an end, so the rule has no application. This appears to me against the express language of the rule, which says "any two or more persons," and I cannot adopt that contention.

I have now reached this point—viz., that if the business of Hirsch, Pritchard, & Co. had been carried on by Englishmen, and if the partnership was dissolved without the plaintiff's knowledge, service on the manager was good service. Mr. Levett next says that Forestreet was not the place of business of "this firm"; but it was where Hirsch, Pritchard, & Co., whoever they were, carried on business, and I therefore overrule that point.

Now I come to the last point, which is a curious one. Mr. Levett says:—"Granted that in the case of two British subjects carrying on business here, the service might be good, the facts here show that Hirsch is a foreigner. He resides in France, and is entitled to say, 'I owe no allegiance to this country, and if you want to sue me you must serve me with notice of the writ under order 11.'" For this *Russell* v. *Cambefort* is again relied on, and there are certainly observations in the judgment of Cotton, L.J., which countenance that argument. But there is a prior decision—*Pollexfen* v. *Sibson*. There all the partners were foreigners. They carried on business in America, and had no place of business within the jurisdiction, as appears from the papers which have been furnished to me. One of the partners, however—viz., Sibson—came to England, and was personally served under ord. 9, r. 6, and the question was whether it was good service on the partnership—*i.e.*, on the other partners. Mathew and A. L. Smith, JJ., held that it was, and sitting here I should, of course, follow that decision of two judges of the Queen's Bench Division.

Now Cotton, L.J., in *Russell* v. *Cambefort*, refers to *O'Neile* v. *Clason*, 46 L. J. Q. B. 191, 25 W. R. Dig. 208, and expressly overrules it. He then deals with *Pollexfen* v. *Sibson*, which, he says, does not interfere with his decision, "for there one partner was served while in England. It did not decide that service can be effected on a foreign partnership under this rule." He goes on to call attention to certain expressions of Smith, J., which are inconsistent with his view, but he does not overrule the decision. Had he meant to do so I think he would have said so, as in the case of *O'Neile* v. *Clason*. As it is, he seems to me designedly to have saved it. At all events, that decision is not expressly overruled, and I have no jurisdiction to overrule it. If I thought it wholly wrong, I could only decline to follow it.

Mr. Levett is right in saying that members of the firm sued and served here are rightly served as to all of them within the jurisdiction, though not served personally, but only by serving the manager at the place of business here, and that if I exclude foreigners out of the jurisdiction, from service under this rule they could be reached by concurrent writ for foreign service, of which notice would be served out of the jurisdiction; but I do not think that is sufficient reason for me to put so narrow a construction on the rule, or refuse to follow *Pollexfen* v. *Sibson*, which is a clear authority for the plaintiff, for in that case all the partners were American citizens, and the effect of that decision is plain. Service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership, and all the partners reside and are domiciled out of the jurisdiction. On the facts before me, although Pritchard is not a party to the motion, I am bound to decide that the service effected is a good service on him. Consequently the decision in *Pollexfen* v. *Sibson* applies, and the service is good as against Mr. Hirsch, although he resides out of the jurisdiction.

Motion dismissed.

Evidence was subsequently given showing conclusively that the plaintiff knew of the dissolution at the time of action brought, and the above order was reversed, and the service of the writ set aside.

Solicitor for the plaintiff, *Ralph Raphael.*

Solicitors for the defendant Hirsch, *Lewis & Lewis.*

NOTE.—The question raised in *Ex parte Young* had been already decided in March, 1883, under the former rules, by Watkin Williams, J., in *Davis* v. *Morris*, 31 W. R. 749, at p. 753, 10 Q. B. D., at p. 449.

Chan. Div. North, J. — June 20.

SHIPWRIGHT *v.* CLEMENTS. (*a.*)

Practice—Amendment—Decree twenty years old—Insertion of words accidentally omitted—R. S. C., 1883, *ord.* 28, *r.* 11.

In December, 1868, *S. and C., who were partners in business, dissolved their partnership, and the lease of the*

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

premises in which the business was carried on was thereupon assigned to S., and C. entered into a covenant that he would not, "during the remainder of the term of the lease," carry on business within a mile of the premises. In February, 1871, a decree was made at the suit of S. prohibiting C. from carrying on the business within a mile of the premises. S., long after the lease had expired, served C. with notice of motion to commit him for breach of the injunction, and C. served S. with notice of a cross-motion to amend the decree by inserting in it words limiting the operation of the injunction to the duration of the term of the lease, which words, he alleged, had been accidentally omitted.

Held, that the decree should be amended by the insertion of the words omitted.

Motion.

The point for decision was whether a decree of the Court of Chancery made in the year 1871 should be amended by adding what was alleged to be an accidental omission therein.

The plaintiff and defendant were formerly partners in the business of hairdressers and perfumers carried on at No. 10, Tichborne-street, which was held by them under a lease for twenty-one years from the 24th of March, 1860. In December, 1868, they dissolved partnership. The lease was then assigned to the plaintiff, and in an agreement made between them, the defendant covenanted that he would not "during the remainder of the term of the said lease," carry on the business of a hairdresser and perfumer within one mile from No. 10, Tichborne-street.

In 1871 the plaintiff commenced an action for an injunction to restrain the defendant from acting in violation of his covenant, the prayer in the plaintiff's bill of complaint asking for an injunction simply and not for an injunction limited to the duration of the lease of No. 10, Tichborne-street, and on the 20th of February, 1871, the plaintiff obtained a decree granting an injunction "perpetually to restrain" the defendant from doing certain specified acts connected with the sale of a particular perfume known as I Zingari Perfume, "and further to restrain the defendant John Bennett Clements from selling any perfume or in any other way carrying on the business of a hairdresser or perfumer within the distance of one mile from No. 10, Tichborne-street, in the county of Middlesex."

The lease of No. 10, Tichborne-street, which had been assigned to the plaintiff, and in reference to which the defendant had entered into the covenant above mentioned, expired in 1881.

The plaintiff in June, 1890, served the defendant with notice of motion to commit him for an alleged breach of the injunction restraining him from carrying on the business of a hairdresser or perfumer within a mile of No. 10, Tichborne-street, and the defendant served the plaintiff with notice of motion under ord. 28, r. 11, to amend the decree of the 20th of February, 1871, by inserting in it after the words "and further to restrain the defendant John Bennett Clements" the words "during the remainder of the term of the lease."

The Rules of the Supreme Court, 1883, ord. 28, r. 11, provides: "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal."

Higgins, Q.C., and *Warrington*, for the plaintiff.—The defendant has committed a breach of the injunction. The Vice-Chancellor may have thought that the defendant acted so badly that he granted a perpetual injunction against him without reference to the terms of the agreement between the plaintiff and defendant.

Cozens-Hardy, Q.C., and *Henry Terrell*.—The injunction was intended to be limited to the period of the duration of the lease of No. 10, Tichborne-street, and the words expressing that limitation were accidentally omitted in drawing up the decree. They ought to be inserted now under the provisions of ord. 28, r. 11.

They referred to *Barker* v. *Purvis*, W. N., 1887, p. 1; *Fritz* v. *Hobson*, 28 W. R. 722, 14 Ch. D. 542.

NORTH, J.—I think that the case is perfectly clear. [His lordship then referred to the agreements between the parties and to the deed of dissolution of the partnership, and continued:—] In 1890 the plaintiff brought an action to restrain the defendant from making the I Zingari perfume or carrying on the business of a hairdresser, or representing that the business he was carrying on was connected with that formerly carried on by the firm. The prayer asked merely for an injunction, and made no reference to a limited period only. The Vice-Chancellor took a strong view of the defendant's conduct, and used these words:—[His lordship then read a passage from the judgment, and proceeded:—] The order was clearly framed with that passage in the shorthand writer's notes, in view. The present motion is to add words to limit the period on the ground "that there is an error in the order by reason of the omission of the period for which the injunction is claimed." Mr. Higgins has said that the terms of the order are perpetual. I do not think that the word "perpetual" applies to both parts of the injunction; but if it did, my opinion would not be different, because I think that there has been an accidental omission in drawing up the order in the registrar's office. In my opinion, from the language of the Vice-Chancellor's judgment, it is clear that he did not intend the injunction to be anything but what was intended in the agreement. What the Vice-Chancellor intended was that the injunction should follow the words of the agreement. If he had looked at the agreement instead of the prayer the mistake would not have arisen. If the matter had been brought before the Vice-Chancellor he would have directed the insertion of the words omitted. The words to be inserted are, "During the remainder of the term of the lease." This insertion will not alter the former part of the decree for the injunction. I do not give costs to either party. There will be one order in both motions.

Solicitors, *Potter, Sandford, & Kilvington; Lumley & Lumley*.

Chan. Div. } March 1, 8.
North, J. }

In re EMPIRE MINING CO. (*a.*)

Company—Arrangement with creditors—Debenture-holders—Sanction of scheme by court—Jurisdiction—Joint-Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.

Debenture-holders are creditors of a company within the meaning of the Joint-Stock Companies Arrangement Act, 1870, *s.* 2, *and the court has jurisdiction to sanction a scheme which provides that the debenture-holders shall accept fully paid-up shares in substitution for their debentures, if the court is satisfied that the arrangement is fair and equitable.*

Petition.

This was a petition under the Companies Acts and the Joint-Stock Companies Arrangement Act, 1870, to obtain the sanction of the court to a scheme of arrangement between the company and its debenture-holders.

The company was incorporated in 1886 with a capital

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

of £125,000 in shares of £1 each, of which 100,300 shares were issued and were fully paid up.

In 1888 debentures were issued of the nominal value of £50 each, and at the present time the total amount outstanding was £23,700.

In October, 1889, an extraordinary resolution for a voluntary winding up of the company was passed, and by a special resolution subsequently passed the liquidators were given a general authority to sell the property of the company to another company partly or wholly in consideration of shares in such new company.

By an agreement dated the 31st of December, 1889, with the Golden Leaf Co. the liquidators agreed to sell the business and property of the company to the new company in consideration of 100,300 shares in the new company, 13s. paid, subject to the debentures.

By an agreement dated the 22nd of January, 1890, and made between the Empire Co. and its liquidators of the first part, the Golden Leaf Co. of the second part, and E. H. Young, on behalf of himself and all other the debenture-holders of the Empire Co., of the third part, it was agreed that each debenture-holder of the Empire Co. should surrender to the new company the debentures held by him and receive in exchange fifty fully-paid up £1 shares in the new company for each £50 debenture surrendered in full discharge of all principal and interest due on such debentures. The agreement was made subject to the sanction of the court and of an extraordinary resolution of the Empire Co.

On the 12th of February, 1890, a meeting of the debenture-holders was held, in pursuance of an order made by North, J., for the purpose of considering the scheme of arrangement embodied in the above agreement, at which debenture-holders to the amount of £20,550 were present, and a resolution was passed approving of the scheme by all the debenture-holders present except four, whose debentures amounted in value to £650.

On the 24th of February, 1890, an extraordinary resolution was passed by the company approving the agreement.

The other debts of the company amounted to about £9,000 in America, and £500 here. Of the former about £7,000 had priority over the debenture-holders according to American law, and of the latter £273 15s. 11d. was a Crown debt here.

Cozens-Hardy, Q.C., and *F. B. Palmer*, for the petitioners.—The court has jurisdiction to sanction this scheme under the Joint-Stock Companies Arrangement Act, 1870, s. 2, as the section applies to any class of creditors: *Slater* v. *Darlaston Steel and Iron Co.*, W. N., 1877, pp. 139, 165; *In re North-Western, &c., Co.*, Palmer's Company Precedents, 3rd ed., p. 603.

Napier Higgins, Q.C., and *Farwell*, for debenture-holders to the amount of £9,000, supported the arrangement.

Seward Brice, Q.C., and *A. Brown*, for a dissentient debenture-holder.—The court cannot deprive a secured creditor of his security without his consent. The mortgagee of a company is outside the winding up: *In re David Lloyd & Co.*, 26 W. R. 572, 6 Ch. D. 339; *In re Richards & Co.*, 27 W. R. 530, 11 Ch. D. 676; and the court will not sanction a scheme which is not fair and reasonable: *In re Dynevor, Dyffryn, and Neath Abbey Collieries Co.*, 27 W. R. 670, 11 Ch. D. 605.

They also cited *In re Bristol and North Somerset Railway Co.*, L. R. 6 Eq. 448, 17 W. R. Ch. Dig. 145, and *In re East and West India Dock Co., ante*, p. 516, 44 Ch. D. 38.

Grosvenor Woods for another dissentient debenture-holder, cited *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 582; *Griffith* v. *Paget*, 25 W. R. 523, 5 Ch. D. 894.

Cozens-Hardy, Q.C., in reply, cited *In re Mammoth Copperopolis of Utah*, Palmer's Company Precedents, 3rd ed., p. 606.

NORTH, J.—I think the proposed scheme should be sanctioned. I feel no doubt about the jurisdiction, as the Act gives the court power to bind "creditors," and debenture-holders are creditors. But should the court exercise its discretion? I felt some difficulty on this point, because the debenture-holders have a first charge on the property of the company, and the scheme proposes to deprive them of the benefit of that security, and also to give to certain unsecured English creditors priority over them; but their claim amounts to £500 only, of which £274 is a Crown debt, having priority, and £177 are the costs due to the company's solicitors, who will accept fully paid-up shares in the new company in discharge. The small balance of £48 I cannot take into account if I am satisfied with the scheme. As regards the alleged deprivation of the debenture-holders of their security, I do not think that the proposed arrangement will have that effect. Debts to a considerable amount, by the law of the American State in which the property is situate, have priority over the company's property, and as against those creditors the debenture-holders are postponed. At the meeting of the debenture-holders held to consider the arrangement they were almost unanimous in favour of adopting it. Now, if the approval of the debenture-holders must be unanimous—if the dissent of one or two holders can stop the whole arrangement—the power given by the Act to the court to summon meetings of creditors and to sanction the scheme approved by a majority would be rendered nugatory. If I were not to give effect to such an expressed opinion of the creditors as there is in this case, I do not know when the court should do so. I therefore sanction the proposed scheme.

Solicitors, *Stretton, Hilliard, & Co.; J. W. Smart; Snell, Son, & Greenip.*

Q. B. Div. (Denman and Charles, JJ.) June 9, 10, 17.

HUME v. SOMERTON. (a.)

Practice—Writ of summons—Renewal—Writ issued before Judicature Acts—Power to renew such writ without leave of court or judge—R. S. C., ord. 8, r. 1; ord. 72, r. 2.

Writs of summons issued prior to the coming into force of the Judicature Acts, come within the operation of ord. 8, r. 1, as to renewal, so that such writs cannot now be renewed without the leave of the court or a judge, as required by that rule.

Motion to set aside the service of a writ of summons.

On the 6th of April, 1861, the plaintiff issued a writ against the defendant, Lord Somerton, now the Earl of Normanton, for a sum of money alleged to be due to the plaintiff from the defendant. That writ had never, until recently, been served, but it had been regularly renewed in the manner prescribed by section 11 of the Common Law Procedure Act, 1852, down to March, 1890. It was then served upon the defendant, and the present motion was to set aside such service on the ground that the writ had been irregularly renewed.

Sir Charles Russell, Q.C., and *A. T. Lawrence*, for the defendant, in support of the motion.—Ord. 8, r. 1, applies to all writs of summons, whenever issued, and whether issued before or after the Judicature Acts. The Common Law Procedure Act, 1852, was repealed by 46 & 47 Vict.

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

c. 49, and therefore section 11 of that Act is no longer in force, and writs cannot now be renewed under its provisions. Ord. 8, r. 1, applies to all renewals, and that rule requires the leave of the court or a judge for a renewal, which leave was not obtained in this case.

Philbrick, Q.C., and *English Harrison*, for the plaintiff.—The writ has been regularly renewed under the Common Law Procedure Act, 1852, down to the present time, and the leave of a court or judge was not obtained as such leave was not necessary, as the practice with regard to the renewal of such writs was still governed by the Common Law Procedure Act, 1852, s. 11, and was in accordance with the practice of the Practice Masters' Rules (5), where it is laid down that such writs are renewed without an order (Annual Practice, 1889-90, p. 1161). Ord. 72, r. 2, keeps the old procedure alive in this respect, as it provides that "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." The words of section 5 of 46 & 47 Vict. c. 49 keep alive section 11 of the Common Law Procedure Act, 1852, as regards writs issued before the Judicature Acts.

A. T. Lawrence replied.

Cur. adv. vult.

June 17.—The written judgment of the COURT was read by

CHARLES, J.—In this case an application was made to us that the service of the writ of summons on the defendant might be set aside, on the ground that the writ was at the date of the service no longer in force. It was originally issued on the 6th of April, 1861, and it was proved to our satisfaction that it had been regularly renewed in the manner prescribed by the Common Law Procedure Act, 1852, s. 11, down to the 5th of March, 1890. Shortly after the last mentioned date it was served on the defendant.

The question now raised is whether the plaintiff can rely on the provisions as to renewal contained in the Common Law Procedure Act, 1852, s. 11, or whether he is not bound by the provisions of ord. 8, r. 1, of the Rules of the Supreme Court, 1883. If that rule applies, the service of the writ ought to be set aside, for writs of summons which come within its purview can only be renewed by order of the court or a judge, and in this case no such order has been obtained. If on the other hand the earlier statute applies, the service was regular, inasmuch as, under the terms of the 11th section, a plaintiff was at liberty to renew a writ of summons without leave.

The section is as follows:—"No original writ of summons shall be in force for more than six months from the day of the date thereof including the day of such date, but if any defendant therein named may not have been served therewith, the original concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ by being marked with a seal bearing the date of the day, month, or year of such renewal, such seal to be provided and kept for that purpose at the offices of the Masters of the Superior Courts, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a *praecipe* in such form as has hitherto been required to be delivered upon the obtaining of an '*alias*' writ, and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons."

There is no limit, it will be observed, placed upon the number of renewals which might be made, nor was it necessary for the plaintiff to show that he had made reasonable efforts to serve the defendant. His right to renew appears to have been absolutely unrestricted, and if the statute had still been in force and applicable to the plaintiff's case, it would have been difficult to hold that the mere frequency of the successive renewals, or the fact of their having been made during a period in which the defendant might have been served, constituted in themselves an abuse of the process of the court. But the Act of 1852 was repealed by the 46 & 47 Vict. c. 49, contemporaneously with the coming into operation of the rules of 1883. The preamble of the Act declares that it is expedient that various enactments mentioned in the schedule, which chiefly relate to civil procedure or matters connected therewith, and which may be regarded as spent, or the subject-matter whereof is provided for, by or under the Supreme Court of Judicature Act, 1873, and the Acts amending it, or rules made pursuant thereto, be now expressly and specifically repealed, and by section 3 provides that "the enactments described in the schedule to this Act are hereby repealed subject to the exceptions and qualifications mentioned in this Act and in that schedule." In the schedule is "the Common Law Procedure Act, 1852," except certain portions of it not material to the question now before us. Section 5 enacts that the repeal effected by the Act shall not affect, amongst other things, "(*a*) anything done or suffered before the passing of this Act under any enactment repealed by this Act, or (*b*) any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured by or under any enactment repealed by this Act," and it is contended that these words keep the Common Law Procedure Act, 1852, s. 11, alive so far as regards writs issued prior to the Judicature Acts coming into operation. But we cannot come to that conclusion. The rules under the Judicature Act and this statute ought, we think, to be read together, and, having regard to the language of the rules, we are unable to hold that, notwithstanding the repeal of the Act of 1852, the plaintiff can still act in a matter of civil procedure under its provisions.

It was not, in our opinion, a right or privilege acquired within the meaning of section 5. The rules, therefore, are the only authority under which writs can be renewed, and unless they can be applied to writs issued prior to the Judicature Acts, as well as to those issued since, there is no authority at all for the renewal of the former class of writs. For since the 24th of October, 1883, when the rules and 46 & 47 Vict. c. 49 came contemporaneously into operation, ord. 72, r. 2, cannot be relied on. That rule provides that "where no other provision is made by the Act or these rules, the present procedure and practice remain in force." As Cotton, L.J., points out in *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123, "even if no other provision is made, it is difficult to hold that this rule keeps on foot any practice or procedure contained in a repealed statute." "No person," says Mellish, L.J., in *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 69, "has a vested right in any course of procedure." But we do not decide this case on that ground, because we have come to the conclusion that ord. 8, r. 1, does make provision for writs prior to, as well as after, the Judicature Act. The prefatory note provides that the rules shall apply, unless otherwise expressly provided, so far as may be practicable to all proceedings taken on or after October 24, 1883, in all causes and matters then pending. There is no such express provision, for whatever may be the construction to be placed on ord. 72, r. 2, it certainly is not an express provision. Then ord. 8, r. 1, enacts that no original writ of summons shall be in force for more than twelve months from the day of the date thereof including the day of such date; but if any defendant therein named shall not have been served

therewith, the plaintiff may before the expiration of the twelve months apply to a court or judge for leave to renew the writ, and the court or a judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ, and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons.

It is contended that these words, which are, it may be observed, a repetition of the words used in the rules of 1875, do not apply, and cannot be construed to include writs issued prior to the coming into operation of the Judicature Acts. The form of the writ under the Judicature Act is prescribed by ord. 2, r. 3, and the form, which has the same parliamentary authority as the rules (see Judicature Act, 1873, s. 100), indicates a twelve months and not a six months writ.

The writ in the present case is, of course, a six months writ. But although it is a six months writ, and in other respects in the form prescribed by the schedule of the Common Law Procedure Act, 1882, it is none the less an "original writ of summons." The words are wide enough, in our opinion, to include all writs of summons, and therefore, if we had been considering the matter in the interval between the coming into operation of the Judicature Act and the repeal of the Common Law Procedure Act, 1852, we should have held that the rule was applicable. But since the repeal of the Act of 1852 we consider it clear that the rules as to renewals form a complete code on the subject of renewal, just in the same manner as the rules as to service out of the jurisdiction form a complete code on that subject (see *In re Busfield*), and that they are capable of being read, and should be read, as applicable to all writs of summons whenever issued.

This construction of the rule is opposed to the prevailing practice.

The practice masters, acting, we presume, under ord. 72, r. 2, have at some period between 1880 and 1888 issued a direction that "writs of summons before the Judicature Acts came into force may be renewed without an order." This direction, however, has no statutory authority. It cannot, in our judgment, be treated as a direction of the court under the Judicature Act, 1873, s. 22, and, even if it could, it cannot control the Rules of Court of 1883, which have parliamentary authority, and are expressly made applicable to pending proceedings.

For the reasons above given, therefore, we think that on the coming into operation of the Judicature Act, 1875, and the rules, the rule as to renewals applied to all writs whether issued before or after the Act.

This being so, ord. 72, r. 2, does not apply. We further think that, even if we are mistaken in our construction of ord. 8, r. 1, ord. 72, r. 2, cannot be relied on by the plaintiff, the Common Law Procedure Act, 1852, now being repealed, and there being no words in the repealing statute sufficient to keep on foot, for the plaintiff's benefit, the unrestricted power of renewing this writ without an order.

We should add that the defendant has not, in our opinion, waived the irregularity, and accordingly we order the service of this writ to be set aside, with costs.

Service of writ set aside, with costs.

Solicitor for the plaintiff, *Henry M. Dalston.*

Solicitors for the defendant, *Tatham & Procter.*

Q. B. Div. (Vaughan Williams, J.) March 29, 31; April 25.

BISHOP AND OTHERS v. BALKIS CONSOLIDATED CO. (a.)

*Company—Transfer of shares—Certification of—Want of title in transferor—Certification—*Ultrà vires*—Representation as to credit or ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6.

The plaintiffs were the transferees of certain shares in the defendant company. Before the transfer form had been executed by the plaintiffs, or the price paid, the stockbrokers procured the defendants to place upon it (partly by means of a stamp, partly in writing) the following words:—"Certificate lodged. The Balkis Consolidated Co. (Limited). J. V. Thomas, for secretary." The defendants subsequently discovered that the transferor had had no title to the shares specified in the transfer, and thereupon, notwithstanding their "certification," refused to recognize the plaintiffs' title to the shares. The plaintiffs then brought an action to recover the price of the shares paid by the brokers upon the faith of the "certification."

Held, that, although the "certification" was a representation by the defendants that a genuine certificate covering the shares denoted by the numbers in the transfer had been lodged with them, and that the transferor had a good title to the same, and, further, that such representation was made with the intent that a subsequent purchaser should act upon it, yet the action was not maintainable, upon the grounds (1) *that the "certification" was* ultrà vires, *and* (2) *that it was a representation as to the credit and ability of the transferor within the 6th section of Lord Tenterden's Act, and, not being under the seal of the defendants, could not bind them.*

Action tried at Birmingham Assizes before Vaughan Williams, J., without a jury.

The defendants were a company, incorporated under the Joint-Stock Companies Acts, who had issued the whole of their authorised share capital. Subsequently to the completion of such issue the plaintiff Bishop, between February and the 25th of May, 1889, made certain purchases of Balkis shares, amounting in all to 200, through Messrs. Blythe & Hutchinson, members of the London Stock Exchange. These contracts were carried over from time to time till the 29th of June, when they were taken up by the plaintiffs, Messrs. Cuthbert, of Birmingham, as the nominees of Mr. Bishop. The money for taking up the shares was not provided by Cuthberts, but by Bishop, who, however, was credited by Cuthberts in account current with the amount so paid by him for the purpose of taking up the shares.

The facts as to the taking up the shares appeared to have been as follows:—

In June, 1889, a clerk of Blythe & Hutchinson, took to the offices of the Balkis Co. a transfer of 1,000 shares by one Powter to one Lupton, which he delivered to the company in exchange for transfer receipts, and on the 4th of July went back to the office of the company with these transfer receipts, and in exchange got certification on a transfer by Lupton to Cuthberts. The words of certification were. "Certificate lodged. The Balkis Consolidated Co. (Limited). J. V. Thomas, for secretary." All these words, except the signature "J. V. Thomas" and the word "for," were printed with an impressed stamp. Hutchinson was acting as the agent of Lupton, the vendor, in getting the certification.

It was in the ordinary course of the defendants' practice to grant such certification if they were satisfied that

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(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

the transferor was entitled to the shares specified in the transfer.

Hutchinson, having obtained the certification on the 8th of July as the agent of Bishop, paid Lupton £38 13s., the price of the shares, and was repaid by Bishop on the 11th of July. Hutchinson having in the meanwhile, about the 9th of July, sent to Cuthberts the transfer, Lupton to Cuthberts, with the certification on it, Cuthberts sent up this transfer to the company on the 11th of July for registration, and it appeared by the company's receipt on the transfer that the company received the transfer for registration on the 11th of July and registered the transfer on the 22nd of that month; but the payment of Bishop's cheque was in no sense made on the faith of the company's receipt of the 11th of July.

The company, having registered the transfer, proceeded on the 6th of August to seal certificates in favour of Messrs. Cuthbert, and on the 22nd of August sent the certificate to Messrs. Cuthbert. Bishop did not appear to have seen this certificate until after the 20th of September, when he sold 100 Balkis shares to one Watson. On the 1st of October Cuthberts sent to the company the certificate and the transfer, Cuthberts to Watson, for certification, and on the 4th of October the company refused to certify the transfer of the whole of the shares on the ground that Lupton had never been entitled to 135 of the shares transferred by him to Cuthberts, certain of which shares were included in the transfer by Messrs. Cuthbert to Watson.

J. Dugdale, Q.C., and *Hugo Young*, for the plaintiffs.

H. D. Greene, Q.C., and *A. T. Lawrence*, for the defendants.

April 25.—VAUGHAN WILLIAMS, J.—The first question which arises is whether Bishop, independently of the issue of the share certificates to Cuthberts, has any cause of action against the company by reason of the certification of the transfer, Lupton to Cuthberts, and the payments made on the face of it. If there is a cause of action it is because Bishop acted upon the faith of the representation made by the company in certifying the transfer; and assuming that Bishop would have a cause of action if the transfer had purported to be to him, it makes, in my opinion, no difference that the transfer purported to be to Cuthberts, as his nominees, and not to himself. The damage sustained by Bishop in either case is precisely the same.

Now, in order that Bishop should have a good cause of action it is necessary, first, that the company should, by certification of the transfer, have represented that a genuine certificate covering the shares in question had been lodged with them. As to this I find, as a matter of fact, that this is the meaning of the certification. Secondly, it is essential to the cause of action that the certification should have been made in order that a subsequent purchaser might act upon it. I find as a fact that it was so made: the transfer mentions Cuthberts as the transferees, but the representation, in my opinion, was made as much to Bishop, the undisclosed principal of Cuthberts, as to Messrs. Cuthbert. Thirdly, it is essential to the cause of action that Bishop should have sustained damage by acting on this representation of the company; it seems clear that Bishop did sustain damage to the extent of £38 15s., which Hutchinson, the broker, paid on the faith of the certification. It was urged in argument that there was another condition essential to the cause of action—viz., that the representation of the company should have been made in the course of some duty owing by the company; but I do not think that is so; it is sufficient, in my opinion, that the company chose, for the purpose of making the shares of its members more marketable, to supplement certificates with this sort of certification, with the intention that such certification should be treated by buyers as a voucher of title. It is true that in the judgments of Cockburn, C.J., and Blackburn, J., in *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q. B. 584, some stress is laid upon the fact that there was a statutory obligation on the company to issue the certificates which raised the estoppel in that case; whereas in the present case there is no duty, statutory or otherwise, to impress certification on the transfers, but if the judgment and the observations of the judges during the argument are looked at, it will be seen that the mention of the statutory duty is not as an essential of the estoppel, but merely for the purpose of pointing out that the declaration contained in the certificate is intended, not only as a voucher as between the company and its members, but also as a voucher to the public at large who might wish to deal with the shareholder. Duty is essential to an action of negligence or estoppel by reason of negligence, but not to an action claiming compensation for damages sustained by acting on representations made for the purpose that they should be acted on.

It is, however, urged on behalf of the Balkis Co. that the giving of these certifications is *ultrà vires*, and that the directors themselves, and *à fortiori* the clerk of the directors, have no authority to give such certification. If I were free to decide this case according to my own view of the law, I should hold the defendants estopped, and should hold that the giving of such certifications were not *ultrà vires*. The certifications are merely representations made in the ordinary course of business by the company in respect of a matter as to which the company had a statutory duty and statutory authority—namely, the issue of certificates, and can only be *ultrà vires* in the sense that a letter addressed to the transferor would be stating that he had lodged such and such a certificate with the company.

But even assuming that the certification is a representation by a clerk made in the course of business so as to bind the company, recognized in *Swift* v. *Jewsbury*, 22 W. R. 319, L. R. 9 Q. B. 301, and acted on in *Shaw* v. *Port Philip Gold Mining Co.*, 32 W. R. 771, 13 Q. B. D. 103, yet the effect of the case of *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714, would seem to be that the company is not liable, by reason that the company have no power to bind themselves to the consequences of any such answer, because, if the company could so bind themselves, the company would be estopped from denying the existence of the certificate referred to in the certification, and no corporate body can be bound by estoppel to do something beyond its powers. The present case does not, of course, fall within the *Charnwood Forest Railway Co.'s case* so far as the facts are concerned, because there was no evidence nor suggestion before me that the clerk of the defendant company was acting for his own benefit in making the certification, but it does seem to me to fall clearly within the principle of that decision. I am afraid that I do not quite understand the judgment in the *Charnwood Forest Railway Co.'s case*, because I find it difficult to assent to it, and because I cannot reconcile the doctrine as to estoppel against corporations contained in those judgments, with the doctrine laid down by the Court of Queen's Bench in *In re Bahia and San Francisco Railway Co.*, for it seems to me that the Bahia and San Francisco Railway Co. had no power, under the 25th section of the Companies Act, 1862, or otherwise, to issue shares beyond the limit in the special Act any more than the Charnwood Forest Railway Co. had to issue the debentures, and that although the 31st section empowers and casts on companies created under the Companies Acts the duty of issuing certificates specifying shares held by any member of the company, yet this power or duty does not enable the company to issue cer-

tificates in respect of shares which have not in fact been issued by the company.

It is clear, however, that the Court of Appeal did not mean to overrule *In re Bahia and San Francisco Railway Co.*, which was not mentioned in the argument or judgment, and although it might well be argued from that case that as a company can estop itself, by the issue of a certificate, from denying, for the purpose of an action for damages, the genuineness of shares which it had no power to issue, so a company may, by representations made on its behalf by its officers, estop itself from denying that such a certificate has been issued, and it will be observed from an observation made by Lush, J., in that case that he seems to have considered that the estoppel might have been raised as well by writing a letter, as by issuing a certificate; yet on the whole I think that the statutory power and duty to issue certificates distinguish the two cases, and I have no right, whatever I may think of the decision, to disregard what seems to me the spirit of the decision in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*

It is further urged that the company is not liable, because the certification, being a representation as to credit within 9 Geo. 4, c. 14, could not bind the company unless under the seal of the company. The case of *Swann* v. *Phillips*, 8 A. & E. 457, shows that a representation as to the possession, by the party making the representation, of title deeds of a person seeking to get credit on the faith of the title deeds may be a representation within the statute, if the representation is made for the purpose that the owner of the title deeds may be trusted, and it is extremely difficult to say that a representation, which is made for the purpose of giving the holder of shares facilities for dealing with and transferring his shares, is not a representation made concerning the credit, ability, or dealings of the shareholder. It is clearly a representation made as to his ability to transfer, and made for the purpose of enabling the shareholder to obtain payment of the price of the shares purported to be transferred.

Upon the ground, therefore, that the facts of this case bring it within the principle of the decision in the *Charnwood Forest Railway Co.'s case*, and also upon the ground that the representation contained in the certification is a representation as to the ability, credit, or dealings of the person for whom credit is sought, I hold, so far as the issue of the certification is concerned, that although I have found in fact that the certification was made for the purpose of being acted upon, and was made to the broker as the agent of the vendor Lupton, and although I find that the money was paid on behalf of Bishop upon the faith of that certification, and that Bishop has been damaged to the extent of £38 15s., yet I feel bound to come to the conclusion that, for the reasons I have given, the company are not liable.

So far I have dealt with the case independently of the issue of the certificates. I have said during the course of the trial that I thought any amendment ought to be made which was necessary to raise the question between the parties as appears by the evidence taken before me; but I am of opinion that the issue of the certificates gives no cause of action whatever to Bishop or to Cuthberts, because in my opinion neither Bishop nor Cuthberts, upon the evidence before me, sustained any damage whatever, or altered their position in any respect to their detriment, by reason of the issue of those certificates, and I do not see that any amendment which could be made would assist the plaintiffs, or either of them, in this respect. It may very well be that Bishop in point of fact was damaged, because Bishop may have had to pay damages to Mr. Watson, the person to whom he sold in October, 1889; but there is no evidence before me of Bishop having to pay any such damages or having sustained any damage by reason of his non-performance of that contract. Under these circumstances my judgment will be for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Woodcock, Ryland, & Parker*, for *Rowley & Chatwin*, Birmingham.

Solicitors for the defendants, *Stretton, Hilliard, Dale, & Newman.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 16.

Ex parte DELMAR.
In re HEREPATH & DELMAR. (*a.*)

Bankruptcy—Proof—Surety—Right of surety to prove before payment—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

Under the provisions of section 37 *of the Bankruptcy Act*, 1883, *the surety of a bankrupt is entitled to prove against the bankrupt's estate, although he has not paid the debt for which he is liable.*

Appeal by a creditor against the rejection by the trustee in the bankruptcy of a proof of debt tendered against the bankrupt's estate.

The case raised the question as to the right of a person who is in the position of a surety for the bankrupt to prove against the bankrupt's estate before he has been called upon to pay the money for which he is so liable.

At the date of the receiving order the bankrupt, A. F. Delmar, was liable under a covenant in a deed bearing date the 23rd of August, 1886, to pay to one Marie Green during her life an annuity of £150 by quarterly payments, and in the event of her death to pay an annuity of £50 to each of her two children until they should reach the age of twenty-five years.

By this deed the appellant, who was the father of the bankrupt, became surety for him for the payment of these annuities, and had actually paid a sum of £175, for which proof was allowed.

The liability of the appellant as surety was also valued at a sum of £1,411, but the proof tendered in respect of this sum was rejected by the trustee on the ground that the creditor was not entitled to prove as surety until he had paid the debt, and, further, that he was not under any liability, and was in any case a secured creditor who had not valued or given up his security.

The creditor now appealed against the rejection of his proof.

Herbert Reed, for the appellant.—The deed of the 23rd of August, 1886, recites that on the death of a person named Walmesley a sum of £15,000 in Consols was left by him to his daughter, Jane Delmar, the mother of the bankrupt, for life, and after her death to her husband, the present appellant, for his life, and after his death to such child as Mrs. Delmar might appoint. The bankrupt was the only son of Mrs. Delmar, and in 1886 she executed a power of appointment in his favour. It is further recited that the bankrupt, being desirous of settling an annuity on Mrs. Green, charged his interest in the fund with the payment of the annuity, and that his father joined in the deed as surety, the fund being charged finally to indemnify the appellant against any payments which he might be compelled to make. If the creditor cannot prove until he has actually paid he can never prove at all. The annuities go on for twenty-five

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

years at any rate, and by that time the bankruptcy will be wound up. Moreover, the case clearly falls within the words of section 37 of the Bankruptcy Act, 1883. The section provides that "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." I admit that the courts formerly held that a surety could not prove until payment, but those decisions turned on the particular words of the Act then in force, and the words of the present Act are wide enough to include this claim. The appellant has clearly no security, but if he has he is quite willing to give it up.

Lane, Q.C., for the trustee.—The terms of section 37 are very wide, but unless the position of a surety is altered by this section it is clear he cannot prove until payment. The question of a surety was always dealt with as a special matter of legislation up to the Act of 1869, and it is not extreme to say that section 37 could not be meant to include the special subject of sureties, which had been before specially dealt with. Upon the words of section 37, as it stands, there seems to be no reason why the liability of a surety should not be included just the same as any other contingent liability. But if the liability can be proved, is that liability one which can be fairly estimated? That cannot be, when another fund is liable. [Cave, J.—The estimate may make allowance for the probability that a great number of these payments will come out of the estate.] In any case the estimate now set up is wrong. The actuary who made the estimate has not taken into any account that, at some time or other, there will be a fund available. The amount proved for is, therefore, clearly incorrect.

Cave, J.—The best way for me to dispose of this case is to declare that the creditor is entitled to prove for something and leave it to be determined for what amount the proof shall stand. I decide that the liability is a provable liability, and that there can be a proof of some kind tendered. The case must then stand over for the parties to settle what the amount of the proof is to be, and there will be liberty to apply.

Order accordingly.

Solicitors for the creditor, *Richardson & Sadler.*

Solicitors for the trustee, *Travers, Smith, & Braithwaite.*

House of Lords.

From C. A. (England). Dec. 12, 13, 1889; April 22, 1890.

Lawrance v. Norreys. (a.)

Statute of Limitations (3 & 4 *Will.* 4, c. 27), *s.* 26—*Concealed fraud—Vexatious action—Striking out statement of claim.*

Should a plaintiff's claim to land be barred by the Statute of Limitations (3 & 4 *Will.* 4, c. 27) *unless he can show that he has been fraudulently deprived of it, within the 26th section, it is essential for him to prove that he, or some person through whom he claims, has been deprived of his land by the particular fraud proved, and further, that it could not, with reasonable diligence, have been known or discovered for a longer period than the statutory one before the action was brought.*

The allegations of fraud in such an action must be definite and precise, leading to the reasonable inference that the fraud complained of was the cause of the deprivation. In the absence of such averments the court may dismiss the action as an abuse of the powers of the court.

This was an appeal from an order of the Court of Appeal (39 Ch. D. 213, 37 W. R. Dig. 145) dismissing the action as vexatious and oppressive and an abuse of the process of the court.

Warmington, Q.C., and *Upjohn*, for the appellant.

Rigby, Q.C., Jeune, Q.C., and *W. B. Trevelyan*, for the respondents, were not called on.

The whole proceedings in the case will be found stated in Lord Herschell's judgment.

April 22.—Lord Herschell.—This is in some respects an extraordinary case. The present appellant, who is the plaintiff, commenced an action in the Queen's Bench Division in June, 1886, against the same defendants, claiming to recover possession of the Towneley Estate, in the county of Lancaster. By his statement of claim he alleged title alternatively, as the heir-at-law of Richard Towneley, who died in 1706, and as the heir-at-law of Jonathan Lawrance, the younger, who died, seised of the premises claimed, in 1816. A summons was taken out to dismiss the action on the ground that no reasonable cause of action was disclosed, and that it was frivolous and vexatious. This summons was referred by the judge at chambers to the Divisional Court, and whilst the matter was pending there the appellant took out a summons for leave to amend, which was also referred to the Divisional Court to be heard with the other summons. The proposed amendments were framed with the view of showing such a concealed fraud as would prevent the lapse of time operating, by virtue of the Statute of Limitations, as a bar to the action. In the result the court made an order dismissing the action. This was admitted to be inevitable unless the proposed amendments were allowed; and the court considered that under the circumstances before them leave to amend ought not to be granted. The present action was then brought in the Chancery Division against the same parties, upon the same title, and to recover the same estate, the allegations designed to avoid the operation of the Statute of Limitations comprising those embodied in the proposed amendments. Where an action is thus brought on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinized.

I will first call attention to what a plaintiff must prove in order to oust the ordinary operation of the statute. The Act says: "In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered." It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

I proceed now to consider the allegations made in the statement of claim. It is noteworthy at the outset that testamentary disposition has been apparently unknown in the family, for every person

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

named in the pedigree is alleged to have died intestate. The connecting link between the families of Towneley and Lawrance is said to have been Mary, the daughter of Richard Towneley, who married one John Lawrance, and died in America in 1742. She became heiress of Richard Towneley on the failure of the issue of his son Charles. When this event occurred is not stated, but it appears to have taken place many years before 1816, for it is alleged that Jonathan Lawrance, the younger, was "for many years, and until shortly before his death, out of possession of the premises." He came from America, where he resided, to establish his title to the property, but at what date is not stated. He employed solicitors in England, and brought an action or actions, in what court does not appear. He made a compromise with one John Towneley, whose position in regard to the property is not disclosed. "Partly by means of such actions, and partly under or by virtue of the deed of compromise," Jonathan Lawrance recovered possession of the Towneley Estates. He died in 1816, seised in fee and in possession of those estates. He left behind him, as his heir-at-law, his son, Lebius Lawrance, who was then grown up, and had a son born to him two years afterwards. But until 1886 Lebius Lawrance and the persons claiming under him remained ignorant of their title to the property. That is the story told in the statement of claim.

The story of the fraud, which is said to be a concealed fraud within the meaning of the Statute of Limitations, and to have deprived Lebius Lawrance and those claiming under him of the property in question, is equally singular. It is this: On the death of Jonathan Lawrance his solicitors in England, who had in their possession the evidences of his title and the deed of compromise, were about to communicate to Lebius Lawrance, whose address in America they knew, the facts that his father had recovered the estates and died intestate seised of them. But John Towneley, the party to the deed of compromise, having wrongfully taken possession of the Towneley Estates, intervened and fraudulently induced them not to make the communication. He further fraudulently, and with intent to deprive Lebius Lawrance of the property, induced the solicitors to deliver to him the evidences of Jonathan Lawrance's title to the property, including the deed of compromise, and having thus obtained possession of them, he fraudulently, and with the intent aforesaid, destroyed those documents. It is also alleged that John Towneley fraudulently, and with the same intent, procured to be taken up and destroyed the tombstone erected over the grave, at Walpole, in the State of Massachusetts, of Mary Towneley, afterwards Mary Lawrance, and her husband, "on which certain material particulars establishing the identity of the said Mary Towneley, and certain material particulars of her family, were inscribed," Lebius and his son being ignorant of the facts inscribed on the tombstone.

Assuming that it could be proved that the solicitor abstained, at the instance of John Towneley, from communicating to Lebius Lawrance the facts with which they would otherwise have made him acquainted, how would this show that the non-communication of these facts by the solicitors deprived Lebius Lawrance or his successors in title of the estate? It does not appear to me to be a natural or necessary consequence. He knew that he was the heir-at-law of his father, and I take it that he knew also that his father had gone from America to England for the purpose of establishing his title to the estate. I say this because in paragraph D., where the state of ignorance of Lebius Lawrance at the time of his father's death is as to certain facts elaborately averred, he is not alleged to have been ignorant of this. An heir-at-law of one who, as far as appeared to him, had died intestate (for if he knew nothing of any will he would naturally assume this) would ordinarily be led to make inquiries for the purpose of ascertaining what property his ancestor had died possessed of, and the more so if he knew that the person to whom he was heir laid claim to an estate, and had shortly before his death gone to England to establish his title to it. The fraud, if committed, shut up one avenue only by which Lebius Lawrance could have ascertained his rights; it left all others open. And I am not prepared to say that, if it were proved beyond doubt, it would make good the essential element in the chain of proof—namely, that the plaintiff had thereby been deprived of the estate. What is there to show that, in spite of the fraud, Lebius or his successor might not with diligence have ascertained their rights? No circumstances are stated here to show how in the present case the fraud had an effect which, as I have said, does not appear to me to be a natural or necessary consequence of it. This was the view taken by Stirling, J.; and I think the same observation applies to the suggested destruction of the tombstone. What is there to show that Lebius Lawrance or his successors knew of the existence of the tombstone or would have done so but for its destruction, or that with due diligence they could not otherwise have ascertained the facts which they would have derived from an inspection of it? Stirling, J., however, thought the allegation that John Towneley had fraudulently obtained possession of the deed of compromise and other evidences of title and destroyed them would, if established, be sufficient to sustain a charge of concealed fraud within the meaning of the statute. The Court of Appeal expressed no opinion upon this point. I propose to take the same course. But I must observe that it is not stated how or when the fraud was discovered. For aught that appears, so far as the facts are stated, the rights of the appellant's predecessors might have been ascertained, and the means of establishing them obtained, half a century ago.

The statement of claim being of the character I have described, I think it becomes important to consider the history of the litigation by which the appellant has sought to assert his alleged right, and to ascertain the origin of the allegations which it contains. Stirling, J., was disposed at first to treat these allegations as mere fiction, but he ultimately allowed the plaintiff to adduce evidence to show that they were not so. The court had therefore before it all the explanation which the plaintiff or his advisers have to offer of the development which the charges of fraud undoubtedly exhibit since they first took shape, and all the facts which can be suggested to show that the claim is a genuine one. The suggestion of a concealed fraud appears for the first time in a crude form in the amended statement of claim submitted to the Queen's Bench Division. The alleged reason why the original statement of claim was silent on the subject was, in substance, this: That Colonel Jaques, the agent of the plaintiff, late in the American army, who had been called to the bar in America, would neither take the law from his own counsel nor trust his own solicitors with the facts, lest perchance they should fall into the hands of the enemy. He had read a reported case which led him to differ from the counsel who was advising him, and he had reason to believe, he says, that some other solicitors whom he had previously instructed "to follow up the clues" which he gave them in reference to the claim had betrayed his confidence. A comparison of the statement of claim in this action with the proposed amendment in the Queen's Bench Division shows a distinct growth in the charges of fraud. Neither the tombstone, nor Jonathan Lawrance's litigation, nor the deed of compromise, has any place in the amended statement of claim submitted to the Queen's Bench Division. There was, however, an allusion in the course

of the argument to a tombstone, and the appellant's solicitor is careful to explain that the story of the tombstone was, in substance, to be found in the instructions laid before counsel to settle the amendments, but he is unable to say why it was omitted from the proposed amendments. I can only draw the inference either that it was not then thought of sufficient importance to be put forward, or that it was known to be incapable of proof. The story of the litigation and of the deed of compromise seems to be of later origin, and to owe its existence to the discussion in the Queen's Bench Division. The only allegation in the statement of claim then prepared was, that John Towneley obtained from the solicitors and destroyed "the evidence of title to the said premises." The counsel who was resisting the application to amend, argued upon this that the best thing that could happen to the heir-at-law would be to destroy the deeds. What was the answer given by the counsel for the plaintiff? He said that the case had been argued as if the documents which constituted evidence of title must have been deeds, but when the heir-at-law claims through a pedigree, as Lawrance did, the best evidences of title are the certificates of births, deaths, and marriages. Not a word about actions ending in a deed of compromise by which the ancestor obtained possession of the estate. And yet the destruction of this deed is one of the most, indeed perhaps the most, material allegation in the present statement of claim. The main point to which the learned judges in the Queen's Bench Division directed the attention of the appellant's counsel was the apparent impossibility of bringing forward any proof of such a fraud as that alleged to have been committed so far back as the year 1816. As to this the learned counsel stated that reliance would be placed on one Richardson, who was said to have been a clerk in the office of the solicitors who acted for Jonathan Lawrance. Richardson was said to be in America, and it was admitted that he must at that time have been probably upwards of ninety years of age. Extracts were read from two letters of his, written more than thirty years ago, to certain persons whose connection with the present case did not appear, referring apparently to some claim to the personal property of a Lawrance, and offering his assistance for a £5 note. But these letters contained no allusion of any kind to any fraud. Then it was said that Richardson had made some verbal communication to somebody in court "in connection with the fraud." And beyond that counsel could not go. On the materals before them the Queen's Bench Division thought the story unworthy of serious attention. Stirling, J., as I have said, though at first disposed to treat the allegations in the statement of claim as fiction, gave the plaintiff an opportunity of filing affidavits. The affidavit of Colonel Jaques was accordingly filed. I agree with the Court of Appeal that it is impossible to conceive anything more shadowy or unsatisfactory than that gentleman's affidavit. It does not show how or when the alleged fraud came to be discovered. It does not show, as might easily have been done if the allegations were true, when and in what court the alleged action or actions were brought. It proffers no explanation of the strange circumstance that Lebius Lawrance never inquired or never learned what his father, whose heir he was, died possessed of. There is no reference in it to Richardson, nor is there any suggestion that any means of proving the appellant's allegations can be found in any other quarter.

It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim, which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley Estate; and when we review the history of the litigation, there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been so. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has had no substantial foundation. For these reasons I concur with the Court of Appeal in thinking that the action is an abuse of the process of the court. I accordingly move your lordships that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—This is a case of a very unusual character. Your lordships are of opinion that its circumstances are such as to justify the exceptional treatment with which it met in the Court of Appeal. I shall endeavour, without entering into minute details, to indicate the reasons which have led me to the same conclusion. At the time when this suit was brought on the chancery side of the High Court, more than seventy years had elapsed from the date at which the title alleged by the appellant accrued; and during the whole of that period the respondents and their predecessors remained in the undisturbed possession of the lands which he is now, for the second time, and upon substantially the same grounds, attempting to recover from them. It is sufficiently obvious, on the face of the previous common law action, as well as of the present proceedings, that the appellant's claim is barred by the Statute of Limitations, unless he can show, in the terms of section 26, that he has hitherto been fraudulently deprived of his estate and of the means of recovering it. The 26th section of the Act reserves no remedy against purchasers for value; but the respondents do not stand in that position, and it is conceded that they are affected by the acts of their ancestor, John Towneley, to whom the frauds alleged in his pleadings are imputed by the appellant. But it is not any and every fraud which will elide the provisions of the statute, and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect these statutory requirements must be fulfilled. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place, it must be a concealed fraud in this sense, that it was not only unknown to the plaintiff and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit. The *onus* is, therefore, upon the appellant to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them, by the exercise of reasonable diligence,

during the fifty-nine years which followed the death of his great-grandfather, Jonathan Lawrance, in 1816.

In my opinion, a plaintiff, who desires to avail himself of the provisions of section 26, is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by Lord Selborne, C., in *Wallingford* v. *Mutual Society*, 29 W. R. 81, 5 App. Cas. 685): "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the raud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect. When a plaintiff, in order to escape from the Statute of Limitations, brings charges of concealed fraud, for the first time, at a distance of seventy years, it appears to me that the duty of making a full and candid statement is specially incumbent upon him. And unless the nature of the frauds alleged is in itself calculated to suggest the improbability of their being discovered by ordinary research, it is equally his duty to state the considerations to which he ascribes his ignorance of their existence. The amount and kind of explanatory statement required in order to impart relevancy to such charges will necessarily vary according to circumstances. But I have rarely seen a case in which fulness and candour of statement were more imperatively required than in the present; and I have met with no other case in which both were so studiously withheld. The appellant argued, as might have been expected, that he could not make a fuller statement without detailing his evidence. That is the usual excuse put forward when an attempt is made to launch a tentative charge of fraud in vague and general terms; and it rests on no better foundation than the fallacious assumption that a statement of facts and circumstances admitting of proof is the same thing with a statement of the evidence required to substantiate them. I purposely avoid particular criticism of the defects of averment which I find in the appellant's statement of claim.

One observation I think it right to make, and it is this: that his averments, so far from excluding, seem to me to point directly to the inference, that the alleged frauds (if they ever were committed) could, with due diligence, have been easily discovered at any time after the news of Jonathan Lawrance's death became known to his relatives in America. Stripped of its general assertions, which are of no relevancy, the statement of claim presents, to my mind, a tissue of improbabilities which ought not to be sent to proof. Such being the opinion which I entertain with respect to the character of the appellant's allegations, I concur with the Court of Appeal in thinking that the present action is, in the strictest sense of the words, vexatious and oppressive. With a view to that result, it is legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the claim, from first to last, which is a very singular and suggestive one. These considerations satisfy me that the order appealed from ought to be sustained, not in pursuance of any order or rule, but in virtue of the inherent jurisdiction of the court to prevent abuse of its procedure.

Lord Macnaghten.—I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, *H. Thomas.*

Solicitors for the respondents, *Ward, Mills, Witham, & Lambert.*

From C. A. (England). March 27.

Storer & Co. v. Johnson. (a.)

Solicitor—Costs—Taxation—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*London agents.*

The court, under its general jurisdiction, but not under section 37 *of the Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *has power to tax part of a solicitor's bill of costs.*

Part of an agency bill of costs may be ordered to be taxed subject to the payment into court of the amount claimed by the agents.

Judgment of the Court of Appeal *affirmed, with a variation.*

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.), reported as *Re Johnson & Weatherall*, 36 W. R. 374, 37 Ch. D. 433.

On the 4th of January, 1886, Messrs. Johnson & Weatherall delivered to Messrs. Storer & Co. their yearly bill of agency charges for the year 1885.

The bill contained charges in respect of a number of actions and matters, the charges relating to each action or matter being stated separately, and one of the actions in respect of which charges were made was *Mellor* v. *Swire.*

On the 3rd of January, 1887, Messrs. Storer & Co. took out a summons asking for the taxation of that part of the bill which related to *Mellor* v. *Swire.*

North, J., held that the applicants were entitled to a taxation only on the terms of the whole bill being taxed.

Messrs. Storer & Co. appealed.

The Court of Appeal suggested that taxation of the charges in *Mellor* v. *Swire* alone should be ordered on the terms of the appellants paying to the respondents within ten days the cash balance claimed to be due—viz., £1,188 1s. 4d., subject to an undertaking to refund.

These terms were not accepted by the appellants, and the appeal was dismissed, with costs.

It appeared that the cash balance claimed at the time of the hearing before the Court of Appeal was less than £1,188 1s. 4d., and at the hearing of the present appeal it had been reduced to £746 3s. 9d.

Sir Horace Davey, Q.C., and *E. L. Levett*, for the appellants.—These charges are not part of a bill. But, if so, there is a general jurisdiction to direct, in a proper case, taxation of part of a bill of costs. This is a case which can fairly be investigated by itself. The terms imposed in the Court of Appeal were outside the jurisdiction of the court.

Cozens-Hardy, Q.C., and *Ingle Joyce*, for the respondents.—It is the settled practice not to order taxation of an agency bill, or part of it, unless the whole amount claimed is brought into court: *Ostle* v. *Christian*, Turn. & R. 324; *Jones* v. *Roberts*, 8 Sim. 397; *Lees* v. *Nuttall*, 2 My. & K. 284; Tidd's Practice, 9th ed., 1828, p. 332; Merrifield's Law of Attorneys, p. 226. *Smith* v. *Edwards*, 37 W. R. 112, 22 Q. B. D. 10, was also referred to. If the balance claimed by the

(a.) Reported by Charles H. Grafton, Esq., Barrister-at-Law.

last cash account is paid into court, the respondents make no objection to the taxation asked for.

Sir H. Davey replied.

Lord HALSBURY, C.—It seems to me that there has been a considerable error about this case throughout. The summons, I cannot entertain any doubt, was intended to be taken out under the Solicitors Act. The reference to that portion of the Solicitors Act which makes the costs dependent upon the proportion which is taxed off convinces me, apart from the argument in the court below, that the parties intended to insist upon their right to have this part of the costs severed from the rest, and to have that taxed by itself. I am of opinion, in common with all the courts who have considered the subject, that that course is erroneous; and I believe that your lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was, of course, open to the court to pronounce a judgment which would do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might, therefore, order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the court, then the court could exercise its own jurisdiction in the way it might think fit: and I am of opinion that the court rightly exercised its jurisdiction so far as it was advised of what were the real facts. On the other hand, I agree that it was unreasonable, in the then state of the account between the parties, to insist upon the whole amount, £1,188 1s. 4d., being either paid into court or paid to Messrs. Johnson & Weatherall. If, as a matter of fact, the truth was that there was at that time only £1,000 due (although only £746 is due now), it would have been unreasonable to insist that more should be paid than was either due or claimed by the parties. I am, therefore, of opinion, and move your lordships, that the order of the Court of Appeal should be varied to this extent, that upon payment into court of £746 3s. 9d. the order sought for to tax these particular items as distinguished from the rest of the bill should be permitted, and that that should be done within the time limited by the Court of Appeal, and that otherwise the appeal should be dismissed, with costs.

Then, having arrived at that conclusion, the question comes to be considered who is responsible for this case having been presented to your lordships without these matters having been adjusted; and I certainly am of opinion that the appellants are themselves to blame. In the first instance, they insisted upon what now, by the judgments of all the courts and by your lordships' judgment, turns out to be an untenable proposition; and then, when an offer was made to them by the Court of Appeal, according to the practice of the court in such cases, that they should pay into court that which (as the Court of Appeal of course meant) according to the practice of the court would have been payable, if there had been an error in the figures, those who were there on behalf of the appellants ought to have put the figures right, and if there was an error in directing the money to be paid to Messrs. Johnson & Weatherall, instead of into court, they then ought to have intervened and to have called attention to that circumstance. Instead of doing that, they allowed the Court of Appeal to make that order upon the hypothesis on which they then proceeded, and it was not until the matter came before your lordships that the facts were accurately stated. Therefore, although I propose that there should be a variation of the order of the Court of Appeal in pursuance of what I have stated, I believe your lordships will think it right that the appellants, who are responsible for what has occurred, should pay the costs in this House, although they are to a certain extent successful.

Lord WATSON.—I am entirely of the same opinion. It appears to me that the bill referred to throughout the 37th section of the Solicitors Act, 1843, is the bill delivered containing all these items; and upon considering the terms of that section I am unable to assent to the argument which has been addressed to us on behalf of the appellants, which seems to have been the only argument pressed upon both the courts below, to the effect that under the statute the court has the power to direct that one item or one branch of the bill delivered shall be taken and remitted to the taxing master for examination.

Now, I have just referred to the course which this case took in the court below. I think that the application was intended to be an application in terms of the Solicitors Act. The reference to the statute, and the whole scope of it, appears to me to point to that result. At the same time I do not think that your lordships are precluded, in a matter like this, from exercising the power which is vested in the court apart from the terms of the statute. North, J., dealt, and, in my opinion, dealt quite rightly, with the case that was presented to him, and went no further. In the Court of Appeal their lordships were prepared to dispose of the case upon the same principle which had been followed by North, J., in the court below; but at the same time they *ex gratiâ* stretched out to the appellants an offer which had certainly not been pressed upon them at the instance of the appellants. The intention of the court obviously was to give them that which they asked, a separation of the branches of the account, as they only could do under their jurisdiction apart from statute, and subject to the condition upon which alone that jurisdiction has been exercised since the time of Lord Thurlow. I think, in these circumstances, we cannot listen to any argument or any suggestion made as to the amount which was fixed by the court below. In that respect the court appears to have received no assistance whatever, not a single hint even, from the party at the bar whose interest it was to make the suggestion. Therefore it appears to me that throughout, even at your lordships' bar, the appellants have repeated a contention which, to my mind, is ill-founded. They rejected in the court below the principle which they are now prepared to accept, and which they ask us to apply to the case; and any error in its application in the court below, I think, is due to the appellants themselves, and I therefore think that they ought to bear the consequences, because any miscarriage which there has been is entirely due to themselves.

Lord MORRIS.—I concur in the judgment which has been pronounced by the noble and learned lords who have preceded me. We concur in the principle of the decision embodied in the order made by the Court of Appeal. It is corrected only in two matters—one a matter of figures, and the other of procedure as regards the lodgment of money in court, in place of payment over to Messrs. Johnson & Weatherall. Neither of these matters, as it appears to me, would have altered the course taken by the appellants if they had been aware at that time that the sum due would have been only £1,000 instead of £1,188, or that they should lodge it in court instead of paying it to Messrs. Johnson & Weatherall. Of course, it would have been more beneficial to Messrs. Johnson & Weatherall to get the money into their pockets, by which they could ob-

tain interest upon it pending the taxation of the costs, instead of having it lodged in court where they would get no interest upon it. I therefore concur entirely in the judgment.

Ordered, that the order of the court below be varied by inserting the sum of £746 3s. 9d. instead of the sum of £1,188 1s. 4d., and by inserting the words "pay into court" instead of the words "pay to Messrs. Johnson & Weatherall." That the appellants do pay to the respondents the costs of the appeal to this House.

Solicitors for the appellants, *Shaw, Tremellen, & Kirkman*, for *William Keating Taylor*, Manchester.

Solicitors for the respondents, *Johnson, Weatherall, & Sturt.*

Privy Council.

June 18, 19, 20, 21, 25, 26; Dec. 14, 1889.

In re The Endowed Schools Act, 1869, and amending Acts; and

In re The Scheme of the Charity Commissioners for the Administration of Christ's Hospital. (*a.*)

Endowed Schools Act, 1869, *ss.* 5, 11, 13, 14 (1), 16, 29, 39, 42—*Educational endowments—Maintenance of scholars—Conscience clauses—Rights of patronage.*

Held, that, though a discretionary power may have existed in the first governors of Christ's Hospital to devote their endowments more or less to purposes unconnected with education, yet as, in fact, those endowments had been applied to educational purposes almost since the original foundation, they came within the meaning of section 5 of the Endowed Schools Act, 1869; and that, under section 29, endowments applied to the maintenance of scholars were likewise educational.

Also, that endowments given subsequently to the 2nd of August, 1819, and legitimately spent in the maintenance of the hospital property, need not be ascertained and removed from the operation of the scheme; and that the consent of the governing body to their inclusion was not necessary under section 14, sub-section 1.

Also, that the scheme was faulty in respect that it directed persons in charge of boarding-houses to allow their boarders exemption, under the "conscience clauses" (sections 15—18), from attendance on religious worship or teaching. The proper course was to direct provision to be made "for enabling the scholars to attend the school and have such exemption as a day scholar" (section 16).

Also, that donation governors' rights of patronage were not vested interests under section 13, or educational interests under section 11; and that a scheme which paid substantial regard to such rights was in conformity with the Act; but that donation governors, as persons directly interested, had a right to be heard on the question whether the scheme was in accordance with section 39, sub-section 3.

Also, that the Corporation of London, having no power of management, though being a portion of the governing body, and legally seised of its estates, had no locus standi *as the governing body under section 39.*

Also, that Guy's Hospital, having no powers of management, though exercising a right of patronage corresponding to an annuity payable by it to Christ's Hospital under the will of the founder, Thomas Guy, had no locus standi *under section 39.*

Also, that, under the 42nd section, no appeal could be brought relating to endowments which, during the three years preceding the commencement of the Act, had an annual gross income of not more than £100.

These were certain appeals, originally twenty-eight in number, under the Endowed Schools Act, 1869, s. 39, amended by section 14 of the Act of 1873, against a scheme of the Charity Commissioners in relation to Christ's Hospital.

The nature of the scheme, and the grounds of the appeals against it, appear in their lordships' judgment.

Rigby, Q.C., and *Vaughan Hawkins*, for the governors of Christ's Hospital, contended that the endowments dealt with were only in part educational, and were excluded from the operation of the scheme by section 8 of the principal Act. The scheme is not in accordance with section 24, nor do the governors assent to it. Funds applicable to charitable uses are diverted therefrom. The governing body is altered in reference to all the endowments dealt with. Charitable endowments given less than fifty years before 1869, and not mixed with old endowments, have been interfered with: section 25. The founder's regulations as to religious instruction according to the doctrine of the Church of England has been violated. [They referred to section 19 (sub-section 2) and section 16 of the Act of 1869.] The scheme interferes with the designs of the founder, and abolishes the discretionary powers given under the original charter.

They cited *Clephane* v. *Lord Provost of Edinburgh*, 4 Macq. 603, L. R. 1 H. L. Sc. 417; *In re Hallett*, 28 W. R. 732, 13 Ch. D. 696; and *In re St. Leonard's, Shoreditch, Parochial Schools*, 33 W. R. 756, 10 App. Cas. 304.

Vaughan Hawkins, for the donation governors (whose *locus standi* was objected to), urged that sufficient regard had not been paid to their rights of patronage.

He referred to *In re Shaftoe's Charity*, 3 App. Cas. 872, 26 W. R. Dig. 208.

Sir A. Watson, Q.C., and *Tweedy*, for the mayor and commonalty and citizens of London, cited *In re Sutton Coldfield Grammar School*, 30 W. R. 341, 7 App. Cas. 91, and *In re Hemsworth Grammar School*, 35 W. R. 418, 12 App. Cas. 449.

H. B. Howard (*Rigby, Q.C.*, with him), for the president and governors of Guy's Hospital, referred to *Attorney-General* v. *Christ's Hospital*, 1 Rus. & M. 626.

Finlay, Q.C., and *Methold*, for the Fishmongers' Company.—[Lord Selborne referred to section 42 of the Act of 1869. Lord Halsbury, C.—Their lordships do not desire to hear the respondents on the appeals of the City of London and the donation governors, or on the appeal of the governing body upon the point whether or not the general resources of Christ's Hospital should be excluded from the scheme as not being an educational endowment within the meaning of the Act.]

Sir Horace Davey, Q.C., and *Romer, Q.C.* (*Joyce* with them), for the Charity Commissioners, contended that with regard to endowments given since 1819, and expended as mentioned in section 25, they were impossible to separate from old endowments. [Reference was made to section 4 and section 14, sub-section 1, of the Act of 1869.] Such recent endowments as have been mixed with other investments representing old endowments have been fairly apportioned. All endowments subject to section 14, sub-section 1, have been dealt with accordingly. As to the conscience clause, there was nothing to show that the scholars were required to be instructed in the doctrines of any particular church. The scheme is therefore in accordance with sections 15

(*a.*) Reported by J. M. Collyer, Esq., Barrister-at-Law.

and 16 of the Act. Guy's Hospital and the Fishmongers' Company have no vested interest under section 13. They are not governors, and have no *locus standi*.

Rigby, Q.C., replied for the Governors of Christ's Hospital and for Guy's Hospital.

Methold replied for the Fishmongers' Company.

Cur. adv. vult.

Dec. 14, 1889.—The judgment of their lordships (Lord HALSBURY, C., the Earl of SELBORNE, Lord HOBHOUSE, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir MONTAGUE E. SMITH) was delivered by

Lord HALSBURY, C.—The scheme framed by the Charity Commissioners in this case has given rise to a great number of appeals, five of which have been argued before their lordships. They are as follows:—

A.—An appeal by the Governors of Christ's Hospital as constituted by Act of Parliament, 22 Geo. 3, c. 77.

B.—Nine appeals by donation governors of the hospital, now heard as a single appeal.

C.—An appeal by the Corporation of the City of London, and by the Lord Mayor, aldermen, and certain common councillors, members of the acting governing body of the hospital.

D.—An appeal by Guy's Hospital.

E.—An appeal by the Fishmongers' Company.

These appeals raise questions affecting the general character and objects of the foundation as well as its governing body: and it will be convenient first to state the material parts of the instruments which determine those points.

In December, 1547, King Henry VIII. executed an indenture and letters patent by which he granted to the corporation of the City of London the church of the late Grey Friars (thenceforth to be called Christ Church) and the site of their house and other property lately belonging to the Grey Friars and to the hospital of St. Bartholomew. He also granted to them licence to hold lands to the extent of 1,000 marks a year.

The king's motive for the grant is thus described in the recitals of the indenture:—

"The kinge consideringe the myserable estate of the poore aged sick sore and ympotente people as well men as women lyinge and goinge about begginge in the common streates of the saide Cittye of London and the Suburbes of the same to the greate paine and sorrow of the same poore aged sick and ympotente people to the greate infeccion hurte and noyance of his Grace's lovinge subjectes which of necessitie muste dailie goe and passe by the same poore sick sore and ympotente people beinge infected with divers greate and horrible sickuesses and diseases his highness of his moste bountifull goodness and charitable mynde mooved with greate pittye for and toward the reliefe aide succour and helpe of the said poore aged sick sore and impotente people and for thadvoydinge of the great daunger and infeccion which dailye dooth and maye ensue to his lovinge subjectes by reason of the greate sicknesses and horrible diseases of the same sick and sore people and for dyvers other good and godlie purposes and intentes."

By the indenture the corporation covenanted that they would maintain certain clergy and almspeople, with details not material for the present purpose; and that besides the specified objects, the whole profits of the lands then granted or to be taken under the licence should go to the relief and sustentation of the poor.

In the month of June, 1553, King Edward VI. executed an indenture and letters patent, by which he granted to the Corporation of the City of London his Manor House of Bridewell, and all the possessions belonging to the late Hospital of the Savoy. He also granted to them power to hold lands to the yearly value of 4,000 marks, "to the use and sustentation of the poor of the new erected Hospital of Christ Church in London for the time being, and to the sustentation of the poor of the new erected Hospital of St. Thomas in the borough of Southwark in the county of Surrey for the time being, and to the sustentation of the poor from henceforth to be found and brought up in the said Manor House or place of Bridewell."

The king's motive for the grant is thus stated in the indenture:—"The king of his mere mercy having pity and compassion on the miserable estate of the poor fatherless and motherless children, and sick, sore, and impotent people, and most graciously considering the good and godly endeavours of his most humble and obedient subjects the mayor and commonalty and citizens of London who diligently by all ways and means do travail for the good provision of the said poor and every sort of them and that by such sort and means as neither the child in his infancy shall want virtuous education and bringing up neither when the same shall grow unto full age shall lack matter whereon the same may virtuously occupy himself in good occupation or science profitable to the commonweal neither the sore nor sick when they shall be healed shall be permitted nor suffered to wander as vagabonds in the commonweal but shall likewise be put to labour and good and wholesome exercise and so be made profitable members of the same."

In this record (Joint App. A., Vol. I., pp. 87—103) are printed, under the head of "The Order of the Hospitals of King Henry VIII. and King Edward VI., viz., St. Bartholomew's, Christ's, Bridewell, St. Thomas's," certain ordinances made by the Corporation of London as governors of those hospitals. It appears that they established a general body of governors for the joint affairs of the four hospitals, with separate bodies for the separate affairs of each. And it is mentioned that in Christ's Hospital there was a grammar school in which "suche of the children as be preguant and very apt to learninge be reserved and kept . . . in hope of preferment to the universitie." (See p. 91).

As early as the year 1557 different objects of the foundations had been distributed to different houses, viz., education to Christ's Hospital, the cure of sickness to St. Thomas's, and correction of malefactors to Bridewell. This appears from a minute of a general court holden at Christ's Hospital on the 27th of September, 1557, printed at p. 103 of the volume.

"And it is further ordered by this generall assemblye in consyderacon that as the good houses of Christ's hospitall hathe bene erected for the vertuouse bringinge vp of the myserable youth, and St. Thoms hospitall for the releuynge of the neadyne and deseased, and Bridewell for thenforcinge of the lewde and naughtie sorte to labor and worke So, for asmoche as the aforesaid Christ's and St. Thoms hospitalls have hetherto had no perfeccon that is to saye anye directe or plaine order for the maintenaunce of either of the said hospitalls That therfore one generall Renter to be assigned shall yelde and paye vnto the Treasaurer of St. Thoms hospitall for the furniture of the charges of the same all the whole reuenewes and profects that shall come of the lands and rents in any wyse belongingo to the said hospitall vntill other or further order shalbe taken for the same And that the Scruteners and gatherers of Legacies shall make an Accompte of all their collecions at all suche tymes as they shalbe called vnto any generall courte And that the treasaurers and Scruteners of the said hospitalls shall receaue suche legacies and conteyne the same in their accomptes as from hensforth shalbe geven to anye of the said hospitalls And that no Treasaurer of any hospitall shall medle wth the legacie in any wyse that is bequethed to another.

"And also that Christ's hospitall shall be stayed wth

the monethlye collecion graunted of the citizens and of suche ysseues as shall aryse and growe of thoffice of Blackwell hall."

The distribution of functions and funds thus effected has never been disturbed. It does not appear that Christ's Hospital retained any of the property granted by the charter to the Corporation of London except the site of its buildings. The bulk of its endowments is derived from subsequent donations.

The arrangements made in 1557 with respect to the government of the hospitals gave rise to disputes between the City of London as governors of all the hospitals on the one hand, and the officers and acting governors of the several hospitals on the other; and in the year 1782 the Act 22 Geo. 3, c. 77, was passed for the purpose of giving validity to a settlement agreed on by the disputing parties. Thereby was established a separate governing body for Christ's Hospital, with full powers of management over its possessions and affairs. That is the body whose appeal comes first in the list, and raises the most important questions.

APPEAL A.

The main objection is one which strikes at the very root of the scheme, for it is contended that the emoluments which the Charity Commissioners have treated as educational endowments within the meaning of the Endowed Schools Act, 1869, are not really such, but are either excluded from the Endowed Schools Act, or, on the view most favourable to the interests of education, are endowments of a mixed character, such as are dealt with by the 24th section of the Act. This contention is supported on two grounds.

First, it is pointed out that the grant of Henry VIII. contemplates, not education specifically, but general eleemosynary objects; and that the grant of Edward VI., though it does contemplate education, does so only among other objects equally important. Therefore it is argued that the first governors, the City of London, being intrusted with the application of these properties to various objects, might have applied the whole so as to exclude education; and so the endowments are, by the terms of section 8 (4) of the Endowed Schools Act, excluded from its operation.

Their lordships think that the answer to these arguments lies on the face of the instruments above cited. They do not agree that, under the grant of Edward VI., education could have been wholly neglected by the administrators of the funds. But passing by any question as to what the first governors might in their discretion have done, they did in fact take the reasonable and wise course of separating, as regards locality and property and management, the various public objects which they had to promote. This was done almost immediately after the foundation. Ever since that time the original site of Christ's Hospital and the large gifts made to it have been applied to education; and its governing body, acting separately from 1557 onwards, and placed separately upon an indubitably legal footing in 1782, has been concerned with educational funds. This long-continued application of these funds clearly brings them within section 5 of the Act.

But then it is said that a large portion (and calculations are made to show that it is much the larger portion) of the funds have been expended on the physical sustenance of the boys admitted to the school; and it is argued that funds employed in maintenance or clothing are not within the Act unless according to the terms of section 29 they are endowments attached to a school for that purpose.

It appears to their lordships that this argument attributes to section 29 an effect precisely the reverse of what was intended. If a donor has given property for no other purpose than that of maintenance or clothing, there might be a doubt whether it should be taken as a purely educational endowment under section 5, though it be attached to a school. Section 29 is adapted to remove this doubt, but not to cut down the definition of educational endowments given in section 5. It certainly would be a strange result if it were found that the Act treats endowments for maintenance of scholars as being general educational endowments if only they are attached to a school, and yet treats general educational endowments as being mixed if in fact they have been applied in maintaining as well as teaching the scholars. Their lordships think that no such anomaly is to be found in the Act. In their judgment funds are applied for the purposes of education at school within the meaning of section 5, whether the system followed be that of teaching only, or that of taking in the scholars and maintaining as well as teaching them.

Their lordships, therefore, are of opinion, with reference to the first objection of the governors, that the scheme is right in treating all the general endowments of Christ's Hospital as educational within the meaning of section 5 of the Act, and in treating those which have been given to it for maintenance of scholars as educational under the terms of section 29.

Some objections have been made to the mode in which the commissioners have dealt with recent endowments, or endowments given subsequently to the 2nd of August, 1819, which, by section 14 (1) of the Act, are excluded from the operation of schemes except with the assent of the governing body. Some of these objections were abandoned in the course of the argument, because it was found that the principles contended for by the appellants would not yield results more favourable to them than those adopted by the commissioners. But Mr. Rigby still contended that where recent endowments had been spent in improving or maintaining the old property, the amount spent should be ascertained and removed from the operation of the scheme.

To this contention their lordships cannot assent. It may be that some gifts have been taken by the governors and brought into the year's expenditure, part of which has been devoted to the maintenance of the hospital property. But the accounts to which their lordships have been referred in p. 258 and in pp. 300 to 307 of the Appendix A, vol. I., do not show, and there is nothing else in the record to show, that the governors have done anything except to apply in the maintenance of their property funds lawfully applicable for that purpose, as any other wise and prudent landowner might do. The accounts are not very clear upon this point, and probably were not made out with any such thought in the accountant's mind; but, assuming that general legacies have been brought in to aid the year's income, and have not been funded or kept to any separate account, the result is that the money has been spent, and spent in legitimate ways, to trace such money would be impossible, and, if possible, would be wrong.

Another important objection taken to the scheme rests on what are commonly called the conscience clauses of the Act, sections 15 to 18. The scheme embodies them with a modification to be mentioned presently. The governors contend that their foundation is one of those which, by force of section 19, are partially excepted from the provisions of the preceding sections, being, as they say, specially attached to the Established Church. Section 19 excepts any educational endowment the scholars educated by which are "required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder or under his authority, in his lifetime or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination."

The instruments of foundation contain no directions

on the subjects to be taught. To bring the case within section 19, the governors rely first on an injunction issued by Edward VI. to all schoolmasters of youth commanding them to teach in their schools the catechism of a certain godly and learned man, probably John Day; but this injunction, whatever its validity, is not a statute or regulation for Christ's Hospital, nor is Day's Catechism a formulary of the Church of England. The governors next rely on a number of minutes entered in their books, and recording orders made by them from time to time. From these it appears that in the year 1570 the children were furnished with Dean Nowell's Catechism, that a person was appointed to give them instruction in "the Catechisme," and that attendance at the catechetical lessons was required of the officers of the house and of two governors. Nowell's Catechism never was a formulary of the Church of England. It is doubtful whether orders of the kind produced, for appointing an officer, for providing books, for prescribing the places and times of instruction and the persons to attend thereat, are statutes or regulations of the kind contemplated by section 19. It is certain that we cannot find in them any such express terms for requiring instruction in the doctrines and formularies of the Church of England as are necessary to fulfil the requirements of that section.

But this part of the scheme (section 80) contains a provision which, so far as their lordships know, is quite novel. It provides that when exemption from attendance on religious worship or teaching has been claimed for a scholar in the way prescribed by section 16 of the Act, every person in charge of a boarding-house of any school of the foundation shall allow such exemption. To this the governors object, and their lordships think that it is not warranted by the Act. In section 16 it is enacted that (when section 19 does not apply) "in every scheme . . . the commissioners shall provide that if the parent . . . of any scholar who is about to attend such school, and who but for this section could only be admitted as a boarder, desires the exemption of such scholar . . . but the persons in charge of the boarding-house of such school are not willing to allow such exemption, then it shall be the duty of the governing body of such school to make proper provisions for enabling the scholar to attend the school, and have such exemption as a day scholar." The commissioners are here ordered to insert in their scheme the exact provisions of the section. If exemption is claimed for a boarder, and the persons in charge of the boarding-house are not willing to allow it, what is to be done? The Act says that provision shall be made "for enabling the scholar to attend the school, and have such exemption as a day scholar." The scheme says that the persons in charge of the boarding-house shall be bound to allow the exemption. These two directions are contradictory of one another, and in this respect their lordships are of opinion that the scheme is erroneous.

APPEAL B.

The case of the donation governors is that at the passing of the Act of 1869 they were entitled to the right of presenting children for adoption into the hospital in rotation with other governors; and that opportunities for presentation occurred, on an average, every 3½ years. Section 93 of the scheme materially curtails this privilege, for it provides that a donation governor shall not present a child as long as there is on the foundation any child presented by him; and also that one-third of the presentees shall be girls. The donation governors therefore object that the scheme is not in conformity with the Act because it has not had regard to their patronage as directed by section 13.

Their lordships agree with the appellants that they are persons directly affected by the scheme, and are therefore entitled to be heard on the question whether the scheme is or is not in conformity with the Act, section 39 (3); but on that question the decision must be against the appeal. It is impossible to deny that regard, and substantial regard, to the patronage in question has been paid in framing the scheme. The appellants contend that it is not sufficient regard; but they have not in their case or through their counsel suggested any measure of the regard that should be paid, except that the patronage should be left wholly untouched, or that a full equivalent should be given in exchange for it.

Their lordships cannot put such a construction on the Act. Section 11 enacts that, when a scheme abolishes or modifies the educational advantages of any class of persons, the commissioners shall have due regard to the educational interests of that class; and section 39 is careful to provide an appeal to her Majesty in Council by the governing body on that very point. Section 13 first enacts that the commissioners shall save or make due compensation for certain vested interests; and section 39 expressly provides an appeal on that very point by the persons directly affected. Those vested interests do not include the rights of patronage claimed by the donation governors. They are dealt with by a separate sentence in section 13, which directs the commissioners to have regard to them, and no express mention of them is made in section 39. If the Legislature intended what the donation governors allege, rights of patronage should simply have been set down in section 13 as one of the vested interests to be saved or duly compensated. But they are dealt with in different terms, and are clearly placed on a different footing both from vested interests and from those educational interests to which due regard is to be had. Their lordships hold that this scheme, which pays regard, not illusory but substantial, to the rights of patronage in question, cannot be successfully impeached as not being in conformity with the Act in that respect.

APPEAL C.

The position of the appellants in this case is a little complicated. They are a portion of the governing body established by the Act of 1782. They represent especially the Corporation of the City of London, which was the original grantee of the endowments of Henry VIII. and Edward VI., and, as their lordships understand, is still legally seised of the estates of the hospital, though without any powers of management. The City has made gifts to the hospital, and there have been accorded to the governors who specially represent it certain privileges of presenting children who are received upon the foundation. They now complain of the scheme because it has not due regard to their rights of patronage. But they also assume the position of a governing body, and take objections to the scheme of the same character as have been dealt with in Appeal A., and the additional objection that the scheme has not due regard to the educational interests of the destitute poor of certain localities.

So far as regards rights of patronage, the case stands on the same footing as the case of the appellants in Appeal B., and the appeal must be rejected for the reasons there assigned.

As regards the other objections, their lordships consider that the appellants are not in those matters directly affected by the scheme, and are not the governing body to which by section 39 the right of appeal in such matters is confined. It is true that the expression "governing body" is by section 7 of the Act defined in wide terms, which, though not strictly grammatical, may include persons who have the right of holding any endowment dealt with by the scheme. And it may be that in some foundations there are more bodies than one who for different purposes of the Act have to be considered as governing bodies. But no such question arises now.

In section 7 the meaning given to the term governing body is expressly stated to be "unless the context otherwise requires," and by section 39 the governing body which is invested with the important power of appealing on several grounds of general interest to the objects of the foundation, must be that body alone which is charged with the power and the duty of general management. These appellants, therefore, have no *locus standi* to be heard on appeal, except as regards their rights of patronage.

Appeal D.

The appeal of Guy's Hospital has relation to a gift made in the year 1724 by Thomas Guy, the founder of the hospital, to Christ's Hospital. By that gift the funds of Guy's Hospital were charged with the payment of £400 a year to Christ's Hospital upon condition that Guy's Hospital should have liberty to put in Christ's Hospital every year four poor children, with a preference to founder's kin.

From that time to the present the annual payment of £400 has been made, and every year four children of Guy's family have been appointed to Christ's Hospital by Guy's Hospital. In the year 1830 Christ's Hospital, finding that the charge of maintaining and teaching Guy's children exceeded the value of the annuity, endeavoured to renounce it, but was compelled to continue it by a decree of the Court of Chancery.

The annuity has been carried into, and administered as part of, the ordinary income of Christ's Hospital, and as such is operated on by the scheme. Guy's Hospital now complains of certain clauses of the scheme—viz., of section 85, which restricts the benefits of the foundation to such as stand in need of assistance, and requires contributions of those whose parents are able to contribute substantially; of section 86, which imposes certain conditions as to the character and health of the children; and more especially of section 99, by which only eight places on the foundation are reserved for Guy's family, and those only for the period of twenty years from the date of the scheme. Guy's Hospital claims to be a governing body of Christ's Hospital, so far as regards the endowment in question, and therefore to have the right of appealing under section 39 (4) of the Endowed Schools Act on behalf of Guy's family.

The claim to be a governing body within the meaning of section 39 of the Act is inconsistent with the construction above placed on that section. Guy's Hospital is under an obligation to pay £400 a year to Christ's Hospital, upon the conditions of Guy's will. But the Governors of Christ's Hospital are the general managers of that sum as of the other revenues of their hospital. What remedy Guy's Hospital may have against a breach of the conditions of Guy's will by Christ's Hospital is a question of law which can only be decided in a suit properly constituted for the purpose. For the purpose of this appeal Guy's Hospital can only be considered as a body corporate directly affected by the scheme, and objecting to it as not being in conformity with the Act because it does not pay regard to the rights of patronage. So far as that consideration goes their lordships think that this case does not substantially differ from that of the donation governors, and that the objection to the scheme cannot be sustained. As regards the educational interests of Guy's children, Guy's Hospital have no *locus standi* under section 39. The right of appeal on this point is given to the Governors of Christ's Hospital alone.

Appeal E.

The appeal of the Fishmongers' Company relates to a gift made by Mark Quested in the year 1642, and to a compromise between the company and Christ's Hospital in the year 1683. Under the compromise the company paid to Christ's Hospital the sum of £200, and Christ's Hospital became bound to receive forthwith six poor children on the appointment of the company. It was also arranged that the company should be entitled to have six nominees always in Christ's Hospital, paying the sum of £4 3s. 4d. a year for each. This arrangement has continued up to the present time. The company object to the scheme on the ground that it does not pay proper regard to the rights of the company or to the educational interests of their nominees.

Probably the considerations which would govern this appeal on its merits are substantially the same as apply to Appeal D. But their lordships are precluded from entering into such considerations, because the 42nd section of the Endowed Schools Act forbids appeals having relation only to endowments which during the three years preceding the commencement of the Act have had an average annual gross income of not more than £100.

As to all the Appeals.

The general result is that, in their lordships' opinion, all the petitions of appeal should be dismissed, except the petition of the Governors of Christ's Hospital. Upon that petition their lordships think that the proper course will be to remit the scheme to the Charity Commissioners, with a declaration that it is erroneous so far as it fails to embody the provisions required by section 16 of the Endowed Schools Act, 1869, and so far as it requires persons in charge of a boarding-house to allow exemptions from prayers and religious worship.

They will humbly advise her Majesty accordingly.

Solicitor for the Governors and Donation Governors of Christ's Hospital, *R. M. Beachcroft.*

Solicitor for the Mayor, &c., of London, *The City Solicitor.*

Solicitors for Guy's Hospital, *Winter & Co.*

Solicitor for the Fishmongers' Company, *C. D. Humphreys.*

Solicitors for the respondents, *Farrer & Co.*

Court of Appeal.

From Chan. Div. Aug. 1.

In re Lord Egmont's Settled Estates. (*a.*)

Settled Land Acts (Amendment) Act, 1887 (50 & 51 *Vict. c.* 30), *s.* 1—*Terminable rent-charge for defraying expenses of improvements—Redemption out of capital money—Payment of bonus.*

Where a tenant for life of settled land has created a terminable rent-charge in pursuance of any Act of Parliament for the purpose of repaying money borrowed for improvements, it is allowable for the trustees of the settlement, under section 1 *of the Settled Land Act of* 1887, *in applying capital money to the expenses of redeeming such rent-charge, to include in such expenses a payment by way of bonus to the lender for taking repayment before the proper time.*

In re Lord Sudeley's Settled Estates, 36 *W. R.* 162, 37 *Ch. D.* 123, *disapproved.*

Appeal from a decision of North, J.

Lord Egmont was the tenant for life of certain estates at Banstead and elsewhere under a settlement dated the 10th of February, 1870. Being desirous of effecting some drainage improvements on the settled lands, he borrowed various sums of money from the Lands Improvement Co. for the purpose of defraying the expenses of the work; and by orders of the Inclosure

(*a.*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

Commissioners made in pursuance of the Lands Improvement Co.'s Acts the settled lands were charged with certain rent-charges in favour of the company extending over a fixed number of years by way of repayment of the sums advanced. The tenant for life was, as between himself and the remaindermen, bound to pay the instalments which should become payable during the continuance of his interest. The instalments were duly paid by the tenant for life for some years.

Subsequently money came to the hands of the trustees, which was applicable as capital money arising under the Settled Land Act, 1882; and Lord Egmont requested the trustees to apply such money to the redemption of the rent-charges. The company were willing to have the rent-charges redeemed, but only on condition that they were paid a sum of money by way of bonus for accepting repayment of the loan before the proper time. The trustees being doubtful whether they had power to redeem on those terms, Lord Egmont applied to the court, asking that the trustees might be at liberty to apply the money in their hands to the redemption of the rent-charges, including the payment by way of bonus.

North, J., thinking he was bound, on the authority of the decision of Kay, J., in the case of *In re Lord Sudeley's Settled Estates*, 36 W. R. 162, 37 Ch. D. 123, to hold that the trustees could not pay any sum by way of bonus to the company, made the following order:—That the trustees might properly, out of money in their hands, being capital money, or money applicable as capital money, arising under the Settled Land Act, 1882' redeem or otherwise provide for payment of so much of the instalments accruing, or to accrue due, of the rent-charges as represented or was appropriated to the payment of capital sums.

Lord Egmont appealed.

Crackanthorpe, Q.C. (*Reginald Winslow* with him), for the appellant.—By section 21 of the Settled Land Act, 1882, "capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, (namely) . . . (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land." In the case of *In re Knatchbull's Settled Estate*, 33 W. R. 569, 29 Ch. D. 588, where terminable rent-charges had been created under the Improvement of Land Act, 1864, it was held that the tenant for life was not entitled to have the charges paid off out of capital money. In consequence of that decision the Settled Land Act of 1887, was passed, section 1 of which enacts:—"Where any improvement of a kind authorized by the Act of 1882 has been, or may be made, either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." The payment by way of bonus which the court is now asked to allow clearly comes within this section. *In re Lord Sudeley's Settled Estates* is distinguishable from the present case; but if necessary that case ought to be overruled.

Onslow, for the trustees.

LORD ESHER, M.R.—In this case the tenant for life borrowed money to pay for improvements on the estate, such improvements being of a kind authorized by the Settled Land Act, 1882, and by way of repaying the loan he created terminable rent-charges. After paying the instalments of the rent-charges for some years he desired to have them redeemed by the trustees. North, J., thought that the money had been properly borrowed, and that the trustees had in their hands money with which they might redeem the rent-charges; but he felt constrained by the decision of Kay, J., in *Lord Sudeley's case* to say that he could not allow payment of part of the money which the trustees would have to pay for redemption—namely, a bonus by way of compensation to the lender, who is willing to be redeemed at a certain price. What is the meaning of the words in section 1 of the Settled Land Act of 1887, "money expended in redeeming such rent-charges, or otherwise providing for the payment thereof"? "Money expended in redeeming such rent-charges" means money which will have to be expended in redeeming. The words must be construed to include what the lender will accept for redemption of the rent-charge. Then was North, J., right in saying that this payment of bonus could not be allowed? *Lord Sudeley's case* was not a case of redemption; the order there asked for was for the payment of the instalments of the rent-charge, from time to time, out of capital money in the hands of the trustees. That case, therefore, does not govern the present. But I think that Kay, J., took too strict a view of the Act in that case, and failed to give effect to the words, "or otherwise providing for the payment thereof." This is a case of redemption pure and simple. I think that North, J., could have allowed payment of this bonus, and the appeal must be allowed. If the trustees desire to go into the question of the amount of bonus, the case must go back to North, J.

LINDLEY, L.J.—This case turns on the true construction of section 1 of the Settled Land Act of 1887, which was passed to remedy the defect brought to light in *Knatchbull's case*. [His lordship read the section.] No distinction is drawn between a rent-charge redeemable by contract and a rent-charge not redeemable by contract. We are asked to apply the Act to a rent-charge not redeemable by contract. The borrower, in order to redeem, must come to terms with the lender. The lender says, I am willing to be redeemed, but I must have something to compensate me for the loss of a good investment. The object of the Act is to enable capital money to be expended in redeeming rent-charges, whether temporary or perpetual; and the payment of the proposed bonus by way of compensating the lender, being part of the expense of redemption, seems to me to be authorized by the Act. It is said that this is not in accordance with *Lord Sudeley's case*. But that case was different from this; there the summons only asked that the capital money might be from time to time applied in payment of the instalments, it did not ask for redemption. However, I agree with the Master of the Rolls that Kay, J., in that case took too limited a view of the Act.

BOWEN, L.J.—I am of the same opinion.

Appeal allowed.

Solicitor for the appellant, *H. T. Boodle.*

Solicitors for the respondents, *Frere, Forster, & Co.*

From Q. B. Div. July 2.

CAPE COPPER CO. *v.* COMPTOIR D'ESCOMPTE DE PARIS. (*a.*)

Practice—Letters of request—R. S. C., 1883, *ord.* 37. *r.* 6*a*; *App. K., Forms* 37*a*, 37*b*.

An order for letters of request to issue to a foreign

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

court, under ord. 37, r. 6a, can only be made where it is sought to examine witnesses under the order, and the court has no jurisdiction to make such an order where production of documents alone is asked for.

Appeal from an order of the Queen's Bench Division (Denman, Charles, and A. L. Smith, JJ.)

The defendants who had obtained an order for a commission to examine witnesses before a special examiner in France, took out a summons for an order that letters of request should issue under ord. 37, r. 6a, to the French court for the purpose of obtaining upon the examination production of certain documents which were in the possession of the French court. The defendants alleged that these documents could only be obtained by means of letters of request. The court, reversing the decision of Lawrance, J., at chambers, ordered the letters of request to issue. A similar application, where the facts were the same, is reported *sub nom. Mason & Barry* v. *Comptoir d'Escompte, ante*, p. 685. The plaintiffs appealed.

Finlay, Q.C. and *F. M. Abrahams*, for the plaintiffs.

Bigham, Q.C., and *Tindal Atkinson*, for the defendants.

The COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.) allowed the appeal. The application was made under ord. 37, r. 6 a, and by that rule forms 37a and 37b in appendix K. were to be followed. According to those forms it was clear that the examination of witnesses was the foundation of the issue of letters of request. The examination of witnesses was the necessary essential in an order for the issue of letters of request, and upon that examination there might be production of documents and copies of those documents taken. In the present case the summons did not ask for the examination of any witnesses, and therefore the court, upon the present materials, had no jurisdiction to issue letters of request. Upon this ground, therefore, the application for letters of request must be refused.

Appeal allowed.

Solicitor for the plaintiffs, *Michael Abrahams, Son, & Co.*

Solicitors for the defendants, *Lyne & Holman.*

From Q. B. Div. May 19.

RHYMNEY RAILWAY CO. *v.* RHYMNEY IRON CO. (*a.*)

Railway company—Undue preference—Set-off of overcharges—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, 6—*Demand of interest—Writ* —3 & 4 *Will.* 4, *c.* 42, *s.* 28.

The Railway Commissioners having decided, under sections 2 and 3 of the Railway and Canal Traffic Act, that the plaintiffs were giving an undue preference to another company over the defendants in their rates for carriage, the defendants sought to set off, in an action brought against them by the plaintiffs, the amount by which the rates paid by them under protest exceeded the rates paid by the other company.

Held, on the authority of Manchester, Sheffield, and Lincolnshire Railway Co. *v.* Denaby Main Colliery Co., 33 W. R. 491, 14 *Q. B. D.* 209, *that the set off could not be maintained.*

A claim on the writ for interest is not a good demand in writing for the purposes of 3 & 4 *Will.* 4, *c.* 42, *s.* 28.

Appeal from the decision of Grantham. J.

The plaintiffs had charged the defendants for the carriage of coal rates in excess of those which they charged the Dowlais Iron and Coal Co. On the 10th of June, 1887, the defendants wrote to the plaintiffs to the effect that they intended to apply to the Railway Commissioners in respect of this undue preference, and that from that date they should only consider themselves liable to pay such rates as might be found by the commissioners to be proper, and that any excess above such rates would be subject to recovery.

The Railway Commissioners, by an order dated July 26, 1888, enjoined the plaintiffs to desist from giving an undue preference to the Dowlais Co., and ordered them to carry for the defendants on equal terms with that company.

The defendants had continued to pay under protest the rates charged by the plaintiffs up to July 26, 1888.

The plaintiffs having brought the present action to recover the balance of an account, the defendants claimed to set off the amount so paid by them in excess of the rates paid by the Dowlais Co., as being shown by the decision of the commissioners to be overcharged.

The indorsement on the writ claimed interest on the amount claimed at the rate of £5 per cent. per annum from the date of the writ.

Grantham, J., on the authority of *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 11 App. Cas. 97, 34 W. R. Dig. 159, gave judgment for the plaintiffs, with interest.

The defendants appealed.

Jelf, Q.C., and *W. Graham*, for the appellants.—Although no action will lie for a breach of section 2 of 17 & 18 Vict. c. 31, yet where an undue preference has been established by a decision of the commissioners the money overcharged and paid under protest can be recovered. Such an action is not in contravention of section 6. In *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* Lord Halsbury expressly reserved this question: *Lancashire and Yorkshire Railway Co.* v. *Greenwood*, 21 Q. B. D. 215, 36 W. R. Dig. 172. Secondly, the claim on the writ for interest is not a demand in writing within 3 & 4 Will. 4, c. 42, s. 28, which contemplates a demand before action.

Bompas, Q.C., and *R. S. Wright*, for the respondents, were only called upon to argue the second point.—Interest may be given as damages for non-payment of the debt, and therefore the claim on the writ is a good demand within section 28.

Lord ESHER, M.R.—The main point in this case has, in my opinion, been already decided in this court in *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Denaby Main Colliery Co.*, 33 W. R. 491, 14 Q. B. D. 209. We there held that the only remedy where there has been a breach of section 2 of the Railway and Canal Traffic Act, 1854, was by application to the Railway Commissioners under section 3. and that the only remedy they can give is as to the future, and not as to the past. That view was expressly supported by Lord Blackburn in the House of Lords, and was certainly not overruled by the other lords. We are therefore bound by that decision, which I entirely adopt, to say that the appellants are not entitled to set off this amount.

As to the point of interest, I think the appellants are right, and that the amount of the plaintiffs' judgment must be reduced by so much.

FAY, L.J.—I agree. The provisions of the Railway and Canal Traffic Act, 1854, give certain remedies in cases contemplated by the Act. But certain rights already existed, and therefore the Act deals with two classes of rights. The old rights are left intact, but the new rights are only to be enforced in the manner specified by the Act. That seems to me the plain meaning of the Act, and it is the meaning given to it by this court and by Lord Blackburn in the House of Lords.

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

LOPES, L.J.—The principal question is, I think, concluded by the decision of this court which has been cited. As to the interest, I do not think that the claim on the writ is a demand in writing within the meaning of 3 & 4 Will. 4, c. 42, s. 28.

Judgment varied.

Solicitor for the appellants, *Howell Thomas*, for *Simons & Plews*.

Solicitors for the respondents, *Bompas & Co.*

High Court of Justice.

Chan. Div. North, J. July 31.

In re MAY.
CRAWFORD *v.* MAY. (*a.*)

Executor—Retainer—Loan by wife to husband—Death of husband intestate and insolvent—Administration of husband's estate—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 3—*Judicature Act,* 1875 (38 *&* 39 *Vict. c.* 77), *s.* 10.

A married woman advanced money to her husband for the purposes of his business. The husband died intestate and insolvent without repaying the advance, and the widow became his administratrix. An action was brought by creditors for the administration of the husband's estate. The widow, as administratrix, received considerable personal estate of her husband, and claimed to retain out of the balance in her hands the amount of her advance to him. On a summons in the administration action for payment of the balance into court,

Held, that the widow, as executrix, was entitled to retain out of the balance of the personal estate the amount of the advance made by her to her husband.

Adjourned summons.

The question for decision was whether the widow and administratrix of a trader whose estate was insolvent had a right of retainer out of personalty received by her as such executrix, in respect of money lent by her to her husband for the purposes of his business.

The administratrix, Frances Emily May, married John Venables May on the 11th of October, 1883, and in February, 1885, advanced to him £143 5s., which he received by a cheque, payable to him, which he paid into his bank to his business account and used for the purposes of his business.

John Venables May died on the 3rd of December, 1889, intestate, and letters of administration to his estate were granted to the administratrix on the 17th of January, 1890. The estate proved to be insolvent. The widow, as administratrix, received considerable personal estate of her husband, and the balance in her hands was £213 8s. 7d., out of which she claimed to retain £143 5s. in repayment of the advance made by her to her husband.

The summons was taken out by William Henry Crawford, a creditor of the intestate, in an action for the administration of the intestate's estate brought by him, on behalf of himself and all other creditors, for the payment into court, by the administratrix, of the sum of £213 18s. 7d., the balance of the intestate's estate.

E. C. Macnaghten, for the summons.—The widow has no right of retainer, as administratrix, in respect of the £143 5s., as by section 3 of the Married Women's Property Act, 1882, her claim is postponed to the claims of the other creditors of the husband in the event of his bankruptcy, and by section 10 of the Judicature Act, 1875, the provisions of section 3 of the Married Women's Property Act, 1882, are incorporated into the administration of insolvent estates; so that she has no right of retainer as against the other creditors. She has no debt owing to her until the claims of the other creditors are satisfied.

He referred to *In re Genese*, 34 W. R. 79, 16 Q. B. D. 700; *Ex parte Taylor*, 28 W. R. 205, 12 Ch. D. 366.

W. Baker, for the widow.—This is not a case of bankruptcy; and the widow is seeking to retain as administratrix, not to prove her debt. Section 10 of the Judicature Act, 1875, does not refer to retainer, and must be construed strictly.

He referred to *In re Count D'Epineuil, Tadman* v. *D'Epineuil*, 30 W. R. 423, 20 Ch. D. 217; *Lee* v. *Nuttall*, 27 W. R. 805, 12 Ch. D. 61.

E. C. Macnaghten replied.

NORTH, J., stated the facts, and proceeded:—With regard to the question of proving that the money was lent to the intestate for the purposes of his trade or business, there is the case of *In re Genese*, in which it was held that a woman who seeks to prove under her husband's bankruptcy for money lent by her to him must show that the money was not lent for the purposes of his trade or business. The natural inference would be that the money was lent for the purposes of his trade or business. The *onus* of proof is on the person seeking to show that it was not an advance for such purposes, and this has not been done.

Then section 3 of the Married Women's Property Act, 1882, provides that "any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise shall be treated as assets of her husband's estate in case of his bankruptcy under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." It is clear on the evidence that the money was lent as a debt, and is due from the intestate as a debt. Under this section it is treated as a debt. The words "subject to reservation of the wife's claim to a dividend as a creditor for the amount or value of such money," &c., show that it is treated as a debt. The Act recognizes her "as a creditor" in respect of it. In this case the husband was not a bankrupt, although he died insolvent. It is not a case of bankruptcy; but it is said that the case is brought within the provisions of section 3 of the Married Women's Property Act, 1882, by virtue of section 10 of the Judicature Act, 1875. That section does not incorporate the rules of bankruptcy for all purposes, but only for particular things. It provides that in the winding up of companies, and in administering the estates of deceased persons, where the assets prove insufficient, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

Now the widow is the legal personal representative of her husband. She has received considerable personal estate, and she seeks, not to prove, but to retain the money she has lent her deceased husband out of the estate she has received. That claim cannot be denied unless by virtue of section 3 of the Married Women's Property Act, 1882, through section 10 of the Judicature

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Act, 1875. But the right of retainer is not affected by the Judicature Act, as was decided in *Lee* v. *Nuttall*, where it was held that an executor's right to retain a debt due to himself did not make him a secured creditor within the meaning of the Judicature Act, 1875, s. 10, and that his right to retain was not affected by that section. This was not because he was a secured creditor, for, if so, he would have a right of retainer against creditors of a higher degree, and not only against creditors of equal degree to himself. If the widow were seeking to prove, it would depend on her right to prove. But here she is only seeking the right of retainer. The right of retainer is not affected by section 10 of the Judicature Act, 1875, and therefore, in my opinion, she has a right to retain the debt.

Solicitors, *J. W. Smart; Buchanan & Rogers.*

Chan. Div. } Stirling, J. } July 18.

In re WALKER.
WALKER *v.* WALKER. (*a.*)

Attachment—Non-payment of money—Persons acting in fiduciary capacity—"Possession or control"—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* 3.

Trustees and executors improperly sold certain bonds, part of their testator's estate, which they had appropriated to answer a certain legacy. In an action by the legatees to compel the trustees to make good the value of these bonds, an inquiry was directed as to what was their market price on the day of the judgment, and the trustees were ordered to pay to the plaintiffs within a specified time the value as ascertained. The value of the bonds had increased between the date of their sale and the date of the judgment. The money not having been paid, the plaintiffs moved for leave to issue a writ of attachment against the trustees.

Held (*following* Cronin *v.* Twinberrow, 32 SOLICITORS' JOURNAL, 44, *W. N.*, 1887, *p.* 201), *that the sum ordered to be paid, so far as it represented the difference between the value of the bonds on the day they were sold and their market price on the day of the judgment, had never been "in the possession or under the control" of the defendants within the meaning of sub-section* 4 *of section* 3 *of the Debtors Act,* 1869, *and that payment could, therefore, not be enforced by attachment.*

Motion.

By the judgment (dated the 26th of February, 1890), in an action brought against the defendants, John Saunders Walker and Robert Walker Smith, to make them responsible for a breach of trust in improperly selling certain bonds, forming part of the estate of William John Walker, of whose will they were trustees and executors, it was declared that they "duly appropriated a moiety of the value of two bonds of the South Yorkshire and River Don Railway Co., one for £700 and one for £500, to answer the legacy of £600 bequeathed by the said will to the children of Walter Walker" (the plaintiffs), "and that the defendants are liable to the plaintiffs for one-half of the market value of this day of the said two bonds, or the securities representing the same, which bonds were improperly sold by the defendants in the month of June, 1881, together with interest on £600 at the rate of £4 10s. per cent. per annum from the 26th day of December, 1887, to this day." And it was ordered that the defendants should, "on or before the 4th of March, 1890, pay to the" plaintiffs "£27 18s. 6d., being the unpaid balance of £57 1s. 9d., the amount of interest due as aforesaid after deducting £29 3s. 3d. received on account." And it was ordered that an inquiry should be made as to what was "the value, at the market price of this day, of one moiety of" the two bonds "or of the securities then representing the same," and that the defendants should "within three months after the date of this order pay to the" plaintiffs "the amount which shall be certified to be the value of the said bonds or securities on this day, together with interest thereon at the rate of £4 per cent. per annum from this day until payment." And it was further ordered that "in default of the defendants paying to the plaintiffs the said sum of £27 18s. 6d., for interest by the time aforesaid," the defendants should "within seven days from the date of the chief clerk's certificate pay to the" plaintiffs "the said sum of £27 18s. 6d., together with the amount which shall by the said certificate be certified to be such value as aforesaid."

The chief clerk certified, on the 21st of April, 1890, that the two bonds in question had, on the 16th of July, 1874, been converted into 4½ per cent. debenture stock of the same amount of the Manchester, Sheffield, and Lincolnshire Railway Co., and that the market value, on the date of the judgment, of £600, being one moiety of £1,200 of this stock, was £840.

The defendants had not paid either of the sums of £27 18s. 6d. or £840 pursuant to the judgment.

Farwell, for the plaintiffs, moved for leave to issue a writ of attachment against the defendants for their contempt in not paying these sums, or, in the alternative, that the defendants might be committed to prison for such non-payment.

A. à B. Terrell, for the defendants, was not called upon.

Barrett v. *Hammond*, 27 W. R. 471, 10 Ch. D. 285; *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338; *Holroyde* v. *Garnett*, 30 W. R. 604, 20 Ch. D. 532; *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. 152; *Cronin* v. *Twinberrow*, 32 SOLICITORS' JOURNAL, 44, W. N., 1887, p. 201, were referred to.

STIRLING, J.—In my opinion this order cannot be enforced by attachment. The defendants were in possession as trustees of certain bonds, and improperly sold them. For that they were, upon the judgment, held liable. The sale was held to be a breach of trust, and they were ordered to make good, not the amount they had received for them, but their value at the date of the judgment. An inquiry was directed as to what was the value of the bonds at the market price on that date, and the defendants were ordered to make that good. It was admitted that their value at the date of the judgment was greater than at the time when they were sold, and that the difference between the amount produced by the sale and the sum which they were ordered to pay by the judgment never came into the hands of the defendants. No doubt they were liable for that, and the judgment, if I may say so, most properly ordered them to make it good. But it is now sought, the money not having been paid, to enforce the judgment by attachment, and the question is, not whether the defendants are liable to pay, but whether the judgment is one which, having regard to the provisions of the Debtors Act, 1869, s. 4, can be enforced by an attachment. It is said that the case falls within the third exception: "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control." Part of the sum which the defendants were ordered to pay did not come into their possession, and was not under their control. For so holding I have the decision of North, J., in *Cronin* v. *Twinberrow*, in which the same point appears to have arisen, and the

(*a.*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

learned judge refused to issue an attachment on the same ground. That case is undistinguishable from the present; but I think that, even without it, I should, having regard to *Middleton* v. *Chichester*, have arrived at the same conclusion. The motion must therefore be refused, but without costs.

Solicitors, *Paterson, Snow, Bloxam, & Kinder*, for *Dibb & Co.*, Leeds; *Learoyd, James, & Mellor*, for *Learoyd*, Huddersfield.

Chan. Div. Stirling, J. June 5, 21.

In re WARE.

CUMBERLEGE *v.* CUMBERLEGE-WARE. (*a.*)

Will—Construction—Power of appointment—Exclusive or non-exclusive—Objects designated nominatim—*Gift over to same persons in default of appointment—Death of one in lifetime of appointor—Validity of appointment—"Representatives"—"Vest"—Marriage settlement—Covenant to settle property of wife—Law of Powers Amendment Act*, 1874 (37 & 38 *Vict. c.* 37).

If a power is given by will to appoint a fund among several persons nominatim, *with a gift over in default of appointment to the same persons* nominatim, *or their representatives, and all the objects of the power survive the testator, the death of some of the objects during the lifetime of the donee of the power will not affect the validity of the power over the whole fund.*

The principle of Boyle *v.* Bishop of Peterborough, 1 *Ves. jun.* 299, *followed and applied.*

Where a gift is given by will to a person and his "representatives," the term "representatives" means executors and administrators, not next of kin, in the absence of any special words in the will to control or restrict such ordinary meaning.

In re Crawford's Trusts, 2 *W. R.* 341, 2 *Drew.* 230, *followed.*

A reversionary interest which becomes vested in the wife during coverture, liable to be divested by the exercise of a power of appointment, is included in a covenant by the husband contained in a marriage settlement to settle all personal estate which shall come at any time during coverture to him or shall vest in him in right of his intended wife, or in her by bequest, gift, or otherwise.

Originating summons by the plaintiff, Samuel Cumberlege, the surviving trustee and executor of the will of Samuel Ware, for a declaration under ord. 55, r. 3, as to who were the persons entitled to the investments representing two sums of £10,000 bequeathed by that will, and in what shares and for what interests.

The testator by his will, dated the 5th of July, 1859, bequeathed to each of the persons thereinafter named, to and for his or her own absolute use and benefit, the sum affixed to his or her name, except as thereinafter limited, that was to say, to John Cumberlege, Anne Cumberlege, the plaintiff, Samuel Cumberlege, and Catherine Cautley, each a sum of £10,000, and limited the above use and benefit of the capital sum of the legacies to the said John Cumberlege and Anne Cumberlege as follows, "so that the sums may be left by them respectively after their deaths in such proportions as they may appoint to their brothers or sisters (*sic*), Charles Cumberlege, Samuel Cumberlege (the plaintiff), and sister, Catherine Cautley, in failure of appointment to be equally divided between the three or their respective representatives." And the testator further directed that the legacies given to Anne Cumberlege and Catherine Cautley should be invested as his trustees should approve, and the interest arising therefrom should be in trust for them for their separate use. And in case either of them should become a bankrupt or insolvent debtor, or should sell, assign, mortgage, or otherwise dispose of the annual interest bequeathed to her, the same should cease and fall into his residuary estate as though she were then actually dead, except in respect of Catherine Cautley, whose legacy should go to her children according as she should appoint, and in default thereof to them absolutely. The will further contained a devise and bequest of residuary estate. The testator died on the 12th of December, 1860.

Catherine Cautley died on the 9th of July, 1867. John Cumberlege died on the 6th of March, 1869, having, by a second codicil to his will, dated the 23rd of February, 1869, which referred to the death of Catherine Cautley, appointed one-third of his £10,000 to his brother, Charles Cumberlege, then Charles Ware, and the other two-thirds to the plaintiff.

Anne Cumberlege died on the 17th of October, 1889, having by her will, dated the 10th of September, 1887, in exercise of her power of appointment contained in the will of the testator, appointed her £10,000 in equal shares between the plaintiff and Charles Ware, her brother, as tenants in common.

Charles Ware died on the 22nd of September, 1888, predeceasing Anne Cumberlege. He left a widow, six children, and grandchildren, issue of a son who had predeceased him.

Upon the marriage of Catherine Cautley a settlement, dated the 12th of July, 1843, had been executed, which contained a covenant by her future husband for the settlement of all personal estate which, upon the marriage, or at any time during the coverture, should come to or vest in him in right of his then intended wife, or in her by bequest, gift, or otherwise.

The plaintiff was the surviving executor of the wills of John Cumberlege, Anne Cumberlege, and Catherine Cautley.

Three questions were raised for the decision of the court, first, whether Catherine Cautley, one of the objects of the power, having predeceased John Cumberlege, and both Catherine Cautley and Charles Ware, two of such objects, having predeceased Anne, the appointments made by John and Anne were respectively valid; secondly, whether "their respective representatives" meant legal personal representatives, or issue, or next of kin; and, thirdly, if legal personal representatives, whether the share which Catherine took in default of appointment was subject to the covenant to settle after-acquired property in the marriage settlement of 1843.

H. A. Giffard, Q.C., and *A. Bailey*, for the plaintiff.—This is an exclusive power of appointment: *In re Veale's Trusts*, 25 W. R. 122, 4 Ch. D. 61, 5 Ch. D. 622. So, the appointment by John is valid, although executed before 37 & 38 Vict. c. 37. Anne exercised her power after that statute was passed, so her appointment was good. Charles Ware predeceased Anne, so that share goes as in default of appointment. [They also referred to *Doe d. Thorley* v. *Thorley*, 10 East, 438.] The death of any of the objects of the power before the testator will to that extent only defeat the power and the devise over; the power and devise over will remain as to the shares of the survivors; Sugden on Powers, 8th ed., p. 421; 2 Jarm. Wills, pp. 265-6, 4th ed.; Farwell on Powers, p. 134; *Reade* v. *Reade*, 5 Ves. 744. If an object of a power survive the testator, but die before the donee of the power, the power and devise over remain: *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299; *Butcher* v. *Butcher*, 9 Ves. 382, 1 V. & B. 79; *Woodcock* v. *Renneck*, 4 Beav. 190, 1 Phil. 72; *Paske* v. *Haselfoot*, 11 W. R.

(*a.*) Reported by W. H. QUARRELL, Esq., Barrister-at-Law.

1089, 33 Beav. 125. This is a power to leave which is equivalent to an appointment by will. It is to be a power to appoint the whole in favour of those who survive the appointor. The plaintiff takes two-thirds of the £10,000 belonging to John Cumberlege, and Charles Ware's representatives take the other third. As to Anne Cumberlege's fund, the plaintiff takes one moiety, and also one-third of the other moiety, which appointment fails by reason of the death of Charles in Anne's lifetime.

Phipson Beale, Q.C., and *W. Cowell Davies*, for the defendants, C. Cumberlege Ware, E. Cumberlege, and H. M. Cumberlege, the executors of Charles Ware and the defendant E. Cumberlege, a beneficiary under the will of Charles Ware.—"Representatives" means legal personal representatives: *In re Crawford's Trusts*, 2 W. R. 341, 2 Drew. 230; *Walker* v. *Marquess Camden*, 16 Sim. 329. That case is entirely different from *In re Horner*, 36 W. R. 348, 37 Ch. D. 695. The executors of Charles Ware are entitled to share in the moiety of Anne's fund.

Wace, for Charles E. C. Ware, as nex tof kin (a grandson of Charles Ware).—"Representatives" means statutory next of kin: *Booth* v. *Vicars*, 1 Coll. 6; *Stockdale* v. *Nicholson*, 15 W. R. 986, L. R. 4 Eq. 359; *Walter* v. *Makin*, 6 Sim. 148; *King* v. *Cleaveland*, 26 Beav. 26, 166, 7 W. R. 602, 4 De G. & J. 477. The fund, in default of appointment, comes to Charles E. C. Ware in the evtnes which have happened.

Graham Hastings, Q.C., and *Lemon*, for Joshua Cautley, the husband of Catherine Cautley.—"Representatives" means legal personal representatives. This is a non-exclusive power. Mrs. Cautley's share, in default of appointment is not bound by her settlement. The term "vest" means indefeasibly vested, or vested in possession: *In re Jackson's Will*, 28 W. R. 209, 13 Ch. D. 190; *In re Mackenzie's Settlement*, 15 W. R. 662, L. R. 2 Ch. 345; *Ricketts* v. *Loftus*, 4 Y. & C. Ex. 519. [STIRLING, J., referred to *Sweetapple* v. *Horlock*, 27 W. R. 865, 11 Ch. D. 745.]

Buckley, Q.C., and *J. G. Butcher*, for H. Mordant and H. W. Lyall, the trustees of Catherine Cautley's settlement.—A vested interest is created which passes to the representatives of all parties. Upon the death of Mrs. Cautley in 1867 the power came to an end altogether. "Representatives" means legal personal representatives. As to John Cumberlege's fund, that must go in thirds, it is a bad appointment: *Woodcock* v. *Renneck; In re Crawford's Trusts; In re Jackson's Will*. The power is non-exclusive: *White* v. *Wilson*, 1 W. R. 47, 1 Drew. 298.

J. Austen Cartmell, for John C. Cautley, son of Mrs. Cautley.—"Representatives" means next of kin by blood or children; this is shown by the gift over. The legacy includes everything which Mrs. Cautley may take.

Giffard, Q.C., was not called upon to reply.

STIRLING, J.—I can dispose of part of this case at once. The first question arises upon the meaning of the words "their brothers or sisters, Charles Cumberlege, Samuel Cumberlege, and sister, Catherine Cautley," which are not strictly grammatical. I assume, without thinking it necessary to decide it, that the gift is in such proportions as John and Anne may respectively appoint to these three persons. John and Anne have made appointments under that power, and the question is, whether, under the circumstances of the case, those appointments are valid. In support of them has been cited the well-known case of *Boyle* v. *The Bishop of Peterborough*, followed as it has been by *Ricketts* v. *Loftus*, and it is said that those cases show that the power subsisted and was exercisable in favour of the survivors of the three persons who were named. A distinction was sought to be drawn between the present case and those to which I have referred, on the ground that the gift there was to a class, and that in the present case it is to named individuals. But it is to be observed that no case has been cited which is a decision that the doctrine laid down in *Boyle* v. *The Bishop of Peterborough* does not apply to a case where the objects of the power are named, and not simply described as a class. The doctrine has been applied in the case of *Boyle* v. *The Bishop of Peterborough* to gifts to children as a class. It was extended, or perhaps I ought not to say extended, but applied, in the case of *Ricketts* v. *Loftus* to a gift where the objects of the power were all of them named, but described as the sons and daughters of a certain person by his wife, and I am asked at this time after the passing of the Act of 1874, which abolished the doctrine altogether as to non-exclusive powers, not to extend it to a case where the persons who are the objects of the power are indicated by name and not by description so as to constitute a class. There is no authority that compels me to adopt that contention, and it seems to me that it is inconsistent with the view which has been taken by the profession as indicated by the three text-writers who have been referred to in the course of the argument—namely, Mr. Jarman, Lord St. Leonards, and Mr. Farwell.

In Mr. Jarman's book the law is laid down thus (4th ed., p. 268):—"Where a power is given by will to appoint property amongst several objects, and the subject, in default of appointment, is given to them individually (and not as a class) as tenants in common, a question sometimes arises whether by the death of any of the objects the power is defeated in respect of the shares of those objects. The established distinction seems to be that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains as to the whole. But, on the other hand, if any object dies in the testator's lifetime by which the gift lapses *pro tanto*, the power is defeated to the same extent." So that Mr. Jarman does not treat the doctrine as resting on the objects being described as a class; but he appears to indicate his opinion to the contrary, because he refers to the subject in default of appointment being given to them individually, and not as a class. Then I have been unable, in the course of the examination which I have given to the passage referred to in Lord St. Leonard's book, to find any indication of his view being otherwise; and when we come to the last writer of all, he apparently takes the view that the doctrine applies whether or not the objects of the power are described as a class or are named.

In Mr. Farwell's book (p. 134, s. 17) the law is laid down in this way:—"Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them *nominatim*, and not as a class, as tenants in common, the death of any of the objects of the powers before the testator will to that extent defeat the power and the devise over; the power and devise over will only remain as to the shares of the survivors." Then he goes on:—"If, however, an object of a power survive the testator, but die before the donee of the power, the power and the devise over will remain."

Seeing that there is no decision to the contrary, and seeing, as I gather from the text-writers, that the view that has been taken by the profession is that the doctrine extends to a case in which the objects of the power are described *nominatim* as well as a class, I think I ought not to draw the line in the way which I am asked to do, especially having regard to the fact that the Legislature has since intervened, and, by the

Act of 1874, has really abolished altogether the doctrine on which the cases rest—namely, that where the power is given to appoint, as I hold here, to three persons, you must appoint something to each of them, otherwise the exercise of the power is bad. I think, therefore, that the exercise of the power by the wills of John and Anne is good.

But then that does not quite exhaust the case. There is a lapse as regards the will of Anne, by reason of her brother Charles having died in her lifetime, and that raises the question how it is to go in default of appointment. The will runs thus :—"In failure of appointment to be equally divided between the three or their respective representatives." Several questions arise as to the force of the word "representatives," and I shall reserve my judgment on this part of the case.

June 21.—STIRLING, J.—I have now to decide what is the construction of the will of the testator with reference to the devolution of a moiety of the legacy of Anne Cumberlege which goes as in default of appointment. The question turns upon what meaning is to be attributed to the words "their respective representatives" in the gift over of that legacy in default of appointment. The meaning of the word "representatives" was considered in a well-known case before Kindersley, V.C., *In re Crawford's Trusts*. He there laid down that the word was to be taken, in the absence of any context to the contrary, as meaning the executors or administrators of the person represented, not the next of kin. That case has been repeatedly cited with approval, and it has been repeatedly followed, and the principles laid down in it would be binding on me, whatever my own individual opinion about them might have been; but I desire to say that, so far from feeling any doubt or desire to differ, I find myself, after having read the judgment most carefully, in entire accord with what is laid down there.

That being so, all I have to consider is this, whether there is anything in this will which would lead me to infer that the testator used the word "representatives" in any other than its primary legal sense. In the first place, it is to be observed that the gift in which the word occurs is not an immediate gift, but one after the determination of prior life interests and in default of appointment; and, as is pointed out by the Vice-Chancellor in *In re Crawford's Trusts*, there is no presumption under that state of circumstances that the testator used the word otherwise than in its primary meaning—namely, executors or administrators. The only circumstance which is in favour of an opposite construction in the present case is, that the testator has twice used the words "executors and administrators" in the course of his will. I cannot think that the mere appointment of executors is a circumstance to which any weight is to be attached. It occurred in the case of *In re Crawford's Trusts*, and was disregarded by the Vice-Chancellor, but in that case, it is true, the word "administrators" did not occur. In the present case the words occur, in the first instance, in connection with the word "trustees," when the testator declares that his trustees, their heirs, executors, or administrators, shall only be chargeable for such moneys as they may respectively actually receive by virtue of the trusts; and, in the second instance, in the limitation of the testator's residuary real and personal property to the residuary devisee and legatee. The Vice-Chancellor, in the case to which I have referred, says emphatically that he adheres to the principle laid down by Lord Cottenham in *The Attorney-General* v. *Malkin*, 2 Phil. 64, at p. 68, that slight circumstances ought not to be considered as affording sufficient evidence of the testator's intention to use the term which he has chosen to employ otherwise than in its ordinary legal sense.

In my judgment, although no case has been cited precisely on all fours with this, there is not sufficient in this will to afford any evidence that the testator intended to employ the words "their representatives" otherwise than in their ordinary legal sense, and I hold that by "representatives" in this will is meant the legal personal representatives of the persons referred to. A further question arises as to the share which, under these circumstances, was given to Mrs. Cautley of the legacy in which Anne Cumberlege took a life interest. It is said that it ought to go to her children, under the clause in the will which directs that her legacy in certain events is to go to her children according to her appointment, and in default to them absolutely. The question, therefore, is whether the word "legacy," as used in that part of the will, includes the share of each of the legacies which, in default of appointment, were given to "the three or their respective representatives." I have read the will very carefully, and it seems to me that throughout, down to the passage in question, whenever the testator speaks of a legacy to Miss Cumberlege or Mrs. Cautley, or John Cumberlege, he means the sum of £10,000, in which those persons respectively take the limited interests which were conferred by the will. I see no reason to suppose that, when he directed the legacy of Mrs. Cautley to go to her children in the manner mentioned, he used the word in any other sense. I think, therefore, that this share of the legacy given to Anne Cumberlege does not go to Mrs. Cautley's children under the clause to which I have referred.

The next question that arises is, whether this share is bound by the covenant to settle after-acquired property contained in Mrs. Cautley's marriage settlement. Is it, in fact, personal estate which, at any time during the intended coverture, came to or vested in Mr. Joshua Cautley in right of his intended wife or in the said Mary Cumberlege, his wife, by bequest, gift, or otherwise? What was the nature of the interest conferred by the will of Samuel Ware which I have read? It has plainly conferred on Mrs. Cautley a vested interest, an interest which, upon the death of the testator, became vested in Mrs. Cautley, liable to be divested by the exercise of the power of appointment conferred on Miss Cumberlege. Does such an interest fall within the terms of the settlement? It did vest in Mrs. Cautley by bequest during the coverture, and I can see no reason for holding that the word "vest" there is used otherwise than in its strict legal sense, which means a vested interest, and not vesting in possession. In my judgment, therefore, the share of Mrs. Cautley is bound by the covenant in the settlement, and goes accordingly. I may add that it seems to me that the case of *In re Jackson's Will*, although not on all fours with the present case, is an authority in favour of the conclusion to which I have come.

Solicitors, *Baileys, Shaw, & Gillett; Wade & Lyall.*

Q. B. Div. (Pollock, B., and Day, J.) July 17.

REG. v. WILLIAMSON. (*a*.)

Gas—Metropolis—Chief gas examiner—Right of gas company to appear before chief gas examiner "by counsel"—Agents—Gas Light and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 12.

By a section of a Metropolitan Gas Act a gas company is entitled to appeal from the decision of a gas examiner to the chief gas examiner, whose decision, after hearing the parties, shall be final and conclusive.

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Held, that, although the gas company could appear on the hearing of such appeal by their "agents," they could not, as a matter of right, appear by "counsel," as counsel cannot be "agents" in such cases, and that it is in the discretion of the chief gas examiner whether he will hear counsel or not.

Rule calling on Professor Williamson, "chief gas examiner" under the Metropolitan Gas Acts, to show cause why he should not "hear counsel" in a case in which the Gas Light and Coke Co. had appealed to be heard before him.

The Metropolis Gas Act, 1860, provides for the appointment of "gas examiners" for testing the illuminating power and purity of gas, and the Gas Light and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), which applies to, amongst other metropolitan companies, the Gas Light and Coke Co., provides that if a company think themselves aggrieved by the report of a "gas examiner," they may appeal to the "chief gas examiner." In a dispute affecting the Gas Light and Coke Co. the company appealed from the decision of a "gas examiner" to Professor Williamson, "chief gas examiner," the right of appeal being given by section 12 of the Act, which provides that "if the company think themselves aggrieved by any report of a gas examiner they may . . . appeal to the chief gas examiner, whose decision, after hearing the parties, shall be final and conclusive." In the particular case that had arisen, the company wished to be represented and heard by counsel before the chief gas examiner, but Professor Williamson refused to hear counsel on the appeal, and the present rule was for a *mandamus* to compel Professor Williamson to "hear counsel" in the matter, and the question now was whether he was bound to hear counsel.

In his affidavit filed in answer to the rule Professor Williamson said: "The questions which arise on such appeals are to some extent of a scientific character, but in many cases the only matter to be considered is whether the gas examiner has followed with sufficient precision the mode of testing prescribed by the gas referees. These questions are as a rule best settled by hearing the gas examiner on the one side, and the scientific or practical officers on the other, and they are seldom susceptible of legal argument. There is no limit to the number of appeals a company may bring. There may be an appeal from the report of every gas examiner for each day at each testing place. Having regard to the subject-matter and to the power given to each company to be represented by its officer, it has appeared to me that the Act does not require me to hear counsel on every appeal against a daily test, and that a discretion is left to me in the matter. During the thirteen years from my first appointment I have never been requested to hear counsel on such appeals, nor have any complaints been made as to my practice, which works well. I have laid down no rule that I will not hear counsel in any case, and whenever a particular case appears to require argument by counsel I am ready to consider the application, but I do not admit the claim as of right."

R. S. Wright, showed cause against the rule.—Professor Williamson does not say that he will not hear counsel in any case, he merely says that he has a discretion in the matter whether he will hear counsel or not, and exercising this discretion in this particular case he refuses to hear counsel, as he thinks it quite unnecessary. There is no compulsion upon the chief gas examiner in such a case to hear counsel: *Collier* v. *Hicks*, 2 B. & Ad. 663; *Ex parte Evans*, 9 Q. B. 279; *In re Macqueen*, 9 C. B. N. S. 773.

English Harrison, for the London County Council, supported the same view, but did not argue.

Sir Horace Davey, Q.C. (*Danckwerts* with him), in support of the rule.—The company are entitled to appear by their "agents." Who is to choose the "agents" by whom the company are to be represented? Professor Williamson says he is entitled to choose them, but that cannot be so, as persons so chosen would not be the agents of the company. The company are entitled to appear by "agents," and it follows that they must be entitled to choose what "agents" they please, and they can choose counsel to appear for them as their "agents." Counsel are properly described as "agents" of the persons for whom they appear. The chief gas examiner has no discretion in the matter, as he is bound to hear the company or their "agents," he is bound to hear counsel whom the company choose.

POLLOCK, B.—This is an application for a *mandamus* against Professor Williamson, chief gas examiner under the Gas Act, commanding him to "hear counsel" in an appeal brought before him by the Gas Light and Coke Co. Now I can have no doubt whatever that the gas company desire to assert their right to be heard by counsel. I do not think they have such a right. My judgment proceeds on this, that for a long time in this country it has been a well-known distinction when persons apply by themselves or by counsel. I cannot believe that counsel would allow themselves to be mere agents or machines in the way contended for. Professor Williamson says, I am bound by Act of Parliament to hear you by some agents, but it is in my discretion whether I shall hear you by counsel. It is clear to my mind that that is the correct view, and on that ground it seems to me that this *mandamus* ought not to go.

DAY, J.—This is an application for a *mandamus* commanding Professor Williamson to hear "the Gas Light and Coke Co. by counsel" in this matter. My answer is that I think he is not bound to hear the Gas Light and Coke Co. by counsel.

Rule discharged.

Solicitor against the rule, *The Solicitor to the Board of Trade.*

Solicitors in support of the rule, *Bedford, Monier-Williams, & Robinson.*

Solicitor for the London County Council, *R. Ward.*

Q. B. Div. (Pollock, B., and A. L. Smith, J.) July 10.

ROBERTS v. WOODWARD. (a.)

Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 29, *sub-sections* (1) (2)—*Sale of coals—False statement as to weight by servant of seller—Liability of seller.*

In order to support a conviction under section 29 of the Weights and Measures Act, 1889, *there must be a false representation as to the weight of the coals sold by the seller of them. Where, therefore, the seller of the coals made no representation as to their weight, but his servant, in the course of delivering them, made an untrue statement as to their weight,*

Held, that the master was not liable for the representation of his servant, and could not be convicted.

Case stated by Mr. Haden Corser, a metropolitan police magistrate.

The facts were as follows:—The respondent, a seller of coals, received an order for five hundredweight of coal. He thereupon directed his servant, Watson, to deliver to the purchaser, at his house, five sacks of coal

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

which were standing in his shop at the time. Watson put the sacks so indicated upon a cart and was proceeding to the purchaser's house when the appellant, an officer appointed by the London County Council for the purposes of the Weights and Measures Act, 1889, met him and asked the weight of the sacks. Watson replied that each sack weighed one hundredweight. The appellant then weighed the sacks and found that they were all seriously deficient in weight. The respondent was then charged under section 29, sub-section (2), of the Act with having sold sacks of less weight than that represented by the seller. Sub-section (1) gives power to the proper officer to enter places where coal is sold, to stop any vehicle carrying coal for sale or delivery to a purchaser, to test weights, and to "weigh any load, sack, or other less quantity of coal found in any such place or vehicle or which is in course of delivery to any purchaser."

By sub-section (2), "If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle as the case may be, shall be liable to a fine not exceeding five pounds."

The magistrate was of opinion that the respondent had not made any representation as to the weight of the coals, and refused to convict. The question was whether he was right in so refusing.

Meadows White, Q.C., for the appellant.—There was a representation by the respondent as to the weight of these sacks. Five hundredweight was ordered, and when the respondent told Watson to deliver those five sacks that was a representation that they contained the quantity ordered. The representation of Watson was the representation by his master. In *Mullins* v. *Collins*, 22 W. R. 297, L. R. 9 Q. B. 292, the master was made criminally responsible for the act of his servant in selling liquor to a constable on duty.

Nevill, for the respondent, was not called on.

POLLOCK, B.—The forcible argument of Mr. White has raised a doubt in my mind as to whether the Legislature has provided a remedy in all cases where honest people would wish a remedy to exist. But looking at the section on which the prosecutor relies it seems to me that to support a conviction there must be a representation by the seller as to the weight of coal sold. It is clear that in this case there was no verbal representation. Where coal is ordered by a customer and immediately sent off, or where coals are sold by a person hawking them in the street, there would usually be a verbal representation as to the quantity sold. [His lordship then briefly stated the facts as above set out, and continued:—] Upon these facts there is no ground for saying that there was a representation by the seller that the sacks were of full weight. The next point is this—that the person in charge of the vehicle when asked the weight stated what was untrue, and that therefore not the servant but his master should be convicted. I cannot think that that is so. I know of no instance of a master being made criminally liable for the act of his servant unless in some such case as where the master is allowing the servant to do some illegal thing and is getting a profit out of it. I think, therefore, that the magistrate was right and that his decision must be upheld.

A. L. SMITH, J.—I also think that Mr. Corser was right when he refused to convict the master here. We have to apply the statute to the facts of the present case. I quite agree that this Act was passed for the protection of poor people who are often defrauded through receiving short weight of coals. But the question is whom has the Legislature brought within its net? When you read section 29 it is quite clear that there must be a representation by the seller. By sub-section (1) the inspector may pounce on the coal either in the shop or during its transit to the purchaser's house; that is during all modes of delivery from the shop to the purchaser on the men's backs as well as in a vehicle. In the present case it was not the servant who was selling, and therefore he cannot be hit, and the master cannot be hit either because he made no representation. It is said that he authorized the representation here. I cannot find that in the facts: all he did was to tell his servant to take the sacks to the vendee. Then it is said that the representation of the servant is the representation of the master, and cases were relied on where a servant in a public-house sold drink to a policeman on duty or allowed gambling to go on without the knowledge of the landlord. Those are strange cases but they are law: they were decided, however, under special and stringent Acts as to the regulation of beer-houses, and they do not govern this case. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *Ward.*

Solicitor for the respondent, *John Godwin.*

Q. B. Div. (Denman, Charles, and Vaughan Williams, JJ.) June 20, 21, 28.

MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SALFORD v. LEVER. (a.)

Principal and agent—Bribery of agent—Action against briber to recover excess price fraudulently obtained—Right of briber to plead satisfaction by agent.

Where an agent under the influence of bribes persuades his principal to pay a price for goods obtained from the briber which is in excess of the market price, the principal has two distinct causes of action. He may sue the agent to recover the bribes which the agent has received, and at the same time he may sue the agent and the briber, either jointly or severally, for damages for the loss occasioned by their joint fraud; and in an action against the briber the defendant is not entitled to rely upon an agreement made between the principal and his agent, the effect of which is to discharge the agent from his liabilities, either because, according to Denman *and* Charles, JJ., *the agreement only operates as an accord and satisfaction of the action for bribes, and has no bearing upon the action for damages for fraud, or because, according to* Vaughan Williams, J., *although the agreement may purport to be in accord and satisfaction of both causes of action, it is one which the plaintiffs, being a municipal corporation, were not entitled to make, and it cannot, therefore, be given any effect to in a court of law.*

Motion for a new trial.

The plaintiffs, who were the proprietors of the Salford Gas Works, employed, during the years 1875 to 1887, as manager of their gasworks one Samuel Hunter, whose duty it was to examine tenders for the supply of coal and to report and advise the plaintiffs thereon.

The defendant was a coal merchant, and during the years 1875 to 1878 submitted tenders for the supply of coal to the plaintiffs, and with a view of procuring the acceptance of these tenders by the plaintiffs the defendant corruptly agreed to pay Hunter a commission or bribe of 1s. per ton on the quantity of coal tendered for. In order to recoup himself for such commission to Hunter, he charged for the coal prices which were in excess of the market prices by 1s. per ton. On the

(a) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

advice of Hunter the tenders of the defendant were accepted by the plaintiffs, the coal was delivered to the plaintiffs under contracts so obtained, and the total amount paid to the defendant under such contracts exceeded the current market value of the coal by £2,329. Of the commission promised, Hunter in all received from the defendant about £1,500. Hunter had, during his term of office, received similar bribes from other contractors, for which those contractors recouped themselves in a similar manner, but there was no evidence that the total amount of the excess value obtained by the various contractors (defendant included) exceeded the sum of £10,000.

In August, 1889, the plaintiffs, who had discovered the frauds, entered into an agreement with Hunter in the following terms:—

1. Hunter to deposit forthwith in the Lancashire and Yorkshire Bank, King-street, Manchester, securities which the said bankers will guarantee shall realize the sum of £10,000 in the name of the Mayor of Salford and J. C. Walker (Hunter's solicitor), such securities to remain in the hands of the bankers until the date hereinafter named as a guarantee that the sum of £10,000 will then be paid over to the Corporation of Salford on the date hereinafter mentioned, and the bankers shall give such a guarantee.

2. The corporation shall, at the request of Hunter, proceed with any pending actions against former contractors with the corporation, or at the instance of Hunter to institute further actions against such contractors for the purpose of recovering any bribes or commissions received by Hunter or promised to be paid to him from such contractors.

3. Hunter to give such information and evidence as may be necessary for the purpose of any such actions or proceedings, and also to pay all costs of or incidental to any such actions or proceedings from this date.

4. Any sums of money that may be recovered and received in any such actions or proceedings, or which may be paid either to the said S. Hunter, or to the corporation by any contractors by way of settlement, without action or after action brought, and as to the sufficiency of such payment, the said S. Hunter shall be the sole judge, shall be paid over to or retained by the corporation, and after deducting costs therefrom, the net balance shall be taken in part satisfaction of the sum of £10,000, it being understood that the corporation are to receive a clear sum of £10,000 irrespective of a sum of £442 10s. (some time since recovered by the corporation) and all costs and expenses as before mentioned, and no more.

5. On the 31st day of December, 1889, in case the corporation shall have been unsuccessful in recovering any sum or sums of money in connection with the said actions or proceedings, the said securities or a requisite part thereof shall be realized, and the sum of £10,000 shall be paid over to the corporation, and the said Hunter shall in addition thereto pay to the corporation all costs and expenses of and incidental to the said actions or other proceedings which they may have incurred and cannot recover from any other person or become liable to from this date until the 31st day of December, 1889, and in case the corporation succeed in recovering and receiving any sum less than the said £10,000, then the difference between such sums as may have been so received (after deducting all other costs and expenses) and the said sum of £10,000 shall be paid over to the corporation.

6. The corporation shall at any time prior to the said 31st day of December next at the request of the said Hunter or his solicitor discontinue all or any such actions or proceedings as before mentioned, and thereupon the said sum of £10,000 shall be payable to the corporation, together with any such costs as before mentioned.

7. On the receipt by the corporation of the said sum of £10,000, together with all such costs and expenses as aforesaid, the corporation shall give to the said Hunter a full and complete discharge, and in the meantime they shall take no steps in the chancery action pending against him and one John Graves Hawkins, but the same shall be stayed.

8. Upon payment into the Lancashire and Yorkshire Bank of any sum of money (to the credit of the Mayor of Salford and J. C. Walker), recovered from the contractors as aforesaid, the said Samuel Hunter shall be entitled to receive and have returned to him a corresponding portion of the said securities deposited.

And upon being satisfied that any contractor has paid a sum satisfactory to the said Samuel Hunter as aforesaid, the said corporation shall thereupon give the said contractor a complete and sufficient release from all claims in connection with the said matter.

In pursuance of this agreement Hunter lodged with the bank securities to the value of £10,000. Actions brought against the other contractors resulted in the recovery by the corporation of sums to the amount of £4,000; and in October, 1889, the plaintiffs commenced an action against the defendant to recover the sum of £2,329 as damages for fraud in relation to the contracts for the supply of coal by him to them and alternatively as money had and received to the plaintiffs' use. To this the defendant pleaded that if he had paid any bribes to Hunter, Hunter had paid the same to the plaintiffs or had accounted to or compounded with them in respect thereof upon the terms that the plaintiffs should seek to recover and should stand possessed of the moneys claimed in this action as trustees for Hunter. On the trial of the action before Day, J., and a special jury, at the Yorkshire (West Riding) Assizes, the judge directed the jury that the agreement between the plaintiffs and Hunter had no bearing upon the rights of plaintiffs and defendant *inter se*. The jury found for the plaintiffs for the amount claimed, and defendant moved for a new trial on the grounds that the judge misdirected the jury by telling them that there was no evidence that they could take into consideration with a view to reducing the amount of damages claimed, and that the judge ought to have directed the jury to find whether or not (or to have held that) the plaintiffs had been paid by or had compounded with Hunter, and whether the action was being maintained for his benefit, and should therefore have given judgment for the defendant, or should have directed the jury to take into consideration some or all of the above matters, or should otherwise have had regard to the agreement of August 6, 1889, between the plaintiffs and the said Hunter, with a view to assessing the amount of damages which the plaintiffs were entitled to recover.

Lockwood, Q.C., and *Lawson Walton, Q.C.*, for the defendant.—In this case there is no evidence that the total amount of loss sustained by the plaintiffs by reason of the excess charges exceeded the sum of £10,000. Of that sum £4,000 has already been obtained, and as to the remaining £6,000 the plaintiffs have, in substance, been paid by Hunter, for since the 31st of December, 1889, is now past the plaintiffs are in a position to realize Hunter's securities. These plaintiffs are in the position of seeking to be paid twice over. But, whatever their loss, plaintiffs cannot sue for the balance. Their action here is, in substance, for damages for a conspiracy to which Hunter was a party; and the agreement of the 6th of August, together with the deposit of securities, amounts to an accord and satisfaction of the plaintiff's claim against Hunter in respect of that conspiracy, and satisfaction by one of two joint tort-feasors is an answer to an action against the other: *Brinsmead* v. *Harrison*, 20 W. R. 784, L. R. 7 C. P. 547. Any satisfaction, however small, suffices; even a mere release to one wrongdoer dis-

charges all, on the ground that a release is as good a satisfaction in law as a satisfaction in deed: *Cocke* v. *Jenner*, Hob. 66; *Hilman* v. *Uncles*, Skinner, 391; *Bird* v. *Randall*, 3 Burr. 1345. Any moneys recovered are, under the agreement, to go in relief of Hunter's liability under his guarantee; thus the plaintiffs are really seeking to recover for the benefit of their own fraudulent servant.

Waddy, Q.C., and *Henn Collins, Q.C.* (*C. Gould* with them), for the plaintiffs.—Plaintiffs had two distinct causes of action. They had an action against Hunter for the amount of the bribes as for money received by him for their use. They had also a right of action either against Hunter and the defendant jointly or severally to recover the excess prices of which they had been defrauded as damages in tort, or against the defendant alone to recover the excess prices as money received by him to plaintiff's use. Now, satisfaction of the first cause of action is no satisfaction of the second, for the remedies are cumulative, and it was the first cause of action alone that was satisfied by the agreement of the 6th of August. It is a mere accident that in this case the amounts of the bribes promised to Hunter and the amount of excess charges received by the defendant happen to be identical; the bribe might have consisted of something else than money. There are two distinct actions, and it can make no difference which of them is brought first.

Lockwood, Q.C., replied.

CHARLES, J., read the judgment of himself and DENMAN, J.—The plaintiffs in this case sought to recover from the defendant £2,329 as damages "for fraud and misrepresentation in and in relation to contracts for the supply of coal and goods to the plaintiffs from the year 1875 forward, and for the secret and fraudulent payment of bribes and commission in respect of such contracts to the plaintiffs' late gas manager and servant, Samuel Hunter." In their pleadings the plaintiffs claimed the money either by way of damages for the defendant's fraud, or alternatively as a liquidated sum wrongfully in the defendant's hands—in other words, as money received for the plaintiffs' use.

The cause was tried at the last Yorkshire (West Riding) Winter Assize before Day, J., and a special jury, when the following facts were proved:—From the year 1875 to 1887 Samuel Hunter was the gas manager and servant of the plaintiffs. The defendant was, during the same period, a coal merchant carrying on business near Salford, and in 1875, 1877, and 1878 he obtained contracts from the plaintiffs, through the intervention and on the advice of Hunter, for the supply of coal to them at prices in excess of the current market price to the extent of 1s. per ton, or £2,329.

This excess the defendant agreed to pay, and did in part pay, to Hunter by way of secret commission or bribe, in order to procure his recommendation to the plaintiffs of the various contracts which they made with the defendant. It was not disputed that the plaintiffs were *primâ facie* entitled to recover in some form or other this excess in price from the defendant.

But the defence was based upon an agreement dated the 6th of August, 1889, before the commencement of the action between Hunter and the corporation, which it was said prevented this action from being maintained against the defendant. It becomes important, therefore, to consider what the provisions of that agreement were. It was in the following terms:—[He read the agreement above set out.] Mr. Waddy, for the plaintiffs, suggested that the agreement only applied to "former contractors," against whom actions were pending, and against whom subsequent actions might be brought. But we cannot take this view of its provisions. We think it applies to all former contractors, including Lever, and is not limited in the manner suggested to such former contractors as were actually then defendants in actions.

Its language is not free from ambiguity, but its general effect appears to be this: that Hunter, who had had received bribes from many other contractors besides the defendant, was to deposit with the Lancashire and Yorkshire Banking Co. securities guaranteed by the bankers to realize £10,000, and they were then to continue or commence actions at his cost and his request against the contractors who had received excess prices, and to apply the sums recovered for his benefit by from time to time returning him securities equivalent in amount to the sums recovered. Hunter, until the 31st of December, 1889, was constituted absolutely *dominus litium* and could until then direct the commencement of or the discontinuance of any actions against the contractors. This agreement was acted upon: Securities to the value of £10,000 were lodged in the bank, and this action (amongst others) was commenced, and it was not disputed that the amount recovered under it would go under clause 4 as other moneys amounting altogether to £4,000 had already gone, in part satisfaction of the sum of £10,000, and so in relief of Hunter. The learned judge, however, was of opinion that the defendant could not rely upon the agreement, and what had been done under it, either as a defence or in reduction of damages; that the plaintiffs had a separate and distinct personal right against him to recover the excess of price which they had paid; and that the mode in which the plaintiffs used the sum recovered was immaterial. They were at liberty, he thought, to apply it, if they could do so consistently with the corporate duty, to the relief of Hunter's securities without any way impairing their right of action against the defendant. He accordingly directed a verdict for the plaintiffs for the full amount claimed. A new trial was moved for on behalf of the defendant, or that judgment should be entered for him "upon the ground that the judge misdirected the jury by telling them that there was no evidence which they could take into consideration with a view to reducing the amount of damages claimed, and that he ought to have directed the jury to find whether or not (or to have held that) the plaintiffs had been paid by or had compounded with their servant Hunter, and whether the action was being maintained for his benefit, and should therefore have entered judgment for the defendant, or should have directed the jury to take into consideration some or all of the above matters, or should otherwise have had regard to the agreement of August 6, 1889, with a view to the amount of damages which the plaintiffs were entitled to recover."

It was contended for the defendant that Lever and Hunter were joint tort-feasors, and that the agreement of the 6th of August, 1889, amounted to payment or satisfaction by one of them, and therefore was an answer to an action against the other. Numerous cases were cited in support of this contention, the correctness of which, indeed, was not disputed. We think, however, that those cases are inapplicable. We are of opinion that the plaintiffs had two separate and distinct rights of action, one against Lever alone, or against Hunter and Lever (for no doubt Hunter might have been made a co-defendant with Lever), and another against Hunter alone. Their right against Lever was to recover the excess price he had received over the market price either as damages for the fraud he had committed jointly with Hunter or, if the excess price had been exactly ascertained before action, as money received for the plaintiffs' use. Their right against Hunter was to recover from him the bribe or commission which had actually been paid, and is based upon the well-known and frequently enunciated rule that no agent shall make a secret profit for himself in any transaction he conducts for his

principal: see *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App. 96; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, 27 W. R. Dig. 43. It is the latter right which they have compounded for with Hunter, and the arrangements which they have thought fit to make with him cannot, in our opinion, be treated as a payment or satisfaction of the tort which Lever has committed. In this case the bribe coincided in amount with the excess price. But it might have been more or less, or it might not have been made in money at all. In any point of view it was a gift to the agent which the principal was entitled to have at once handed to him. With reference to that gift the plaintiffs might, we think, so far as their corporate duty allowed, make what arrangements they pleased with their servant without prejudicing their right to recover from Lever the full excess price paid. It is true that the amount recovered will go in relief of some of the securities deposited by Hunter, but assuming the plaintiffs have power so to mitigate the loss which would otherwise fall upon their servant, we do not think the defendant can avail himself of that circumstance, either as reducing the amount payable by him for the fraud to which he was a party, or as a bar to the action. There has been no payment or satisfaction by Hunter in respect of the cause of action against the defendant, but only in respect of the separate cause of action against himself, an action to which the defendant could not have been a party, although no doubt Hunter could have been made a co-defendant in the action against him in so far as it is an action to recover damages for the fraud which, in concert with Hunter, he had committed.

We therefore have come to the conclusion that the learned judge was right in the course which he took at the trial, and dismiss this motion, with costs.

VAUGHAN WILLIAMS, J., delivered the following written judgment:—I have also come to the conclusion that this motion must be refused, but I prefer to state my own reasons for this conclusion. The action is for damages for fraud, and in the alternative for money received to the use of the plaintiffs—viz., the sums received by the defendant for the purpose of covering bribes to Hunter, the servant of the corporation, to procure his recommendation of the defendant's tender for the supply of coal to the corporation. In my opinion this action sounds in damages, and will not lie in the alternative form for money received. The bribes did not necessarily come out of the pockets of the corporation. The damage sustained by the corporation depends upon how far the price charged to them was in excess of the market or fair and ordinary price of the coal supplied. The bribes might come out of the defendant's profit. I do not think that the plaintiffs can hold to the contract and recover back a portion of the contract price as money received to the use of themselves. It is not like the case where money has by mistake been overpaid under a contract, because then the recovery of the money overpaid is consistent with the contract. In the present case it would be inconsistent. It follows that, in my opinion, the plaintiffs can only recover damages for having been induced by fraud to enter into a contract in excess of the price which they would have had to pay but for the corruption of their servant. The defence set up in the sixth paragraph of the defence seems to consist of two parts. The first part is accord and satisfaction with Hunter, a co-wrongdoer, with the defendant by payment in full or by payment of a composition. The second part seems to be an allegation of an assignment of the benefit of the action to Hunter. It may be that this defence has not been pleaded according to its proper legal result, but now one has not to plead in that form, the defence now has to be set forth in the matter of substance relied on, and the matter of substance relied on in this paragraph is that the plaintiffs have entered into an agreement with Hunter which prevents them from successfully suing the defendant Lever. Now I agree that when a contractor bribes a servant in order that a servant may get for the contractor the master's orders, the master has two distinct causes of action—one against the servant for the profit he has made by the bribes—the other against the contractor and the servant jointly and severally for any loss that the master may have suffered by the joint fraud of the contractor and the servant. I agree further that the master, even though he takes from the servant the bribes which the servant has received from the contractor, is under no obligation to give credit for those bribes in reduction of the damages which the master has suffered by the joint fraud of the contractor and the servant unless indeed the master knew of the servant taking the bribes and allowed him to do so.

Now let me consider the effect of the agreement in this case between the master and the servant—that is to say, between the corporation and Hunter. It seems to be this: Hunter, the servant, is to deposit with the master £10,000 of securities. This £10,000 may, I think, be taken as the amount of the bribes which Hunter had received from the various contractors, probably including Lever. In consideration of this deposit the master—that is, the corporation—is to bring and continue such actions against the fraudulent contractors, at the expense of the servant Hunter, as Hunter may direct, and the proceeds of such actions are to be paid into a bank, and when the amount arrives at £10,000 Hunter, the servant, is to receive back his securities and to receive a full and complete discharge from the corporation: see clause 7. I think that, having regard to the terms of this agreement, this means that Hunter is to be discharged from all claims of the master, as well as claims in respect of the bribes as claims in respect of the joint frauds of Hunter and Lever, the servant and contractor.

The question is whether this agreement in any way prevents the master, the corporation, suing Lever, the contractor. If the agreement does afford an answer to the action it must be, it would seem, on one of the following grounds—viz.:—(1) That it operates as a release of one of the two joint tort-feasors; (2) Because it operates as an agreement by way of composition, to the benefit of which all the wrongdoers are entitled; (3) Because it operates as an assignment of the cause of action to Hunter, and that Lever has a good answer to Hunter as *participes criminis*. I do not think that it operates as a release; but I am not very certain of this. The test is whether Hunter could have successfully pleaded the agreement if, after the deposit of the £10,000, the corporation had brought this action against Hunter and Lever jointly. If Hunter could have so pleaded the agreement I think that the action against Lever must fail.

Now, in my opinion, Hunter could not have successfully pleaded the agreement, but not because the intention of the parties was not such that, as between them, the agreement was intended to operate as a release of Hunter, but because it would have been a good replication to such a plea—at all events, if pleaded by Lever—that the agreement between the corporation and Hunter was illegal, *ultrà vires*, and of no effect. I think that the agreement was illegal and *ultrà vires* because the corporation had no right to present to Hunter the amount he had received in bribes on account of the corporation; and I further think that an agreement to present an intended witness with moneys proportioned to the effect of his evidence is an immoral agreement and void as against public morality. I have assumed for the purpose of these observations that the effect of the agreement, if operative at all, was to give to the corporation any surplus recovered in the actions beyond £10,000; but I am by no means clear that the

true effect is not that if £10,000 was recovered before the 31st of December, or paid by Hunter to the corporation before that date, the whole proceeds of such actions were not to go into the pocket of Hunter; but if, as I think, this agreement is of no effect or validity, its construction is immaterial.

I do not think that the agreement operates even when £10,000 is paid by way of payment or composition, for the £10,000 is not paid by Hunter, nor does it come out of his pocket. Nothing, in fact, is given or paid by Hunter to the corporation, who only receive what is their own.

I do not think that the agreement operates as an assignment so as to let in defences against Hunter, because I am inclined to think that if the agreement is operative at all the surplus beyond £10,000 belongs to the corporation. I am aware that the illegality of the agreement is not replied by the corporation, but this does not prevent the court from refusing to give effect to an illegal agreement.

Motion refused.

Solicitors for the plaintiffs, *Trass & Jarmain*, for *S. Brown*, Salford.

Solicitors for the defendant, *Godfrey Rhodes, Firth, & Co.*, for *Godfrey Rhodes & Evans*, Halifax.

Q. B. Div. (Lord Coleridge, C.J., and Wills, J.) June 23.

REG. *v.* COUNTY COUNCIL OF HEREFORD. (*a.*)

Local government—Superannuation allowance—Lunatic asylum—Officer of or in asylum—Chaplain not residing in asylum—Right of chaplain to pension—Lunatic Asylums Act, 1853 (16 & 17 *Vict.* c. 97), *s.* 57.

A chaplain of a lunatic asylum, appointed under the Lunatic Asylums Act, 1853, *is an officer of the asylum, although he does not reside therein or give his whole time to the duties of his office therein, and as an officer of or in the asylum he is qualified to receive a superannuation allowance, under the 57th section of the Act, if the visitors in their discretion think right to grant him such allowance.*

Rule for a *mandamus* calling on the county council for the county of Hereford to show cause why they should not pay to the Rev. C. Bulmer a certain sum as a superannuation allowance, which had been granted by the visiting justices, and confirmed by the quarter sessions, before the county council was established.

Mr. Bulmer had been for eighteen years the chaplain of the Hereford Lunatic Asylum, appointed under the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), section 55 of that Act enabling the visiting justices to appoint a chaplain, who shall be in priests' orders and licensed by the bishop.

By that section the chaplain is to perform in the chapel of the asylum the service of the Church of England, but he was not required by the Act to reside in the asylum, as some of the other officers were.

Mr. Bulmer did not reside in the asylum, but he resided at a benefice which he held about two miles distant from the asylum, and he came from his residence to the asylum when he performed the duties of chaplain there.

His salary as chaplain was £150 a year; he was fifty-four years of age and he wished to resign the chaplaincy on the ground of his age and increasing infirmity, and that he was incapable of performing satisfactorily the duties of the chaplaincy in addition to those of his benefice.

The visiting justices granted him a superannuation allowance of £50 a year, and this was confirmed by the sessions, but the county council of the county refused to pay it, as some objection was made that Mr. Bulmer was still able to perform the duties of the chaplaincy.

Section 57 of the Lunatic Asylums Act, 1853, enacts:—"In case any superintendent, chaplain, matron, or any officer or servant of any asylum become, from confirmed sickness, age, or infirmity, incapable of executing the office in person, or have been an officer or servant in the asylum for not less than twenty years, and be not less than fifty years of age, it shall be lawful for the committee of visitors of such asylum, if in their discretion they think fit so to do, but not otherwise, to grant to such superintendent, chaplain, &c., such annuity by way of superannuation as they, in their discretion, think right."

The same words are used in the Lunacy Act, 1890 (53 Vict. c. 5), s. 280, with the exception that fifteen years' service is substituted for the twenty years' service in the Act of 1853.

A rule was accordingly obtained, on behalf of Mr. Bulmer, calling on the county council to show cause why they should not pay to him the superannuation allowance granted by the visiting justices.

Jelf, Q.C., and *Austin*, showed cause.—The Act was not intended to give an allowance to a person in the position of Mr. Bulmer. If a person lives in the asylum and gives up his whole time to his duties there, it is quite right that he should have certain advantages. This gentleman did not live in the asylum, and was, therefore, not an officer in the asylum. It is a different thing to deal with a person living in the asylum and with a person outside the asylum, who has a good living outside the asylum. Mr. Bulmer was not an officer in the asylum, and does not come within the class of persons entitled to allowances. There is a second ground why he should not have this pension. To bring the case within the Act a person must be incapacitated by "confirmed sickness, age, or infirmity." Mr. Bulmer does not come within that description, as he was only fifty-four years of age, and there is no suggestion that he could not still perform the duties of the chaplaincy if he gave up his time to them. [Lord COLERIDGE, C.J.—If you are wrong on the first point, then this point goes also, as it is a matter in the discretion of the justices.] That is so. This rule ought to be discharged.

Asquith, Q.C., and *A. T. Lawrence*, in support of the rule.—The answer to the argument on the other side is twofold—in the first place, the distinction between an officer in the asylum and an officer of the asylum is a casual distinction; in the second place, if it is not so, this gentleman is an officer in as well as an officer of the asylum. If the Legislature had intended to confine the right to a pension to persons living in the asylum they would have said so. Mr. Bulmer was an officer in the asylum, as he performed the duties of chaplain in the asylum.

Lord COLERIDGE, C.J.—If the second point taken by Mr. Jelf had stood alone, I confess I should be of opinion that he had a case. But that point is not for us to consider, it is for the justices. I am of opinion, however, that Mr. Jelf has failed on his first point. The words of the Act seem to be clear. The 55th section gives power to appoint a chaplain, and the duties of the chaplain are specified in that section. The section gives the visiting justices power to appoint a medical officer, "who shall be resident in such asylum." The chaplain need not be resident, though the superintendent must be. Then by the same section the visitors are to fix the salaries according to the services. That is the 55th section. Then the 57th section is the one we have to deal with. Now Mr. Jelf says there is a marked

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

distinction between officers of and officers in the asylum, and that although they are all officers of the asylum, they are not all officers in the asylum. I can see no such marked distinction and no such marked antithesis as he contends for. I see no such distinction in that phraseology, and I see no good reason for making such distinction. The chaplain, while he performs his duties, must perform them in the asylum, and while he performs the services in the asylum he must be an officer in it. It is said that that is not so, and that a person to be an officer in the asylum must be a person who has given his whole time to the duties of his office in the asylum. There is nothing in the Act of Parliament which says so, and I am of opinion that this rule should be made absolute.

WILLS, J.—I am of the same opinion, and I agree in every word my lord has said.

Rule absolute.

Solicitor against the rule, *A. Hunt.*

Solicitors in support of the rule, *Barlow & James.*

Q. B. Div. (Pollock, B., and Hawkins, J.) } Jan. 22, 23; April 29.

GOVERNING BODY OF CHARTERHOUSE SCHOOL *v.* LAMARQUE. (*a.*)

Inland revenue—Inhabited house duty—Charterhouse School—Charity school—Exemption from duty—14 & 15 Vict. c. 36—48 Geo. 3, c. 55, schedule B., case 4.

The Charterhouse School was founded in the reign of James I., under a charter for founding "one hospital, house, or place of abiding for the relief of poor or impotent people," and also "one free school for the instructing, teaching, maintenance, and education of poor children or scholars." In 1867 the school was removed to the country, but the hospital still remained in London. In 1888 the school buildings were assessed to inhabited house duty. There were scholarships and exhibitions at the school, and a large number of paying pupils, and the school was to a large extent self-supporting, though a number of the pupils derived a benefit from the charitable foundation. Exemption from inhabited house duty was claimed for all the school buildings (except the masters' residences) under 48 Geo. 3, c. 55, schedule B., case 4, as being a charity school within the exemption in favour of "a hospital, charity school, or house provided for the reception or relief of poor persons," and the Commissioners of Income Tax decided that they were not exempt under that section.

Held, that the school, being mainly self-supporting, was not a "charity school" within the meaning of the exemption, and that, therefore, the school buildings were not exempt from inhabited house duty.

Case stated by Commissioners of Income Tax acting for the division of Godalming, in the county of Surrey.

The governing body of Charterhouse School appealed against an assessment to inhabited house duty, and they claimed that the school buildings (except the masters' residences), which constituted the Charterhouse School, were exempt from such duty, as being a charity school within the meaning of the exemption in 48 Geo. 3, c. 55, schedule B, case 4, which exempts from the inhabited house duty "any hospital, charity school, or house provided for the reception or relief of poor persons." In 1867 the school was removed from Smithfield, in the county of Middlesex, to Godalming, in Surrey, but the hospital remained in Smithfield, and there was now no question as to the hospital.

The surveyor of taxes assessed the school buildings to inhabited house duty, and this assessment was confirmed by the commissioners, except as to a sanatorium called "Uskites," which was a building apart from the other buildings, and which was used for sick boys. This sanatorium was held to be exempt, and as to this there was no appeal.

The facts and cases cited during the arguments are fully set out in the judgment.

Cur. adv. vult.

Jeune, Q.C., and *Coward*, for the appellants.

Sir Edward Clarke, S.G., and *Dicey*, for the respondent.

April 29.—The following written judgment of the court was read by

POLLOCK, B.—The governing body of Charterhouse School appeal against an assessment for inhabited house duty made by the commissioners acting for the division of Godalming on the 3rd of December, 1888, upon premises used as a sanatorium called "Uskites," and also upon the schoolhouse and buildings connected therewith other than the portions occupied by the head master and assistant masters as residences. The school consists of the school itself and the head master's and two assistant masters' houses, each under one roof and adjoining to each other, and of a chapel, library, large hall, and classrooms, two sanatoriums, and other buildings which are not in actual communication with the main building, but all in a group, except the sanatorium called "Uskites."

The inhabited house duty is now payable by virtue of 14 & 15 Vict. c. 36. By section 2 the provisions of 48 Geo. 3, c. 55, schedule B. (which had been repealed by 4 Will. 4, c. 19), are by reference re-enacted. By that schedule the duty is made payable upon "all inhabited dwelling houses" the occupiers of which for the time being are made chargeable, and rules are made for charging the duty. The schedule also contains a table of exemptions, and by one of these, "case 4," "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted. The appellants contended that the whole school premises except the masters' houses come within this exemption. The commissioners decided against this contention, and we have now to say whether they were right in so doing.

The foundation of Charterhouse dates from a royal charter granted 9 James 1, whereby Thomas Sutton was empowered to found and establish in "the late dissolved Charterhouse beside Smithfield, in the county of Middlesex," one hospital house or place of abiding for the finding, sustentation, and relief of poor, aged, maimed, needy, or impotent people; and the founder, and after his death the governors, were empowered to place in the hospital a master and such poor people, men and children, as should from time to time be convenient. By the same charter further power was given to Thomas Sutton to found and establish at the same place one free school for the instructing, teaching, maintenance, and education of poor children or scholars, and similar power was given to the founder, and after him the governors, to place in the school such numbers of poor children or scholars as should be from time to time convenient. The foundation of the hospital (in which the school was included) was confirmed by the 3 Car. 1 and by another statute of the same year, whereby provisions were made for the constitution, management, and conduct of the establishment. The poor brothers to be placed in the hospital were not to exceed four score in number. The scholars of the foundation were limited to forty. They were fed

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

and received certain clothing. This was the character of the hospital and school in the 17th century.

The school, however, underwent a considerable development, and a large number of pupils became attached without participating in any of the advantages of the foundation. In 1867 it was thought desirable that the school should be moved into the country, and to give the necessary powers for this purpose the Charterhouse School Act, 30 & 31 Vict., c. 8 (Private), was passed. By this the governors were empowed to sell the school buildings in Charterhouse and purchase a site not exceeding 100 acres elsewhere, with all the requisite appurtenances, on which they might erect buildings for the purpose of a school, with a chapel, dwellings, and suitable offices, playground, yards, garden, approaches, conveniences, and appurtenances. All scholarships, exhibitions, and endowments belonging to the then existing school were to belong to the school when removed, and all powers and provisions contained in the royal charter and other statutes before mentioned were to continue in full force and effect, except so far as they were inconsistent with the Act. Under the powers of this Act a site was purchased at Godalming, all the requisite buildings were erected, and the school was removed there, the hospital remaining at the original site in London. In pursuance of the Public Schools Act, 1868, special commissioners were appointed for determining and establishing the constitution of the new governing body; and in 1871 a statute was framed by them containing provisions for that purpose; and under the statute for the government of the school, as altered by an Order in Council of March 3, 1883, the mode of enjoying the privilege of the foundation is modified and altered, and a system of scholarships and exhibitions is established, whereby senior and junior scholarships, with certain rules and regulations as to their number, value, and the qualifications of the competitors for them, now exist. The senior scholarships are not less than thirty in number and of the annual value of £80. Admission to such scholarships is by competitive examination, and open to all boys who have been at the school at least twelve months previous to the commencement of the examination and between the ages of fourteen and sixteen. The junior scholarships are thirty and of the annual value of £60, and the competitors are from twelve to fourteen years of age, but in the case of these scholarships the governing body have power, if it appears to them that any successful candidate is in point of circumstance not fit to receive the aid of an endowment, to withhold from the scholarship to which such candidate shall have been elected the payment of £60 per annum. Besides these there are ten exhibitions of the annual value of £20 open to all boys at the school under fourteen years of age and tenable till sixteen; twenty exhibitions tenable after quitting the school of the annual value of £80, and also an exhibition called Lady Holford's Exhibition. With regard to the payment of the scholarships at the school, the governing body pay out of the school fund to the master of a boarding-house for every senior scholar in such house £55 per annum, and for every junior scholar in such house £35 per annum, and in the case of exhibitioners a sum of £20; and, further, they also pay out of the school fund to the "tuition fund" for every scholar the annual tuition fee of £25. Lastly, with regard to the fees payable by scholars not on the foundation, the annual "tuition fee" for every boy is £25, payable in equal instalments at the end of each term; the boarding-house charges for each boy (not a scholar) are £80 per annum; an annual capitation charge of £5 is made on each boy with the exception of the scholars for the purpose of increasing and maintaining the school buildings; and in the case of the three boarding-houses forming part of the main school building, the amount of £3 6s. 8d. per term for every boy not holding a scholarship is set aside to form a fund to be applied at the discretion of the governing body for certain purposes.

From this state of facts it would appear that at the date of the passing of 48 Geo. 3, c. 55, the buildings of Charterhouse in Middlesex would be properly described as that of a "hospital, charity school, or house provided for the reception or relief of poor persons," and so would be exempt at that time from house tax. This Act, however, was repealed, and its provisions were dormant until they were revived by the Act of 1851 (14 & 15 Vict. c. 36). At this date also the buildings of the Charterhouse were all still in Middlesex. Whether or no the character of the institution, in so far as the school was concerned, had been so altered as to deprive the school buildings of the benefit of the exemption seems open to some doubt, but it is unnecessary for us to decide this. Even if the exemption still applied, this falls far short of establishing what the appellants are called upon to prove in order to support their contention—viz., that the buildings in question, which are at Godalming, were at the time of their assessment within the exemption. There is nothing in the language of the Act or in its intention to show that the liability to or the exemption from taxation is to be fixed when the Act which authorized the taxation was passed. The whole language and object of the Act militate against this, and point to the conclusion that whether a particular building is taxable or not is to be determined by its *status* when the incident of taxation arises. At this date that portion of the foundation of the Charterhouse which consisted of a hospital remained in Middlesex. The school had before then been removed to Godalming, in Surrey, where new buildings, including those assessed, were erected for the purpose of carrying it on as remodelled by the new scheme and statutes. There is now at Godalming no hospital, giving to that word the widest meaning that it will bear. The hospital remained in London, and the buildings at Godalming are built for and used as a school only. Then arises the question, can it be said that the buildings are those of a "charity school," giving to these words, as we think we ought to give, the largest interpretation that can fairly be put upon them in favour of those to whom the exemption applies? The case for the appellants was based upon the ground that, the original foundation of the Charterhouse having been of an eleemosynary character, however its objects may have been altered or its buildings and their character varied, the original exemption must attach; and further that, so long as some portion of the original character of the foundation remains, the exemption should be held to continue in its entirety, although by the diversion of the objects of the foundation in part it had to this extent lost its eleemosynary character. We cannot think that either of these arguments ought to prevail. As to the first, the language of the exemption in case 4, coupled with that used in case 1, whereby the royal residences and public buildings are exempted, indicates clearly the intention to protect from taxation house property whence no profitable occupation is derived. It seems only necessary to apply this principle to the school buildings of Charterhouse at Godalming to show that they come neither within the letter nor the spirit of the exemption. Here are class rooms, hall, chapel, library, sanatoriums, and other buildings all necessary for and incidental to the carrying on of a large public school of a high class with 500 scholars who are thereby furnished with all the requirements of comfort and refinement, and who on their part, by themselves or their parents, pay an annual tuition fee of £25 each boy, and a further amount of £5 per head, annual capitation charge, for increasing and maintaining the school buildings, some boys also contributing £3 6s. 8d. a term

for other purposes. If the school in its present condition were of recent origin, we cannot conceive for a moment that it could properly be called a charity school, and, if not, to say that it formerly was such seems to us to be as much beside the question as if it were said of an ancient royal palace or public building now converted into a warehouse or factory. As to whether some portion of the eleemosynary character of the foundation still remains, and to what extent, this is a question mostly of fact, and as far as it is one of pure fact it is for the commissioners to decide rather than for this court; but our conclusion is not arrived at upon this ground, for no doubt it is a mixed question of law and fact, and as such is a proper subject for appeal. It must be a question of degree, because upon the facts stated it cannot be said that no part of the benefits obtained by the scholars is derived from the funds of the foundation, especially when reference is made to the scholarships; but with respect to the particular buildings which have been assessed the charitable character of the school generally bears no relation to one portion of the buildings rather than another, and therefore they cannot be severed so as to make the exemption apply to some of them and not to others. We can only deal with this part of the case in the way in which all questions of degree in which the court is challenged to point out what is the dividing line ought to be dealt with—namely, by saying we must look at the matter substantially, and ask ourselves whether, taken as a whole, the modern school of Charterhouse is a charity school. One mode of testing this would be by considering whether by far the larger portion of the school could not be carried on without the aid derived from the charitable foundation, and as to this there seems to be no doubt that it could. Any number of instances may be suggested bearing more or less upon the question. One was dealt with by Denman, J., in *Blake* v. *Mayor of London*, 35 W. R. 212, 18 Q. B. D. 445, where he says, "A hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital." We entirely agree with this. Where, however, a school is in the main self-supporting, we do not think it could properly be called a charity school because a small proportion of the scholars derive benefit from the charitable foundation whence it originally sprung. As each case depends upon its own particular facts rather than the application of the language of the exemption to those facts, it cannot be expected that much authority should be obtained bearing immediately upon the matter before us. We were referred, however, to *Needham* v. *Bowers*, 37 W. R. 125, 21 Q. B. D. 436, where buildings were assessed to the inhabited house duty which belonged to an institution for the reception of insane persons, which was founded by charitable donations, but unendowed. It was vested in trustees, and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less, than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there was an annual surplus of profits, which were expended in enlarging and improving the institution. It was held that the institution, being wholly self-supporting, was not exempt as a "hospital" within the exemption we are now dealing with, which, it was said, must be restricted to hospitals maintained wholly or in part by charity. Here there was no charitable element whatever. The language of the court as to a hospital maintained "in part by charity" might seem to militate against our view, but the judges clearly had no such case as is now before us in their minds when this remark was made. The case of *Blake* v. *The Mayor of London* was cited on behalf of the appellants as showing that the school buildings and ground of the City of London School were held to be exempted from income tax. This case, however, presents no true analogy, for the assessment and the decision of the court were based upon the language of section 61, r. 6, of 5 & 6 Vict. c. 35, which provides that allowances in respect of property tax, levied under Schedule A of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse in respect of the public buildings, offices, or premises belonging thereto." The court held that the application of these words was not limited to public schools maintained wholly by charity, but that they applied to a public school maintained partly by charitable endowments and partly by fees charged for instruction. One ground for this construction was based on the consideration that the same rule exempts any college or hall in any of the Universities of Great Britain in respect of the public building and offices belonging to such college or hall. Denman, J., in giving judgment, says:—"The enactment seems to have been drawn with a mixed intention—namely, to exempt charitable institutions and to exempt certain institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions." The case of *The Queen* v. *The Commissioners of Income Tax*, 37 W. R. 294, 22 Q. B. D. 296, was also cited for the appellants, but as this was an assessment not for inhabited house duty, but for income tax, and depended upon the proper meaning to be given to the words "charitable purposes," we do not feel that any benefit would arise from our dealing with it upon the present occasion. In the result we hold that the commissioners came to a correct conclusion when they decided that the buildings in question are not entitled to the exemption from inhabited house duty which was claimed for them by the appellants, and we dismiss the appeal, with costs.

Appeal dismissed.

Solicitor for the appellants, *Harry W. Lee.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April 28.

OVERSEERS OF MANCHESTER *v.* GUARDIANS OF ORMSKIRK UNION. (*a.*)

Poor law—Settlement—Illegitimate child under sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), s. 35.

An illegitimate, like a legitimate, child under sixteen years of age, cannot acquire a settlement for itself, but must follow its parentage settlement.

Special case stated by consent under 12 & 13 Vict. c. 45, s. 11, from which the following facts appeared.

The respondents, the Guardians of the Ormskirk Union, had obtained an order of justices adjudging the place of the last legal settlement of Eleanor Bailey, a pauper, and her illegitimate child to be in the appellants' township.

The pauper, Eleanor Bailey, a single woman, was the illegitimate daughter of Emily Bailey, and was born at Worsley, near Manchester (without the appellants' township), in June, 1874, and remained there till December, 1876, when she was taken by her mother to Manchester, to the house of her mother's aunt, Martha Corrigan,

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

where she and her mother resided together within the appellants' township until June, 1877.

In June, 1877, the pauper's mother left Manchester and went into service in the township of North Meols, within the respondents' union, where she had ever since resided, never having received parochial relief. She left her daughter, the pauper, at Manchester, with Martha Corrigan, with whom the pauper resided within the appellants' township until December, 1881. From that month until June, 1882, the pauper resided with Martha Corrigan at Harpurhey, within the Prestwich Union, when Martha Corrigan died; thenceforth until the 6th of December, 1888, the pauper resided with Marion Corrigan, the daughter of Martha Corrigan—viz., at Harpurhey to November, 1883; at Manchester, within the appellants' township, from November, 1883, to February, 1887; and at Cheetham, within the Prestwich Union, from February, 1887, until the 6th of December, 1888, on which day the pauper was fetched by her mother from Marion Corrigan's, at Cheetham, and taken to North Meols, within the respondents' union, where she remained and resided, supported by her mother, at her mother's expense, until February, 1889, when she (the pauper) was admitted into the workhouse at Ormskirk, where her child was born.

The case then proceeded to set out facts relating to the visits of the pauper to her mother, and of the latter to the pauper, while the pauper was residing with the Corrigan's, and stated that the pauper's mother paid nothing either to Martha or Marion Corrigan for the pauper's maintenance, but occasionally bought for her articles of clothing.

The respondents contended, and the appellants denied, that, upon the facts stated in the case, the pauper and her child were settled in the appellants' township by reason of an uninterrupted residence therein of the pauper for a period of three years under the provisions of 39 & 40 Vict. c. 61, s. 34.

The question for the court was whether or not the legal settlement of the pauper and her child was in the township of Manchester.

Aspland, Q.C., and *Evans*, for the appellants, the Overseers of Manchester.—A child under sixteen, whether legitimate or illegitimate, cannot acquire a settlement for itself: *Reigate Guardians* v. *Croydon Guardians*, *ante*, p. 295, 14 App. Cas. 465; *Guardians of West Derby Union* v. *Guardians of Atcham Union*, *ante*, p. 361, 24 Q. B. D. 117; *Mitford Union* v. *Wayland Union*, *ante*, p. 632, 24 Q. B. D. 122. The Divided Parishes Act, 1876, s. 35, supersedes the words "or shall acquire a settlement in its own right" applicable to an illegitimate child by section 71 of 5 & 6 Will. 4, c. 76.

Smyly, for the respondents, the Guardians of Ormskirk Union.—The House of Lords, in the *Reigate case*, merely decided that an illegitimate child after sixteen was upon the same footing as a legitimate child after that age. Section 35 of the Act of 1876 was intended to override a particular decision: *Reigate Guardians* v. *Croydon Guardians*. An illegitimate child only retains the settlement of its mother when it has not acquired a settlement in its own right: *Reg.* v. *Leeds Union*, 27 W. R. 708, 4 Q. B. D. 323.

Lord COLERIDGE, C.J.—I am far from saying that an ingenious argument might not be raised upon the phraseology of section 35 of the Divided Parishes Act, for that section is so expressed as to afford many opportunities for argument; but we must look at the language there used as it has been interpreted by the highest court of the realm. It has been pointed out by the Master of the Rolls in *Guardians of West Derby Union* v. *Guardians of Atcham Union* (and I entirely concur with him), that where in the House of Lords one of the learned lords gives an elaborate explanation of the meaning of a statute, and some of the other learned lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it. Now a most elaborate explanation of the meaning of this section has been given in the case of *Guardians of Reigate Union* v. *Guardians of Croydon Union* by Lord Watson, in whose judgment the Lord Chancellor and Lords FitzGerald and Macnaghten all concurred, Lord Macnaghten giving the same explanation in different language; they decide in substance that the meaning of the Act of Parliament is, as far as possible, to assimilate the position of illegitimate to that of legitimate children. Heretofore there had been a difference in their positions in a variety of incidents, but by this statute Parliament intervened once for all, and the interpretation placed upon the statute is, that a legitimate child under the age of sixteen shall not be capable of acquiring a settlement for itself, but shall follow its parentage settlement under that age, and that an illegitimate child is to be treated as far as may be as though it were legitimate; it cannot, of course, be in all respects so treated. Now it is admitted by the respondents that there would be nothing to be said on their behalf if the pauper were under sixteen and were legitimate; it must, in that case, take as its parentage settlement that of its father or mother; but we are asked to bring in the old Act of 4 & 5 Will. 4, c. 76, for the purpose of differentiating the case of a legitimate from that of an illegitimate child in cases where the recent Act shows that it is not desired to make any such difference, and to fly in the face of the judgment of Lord Watson and the intention of the recent statute. The object of that statute has been explained by the House of Lords, and that object has been accomplished as far as it was possible to accomplish it; the matter is one which can be properly effected by legislation, and the conclusion to which I have come, following the evident meaning of the judgments in the House of Lords, is that an illegitimate, like a legitimate, child cannot gain a settlement for itself while under the age of sixteen.

MATHEW, J., concurred.

Appeal allowed.

Solicitor for the appellants, *Featherstone Johnson*, for *A. Lings*, Manchester.

Solicitors for the respondents, *Bower, Cotton, & Bower*, for *Parr & Co.*, Ormskirk.

Q. B. Div. (Wills, J.) April 21, 24.

KENRICK & CO. v. LAWRENCE & CO. (a.)

Copyright—Drawing of no artistic merit—Limitation of copyright—"Author" entitled to registration—Copyright Act, 1862 (25 & 26 *Vict. c.* 68).

The plaintiffs, as proprietors, registered a card upon which was drawn a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at parliamentary and other elections for the guidance of voters. They stated in the memorandum that J. was the author of the drawing, whereas J. had employed an artist to make it. The card had no artistic merit, and after it had been registered the defendants published similar cards for a similar purpose.

Held, that no action for infringement of copyright would lie, because (1) *the plaintiffs' drawing was only entitled to protection against an exact reproduction*; (2) *because J. was not the author, and the registration was therefore void.*

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law

This was an action for infringement of copyright in an original drawing under the Copyright (Works of Fine Arts) Act, 1862.

The case was tried by Wills, J., and a common jury, but the jury were discharged and the damages agreed at forty shillings if the judge should decide in the plaintiffs' favour.

Aston, Q.C., and *Macrory, Q.C.*, for the plaintiffs.

Bosanquet, Q.C., and *Pritchett*, for the defendants.

WILLS, J.—The plaintiffs in this case are A. J. Kenrick and F. T. Jefferson, trading in partnership at West Bromwich as the Free Press Co. They are printers and publishers. During the pendency of the partnership it occurred to Mr. Jefferson that it was very difficult without a picture to convey to a voter who cannot read, in respect to parliamentary and other elections at which voting is effected by means of a cross put in a certain place on a piece of paper, how he is to vote; and it occurred to him that a card or paper, on which there should be a picture of a hand holding a pencil and in the act of completing a cross within the proper square upon the paper, would be likely to sell. He is unable to draw himself, but he drew upon a piece of paper the proper lines dividing a representation of the ballot paper into the proper spaces, and told a Mr. Bott, an artist in the employment of himself and his partner, to draw a hand carrying a pencil and in the act of finishing a cross inclosed in a square. The artist made him a sketch, which he directed the artist to alter as to the position of the hand, and this drawing, so arrived at, Mr. Jefferson registered under 25 & 26 Vict. c. 68 as a drawing of which he, Mr. Jefferson, was the author, and of which his firm were the proprietors.

The defendant has published a similar card with a hand, in a slightly different position, also holding a pencil, in the act of finishing a cross upon the proper spot in a voting paper, and I have no doubt that he took the suggestion from the plaintiffs' card. The plaintiffs complain of this as an infringement of their copyright under the Act. It was in evidence that more than a million copies of the card of the plaintiffs have been sold since the year 1885, and that they have been used at nearly every election in the kingdom. It was urged, probably with truth, that such a card was practically the only mode of instructing the illiterate voter how to record his vote, and it is obvious that if the privilege of instructing the illiterate voter how to vote by the only vehicle by which the act of voting can be represented to the eye, and the instructions how to vote, and whom to vote for, can be brought home to him, be vested in the plaintiffs for seven years beyond the termination of a life which may very well subsist for half a century longer—for Mr. Jefferson is now only thirty-six years of age—and be their monopoly, it is difficult to put an adequate value upon their property in such a right. If that period should shortly arrive which to many politicians appears to be a kind of constitutional millennium, when all the remaining ignorance, male and female, of the three kingdoms shall be swept into the electoral fold, the amount of political power which may become vested in the plaintiffs or their assignees will be greater than it is possible to estimate, and the destinies of the country may be placed in the hands of the fortunate owner of the talisman. A prospect is open which may be described in well-known language as a "potentiality of wealth beyond the dreams of avarice," and legislation might even be necessary to prevent so potent an engine of political power from becoming vested in an infant or a madman, an official receiver or a trustee in bankruptcy, or from being bought or sold at auction or remaining permanently the heritage of any one political party. The importance of the question raised in this particular instance cannot, therefore, be put too high, and justifies the elaborateness and seriousness with which the case was opened by Mr. Aston, and which, until I came to reflect upon the constitutional aspect of the case, I confess I thought a little exaggerated.

The first question which arises is what is and what is not the nature of the right conferred under the Act upon the author by the registration of the drawing of which he is the author. It is perhaps easier to say what it is not than to give a satisfactory definition of what it is, and I think that I am upon very safe ground in saying that the mere choice of subject can rarely, if ever, confer upon the author of the drawing an exclusive right to represent the subject, and certainly where the subject chosen is merely the representation to the eye of a simple operation which must be performed by every person who records a vote, there cannot possibly be an exclusive right to represent in a picture that operation. It may well be that something special in the way of artistic treatment, even of this simple operation, if it existed, might be the subject of copyright, but nothing of the kind is suggested or exists in the present case, and if it does exist without being discovered it has not been imitated, for there is nothing which, by any flight of imagination, can be called artistic about either the plaintiffs' or the defendants' representation of a hand making the mark of a cross. It may be also that even the coarsest or the most commonplace or the most mechanical representation of the commonest object is so far protected on registration that an exact reproduction of it, such as photography for instance would produce, would be an infringement of copyright. But in such a case it must surely be nothing short of an exact literal reproduction of the drawing registered that can constitute the infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world. It is possible that in this case the proprietors of the drawing registered may have a right to be protected from a reproduction of their picture of a hand drawing a cross in which every line, dot, measurement, and blank space shall be rendered exactly as in the original, or in which the variations from such minute agreement shall be microscopic. But I cannot see how they can possibly make a higher claim, or say that because they have registered a drawing of a hand pencilling a cross within a square that no other person in the United Kingdom is at liberty to draw a hand pencilling a cross within a square for perhaps the next half century.

The plaintiff, Mr. Jefferson, put his case as high as that proposition, for he said he might wish to claim applications of the picture to subjects other than the voting cards. It is obvious that, unless there be a copyright in the subject, any other person who wishes to draw a hand pencilling a cross within a square cannot help producing something so like the plaintiff's design as to look very like a colourable imitation of it. Now it may or may not be very shabby conduct on the part of the defendants to wish to represent a hand pencilling a cross within a square, notwithstanding that the plaintiffs were first in the field, and notwithstanding that but for the picture used by the plaintiffs they might never have thought of making theirs, but I cannot see why they should be precluded, for the next fifty years perhaps, from representing in a picture the act which every voter performs when he records his vote, simply because one of the plaintiffs first thought of doing so, any more than, if a new article of commerce were introduced of extensive distribution and very simple and definite shape and proportions, and a drawing of it were made for one firm, all other persons should be precluded from making a drawing which, if it truthfully represented the same thing, must be exceedingly like the first drawing, nor even though the draftsman of the second drawing might never have seen the original article, or might have derived his knowledge of its existence and aspect solely from the first drawing.

If a new and very simple tea-caddy were represented first by A. in a drawing which he registered, I cannot conceive that he could during his whole life prevent B. from drawing the same tea-caddy, and even from drawing it from his recollection of A.'s picture, nor that A. could claim copyright except in the extremely limited and useless sense in which I have suggested that possibly a copyright might exist for a registered drawing of even such a subject.

In the present instance what the plaintiffs claim is really a right to prevent anyone else from drawing the same subjects as that of Mr. Jefferson's drawing. If they have a copyright in the subject there is a colourable imitation because the subject is not altered by changing the position of the hand and adding the indications of a shirt sleeve. But it is clear that there is no copyright in the subject. As for the manner of treating the subject there can be no copyright in that, for if the thing to be represented be represented at all it is impossible to treat it in any other way. It seems to me, therefore, that although every drawing of whatever kind may be entitled to registration, the degree and kind of protection given must vary greatly with the character of the drawing, and that with such a drawing as we are dealing with the copyright must be confined to that which is special to the individual drawing over and above the idea—in other words, the copyright is of the extremely limited character which I have endeavoured to describe. A square can only be drawn as a square, a cross can only be drawn as a cross, and for such purposes as the plaintiffs' drawing was intended to fulfil there are scarcely more ways than one of drawing a pencil or the hand that holds it. If the particular arrangement of square, cross, hand, or pencil be relied upon, it is nothing more than a claim of copyright for the subject, which, in my opinion, cannot possibly be supported.

I have endeavoured to discuss this part of the subject without putting any limitation upon the kind or nature of the drawing for which copyright may be claimed. But it is clear that in the opinion of Bowen, L.J., in *Nottage* v. *Jackson*, 32 W. R. 106, 11 Q. B. D. 627, the statute relates only to works of art of some sort or other. He says: "Parliament treats photography as a fine art. It puts it on a level, for the purposes of registration, with paintings and drawings" (at p. 636). It would be absurd to speak of such drawings as those in the present case as works of art. Possibly it would be a more correct view of his lordship's judgment to say that he considered that it was the product of the artistic faculty that was intended to be primarily, at all events, the subject of copyright—the thing to be protected by the Act. The difference, after all, is one rather of words than of practical effect. The title of the statute is "An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works." The title of a statute does not go for much in construing it, but I do not know that it is to be absolutely disregarded. The cases on the subject are collected, and their effect stated, in Master Wilberforce's very careful and able treatise on Statute Law, at pages 272—276. The title of Lord Campbell's Act was certainly referred to as not without significance in a considered judgment of the Court of Queen's Bench in *Blake* v. *Midland Railway Co.*, 18 Q. B. 93, 109. As far as it goes the title would certainly seem to point to the notion that it is the product of the artistic faculty which is the primary thing to be protected. And although it might not be right on that account to cut down the generality of the expression "every drawing," yet it may serve to point to the character of the protection intended. The phrase "artistic faculty" which I have used is vague enough, but here again it is easier to say what is not the product of any artistic faculty than to define what is so, and here it is easy to pronounce that no such faculty has been exercised. No kind of value is given to the article produced by reason of its being a pleasing, a particularly accurate, or a tasteful representation upon paper of the object represented, or by reason of that object itself, or the method of treating it, appealing in any way to imagination, affection, memory, or association. It has less even of such properties than the geometrical figures which illustrate a proposition of Euclid, and the kind of moral claim, if I may so speak, which such a drawing has to protection is far more of the nature which attaches to a trade design than to that which belongs to a work of art—a production which has merit or value as and in its character of a drawing, a painting, or a photograph, and not simply because it conveys, by way of a picture, a description or direction which could be just as well put into words, if words were not to many people a sealed book.

Without going further, therefore, my judgment would be for the defendants; other objections, however, have been raised to the right of the plaintiffs to recover, even supposing that the design in question comes within the purview of the statute. First, it is said that the plaintiffs can be the proprietors only by assignment from the author—and by section 3 of the Act the assignment is to be in writing—and that, whoever be the author, there is no such assignment. I think, however, this objection is not valid. By section 1, if the drawing is executed for pay or valuable consideration for a particular person the copyright is to belong to that person, and here the drawing was executed by Mr. Bott for the plaintiffs, for money paid by them to him. And, therefore, the copyright belongs to them, and they are properly registered as proprietors.

But then it was said the registration in this case did not satisfy the Act, inasmuch as the Act requires the name or place of abode of the proprietor to be stated, and the actual registration is that of the firm or style under which the plaintiffs carry on business. This question, however, seems to me to have been decided in favour of the registration of the firm name by the case of *Rock* v. *Lazarus*, 21 W. R. 215, L. R. 15 Eq. 104. It would do a great deal of mischief to unsettle the law upon this point, when, no doubt, a great deal of valuable property is protected only by registration effected in a similar manner on the faith of that decision.

There remains, however, a more serious objection to the registration. Mr. Jefferson is registered as the author of the drawing. It seems to me he was not the author. The expression is, no doubt, an unhappy one. But I do not see how a gentleman who is incapable of drawing even such a very simple picture as a rough sketch of the human hand, and who did not, in fact, set pencil to paper in the matter, can be called the author of the drawing. He suggested the subject, and made such limited suggestions as to the treatment as the subject admitted of, but it seems to me that in an Act which gives copyright to drawings, the author must mean a person who has, at least, some substantial share in putting the touches on to paper. Such was very clearly the view of every member of the Court of Appeal in *Nottage* v. *Jackson*, and although that case might perhaps have been decided without saying what is meant by the author of a drawing or painting, and so, perhaps, in a very strict sense the observation was extra-judicial, still it was very nearly necessary to the determination of that case, and I should follow it even if I differed from it. But as it entirely expresses my own view I can act upon my own view with the less hesitation. It may possibly be that Mr. Jefferson and Mr. Bott were joint "authors" of the drawing, but I cannot understand how the man who did all that was done in the way of drawing can be excluded from all participation in the authorship of the thing drawn by him.

In my opinion, therefore, the defendants are entitled to judgment with costs.

Judgment for the defendants.

Solicitor for the plaintiffs, *Frith Needham*, for *E. Caddick*, West Bromwich.

Solicitors for the defendants, *C. Robinson & Co*, for *J. W. Phillips*, Birmingham.

Q. B. Div. (Lord Coleridge, C.J., and Lord Esher, M.R.) March 27.

GILES *v.* WALKER. (*a.*)

Nuisance—Thistles on neighbouring land—Negligence of occupier—Right of action.

There is no right of action for the nuisance created by thistledown blown from the land of one man to that of another, for, as between adjoining occupiers, there is no duty to keep down the natural growth of the soil.

This was an appeal from the Leicester County Court.

The action was brought to recover damages for injury done to the plaintiff's land by thistle seed blown from the defendant's land. The defendant was in occupation of land which had been originally forest land, but which for more than seven years had been brought into cultivation. The result of cultivation had been to produce a great crop of thistles, which the defendant neglected to keep down. In consequence of this neglect there were thousands of thistles in full seed in the years 1887 and 1888, the seeds from which took root in plaintiff's land and caused damage. The judge left the question to the jury whether the defendant had been guilty of negligence in not cutting the thistles. The jury found that he was negligent, and judgment was given for the plaintiff. The defendant appealed.

Toller, for the defendant.—The judge was wrong in leaving the question of negligence to the jury, as the facts disclosed no cause of action. There was no duty on the defendant to protect the plaintiff from the result of any natural growth upon his land. [He was stopped by the court.]

R. Bray, for the plaintiff.—The defendant entered into occupation of this land with the cause of nuisance upon it, and was under an obligation to his neighbour to prevent any injury to his land. In *Crowhurst* v. *Amersham Burial Board*, 27 W. R. 95, 4 Ex. D. 5, an occupier of land was held responsible for the consequence of neglecting to cut yew trees, so as to prevent them from overshadowing his neighbour's land.

Lord COLERIDGE, C.J.—I never heard of such an action as the present. There can be no duty, as between adjoining occupiers, to cut the thistles—the natural growth of the land. The appeal must be allowed.

Lord ESHER, M.R.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiff, *Field, Roscoe, & Co.*

Solicitors for the defendant, *H. B. Wade*, for *Fowler, Warwick, & Neale*, Leicester.

(*a.* Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Lord Esher, M.R.) March 27.

JONES *v.* PADGETT & CO. (*a.*)

Sale of goods by sample—Implied warranty of merchantableness—Extent of.

The defendants, manufacturers, contracted to supply to the plaintiff a quantity of indigo cloth according to sample. The cloth was delivered and accepted according to sample, but the plaintiff, who was a tailor as well as a woollen merchant, used the cloth for the purpose of making liveries, for which it proved to be unsuited. It was proved that cloth of the same description was commonly used for making liveries, but the defendants were unaware of the purpose for which the plaintiff bought the cloth in question. It was not proved that the cloth was unsuitable for any other purpose than that of making liveries. In an action against the defendants for breach of an implied warranty of merchantable quality, the judge left the question to the jury whether the cloth was merchantable for a woollen manufacturer, and refused to leave to them the question whether an ordinary use for the cloth was the making of liveries.

Held, that there was no misdirection.

This was an appeal from the Westminster County Court.

The plaintiff, who was both a woollen merchant and a tailor, ordered of the defendants, who were woollen manufacturers, a quantity of "indigo blue cloth" to be made according to sample. The defendants supplied the plaintiff with the goods in accordance with the sample, but were not aware of the particular purpose for which the goods were required.

The plaintiff made the cloth into liveries for the use of servants in a London club, and it was admitted that the cloth was unsuitable for this purpose. There was evidence to show that cloth of a similar description was ordinarily used for the purpose of liveries, but it was admitted that it was also used for other purposes, and no evidence was adduced to show that the cloth supplied was unsuitable for any of these other purposes. The plaintiff, having sued the defendants for breach of an implied warranty that the cloth was merchantable, the judge left the question to the jury whether it was merchantable as supplied to woollen merchants, and refused to leave to them the question whether cloth of this description was ordinarily used for the making of liveries. The jury found for the defendants, and the plaintiff moved for a new trial on the ground of misdiscretion.

Danckwerts, for the plaintiff.—The judge was guilty of a misdirection in not explaining to the jury the meaning of the word "merchantable"; merchantable means fit for all the purposes to which the purchased article is usually applied. [Lord ESHER.—By the person to whom it is supplied.] The plaintiff was a woollen merchant, and the defendants ought to have known that this cloth might be used for the particular purpose of making liveries. *Jones* v. *Bright*, 5 Bing. 533, and *Mody* v. *Gregson*, 17 W. R. 176, L. R. 4 Ex. 49, establish that a manufacturer supplying goods to a purchaser undertakes that they shall be fit for the purpose to which he knows that the purchaser intends to apply them. In *Drummond* v. *Van Ingen*, 36 W. R. 50, 12 App. Cas. 284, the same doctrine is carried still further, and extends the implied warranty to all the purposes to which the manufacturer ought to know that the goods are to be applied. This is to be found in the language of Lord Selborne, at p. 287, and of Lord Herschell, at p. 293. The county court judge, therefore, ought to have

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

told the jury that "merchantable" meant that the cloth possessed all the essential qualities which cloth of that kind usually does possess.

Guiry, for the defendants, was not called on.

Lord COLERIDGE, C.J.—I am of opinion that in this case the direction of the county court judge to the jury was right, and that there was not any such non-direction as made his direction amount to a misdirection. There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago, in the case of *Jones* v. *Bright*, and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here all that was shown was that the seller on the one side was a manufacturer and the buyer on the other side was a woollen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for which they were not fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them. But there was nothing beyond the position of the parties to show that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. But then it is said that the case of *Drummond* v. *Van Ingen* in the House of Lords, carries the law further than *Jones* v. *Bright*.

In my opinion that is not so. There was no intention on the part of the Lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so, also, did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine further. He said:—"It was argued for the appellants by the Attorney-General in his able argument at the bar that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials." If the plaintiff is to succeed it must be on the ground of the reasonableness of imputing such knowledge to the manufacturer. I do not see that there was any evidence that the making of liveries was the only purpose, or even the most usual purpose, for which this particular kind of cloth was ordinarily used, and unless that is so there is nothing to fix the manufacturer with knowledge which would bring the case within the rule.

Lord ESHER, M.R.—The question which was left by the judge to the jury, and the sufficiency of which is now complained of, was whether the cloth supplied by the defendants to the plaintiff was merchantable as supplied to woollen merchants. The cloth in question was ordered under a particular name—namely, "indigo blue cloth"—by a woollen merchant of a woollen cloth manufacturer to be made according to sample. It was not denied that the cloth supplied answered the name, nor was it disputed that it agreed with the sample.

But it was said that there was a breach of an implied warranty that it should be fit for the particular purpose of being made into liveries. Now, the rule with regard to the implied warranty of fitness which arises in the case of a sale of goods is that which is laid down in *Jones* v. *Just*, 16 W. R. 643, L. R. 3 Q. B. 197, in the fourth of the five classes there enumerated:—"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces or in which he deals to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is applied." Those are the limits of the warranty. Here the goods were ordered by a woollen merchant. He, no doubt, happened also to be a tailor; but that fact was unknown to the defendant. The purpose for which a woollen merchant buys cloth is to sell it again to others. There was, indeed, evidence that such cloth as this, if sold to a tailor, was not fit for one of the purposes to which a tailor might apply it. But there was no evidence that it was not fit for other of the purposes, even of a tailor. Moreover, the cloth might have been sold by woollen merchants to fifty other classes of persons besides tailors. There was no evidence that woollen manufacturers know that woollen merchants sell to tailors at all. The manufacturer here was not told, either expressly or by implication, that the goods were ordered that they might be sold to tailors. Then, is there any authority which establishes that where goods are ordered by a woollen merchant of a cloth manufacturer the latter must be taken to know that they may be ordered to be sold to tailors?

The case referred to in the House of Lords is no authority for such a proposition, for there the goods were ordered under the designation of "coatings," which necessarily imported that they were intended to be made up into coats, and therefore the facts of that case came within the precise terms of the fourth rule in *Jones* v. *Just*. It is suggested that every woollen manufacturer is bound to know all the ordinary purposes to which a woollen merchant may put the cloth which he buys—that is to say, he is bound to be acquainted with all the trades to which the woollen merchant may resell it—but that is the very proposition which Lord Herschell expressly denies. "It would be unreasonable," he says, "to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used." Though he adds that, "There seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats." And Lord Selborne says that, although, "if the goods being of a class known and understood between merchant and manufacturer as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them when supplied a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended," the doctrine of implied warranty applies; yet that doctrine "ought not to be unreasonably extended so as to require manufacturers to be conversant with all the specialities of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them." The Lords decided that case on the ground that it came within the fourth proposition in *Jones* v. *Just*, which proposition they held to be applicable to a case in which the goods were bought by sample. But here there is no evidence to bring the case within that proposition. The direction of the county court judge was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiff, *C. Butcher*.

Solicitors for the defendants, *Bell, Brodrick, & Gray*, for *Culvert*, Leeds.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 28.

Ex parte SHERIFF OF ESSEX.
In re LEVY. (*a.*)

Bankruptcy—Sheriff—Costs of execution—Right to possession money where receiving order made before sale—Delay of sale—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-section* (1)—*Bankruptcy Rules*, 1886, *r.* 118.

On the 2nd of September, 1889, *the goods of the bankrupt were seized by the sheriff under a writ of* fi. fa., *and in consequence of interpleader proceedings the possession was continued without selling until the 2nd of October*, 1889, *when, on notice of a receiving order having been made against the bankrupt, the goods were delivered by the sheriff to the official receiver. The sum of* £5 10s. *having been taxed by the master off a charge made by the sheriff in his bill of costs of* £7 10s. *for thirty days' possession money from the 2nd of September to the 2nd of October*, 1889, *the sheriff applied that the decision of the taxing master might be reviewed.*

Held, that the proper order would be that the amount should be allowed unless the official receiver, within seven days, required the sheriff to take out a summons before the master to have the costs disposed of. If such summons were taken out, the official receiver to be at liberty to appear on it, and to contend, if so advised, that the claimant or the execution creditor ought to pay the possession money in dispute.

Application by the sheriff of Essex for a review of the taxation of certain costs of execution.

The case raised an important question with reference to the right of a sheriff to charge possession money where he has been prevented from selling the goods within the ordinary time by reason of proceedings being taken by third parties, and notice of a receiving order is subsequently given to him before the goods are actually sold.

On the 29th of August, 1889, a writ of *fi. fa.* was lodged with the sheriff against the goods of the bankrupt under which the sheriff seized on the 2nd of September, 1889. On the 10th of September a claim was made to the goods and interpleader proceedings were directed, an order being made on the 18th of September requiring the claimant to bring a certain sum into court within a week, or, in default of this, that the sheriff sell the goods. The sheriff was preparing to sell when, on the 30th of September, notice of a receiving order against the bankrupt was served on him, and on the 2nd of October the sheriff withdrew from possession in accordance with section 46, sub-section (1), of the Bankruptcy Act, 1883.

A bill of costs was subsequently brought in by the sheriff against the official receiver under rule 118 of the Bankruptcy Rules, 1886, in which, in addition to the usual officer's fee and mileage, a charge was made of £7 10s. for thirty days' possession money at 5s. a day from the 2nd of September to the 2nd of October, 1889. From this item of £7 10s., however, the sum of £5 10s. was taxed off by the master, on the ground that the sheriff was not entitled to charge any possession money during the time the sale was delayed by reason of the interpleader proceedings, and that in such case only reasonable expenses, and not what might be called extraordinary expenses, could be allowed.

The sheriff now applied for a review of this taxation.

Herbert Reed, for the sheriff.—Of course, if the sheriff delays and stops in for thirty days, he cannot get thirty days' possession money; but when the sheriff is compelled to stay in, and when, if he had sold, he could have deducted the costs, it is very unfair to say that if there is a bankruptcy before the sale he cannot have the costs. It was not intended by the Bankruptcy Act that the right of the sheriff should be lost, and there is no case which goes to the length of saying that possession money is not part of the costs of execution. The question is of much importance, and I ask that some general rule may be laid down by the court.

The official receiver and the parties to the interpleader proceedings did not appear.

CAVE, J.—It is difficult to lay down any rule in the absence of parties who might be affected, except that *primâ facie* a sheriff who does what has been done as part of his duty, and is doing nothing wrong, ought to get these costs out of someone or other. The costs have really been caused by the claimant and the execution creditor disputing as to who was entitled to the proceeds of the goods, and in an ordinary case the person who was wrong would be ordered to pay the costs. Assuming, for example, that the claim was a got up claim, it would be very hard for the creditors to have to pay what the claimant ought to pay himself. In the present case the difficulty may be got over if I make the following order: Amount allowed, unless the official receiver, within seven days after service of this order, requires the sheriff to take out a summons before the master to have the costs disposed of. If such summons is taken out the official receiver to be at liberty to appear on it, and to contend, if so advised, that the claimant or the execution creditor ought to pay the possession money in dispute. If the summons goes before the master he may, if he finds a difficulty in it, refer it back to me.

Order accordingly.

Solicitor for the sheriff, *R. H. Gill.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

ALSO OF

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE AND COURT OF BANKRUPTCY IN IRELAND;

FROM THE 24TH OF OCTOBER, 1889, TO THE 12TH OF AUGUST, 1890.

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1890.

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TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the HOUSE OF LORDS; P.C., the PRIVY COUNCIL; C.A., the COURT OF APPEAL; LUN., LUNACY; CH.D., the CHANCERY DIVISION; KAY, J., MR. JUSTICE KAY; CHI., J., MR. JUSTICE CHITTY; NOR., J., MR. JUSTICE NORTH; STI., J., MR. JUSTICE STIRLING; KEK., J., MR. JUSTICE KEKEWICH; Q.B.D., the QUEEN'S BENCH DIVISION; Q.B.D., BKCY., the QUEEN'S BENCH DIVISION sitting in BANKRUPTCY; P.D. & A.D., the PROBATE, DIVORCE, AND ADMIRALTY DIVISION; C.C.R., the COURT FOR CROWN CASES RESERVED; C.A. (Ir.), the COURT OF APPEAL IN IRELAND; M.R. (Ir.), the MASTER OF THE ROLLS IN IRELAND; V.C. (Ir.), the VICE-CHANCELLOR OF IRELAND; L.J. (Ir.), the LAND JUDGE, IRELAND; Q.B.D. (Ir.), the QUEEN'S BENCH DIVISION, IRELAND; EX.D. (Ir.), the EXCHEQUER DIVISION, IRELAND; P. & D.D. (Ir.), the PROBATE AND DIVORCE DIVISION, IRELAND; C.C.R. (Ir.), the COURT FOR CROWN CASES RESERVED, IRELAND; BKCY. (Ir.), the COURT OF BANKRUPTCY, IRELAND.

*** THIS DIGEST CONTAINS THE NAMES OF ALL CASES REPORTED UP TO THE END OF AUGUST, 1890.

ABANDONMENT.—See COMPANY, 23; RAILWAY, 1, 4.

ABATEMENT.—See WILL, 1, 2.

ACCEPTANCE.—See CONTRACT, 1.

ACCESSORY.—See CRIMINAL LAW, 8.

ACCORD and SATISFACTION.—See PRINCIPAL AND AGENT, 2.

ACCOUNT.—See ADMINISTRATION, 1, 2; MORTGAGE, 1, 7; PATENT, 2, 9; PRACTICE, 21; PRINCIPAL AND AGENT, 1, 5.

ACKNOWLEDGMENT.—See MARRIED WOMAN, 1, 2; LIMITATIONS, STATUTES OF, 1, 2, 3, 10; SETTLEMENT, 10.

ACT of BANKRUPTCY.—See BANKRUPTCY, 1, 2, 3, 19.

ADEMPTION.—See WILL, 3.

ADMINISTRATION:—

1. *Account—Executor—Retainer—Set-off—Ord.* 15, *r.* 1; *ord* 55, *r.* 10a.—An order for accounts under ord. 15, r. 1, without a decree for administration, made in an administration action, does not prevent a creditor of the estate from suing the executor, or the executor from paying a debt due from the estate.

By a marriage settlement a husband covenanted to pay to a trustee certain sums of money upon trust to pay the income to the wife for life, with an ultimate trust for himself absolutely, and died without performing his covenant, having appointed his wife sole executrix. His creditors brought an administration action against the executrix and obtained an order for accounts under ord. 15, r. 1, without a decree for administration, and the executrix was afterwards appointed trustee of the marriage settlement, and the testator's estate proved insolvent.

Held, that the executrix, notwithstanding the order for accounts, was entitled to apply the assets in her hands as executrix in payment to herself as trustee of the debt due on the covenant in the marriage settlement.—*Whitaker* v. *Barratt*, CH.D. NOR., J. 59—43 Ch. D. 70; 59 L. J. Ch. 218.

2. *Accounts—Inquiries in chambers—Cross-examination of witnesses—Discretion of judge—Ord.* 38, *r.* 18.—Although no hard and fast rule can be laid down

that, in proceedings in chambers after judgment, no fresh evidence can be adduced after cross-examination —that being a matter in the discretion of the judge —there is nothing reprehensible in the practice which has grown up in chambers, and is well known to practitioners there, that liberty to cross-examine is, in the absence of special circumstances, only accorded on the footing that all the evidence will be completed before cross-examination. In ordinary cases, and under ordinary circumstances, this practice is a good and convenient one.—*Issard* v. *Lambert*, C.A. 584—44 Ch. D. 253; 59 L. J. Ch. 516; 62 L. T. 584.

3. *Annuity — Deficiency — Tenancy for life.*—A. devised all his real estate (except two specified estates) to trustees upon trust for his son for life, with remainder in strict settlement. He devised the two specified estates upon trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, the testator covenanted to pay an annuity to the son or his wife during their joint lives. The testator's personal estate proved insufficient to provide for the payment of the annuity.

Held, that the three real estates ought to contribute rateably towards payment of the annuity, and that each tenant for life would have a charge upon the *corpus* of the estate in respect of the proportion of the annuity paid by him or her, but that he or she would have to keep down the interest on the amount so charged.—*Townson* v. *Harrison*, CH.D. NOR., J. 265—43 Ch. D. 55; 59 L. J. Ch. 169; 61 L. T. 762.

4. *Annuity—Insolvent estate—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Ord.* 55, *rr.* 3, 4.—A testator covenanted to pay to trustees during the life of D. an annuity of £500 for the benefit of her and her children. After the testator's death the trustees issued an originating summons for the administration of his estate, on the ground that it was insufficient to provide for the payment of the annuity in full. No payment of the annuity was at the time in arrear.

Held (affirming the decision of North, J.), that, although section 10 of the Judicature Act, 1875, gives a right to an annuitant to prove in administration proceedings for the capital value of an annuity, yet it confers no right upon the annuitant to obtain an order for administration so long as the annuity is punctually paid, although the estate may be insolvent, and that the summons must therefore be dismissed.—*In re Hargreaves, Dicks* v. *Hare*, C.A.—44 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819.

5. *Annuity—Security—Leaseholds—Conversion.*—A., after bequeathing certain legacies and annuities, declared that the residue of his property, after payment of his debts and funeral and testamentary expenses and the legacies and annuities, should be divided among his next of kin and heiresses as though he had died intestate. The testator died possessed of real estate, consisting of freeholds and leaseholds, of large value. The leaseholds and part of the freeholds were subject to mortgages. All the testator's debts, other than the mortgage debts, and his funeral and testamentary expenses had been paid out of the personal estate, and there was a balance of £2,000 in the hands of the surviving executors. The annuities had been punctually paid. The annuitants claimed to have the testator's leaseholds sold and the mortgage debts paid out of the proceeds, and a sufficient sum invested to provide for their annuities.

Held, that the annuitants were not entitled to have the leaseholds sold, but were only entitled to have the annuities properly secured.

Webber v. *Webber*, 1 Sim. & S. 311, and *King* v. *Molcot*, 9 Ha. 692, approved.—*Scott* v. *Leak*, CH.D. NOR., J. 226—43 Ch. D. 70; 61 L. T. 386.

6. *Bond—Sureties—Bankruptcy—Official Receiver.*—Where a grant of administration was made to the Chief Official Receiver in Bankruptcy, the court, though requiring an administration bond, dispensed with sureties.—*In the Goods of Cope*, P.D. & A.D. 688—15 P. D. 107.

7. *Bond—Sureties—Lunacy of administratrix—Grant to committee.*—An administratrix became a lunatic, and was so found by inquisition. £11,150, part of the estate, had been paid into the Chancery Division, but an administrator was required to receive the remainder, £850, due on a mortgage. On the application of the committee for administration for the use and benefit of the lunatic, the court allowed the security to be given by the sureties to be limited to twice the amount of the balance outstanding, but required the bond given by the administrator to be for the full amount.—*In the Goods of Morris*, P.D. & A.D. 496—15 P. D. 9; 59 L. J. P. D. & A. 16; 61 L. T. 652.

8. *Charitable gift—Discretion of executor—Payment out of court—Affidavit.*—A. bequeathed money to his executor in trust for such charitable purposes as he might think right.

Held, that, though the executor was entitled to exercise his own discretion in selecting the charities, the court would not order payment of the money out of court without an affidavit by the executor stating how he intended to apply it.—*Hagan* v. *Duff*, M.R. (Ir.)—23 L. R. Ir. 516.

9. *Compromise by administrator.*—In an administration suit the chief clerk found that the next of kin at the date of the testator's death were M. and E., both of whom had since died, and that their respective personal representatives were B. and D. M. had died in 1860, and her will was duly proved, and in 1885 a grant of administration *de bonis non*, with the will annexed, was made to B. The Court of Appeal in Ireland held that a bequest of all the testator's property, subject to certain life interests, under which bequests the defendant claimed, was void, and that B. and D. were entitled to the personal estate in equal shares. While an appeal to the House of Lords was pending, a compromise was made, and judgment was given reversing the order of the Court of Appeal, and declaring that the defendants were entitled to half the fund in court, and B. and D. were entitled to the other half.

Held, that B. and D. were competent to effect the compromise.—*Smithwick* v. *Hayden*, V.C. (Ir.)—23 L. R. Ir. 475.

10. *Fraud of solicitor — Share of administratrix in estate.*—P. was the administratrix of H., and was entitled, as one of his next of kin, to a share in the residue of his estate. Before H.'s death P. had by a settlement covenanted to settle her after-acquired property. The proceeds of sale of a part of H.'s estate were misappropriated by P.'s solicitors.

Held, that neither P. nor the trustees of her settlement could take any part of the personal estate of H. till she had replaced the sum for which, as administratrix, the fraud of her solicitors had made her liable. —*Short* v. *Parratt*, CH.D. KAY, J.—61 L. T. 429.

11. *Insolvent estate—Transfer to bankruptcy—Discretion of court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 123 (4).—The power to transfer proceedings for administration of the estate of an insolvent deceased debtor to the court having jurisdiction in bankruptcy given by section 125 (4) of the

Bankruptcy Act, 1883, is, on the true construction of the Act, a discretionary, not an imperative power.

Higgs v. *Weaver*, 33 W. R. 874, 29 Ch. D. 236, approved.

The fact that the mode of administration of assets in chancery differs from that in bankruptcy—as, for instance, by reason of the recognition, in the chancery mode of administration, of the executor's right of retainer, and of the executor's right to refrain from pleading the Statute of Limitations against, and thereby to favour, the creditor who obtains an administration order—does not render it imperative on the court to make an order for transfer under section 125 (4).

Quære, whether, if a transfer were made, the executor's right of retainer would be destroyed.—*In re Baker, Nichols* v. *Baker*, C.A. 417—44 Ch. D. 262; 62 L. T. 817.

12. *Interest—Life estate—Residuary gift.*—A. by his will gave pecuniary legacies and gave his residuary estate to M. for life, with a bequest over. The investments representing the general estate produced, on the average, less than four per cent., which income was more than four per cent. on the amount of the legacies.

Held, that the difference between the actual interest on the legacies and interest thereon at four per cent. should be deducted from the capital of the residue from the testator's death, and that M. was entitled to the actual interest on the net residue.—*Massy* v. *Gahan*, V.C. (Ir.)—23 L. R. Ir. 518.

13. *Intestacy—Grant to attorney—Form of oath.*—P. died intestate, leaving a brother, S. P. was married in 1860, but her husband, a sailor, had not been heard of for twenty years. S., who was resident in America, appointed J., a solicitor, as his attorney to apply for administration.

The court refused to modify the form of the oath by allowing J. to swear that he believed the intestate to be a widow at the date of her death.—*In the Goods of Pridham*, P.D. & A.D.—61 L. T. 302.

13a. *Intestacy—No next of kin—Grant* ad colligenda bona.—Under a grant *ad colligenda bona*, made to the Solicitor to the Treasury, the court gave leave to the administrator to pay all pressing claims for rent, rates, and taxes, to take the accounts of the manager of the intestate's business, and to dispose of the said business. —*In the Goods of Oddy*, P.D. & A.D.—62 L. T. 643.

14. *Limited grant—Administration* ad colligenda bona—*Grant to creditor.*— A woman died intestate without known relatives, and it was not known whether she had ever been married.

The court granted administration *ad colligenda bona* to an unsecured creditor, and allowed his solicitor to swear that he was informed and verily believed that the deceased died a widow without known relatives, and intestate.—*In the Goods of Ashley*, P.D. & A.D.—15 P. D. 120.

15. *Limited grant—Administration* de bonis non—*Administration* pendente lite—*Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—F. by his will appointed his wife sole executrix. The widow proved the will, and died, leaving a will, and leaving part of her husband's estate unadministered. The validity of the widow's will was disputed by A., one of her residuary legatees.

The court made a grant of administration *pendente lite* of F.'s unadministered estate to a person to be selected by the registrar.—*In the Goods of Fawcett*, P.D. & A.D.—58 L. J. P. D. & A. 87; 61 L. T. 303.

16. *Limited grant—Infant—Guardian* ad litem.—A guardian *ad litem* of an infant had been appointed in the Chancery Division in an administration action to obtain letters of administration. All money received by the administrator would be paid into court in the administration action.

The court made a grant of administration to the guardian *ad litem*.—*In the Goods of Mustapha*, P.D. & A.D.—59 L. J. P. D. & A. 61; 62 L. T. 606.

17. *Limited grant — Lunacy — Pauper lunatic — Grant to nominee of guardians.*—The husband of an intestate was a pauper lunatic confined in a county asylum at the charge of a board of guardians.

The court, after notice to the next of kin and no entry of an affidavit, made a grant of administration to the nominee of the guardians, for the use and benefit of the lunatic, limited to such time as he should remain insane.—*In the Goods of Eccles*, P.D. & A.D.—15 P. D. 1; 61 L. T. 652.

18. *Married woman—Canadian domicil—Grant to attorney of children of deceased.*—Where a person entitled by English law to administration of the estate of a married woman who died intestate and domiciled in Canada had been cited and had not appeared, the court made a grant of administration to the attorney of the children of the deceased.—*In the Goods of Babin*, P.D. & A.D.—59 L. J. P. D. & A. 46; 62 L. T. 185.

19. *Married woman—Presumption of husband's death.*—Where a husband had not been heard of for more than seven years, the court refused to allow a party applying for administration to the estate of his wife to presume the husband's death, but held that the applicant would be entitled to take the grant on swearing her belief that the deceased died a widow.—*In the Goods of Clark*, P.D. & A.D. 448—15 P. D. 10; 59 L. J. P. D. & A. 6; 61 L. T. 697.

20. *Marshalling — Personal estate not specifically bequeathed.*—A. by his will directed payment of his debts as soon as convenient after his death, and specifically devised his real estate. There were also certain pecuniary and specific bequests.

Held, that the whole personal estate not specifically bequeathed must be applied to payment of debts before the real estate was resorted to.—*Bate* v. *Bate*, CH.D. KAY, J.—43 Ch. D. 600; 59 L. J. Ch. 277.

21. *Proof—Distribution—Creditors not to be found.* —Creditors brought in proofs under an administration decree made in 1866, but, owing to an insufficiency of assets, the proceedings were not completed. In 1888, other assets having been realized, there was a sufficient fund to pay all the creditors, some of whom could not be found.

Held, that a sum representing the debts, with interest, due to the creditors who could not be found must be retained in court, the residue of the fund being fully administered.—*Macalpin* v. *Macdonald*, CH.D. CHI., J.—59 L. J. Ch. 231.

22. *Proof—Executors carrying on business—Debt incurred by executors.*—An action was brought to administer the estate of A., who had directed his executor to carry on his business. Creditors whose claims had arisen since A.'s death applied for leave to attend the proceedings.

Held, that leave ought not to be granted till the executors were proved not to be in default.—*Morris* v. *Latchford*, M.R. (Ir.)—23 L. R. Ir. 333.

23. *Revocation of grant—Absence of administrator —Grant to next of kin.*—Where an administrator could not be found, having absconded after threatening to commit suicide, and the only estate remaining unadministered was a claim for debt against a bankrupt's estate, the court without citation revoked the grant, and made a new grant to one of the next of

kin.—*In the Goods of Covell*, P.D. & A.D. 79—15 P. D. 8; 59 L. J. P. D. & A. 7; 61 L. T. 620.

24. *Special circumstances—Disputed claim—Compromise—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—A doubt, depending on the validity of a marriage of the grandmother of one of two persons, having arisen as to which of them was the sole next of kin of the deceased, who died intestate, an agreement was made between them that one of them should apply for a grant of letters of administration to the deceased's estate, and, after payment of all expenses and costs, divide the residue between them.

Held, that there were special circumstances in the case which authorized the court to grant such letters of administration to the applicant under section 73 of the Probate Act, 1857.

In the Goods of Hopkins, L. R. 3 P. & D. 235, 23 W. R. Dig. 7, followed.—*In the Goods of Minshall*, P.D. & A.D. 80—41 P. D. 151; 58 L. J. P. D. & A. 69; 61 L. T. 257.

25. *Will annexed—Married woman—No appointment of executor.*—A wife who had been separated from her husband for twenty-seven years made a will bequeathing all her property to A. There was no appointment of an executor.

The court refused to grant administration with the will annexed to A. without citing the next of kin.—*In the Goods of Miles*, P.D. & A.D.—59 L. J. P. D. & A. 59.

See also Costs, 1, 12; County Court, 5; Executor, 1, 2, 4; Married Woman, 1; Mortgage, 24; Practice, 14; Will, 58.

ADMIRALTY.—See Costs, 1; County Court, 1, 4; Shipping, 24.

ADULTERATION:—

1. *Margarine—Exposure for sale—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *s.* 6.—By section 6 of the Margarine Act, 1887, "if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine.'"

A customer asking for margarine was served from a parcel of margarine then in the shop and unlabelled, but placed behind a screen so as not to be visible to customers.

Held, that the margarine was not "exposed" for sale, within the meaning of section 6, because it was not exposed in the shop so as to be visible to customers and so as to induce them to buy it without knowing that it was margarine; and, that a summons against the vendor for exposing it for sale without a label, contrary to the provisions of the section, was rightly dismissed by a magistrate.—*Crane* v. *Lawrence*, Q.B.D. 620—25 Q. B. D. 152.

2. *Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 9—*Milk—Evidence—Guilty knowledge.*—In a prosecution under section 9 of the Sale of Food and Drugs Act, 1875, for selling an article of food which has been so altered by abstraction of any part of it as to affect injuriously its quality, substance, or nature, it is not necessary to prove that the seller had knowledge of the alteration; but he may be convicted of an offence under the section, even if he had no knowledge of such alteration.—*Pain* v. *Boughtwood*, Q.B.D. 428—24 Q. B. D. 353; 59 L. J. M. C. 45; 62 L. T. 284.

See also Justice of the Peace, 9.

ADVANCEMENT.—See Will, 4, 5.

AFFIDAVIT.—See Administration, 8; Bill of Sale, 5; Divorce, 15; Evidence, 1, 2, 3; Justice of the Peace, 4; Practice, 1; Practice (Ireland), 1.

AFTER-ACQUIRED PROPERTY.—See Bill of Sale, 3; Bankruptcy, 27; Married Woman, 13; Settlement, 1, 2.

AGRICULTURAL HOLDINGS ACT.—See Landlord and Tenant, 1, 2.

ALIMONY.—See Divorce, 12; Husband and Wife, 4; Practice, 38.

ALLOTMENT.—See Company, 4, 5, 17.

AMBASSADOR.—See Poor Rate, 1.

AMENDMENT.—See Election Law, 4; Patent, 3; Practice, 2, 28, 45; Will, 52.

ANNUITY.—See Administration, 3, 4, 5; Bankruptcy, 20; Income Tax, 1, 2; Married Woman, 11; Mortgage, 16.

APPEAL.—See Bankruptcy, 5, 6, 7, 8, 9, 10; Canada, Law of, 1, 3; Costs, 2, 3, 4, 6, 8, 14; County Court, 1, 2; Justice of the Peace, 1, 2, 4; Licensed House, 3, 4; Practice, 3—13, 19; Privy Council; Sheriff, 1; Solicitor, 12.

APPOINTMENT, POWER OF.—See Power of Appointment, 1—6.

APPORTIONMENT.—See Building Society, 6; Costs, 9; Infant, 4; Settlement, 15.

APPRENTICE:—

Wrongful dismissal.—Measure of damages.—The plaintiff bound himself as an apprentice to the defendants for 4 years, the defendants covenanting to instruct him and provide him with food and lodging. If the plaintiff showed a want of interest in his work, the defendants were to be at liberty to cancel the deed on a week's notice. The defendants dismissed the plaintiff without notice, alleging acts of insubordination and other misconduct. In an action for wrongful dismissal the jury found that the plaintiff had not been guilty of misconduct, and that there was no ground for dismissing him without notice, though there were sufficient grounds for dismissing on a week's notice. The judge directed the jury that they were not bound to limit the damages to the value of the week's notice which had not been given.

Held, that there was no misdirection.—*Maw* v. *Jones*, Q.B.D. 718—25 Q. B. D. 107.

See also Infant, 1.

ARBITRATION:—

1. *Agreement to refer—Stay of proceedings—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.—A lessor covenanted with the lessee to lay down all apparatus necessary for supplying with water a reservoir of the lessee's, and to cause to be delivered such a quantity of water as would enable the lessee to furnish his works with the supply necessary for the purposes of his business, such supply not to exceed a certain limit. The lease contained a clause for referring to arbitration any dispute "touching these presents or any clause, matter, or thing herein contained, . . . or any matter in any way connected with these presents, . . . or the rights or liabilities of either party in connection with the premises." Several years afterwards, during the continuance of the lease, an agreement in writing was entered into between the plaintiff and the lessor, the effect of which was to some extent to modify the rights of the parties under the lease and to impose fresh liabilities on the lessor; there was no arbitration clause in the agreement. The plaintiff (an assignee of the original lessee), after the date of the agreement,

commenced an action against the lessor, and, by the statement of claim, alleged breaches by the defendant of the stipulation contained in the agreement and also breaches of the covenant contained in the lease, and claimed damages "by reason of the matters aforesaid." The defendant, before putting in a statement of defence, took out a summons for a stay of the action, and that all matters in dispute should be referred to arbitration.

Held, that the arbitration clause in the lease did not cover matters arising under the subsequent agreement, and that, even if it did, the judge had properly refused to refer the action under this clause, as the action raised questions as to the construction of the agreement and its effect on the previous lease which could not come within the powers of the reference under the clause.

Held, also, that it would not be right to separate the litigation into two actions by referring to arbitration the questions arising under the lease, and allowing the action to proceed only as to matters not arising under the lease.

Decision of North, J., affirmed.—*Turnock* v. *Sartoris*, C.A. 340—43 Ch. D. 150; 62 L. T. 209.

2. *Award—Setting aside—Extension of time—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 26—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 17—*Ord.* 64, *rr.* 7, 14.—The court has jurisdiction, under ord. 64, r. 7, to extend the time for applying to set aside an award, even if the time limited for the purpose by 9 & 10 Will. 3, c. 15, s. 2, as modified by ord. 64, r. 14, has expired.—*Oliver* v. *Scott*, CH.D. KEK., J. 476—43 Ch. D. 310; 59 L. J. Ch. 148; 61 L. T. 552.

3. *Award—Setting aside—Time—Ord.* 64, *r.* 14.—A notice of motion to set aside the award of an arbitrator is an "application" within the meaning of ord. 64, r. 14, and is in time if given before the last day of the sittings next after such award has been made and published, even if the motion cannot be heard until after the expiration of the sittings.

Mayor of Huddersfield v. *Jacomb*, 23 W. R. 100, L. R. 10 Ch. App. 92, and *Smith* v. *Parkside Mining Co.*, 29 W. R. 154, 6 Q. B. D. 67, followed.—*Gallop* v. *Central Queensland Meat Export Co.*, Q.B.D. 621—25 Q. B. D. 230; 62 L. T. 834.

4. *Landlord and tenant—Compensation for quitting—Valuation—Execution—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 12, 27.—An agreement made between the purchaser of a close of land and the tenant, who was a nurseryman and market gardener, provided that the tenant should give up possession before the expiration of his lease, and that the amount of compensation to be paid to him (*a*) in respect of such giving up possession, (*b*) in respect of various plants and shrubs taken by the purchaser, should be determined by two named arbitrators, one of whom was a seedsman and the other a market gardener, and, in case of dispute, by an umpire to be appointed by the arbitrators.

The arbitrators differed, and the amount of compensation was assessed by an umpire appointed by them.

Held, that this was a valuation, and not an award, and that the tenant was therefore not entitled to issue execution under the Arbitration Act, 1889.—*In re Hammond and Waterton's Arbitration*, Q.B.D.—62 L. T. 808.

5. *Partnership—Dissolution—Stay of proceedings.*—The plaintiff claimed an account of the dealings between himself and the defendant under articles of partnership, and to wind up the partnership. The defendant moved to stay further proceedings in the action, and for a reference to arbitration of all matters in dispute under a clause in the articles.

The court ordered the motion to stand over till the trial of the action.—*Joplin* v. *Postlethwaite*, CH.D. KAY, J.—61 L. T. 629.

6. *Stay of proceedings—Discretion of court—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 19.—The court has a discretion under section 4 of the Arbitration Act, 1889, as to staying legal proceedings commenced by one of the parties to an instrument of submission to arbitration against the other party, and will not stay proceedings where the question to be decided is a question of law only.—*In re Carlisle, Clegg* v. *Clegg*, CH.D. NOR., J. 638—44 Ch. D. 200; 59 L. J. Ch. 520; 62 L. T. 821.

7. *Stay of proceedings—Injunction—Partnership—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25 (8).—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.—Partnership articles provided that, in case any dispute should arise between the three partners relating to the partnership, they should forthwith each nominate a referee, and that the referees should determine all matters in dispute, or, in default of agreement, appoint an umpire. Questions arose, and two of the partners appointed referees to "settle and determine all questions, disputes, differences, and matters that may be in dispute or difference" between the partners. The third partner objected that there was no point in dispute within the clause. He asked for information as to the alleged differences, and was told that particulars would be furnished at the proper time. He now moved to restrain his partners from proceeding with the arbitration finally, or until they had specified what disputes they wished to refer, or that he might be at liberty to revoke the submission to arbitration.

Held, that the court had jurisdiction to grant the injunction, but that an arbitration without particulars and without the consent of the plaintiff would be merely futile; and that there was no ground for restraining the proceedings.—*Farrar* v. *Cooper*, CH.D. KEK., J. 410—44 Ch. D. 322; 52 L. J. Ch. 506; 62 L. T. 528.

See also BUILDING SOCIETY, 1, 2; LANDLORD AND TENANT (IRELAND), 3; LANDS CLAUSES CONSOLIDATION ACT, 1; SCOTLAND, LAW OF, 1.

ARTISANS' DWELLINGS ACTS.—See LANDLORD AND TENANT, 5; LIGHT, 1.

ASSAULT.—See CRIMINAL LAW, 2, 3; HUSBAND AND WIFE, 1; JUSTICE OF THE PEACE, 3, 4.

ASSIGNMENT.—See BANKRUPTCY, 1, 27, 30, 31; CHOSE IN ACTION; DEED, 1; LANDLORD AND TENANT, 6; PARTNERSHIP, 1; PATENT, 1, 4; SOLICITOR, 1; VENDOR AND PURCHASER, 6.

ATTACHMENT:—

1. *Contempt of court—Judicial separation—Molestation by respondent.*—A wife molested her husband after he had obtained a decree of judicial separation.

Held, that the wife could not be attached for contempt of court.—*Smith* v. *Smith*, P.D. & A.D.—59 L. J. P. D. & A. 15.

2. *Contempt of court—Newspaper—Company—Examination of witness—Costs—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.—Publication of examinations taken under section 115 of the Companies Act, 1862, is a contempt of court.

A company in liquidation brought an action against A. and others. A. was examined under section 115 of the Companies Act, 1862. B., who was the printer and publisher of a newspaper in which was published what purported to be an account by A. of what had occurred during the examination, was ignorant of the contents of the newspaper.

Held, that B. was responsible for the contempt of court, and must pay the costs of a motion to commit him.—*American Exchange Co.* v. *Gillig*, CH.D. STI., J. —58 L. J. Ch. 706.

3. *Divorce—Permanent maintenance—Non-payment.*—The court will not grant an attachment for non-compliance with an order for payment of permanent maintenance.—*De Lossy* v. *De Lossy*, P.D. & A.D. 511—15 P. D. 115; 62 L. T. 704.

4. *Garnishee order—Bankruptcy dividend—Order on official receiver—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 125—*Ord.* 45, *r.* 1.—A dividend payable in a bankruptcy cannot be attached in the hands of the official receiver to answer a judgment obtained against the creditor to whom it is payable.—*Prout* v. *Gregory*, Q.B.D. 204.—24 Q. B. D. 281; 59 L. J. Q. B. 118.

5. *Judgment debtor—Committal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 14 (1) (c).—A judgment debtor, against whom a committal order has been made under section 5 of the Debtors Act, 1869, is not entitled, on his arrest, to claim to be taken to a safe and convenient dwelling-house for twenty-four hours before being taken to prison, since such a committal order is not an "attachment for debt" within the meaning of section 14 (1) (c) of the Sheriffs Act, 1887.

Decision of the Queen's Bench Division (37 W. R. 798, 23 Q. B. D. 373) affirmed.—*Mitchell* v. *Simpson*, C.A. 565—25 Q. B. D. 183; 59 L. J. Q. B. 355.

6. *Notice of motion—Non-appearance—Ord.* 44, *r.* 2; *ord.* 67, *r.* 4.—The defendant, a trustee, had not entered an appearance, and the writ and statement of claim had been filed. An order that the defendant should pay money into court within seven days had been served personally upon the defendant, and was not obeyed. Notice of motion for leave to issue a writ of attachment had been filed.

Held, that the filing of the notice was sufficient service.—*Morris* v. *Fowler*, CH.D. CHI., J. 522—44 Ch. D. 151; 59 L. J. Ch. 407; 62 L. T. 758.

7. *Trustee—Breach of trust—Bankruptcy—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9.—By an order made on the 5th of April, 1889, the defendant was directed as trustee to pay two sums of cash into court on or before the 6th of May. He did not comply with the order. On the 13th of May, 1889, a receiving order was made against him on his own petition, and he had not obtained his discharge. The plaintiffs moved for liberty to issue a writ of attachment against him, the notice of motion being dated the 22nd of April, 1890.

Held, that the property and person of the debtor were protected by section 9 of the Bankruptcy Act, 1883, and the court had no jurisdiction to direct a writ of attachment to issue against him.—*Simes* v. *Newbery*, CH.D. KEK., J. 570.

8. *Trustee—Breach of trust—"Possession or control"—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* 3.—Trustees and executors improperly sold certain bonds, part of their testator's estate, which they had appropriated to answer a certain legacy. In an action by the legatees to compel the trustees to make good the value of these bonds, an inquiry was directed as to what was their market price on the day of the judgment, and the trustees were ordered to pay to the plaintiffs within a specified time the value as ascertained. The value of the bonds had increased between the date of their sale and the date of the judgment. The money not having been paid, the plaintiffs moved for leave to issue a writ of attachment against the trustees.

Held (following *Cronin* v. *Twinberrow*, 32 SOLICITORS' JOURNAL, 44, W. N., 1887, p. 201), that the sum ordered to be paid, so far as it represented the difference between the value of the bonds on the day they were sold and their market price on the day of the judgment, had never been "in the possession or under the control" of the defendants within the meaning of section 4 (3) of the Debtors Act, 1867, and that payment could, therefore, not be enforced by attachment.—*Walker* v. *Walker*, CH.D. STI., J. 766.

See also BANKRUPTCY, 5, 18; HABEAS CORPUS; PRACTICE (IRELAND), 2.

ATTEMPT.—See CRIMINAL LAW, 4.

ATTESTATION.—See BILL OF SALE, 1, 14; WILL, 52.

ATTORNMENT.—See MORTGAGE, 2.

AUCTIONEER.—See MORTGAGE, 5.

AUTHOR.—See COPYRIGHT.

AVE. E.—See SHIPPING, 26.

AWARD.—See ARBITRATION, 2, 3; LANDLORD AND TENANT (IRELAND), 3; LANDS CLAUSES CONSOLIDATION ACT, 1.

BAILMENT.—See ESTOPPEL.

BANKER:—

1. *Bank Charter Act*, 1844 (7 & 8 *Vict. c.* 32), *s.* 23 —*Country bank—Compensation—Transfer of business.*—A bank entitled to compensation from the Bank of England under section 23 of the Bank Charter Act, 1844, does not lose such right by an amalgamation with other banks, nor by a change of its place of business.—*Capital and Counties Bank* v. *Bank of England*, Q.B.D.—61 L. T. 516.

2. *Bank of England—Transfer of stock—Tenancy in common—Registration*—Mandamus—5 & 6 *W.* & *M. c.* 20, *s.* 19—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 1, 22.—A transfer of stock into the joint names of a corporation and an individual creates a tenancy in common, and not a joint tenancy, and therefore, by virtue of sections 1 and 22 of the National Debt Act, 1870, the Bank of England is under no obligation to register such transfer.—*Law Guarantee and Trust Society* v. *Bank of England*, Q.B.D. 493—24 Q. B. D. 407; 62 L. T. 496.

3. *Deposit—Negotiable instruments.*—It is the duty of a banker who makes advances to a stockbroker on the security of negotiable instruments payable to bearer to inquire into the stockbroker's title.—*Simmonds* v. *London Joint-Stock Bank*, CH.D. KEK., J.—62 L. T. 427.

4. *Interest—Contract implied—Overdraft.*—A. had been in the habit of overdrawing his account with his bankers, and the bankers in furnishing accounts to A. used to charge him with compound interest on the overdrafts with half-yearly rests in March and September. A. died in December, 1880, and at his death the period for capitalizing the interest current from the last statement of accounts had not arrived.

Held (*diss.* Harrison, J.), that the bank were entitled to charge A.'s executor with six years' simple interest on the amount due at A.'s death until paid.—*Provincial Bank of Ireland* v. *O'Reilly*, Q.B.D. (Ir.)—26 L. R. Ir. 313.

See also GIFT, 2; SAVINGS BANK.

BANKRUPTCY:—

ACT OF BANKRUPTCY—

1. *Assignment for benefit of creditors—Informal direction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (a) (b).—On the 22nd of November a debtor, at the instance of his creditors, gave by letter

an authority to an auctioneer whom he had instructed to sell certain furniture and effects, which constituted practically the whole of his property, to pay the proceeds of sale into a bank to the joint account of certain persons, who were to hold it for the benefit of his creditors.

Held, that there was not an act of bankruptcy within section 4 (1) (*a*) of the Bankruptcy Act, 1883, since the conveyance or assignment there mentioned must be a formal conveyance or assignment by deed, and did not include any dealing with the property by agreement or declaration of trust.

Decision of the Queen's Bench Division (38 W. R. 368) reversed.—*Ex parte May, In re Spackman*, C.A. 497—24 Q. B. D. 728; 59 L. J. Q. B. 306; 62 L. T. 849.

2. *Suspension of payments—Notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1).—A notice by a debtor to his creditors that he is about to suspend payment of his debts is not an act of bankruptcy unless it is unqualified and unconditional, and unless an ordinary man of business would understand from it that, if the creditors would not accept less than what was due to him, the debtor would have no alternative but to suspend payments.

A trader sent the following notice to his creditors: "Being unable to meet my engagements as they fall due, I invite your attendance at a meeting, when I will submit a statement of my position for your consideration and decision."

Held (Fry, L.J., *diss.*), that the debtor had not committed an act of bankruptcy.—*In re Crook, Ex parte Crook*, C.A.—24 Q. B. D. 320.

3. *Tender of debt—Refusal—Petition—Receiving order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (*g*).—After an act of bankruptcy a debtor tendered to one creditor payment of his debt, but the creditor refused to receive it, and subsequently joined in a bankruptcy petition presented against the debtor, upon which a receiving order was made. The debtor appealed against the receiving order, on the ground that, by reason of the tender, there was no good petitioning creditor's debt.

Held, that, at the time when the tender was made, an act of bankruptcy having been committed by the debtor, of which the creditor had knowledge, he was justified in refusing to accept payment, and the receiving order was rightly made.—*Ex parte Lowe, In re Lowe*, Q.B.D., BKCY. 560—62 L. T. 263.

ADJUDICATION—

4. *Partnership—Composition — Bankruptcy (Ireland) Act*, 1857 (20 & 21 *Vict. c.* 60), *ss.* 343, 353.—Three partners presented a petition for arrangement, and offered to their creditors a composition for both their joint and their separate liabilities. The proposals of one of the debtors were not accepted.

Held, that the three partners were rightly adjudicated bankrupts.—*In re Lore*, C.A. (Ir.)—23 L. R. Ir 365.

APPEAL—

5. "*Criminal cause or matter*"—*Committal for contempt—Wilful failure to deliver property to the trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24 (4), 104 (2)—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.—A bankrupt is entitled, under section 104 (2) of the Bankruptcy Act, 1883, to appeal to the Court of Appeal against an order for committal for contempt of court for wilful failure to deliver up to the trustee property forming part of the bankrupt's estate.—*In re Ashwin, Ex parte Ashwin*, C.A.—25 Q. B. D. 271.

6. *Jurisdiction—Three orders made in county court —One notice of appeal and one deposit—Fees—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 39—*Bankruptcy Rules*, 1886, *r.* 131.—On appeal to the county court judge from the rejection by the trustee of three proofs tendered against the bankrupt's estate, three orders were drawn up affirming the trustee's rejection. An appeal was brought from the decision of the county court judge to the Divisional Court in Bankruptcy, only one notice of appeal being duly stamped and one deposit lodged on the appeal.

Held, that the court could not hear the appeal until the additional payments had been made, and that the case must stand over in order that the necessary requirements might be complied with.—*Ex parte Smith, In re Smith & Sons*, Q.B.D. 719.

7. *Notice — Receiving order — Official receiver — Bankruptcy Rules*, 1886, *r.* 134—*Ord.* 58, *rr.* 2, 15; *ord.* 64, *r.* 7.—Where the ground of an appeal is that no receiving order ought to have been made, service of notice of appeal need not be made on the official receiver, nor need he be brought before the court in any way.—*Ex parte Harris, In re Harris*, C.A. 195.

8. *Notice — Receiving order — Official receiver — Bankruptcy Rules*, 1886, *rr.* 130, 134—*Ord.* 58, *rr.* 2, 15.—In all cases of appeals against receiving orders, notice of appeal must be served on the official receiver within twenty-one days.—*Ex parte Webber, In re Webber*, C.A. 195—24 Q. B. D. 313.

9. *Notice—Service by post—Ord.* 58, *r.* 2—*Bankruptcy Rules*, 1886, *rr.* 130, 132.—A notice of appeal in bankruptcy did not reach the respondent till after the expiration of twenty-one days from the date of the order, though it was posted before the twenty-one days had expired.

Held, that the service was too late.—*Ex parte Cochrane, In re Faulconer*, Q.B.D., BKCY.—61 L. T. 56.

10. *Stay of proceedings—Discretion of registrar—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 7 (4), 95, 97.—A judgment debtor cannot, on the ground that an appeal from such judgment is pending, claim a stay of bankruptcy proceedings for the judgment debt as of right, as a stay on such grounds is entirely in the discretion of the registrar under section 7 (4) of the Bankruptcy Act, 1883.

The presentation of a bankruptcy petition in a wrong court by inadvertence will not invalidate the jurisdiction, as, by section 97 of the Bankruptcy Act, 1883, when read with section 95, the proceedings can be removed into the proper court.

Ex parte May, 33 W. R. 598, 14 Q. B. D. 37, approved.—*Ex parte Ball, In re French*, C.A. 52—24 Q. B. D. 63; 62 L. T. 93.

COMPOSITION—

11. *Instalment—Action by creditor—Injunction—Bankruptcy (Ireland) Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 66.—A composition being payable by instalments, a creditor brought an action on his original debt, alleging that an instalment was unpaid. The debtor, alleging that the creditor had purposely kept out of the way of payment, applied for an injunction to stay the action.

The court ordered the issue of fact to be tried before itself.—*In re L.*, BKCY. (Ir.)—23 L. R. Ir. 528.

DISCHARGE—

12. *Condition—Consent to judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28 (6).—In imposing as a condition of granting a bankrupt his discharge that he shall consent to judgment being entered against him for the balance of the provable debts under section 28 (6) of the Bankruptcy Act, 1883, the court ought to have regard to public morality and to the interests of the public generally,

and, unless the court finds a man in receipt of an income which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise proceeding to grant an order of discharge subject to such a condition.

In 1886 a bankrupt, who had previously been employed as an assistant to a linendraper, took over the business of a chemical manufactory, which he carried on until 1888, when he became bankrupt. On application by the bankrupt for his discharge, the official receiver reported that he had continued to trade after knowing himself to be insolvent, and had brought on his bankruptcy by rash and hazardous speculations, and the county court judge granted the discharge on condition that the bankrupt should consent to judgment being entered against him for the sum of £4,038, being the amount of the unsecured debts provable under the bankruptcy unsatisfied at the date of the order, with costs, such judgment to remain in force until all the creditors had been paid 5s. in the pound on their debts. The bankrupt appealed against this order, it being stated that he was a married man with four children, and that his present earnings only amounted to £150 a year, with no prospect of an increase.

Held, that the order of the county court ought to be varied, and that a proper order under the circumstances would be that the discharge of the bankrupt be suspended for three years.—*Ex parte Shackleton, In re Shackleton*, Q.B.D., BKCY. 288.

13. *Discretion of court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 28 (2), (3), (5), (6).—The court is entitled, in exercising its discretion as to the granting of an order of discharge to a bankrupt under section 28 (2) of the Bankruptcy Act, 1883, to take into consideration any conduct of the bankrupt connected with or relevant to the bankruptcy, and is not limited to the matters mentioned in section 28 nor section 24.

Judgment of the Queen's Bench Division (38 W. R. 429) affirmed.—*Ex parte Jones, In re Jones; Ex parte Constable, In re Barker*, C.A. 609—25 Q. B. D. 285; 59 L. J. Q. B. 331.

14. *Liquidation—Close—Resolution—Registration—Bankruptcy Rules*, 1870, *r.* 303—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125 (10)—*Bankruptcy Discharge and Closure Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 2.—In 1882 a debtor presented a petition which resulted in a liquidation by arrangement, and in 1884 resolutions were passed at a meeting of creditors closing the liquidation and refusing the debtor his discharge. In 1889 a further meeting of creditors was held, at which the debtor obtained a resolution granting him his discharge, and he applied to the county court registrar, under section 125 (10) of the Bankruptcy Act, 1869, to register the resolution.

Held, that the registrar was right in refusing to register the resolution, and that the proper course was for the debtor to apply for his discharge under section 2 of the Bankruptcy Discharge and Closure Act, 1887.—*Ex parte Hart, In re Hart*, Q.B.D., BKCY., 32—58 L. J. Q. B. 440; 61 L. T. 256.

15. *Refusal—Misconduct—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28 (3).—The official receiver reported that a bankrupt had committed offences under section 28 (3) of the Bankruptcy Act, 1883; that he had occupied a fictitious residence, and filed a petition himself when he knew that a creditor's petition had been filed; that he had traded with spurious bills of exchange; and that he had asked his brother to put in a false proof.

Held, that the bankrupt's discharge was rightly refused.—*Ex parte Cook, In re Cook*, Q.B.D., BKCY.—61 L. T. 335.

16. *Refusal—Second application—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 104.—If a bankrupt whose application for his discharge has been refused makes a second application for it, such application should be by way of review, and the bankrupt must make out a *primâ facie* case.—*Ex parte Lloyd, In re Lloyd*, Q.B.D., BKCY.—62 L. T. 366.

17. *Suspension—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28.—A bankrupt was reported by the official receiver to have committed two offences under section 28 of the Bankruptcy Act, 1883. He was receiving a small salary.

Held, that the bankrupt's discharge should be suspended for three years.—*Ex parte Freeman, In re Freeman*, Q.B.D., BKCY.—62 L. T. 367.

EXAMINATION—

18. *Non-attendance of debtor—Warrant—Notice—Service—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 25, 28, 142—*Bankruptcy Rules*, 1886, *rr.* 92, 185, 186.—A copy of the order appointing a time and place for holding the public examination which, by rule 186 of the Bankruptcy Rules, 1886, the official receiver is required to serve on the debtor, need not be personally served; and if a debtor, to whom a copy of the order has been sent by registered letter, neglects to attend his public examination, a warrant may be issued for his arrest.—*Ex parte Official Receiver, In re McGrath*, Q.B.D., BKCY., 416—24 Q. B. D. 466; 62 L. T. 122.

PETITION—

19. *Amendment—Act of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4.—A bankruptcy petition was presented against E. L. which alleged "that the said E. L. within three months before the date of this petition has committed the following act of bankruptcy—namely, non-compliance with a bankruptcy notice issued out of this court on the 13th day of May, 1890, and duly served upon the said E. L. on the 13th day of the said month." Objection was taken by the debtor that the act of bankruptcy was not sufficiently alleged upon the face of the petition. The registrar upheld the objection, and the creditor appealed.

Held (allowing the appeal), that the registrar ought to have amended the petition, and heard the case on the merits, and that, as that had not been done, the case must go back to him.—*Ex parte Constable, In re Lorrimar*, Q.B.D.—62 L. T. 943.

19a. *Notice—Interest on judgment debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4—*Bankruptcy Rules*, 1886, *r.* 136.—Where a creditor seeks to issue a bankruptcy notice on a judgment debt, he is entitled to add to the judgment debt the interest which has accrued due upon it, and to have a bankruptcy notice issued for the full amount.—*Ex parte Husluck, In re Lehmann*, Q.B.D.—62 L. T. 941.

19b. *Substituted service—Debtor out of the jurisdiction—Bankruptcy Rules*, 1886, *rr.* 141, 154, 156.—Rule 154 of the Bankruptcy Rules, 1886, which provides for the substituted service of a bankruptcy notice or petition where the debtor is keeping out of the way to avoid personal service, applies to a case where the debtor has gone out of the jurisdiction for that purpose.

Fry v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395, distinguished.—*Ex parte Urquhart, In re Urquhart*, C.A. 612—24 Q. B. D. 723; 59 L. J. Q. B. 364.

PROOF—

20. *Contingent liability—Annuity—Limit of time for rejection by trustee—Assent to creditors' estimate*

of proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *schedule* 11, *r.* 2—*Bankruptcy Rules*, 1886, *rr.* 219, 228.—On the 22nd of May, 1885, proofs were put in by A. V. against the estates of J. D. and M. D. for £240 (being arrears of an annuity of £120 a month arising out of a covenant by J. D. and M. D. to pay the same), and for £7,000, the estimated value of the annuity for the residue of A. V.'s life.

A. V. was seventy-four years of age, and on the 20th of September, 1885, she died.

On the 7th of January, 1890, both proofs were rejected by the trustee to the extent of £5,920, on the ground that the annuity was determined by A. V.'s death. On motion to reverse this decision,

Held, that the trustee's calculation was correct; that he had not assented to the creditors' estimate of the annuity; and that the proofs must be rejected to the extent he had named.

Held, further, where a creditor sends in a proof for a contingent liability, and also estimates the value of such liability for the purposes of proof, the trustee is not bound, if he dissent from the proof, to reject it in twenty-eight days under rule 228.—*Ex parte Vaughan's Executors, In re Dodds*, Q.B.D., BKCY.—59 L. J. Q. B. 403, 62 L. T. 837.

21. *Partnership—Proof by partner.*—A partnership between A. and B. was dissolved, B. receiving a sum of £11,642, which he left on mortgage. B. afterwards became bankrupt, his debts being £23,700 and his assets £3,842. Joint creditors of the old firm proved for £7,000 against B.'s separate estate.

Held, that A. could not prove against B.'s estate for £11,642.—*Ex parte Hind, In re Hind*, Q.B.D., BKCY.—62 L. T. 327.

22. *Secured creditor — Company — Articles of association—Lien on shares—Bankruptcy Act*, 1883, *ss.* 6, 168.—A limited company presented a petition in bankruptcy. The debtor had obtained judgment against a registered shareholder in the company declaring that the latter was a trustee of some of his shares for the debtor. The articles of association gave the company a first and paramount lien on all shares for all money due to the company from the registered holders or other persons for the time being entitled to them.

Held, that the company had no lien for debt due, and was not a secured creditor.—*Ex parte Mexican Santa Barbara Mining Co., In re Perkins*, C.A. 710—24 Q. B. D. 613; 59 L. J. Q. B. 226.

23. *Surety—Right of surety to prove before payment—Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.—Under the provisions of section 37 of the Bankruptcy Act, 1883, the surety of a bankrupt is entitled to prove against the bankrupt's estate, although he has not paid the debt for which he is liable.—*Ex parte Delmar, In re Herepath & Delmar*, Q.B.D. 752.

RECEIVING ORDER—

24. *Domicil—Dwelling-house in England—Single creditor — Stay of proceedings — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6 (1) (d).—A debtor, a Frenchman domiciled in France, and having apartments in Paris, against whom a judgment had been obtained in France by an English creditor, which judgment had not been satisfied, came to London to conduct an action upon an entirely distinct claim against the same creditor. He rented per month five furnished rooms on different floors in a house occupied by an agency office on the ground floor, and the lessor retained another room for his own use. He brought his wife and some servants, and stayed for three months. After the date of the issue of the writ in the second action the creditor brought an action in this country against the debtor to enforce the French judgment. He obtained judgment, and upon the failure of the debtor to comply with a bankruptcy notice, presented a petition against him. The debtor's action against the creditor was still pending, and the debtor alleged that there was no other creditor than the petitioner, and that there were no assets. The registrar made a receiving order.

Held, that the debtor had "a dwelling-house in England" within the meaning of section 6 (1) (*d*) of the Bankruptcy Act, 1883, and that, if he had such a dwelling-house within a year of the date of the presentation of the petition, no extent of the time of such occupation was necessary to make him liable to bankruptcy proceedings.

Held, further, that there was no principle of law that the fact of there being no other creditor and no assets must be a bar to bankruptcy proceedings; that such facts must be shown upon the examination of the debtor, and not upon the making of the receiving order; and that such facts and the fact of other legal proceedings being pending were merely grounds for the exercise of the registrar's discretion.—*Ex parte Baird, In re Hecquard*, C.A. 148—24 Q. B. D. 71.

25. *Foreign bankruptcy—Stay of proceedings.*—A firm had its head office in Paris, and a branch office in London. The partners were adjudicated bankrupts in France, and a syndic was appointed to administer the estate. A bankruptcy petition was afterwards presented in England, and an *interim* receiver was appointed. There was no evidence as to the domicil of the debtors, but two of them resided, and had assets, in England.

Held, that the receiving order was rightly made, and that the foreign bankruptcy was no ground for ordering a stay of proceedings.—*Ex parte Hermanos, In re Chale*, C.A.—24 Q. B. D. 640; 59 L. J. Q. B. 254; 62 L. T. 781.

26. *Solicitor — Counsel's fees.* — On application by a barrister for an order that the trustee in bankruptcy of a solicitor might be directed to pay counsel's fees alleged to have been received by him in respect of the bankrupt's bills of costs as a solicitor in certain matters, it was contended that payments had been made by the bankrupt to the applicant on general account, which included the fees claimed, and also that an agreement had been come to between the trustee and the clients, whereby a lump sum was accepted in settlement of the bills of costs, exclusive of fees to counsel.

Held, that the matter must be referred to the registrar to inquire what fees had been received by the trustee, and whether any of such fees had been paid by the bankrupt to the applicant either specifically or generally, the applicant to be at liberty, on the registrar's finding, to raise before the court the question whether it was competent for the trustee to enter into an arrangement with a client of the solicitor to receive a less sum than was claimed by a bill of costs after deducting counsel's fees.—*Ex parte Colquhoun, In re Clift*, Q.B.D., BKCY, 688.

TRUSTEE—

27. *After-acquired property—Assignment by bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—All transactions entered into by a bankrupt after his bankruptcy with any person dealing *bonâ fide* with him for value, before the trustee intervenes, with respect to his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.

An undischarged bankrupt, having brought an action for the wrongful conversion of certain goods

acquired by him during the bankruptcy, assigned the cause of action for value to the plaintiff, who knew that he was an undischarged bankrupt. The bankrupt recovered a verdict, and before the money was paid over the plaintiff gave notice that he claimed the money under the assignment. The trustee in bankruptcy also claimed it.

Held, that the assignment, being *bonâ fide* on the part of the plaintiff, and having been completed before the trustee intervened to claim the money, was valid as against the trustee.—*Cohen* v. *Mitchell*, C.A. 551—25 Q. B. D. 262.

28. Chose in action—*Will—Executory interest—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4. —A. by his will gave his wife the right of possession and enjoyment of all his pictures during her life, and, subject to this, bequeathed the pictures to his son, T., for his absolute use and benefit. T. afterwards executed a mortgage assigning all his interest under his father's will in the money, hereditaments, and premises thereby devised and bequeathed, expectant on his mother's death. T. was afterwards adjudicated a bankrupt.

Held, that T.'s interest in the pictures was a *chose in action*, and did not pass to the trustee in bankruptcy. —*Ex parte Singleton, In re Tritton*, Q.B.D., BKCY.—61 L. T. 301.

29. *Compromise—Committee of inspection—Dissentient creditors—Resolution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 57, 89.—A compromise agreed upon by the trustee in respect of a claim made against the bankrupt's estate was approved by the committee of inspection, but, at a subsequent general meeting of the creditors, a resolution was passed refusing to accept the compromise. The trustee applied to the court for leave to carry out the compromise, notwithstanding the resolution.

Held, that, the resolution of the creditors having been passed *bonâ fide*, and with a view to their own interests, the compromise ought to be abandoned.—*Ex parte Hurlbatt, In re Ridgway*, Q.B.D., BKCY. 432 —62 L. T. 647.

30. *Disclaimer—Lease—Assignment—Mortgage—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.—Where the owner of leasehold premises, burdened with onerous covenants, assigns such premises by way of mortgage for the whole of the residue of the term granted by the lease, and subsequently becomes bankrupt, the equity of redemption which vests in the trustee in bankruptcy is not property burdened with onerous covenants within section 55 of the Bankruptcy Act, 1883, and an application for leave to disclaim the lease need not be made by the trustee.—*Ex parte Board of Trade, In re Gee*, Q.B.D., BKCY. 143—24 Q. B. D. 65; 59 L. J. Q. B. 16; 61 L. T. 645.

31. *Disclaimer—Lease—Mortgage—Sub-demise—Assignment by mortgagee to trustee for himself—Exclusion of mortgagee and his assignee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-section* (6). —Where a mortgagee by sub-demise has, after the bankruptcy of the lessee, assigned his mortgage to a trustee for himself, he is still liable to have an order made against him at the instance of the lessor under section 55, sub-section (6), of the Bankruptcy Act, 1883, excluding him from all interest in, and security upon, the demised property, unless he elect to take an order vesting the property in him, subject to the bankrupt's liabilities in respect thereof at the date of the filing of the petition.

Such an assignment in trust is, as between the mortgagee and the landlord, absolutely void.—*Ex parte Hepburn, In re Smith*, C.A. 744.

See also ADMINISTRATION, 6, 11; ATTACHMENT, 4, 7; BILL OF SALE, 11; COSTS, 4, 5, 16; COUNTY COURT, 7a; CRIMINAL LAW, 5; INJUNCTION, 1; MORTGAGE, 10; SHERIFF, 2; SHIPPING, 19; SOLICITOR, 3, 6; WILL, 17, 18.

BETTING.—See GAMING; LICENSED HOUSE, 2.

BILL of EXCHANGE:—

Evidence—Fraud—Burden of proof—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 30 (2).—Under section 30 (2) of the Bills of Exchange Act, 1882, the *onus* is on the owner of a fraudulently-negotiated bill to prove, not only that he has actually given value for the bill subsequently to the alleged fraud, but that he gave such value in good faith without notice of the fraud.—*Tatham* v. *Hesler*, Q.B.D. 109—23 Q. B. D. 345; 58 L. J. Q. B. 432.

See also PROMISSORY NOTE, 2.

BILL of LADING.—See SHIPPING, 1, 2, 21—23.

BILL of SALE:—

1. *Attestation—Description of witness—Address—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8—10, *schedule.*—A bill of sale which does not contain both the address and the description of the witness attesting the bill of sale is not "made in accordance with the form in the schedule" annexed to the Bills of Sale Act, 1882, and is void.—*Parsons* v. *Broad, Coulson* v. *Dickson*, C.A. 388—25 Q. B. D. 110; 59 L. J. Q. B. 189; 62 L. T. 479.

2. *Chattels—Insufficiency of description of chattels —Statutory form.*—Stock comprised in a bill of sale had been described in the schedule to the bill as follows:—"Roan horse, 'Drummer,'" "brown mare and foal," "three rave carts."

Held, that the horse and mare were sufficiently specified within the requirements of the Bills of Sale Acts, and that, in the absence of evidence showing want of identification of the particular carts, the expression "three rave carts" would be a sufficiently specific description.

Carpenter v. *Deen*, 23 Q. B. D. 566, and *Witt* v. *Banner*, 36 W. R. 115, 20 Q. B. D. 114, distinguished. —*Hickley* v. *Greenwood*, Q.B.D. 686—25 Q. B. D. 277.

3. *Chattels real—Statutory form—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—A bill of sale had been drawn mainly in the form set out in the schedule of the Bills of Sale Act, 1882, but to "all and singular the several chattels and things specifically described in the schedule" there had been added the words "together with all tenant-right, valuation, and goodwill, tillages, and interest of the mortgagor" in a certain farm, and these interests were further specified in the schedule, together with various personal chattels.

Held, that the document was void as a bill of sale, on the ground that it was not drawn in the statutory form, and had not the same legal effect, since it included chattels real in the security, whereas the Bills of Sale Acts only contemplate advances on the security of chattels personal.

Ex parte Byrne, 36 W. R. 128, 20 Q. B. D. 310, distinguished.—*Cochrane* v. *Entwistle*, C.A. 587—25 Q. B. D. 116; 62 L. T. 852.

4. *Mortgage—Judgment—Priority.*—A. having mortgaged a house with trade fixtures, afterwards executed a bill of sale of the chattels on the premises, including the trade fixtures. The chattels and trade fixtures were taken in execution.

Held, that the grantee of the bill of sale was entitled to the goods as against the execution creditor. —*Usher* v. *Martin*, Q.B.D.—24 Q. B. D. 272; 59 L. J. Q. B. 11; 61 L. T. 778.

5. *Registration—Affidavit—Description of grantor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 11.—The grantor of a bill of sale had described himself in the affidavit as "residing at 20, Avington-grove, in the hamlet of Penge, in the county of Surrey." In the bill of sale he was described as "of 20, Avington-grove, and of 72, Beckenham-road, both in the hamlet of Penge, and of 100, High-street, Croydon, all in the county of Surrey." The grantor had offices at all three places, but he resided only at the first. The goods scheduled in the bill of sale were distributed among all three places.

Held, that the grantor was sufficiently described in the affidavit. — *Greenham* v. *Child*, Q.B.D. 94—24 Q. B. D. 29; 61 L. T. 563.

6. *Registration—Assumed name—Grantor giving bill of sale in assumed name by which he was known—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2.—The grantor of a bill of sale gave the same under an assumed name, the only name by which the grantees of the bill of sale knew the grantor, and this assumed name was the name by which the grantor was known in the neighbourhood for some three years, and under which he had carried on business for that time, and the bill of sale was registered in the assumed name. Judgment had been previously obtained by other persons against the grantor under another name.

Held, that the bill of sale was duly registered under sub-section 2 of section 10 of the Bills of Sale Act, 1878, and was valid, as it was registered in the name by which the grantor was known and recognized at the time, and the section does not necessarily require a bill of sale to be executed and registered in the real name of the grantor.—*Central Bank of London* v. *Hawkins*, Q.B.D.—62 L. T. 901.

7. *Registration—Building agreement—Mortgage—Power of entry—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.—By a mortgage deed the plaintiff assigned to the defendants certain land, and buildings in course of erection thereon, "and also all bricks, timber, slates, and other building materials which may at any time hereafter be brought by or for the mortgagor into the said premises for completing the buildings." The plaintiff covenanted that all such building materials should be considered as immediately attached to, and forming part of, the fee simple of such premises; none were to be removed without the concurrence of the mortgagees; and, in default of completion of the premises to the satisfaction of the mortgagees, a power to enter, seize, and take possession of all such building materials was given to them. Power was further given to the mortgagees, in case of default by the mortgagor, to sell all or part of the premises, and all building materials, bricks, timber, &c., standing and being thereon, or on any part thereof, either together or in parcels.

Held, that, as the deed gave a power to sell the building materials, independent of the powers of entry and of taking possession of the premises, and exercisable without the latter powers being exercised, it was an assurance of personal chattels, or a licence to take possession of personal chattels as security for a debt, within the meaning of section 4 of the Bills of Sale Act, 1878, and was a bill of sale, and void under section 8 of the Bills of Sale Act, 1882, for want of registration in respect of the personal chattels comprised therein.—*Climpson* v. *Coles*, Q.B.D. 110—23 Q. B. D. 345; 58 L. J. Q. B. 432; 61 L. T. 116.

8. *Registration—Collateral security—Life insurance policy—After-acquired property—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.—By a registered bill of sale the grantor assigned as security for a loan "all and singular the several chattels and things described" in the annexed schedule, which described the chattels as "twenty-one milch cows" on the grantor's farm, and "all goods, chattels, and effects in or upon" the premises belonging to him. As a collateral security he deposited with the grantee a policy of insurance on his own life, but there was no memorandum of deposit, and the bill of sale did not refer to the policy. The grantor afterwards sold some of the cows, and bought others.

Held, (1) that the policy of insurance did not require registration as a part of the bill of sale; (2) that the bill of sale did not extend to any property afterwards brought upon the farm; (3) (Lopes, L.J., dissenting) that the words "twenty-one milch cows" were not a sufficient description of the chattels.

Judgment of Charles, J., reversed.—*Carpenter* v. *Deen*, C.A.—23 Q. B. D. 566; 61 L. T. 860.

9. *Registration—Debenture—Incorporated company—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 17.—Debentures of an incorporated company are not bills of sale which require registration under the Bills of Sale Act, 1878, and are specially exempted under the Bills of Sale Act (1878) Amendment Act, 1882.—*Read* v. *Joannon*, Q.B.D. 734—25 Q. B. D. 300.

10. *Registration—Execution creditor—Bills of Sale (Ireland) Act*, 1879 (42 & 43 *Vict. c.* 7), *s.* 8.—In 1883 a partnership between A. and B. was dissolved by deed. A. assigned to B. the premises, stock-in-trade, and goodwill in consideration of an annuity of £400 for his life. B. covenanted to pay the annuity, which was made a first charge on the premises, stock-in-trade, capital, and goodwill. Power of distress and entry for arrears of the annuity was reserved to A., with a further power if, after B.'s death, the annuity should be sixty days in arrear, for A. to sell the premises, stock-in-trade, and goodwill, and pay thereout the debts due on account of the business, including the money due for the annuity, and to retain one-half the surplus for his own benefit, and to pay the other half to B.'s executors or administrators, the annuity thereupon to cease. The deed was not registered as a bill of sale. In 1887 B. executed a trust deed for the benefit of his creditors. He died in 1888. In 1889 the stock and goods on the premises were seized by the sheriff in an action in which the firm were defendants.

Held, that the deed was not void against the execution creditor.—*Cranfield* v. *Cranfield*, V.C. (Ir.)—23 L. R. Ir. 555.

11. *Registration—Hiring agreement—Bankruptcy—Bills of Sale Act*, 1878 (41 & 42 *Vict, c.* 31) *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8. — In 1887 a dissolution of partnership was agreed upon between the bankrupt and J. F. W., who had previously carried on business together as saw mill proprietors, and, in order to provide the sum of £365 required to pay out the retiring partner, the bankrupt applied to W. W., his partner's brother, who was a solicitor, to advance him £650. An agreement was come to between the bankrupt and W. W., by which the bankrupt sold to W. W. certain of his machinery in consideration of £650. The machinery was to remain in the possession of the bankrupt upon certain terms, and the £650 was to be repaid by instalments extending over ten years. A receipt was given by the bankrupt for the £650, which was specified to be in full payment for the engine, boiler, and machinery agreed to be sold at that price on the termination of the partnership, and a hire-purchase

agreement was drawn up, purporting to be made between W. W., called the "owner," and the bankrupt, called the "hirer," whereby the said machinery was let to the bankrupt upon the terms and conditions therein specified. Neither the receipt nor the hiring agreement were registered under the Bills of Sale Acts, and, the bankrupt having filed his petition, the machinery was claimed by his trustee as forming part of the bankrupt's estate.

Held, that there was no document which required to be registered as a bill of sale, and that the trustee was not entitled to the proceeds derived from the sale of the machinery.—*Ex parte Collins, In re Yarrow*, Q.B.D., BKCY. 175—59 L. J. Q. B. 18; 61 L. T. 642.

12. *Registration—Hiring agreement—Licence to take possession—Bills of Sale Act*, 1878 (41 & 42 *Vict.* c. 31), *s.* 4.—A transaction purported to be a sale by delivery of certain goods for value, followed by an agreement in writing, under which the goods were let on hire by the alleged purchaser to the alleged vendor, with power to the alleged purchaser to retake possession on the happening of certain events. The real nature of the transaction was one of loan upon the security of the goods, and not a *bonâ fide* sale and hiring.

Held, that the court was not precluded by the form of the document from inquiring into the real nature of the transaction, and that the alleged hiring agreement was a bill of sale, it being a "licence to take possession of personal chattels as security for a debt" within section 4 of the Bills of Sale Act, 1878.

Ex parte Collins, In re Yarrow, 38 W. R. 175, not followed.—*Ex parte Official Receiver, In re Watson*, C.A. 567—25 Q. B. D. 27; 59 L. J. Q. B. 394.

13. *Registration—Hiring agreement—Receipt and inventory—Bills of Sale Act*, 1878 (41 & 42 *Vict.* c. 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 8.—A sheriff having seized the plaintiff's goods, an order was made by consent giving the sheriff power to sell them by private contract to the defendants. The goods were sold for the amount of the execution debt; the money was paid, and a receipt with an inventory sent by post. On the same day the defendants let the goods to the debtor's wife on a hiring agreement. The debtor became bankrupt, and his trustee claimed the goods. The receipt and inventory were not registered.

Held, that the documents did not require registration under the Bills of Sale Act; and that the trustee was not entitled to the goods.—*Jones* v. *Tower Furnishing Co.*, Q.B.D.—61 L. T. 84.

14. *Registration—Names of attesting witnesses—Interest—Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 10.—A bill of sale purported to assign the goods specified in the schedule as security for a loan of £50 and interest at the rate of £17 10*s.* for three years, the grantor covenanting to pay the principal and interest in thirty-six equal instalments of £1 17*s.* 6*d.*, commencing from the date of the instrument. The addresses and description of the attesting witnesses were not stated in the bill of sale, but were stated in the affidavit filed with the registrar.

Held, that the bill of sale was void (1) for not specifying the rate of interest; (2) for not stating the addresses and descriptions of the attesting witnesses. —*Blankenstein* v. *Robertson*, Q.B.D.—24 Q. B. D. 543; 59 L. J. Q. B. 315.

15. "*True owner*"—*Partnership—Undivided moiety —Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 5.—The words "true owner" in section 5 of the Bills of Sale Act, 1882, are used in their natural, and not in an artificial sense, and a man does not cease to be the true owner of personal chattels within the meaning of that section because they may be subject to some lien or equitable right.

In 1885 the bankrupts commenced to carry on business in partnership, and in 1888 a bill of sale was executed by the elder partner, with the consent of the younger, upon partnership property as security for an advance for partnership purposes. This bill of sale was set aside by the county court judge, on the ground that the grantor was not the "true owner" of either the whole or a moiety of the goods specified in the schedule within section 5 of the Bills of Sale Act, 1882, and the bill of sale holder was ordered to repay the value of the goods to the trustee in bankruptcy.

Held, that the county court judge was wrong in ordering the bill of sale holder to pay back the whole of the money; that the grantor was the true owner of his moiety of the goods; and that the bill of sale holder was entitled to retain one-half of the money realized.—*Ex parte Barnett, In re Tamplin*, Q.B.D., BKCY. 351—59 L. J. Q. B. 194; 62 L. T. 264.

See also BANKRUPTCY, 28; GIFT, 1; LANDLORD AND TENANT, 3; MORTGAGE, 2.

BOND.—See ADMINISTRATION, 6, 7; CHARITY, 4.

BONUS.—See INCOME TAX, 6; SETTLEMENT, 13.

BREACH of TRUST.—See ATTACHMENT, 7, 8; CHARITY, 4; LIMITATIONS, STATUTES OF, 4; TRUSTEE, 5.

BRIDGE.—See CHARITY, 3; RAILWAY, 2.

BRITISH GUIANA.—See GUIANA, LAW OF.

BUILDING SOCIETY:—

1. *Arbitration—Dispute—Retiring member.*—By a rule of a benefit building society it was provided that every dispute between the society and any member on which the decision of the board should not be deemed satisfactory should be settled by a reference to arbitration, pursuant to the Building Societies Act, 1874; that five arbitrators should be elected by the members at a general meeting, and in each case of dispute the names of three arbitrators should be selected by lot out of the five as the persons to decide the dispute. A dispute having arisen between a member who had given notice of withdrawal and the society as to the amount which the member was entitled to receive on withdrawal, the member brought an action against the society to enforce his claim. After the writ had been issued, the society, for the first time, elected five arbitrators pursuant to the rule, and took out a summons to stay all further proceedings in the action, and to have the matter in dispute referred to arbitration.

Held, that, as no arbitrators had been elected at the time of the issue of the writ, the action had been properly commenced, and that the society could not, after litigation had been thus commenced, have the matter in dispute referred to arbitration.—*Christie* v. *Northern Counties Building Society*, CH.D. NOR., J. 280—43 Ch. D. 62; 59 L. J. Ch. 210; 61 L. T. 796.

2. *Arbitration—Dispute—Withdrawing member—Alteration of rules.*—In 1883 the plaintiff became a member of a building society, and in 1887 he gave notice of withdrawal. After his notice the society was incorporated under the Building Societies Act, 1874, the rules were altered, and a certificate of registration was granted. The original rules had provided for additions, repeals, alterations, and amendment of the rules. The amended rules provided that all disputes with members should be referred to arbitration.

Held, that the dispute between the society and the plaintiff must be referred to arbitration.—*Davies* v. *Chatham Permanent Building Society*, Q.B.D.—61 L. T. 680.

3. Ultrà vires—*Directors—Power to make advances on equitable mortgage of leaseholds—Advances on security of leasehold colliery—Negligence—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 12, 13, 25.—The rules of a benefit building society provided (*a*) that the directors should not be answerable for the insufficiency in title of any security unless the loss should happen through their own neglect, and that none of the directors should be answerable for the acts or default of the others; (*b*) that the funds of the society should be applied at the discretion of the board in making advances to members on legal or equitable mortgage of leasehold property.

The directors advanced £25,000 to J. upon a second mortgage of a leasehold colliery, taking also as a collateral security a charge upon a beneficial interest under a trust of personal estate. The advance was made upon a valuation and report of a competent surveyor selected by the chairman out of five names submitted by the borrower.

The chairman took an active part in the inquiry into the nature and value of the security, but the other directors acted simply in good faith on the materials submitted to them.

Held, (1) that the advance on the security of the leasehold colliery was not *ultrà vires* of either the society or the directors; (2) that the directors were not guilty of negligence in acting on the surveyor's report and taking a second mortgage as the principal security; (3) that the directors had also power by implication to redeem the first mortgage and to enter into possession of the mortgaged property and pay the rent and the proper expenses to maintain and work the colliery without rendering themselves personally liable therefor.

Small v. *Smith*, 10 App. Cas. 119, and *Royal Bank of India's case*, L. R. 4 Ch. App. 252, explained.—*Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, CH.D. STI., J.—44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678.

4. Ultrà vires—*Investment—Trust funds—Trust Investment Act*, 1889 (52 & 53 *Vict. c.* 32), *ss.* 3, 5, 6.—The funds of a building society which are invested in the name of the society, or in the names of trustees who have no power of investment, but are trustees for the society acting under the direction of the board of directors, are not within the Trust Investment Act, 1889.—*In re National Permanent Mutual Building Society*, CH.D. NOR., J. 475—43 Ch. D. 431; 59 L. J. Ch. 403; 62 L. T. 596.

5. Ultrà vires—*Mortgage—Subrogation—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 15 (2).—Under section 15 (2) of the Building Societies Act, 1874, the amount for the time being secured to a building society by mortgages from its members is not limited to the principal moneys thereby secured, but includes also all such other sums as at the date of borrowing may be due in respect of interest, fines, or otherwise, and instalments not then accrued, but secured by the mortgages and outstanding.

Money was borrowed *ultrà vires* by a building society and applied in advancing members who gave to the society mortgages to secure the repayment of the advances.

Held, that the persons from whom the moneys were borrowed by the society in order to make the advances were entitled to follow their moneys into the hands of the advanced members, and claim against the mortgages held by the society for the amounts secured by the mortgages, notwithstanding that a premium was deducted from that amount by the society when advancing the members.

Blackburn and District Benefit Building Society v. *Sunliffe Brooks*, 29 Ch. D. 902, 34 W. R. Dig. 25, followed.—*Neath Permanent Benefit Building Society* v. *Luce*, CH.D. CHI., J. 122—43 Ch. D. 158; 59 L. J. Ch. 3; 61 L. T. 611.

6. *Winding up—Contributory—Advanced members—Borrowing members—Apportionment.*—Under one of the rules of a building society, deficiences of income, by which the society might be prevented from meeting its anticipated expenditure and liabilities, were to be apportioned between the investing and borrowing members.

Held, that "liabilities" included the sums due to the investing members in respect of their shares, and that the borrowing members were liable to contribute rateably to any losses thereon incurred by the investing members.

Under another rule of the society, the property mortgaged to the society to secure advanced shares was to be so secured until the amount of such shares should be repaid to the society, with all fines and other payments incurred in respect thereof.

Held, that, under the last-named rule, a borrowing member was not entitled to redeem his mortgage, except on payment of what might be due from him in respect of his above-mentioned liability.—*In re West Riding Permanent Building Society*, CH.D. CHI., J. 376—43 Ch. D. 407; 59 L. J. Ch. 197; 62 L. T. 486.

7. *Winding up — Dissolution, deed of — Withdrawing members.* — The rules of a building society formed under the Act provided that a member wishing to withdraw should give three months' notice in writing to the secretary to repay the subscriptions standing to his credit, and that members having given notice of withdrawal should, "from the date of such notice, cease to take part in the affairs of the society." Sixty-nine members had given notice of withdrawal, but had not been paid off, when an instrument of dissolution was executed, which was signed by fifty-seven out of the seventy-four remaining members, but by none of the sixty-nine withdrawing members.

Held (affirming the decision of North, J.), that, upon the true construction of the rules (which would otherwise conflict with the Building Societies Act, 1874), withdrawing members were merely precluded from taking any part in the affairs of the society as a going concern, but that they were still "members" within the meaning of section 32 of the Act, and must therefore be taken into account in determining whether the instrument of dissolution had been signed by the requisite statutory majority of the members.

In re Sheffield and South Yorkshire Permanent Building Society, 22 Q. B. D. 470, 37 W. R. Dig. 29, explained and distinguished.—*Sibun* v. *Pearce*, C.A. 658—44 Ch. D. 354.

8. *Winding up—Priority—Withdrawing members—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 32 (4).—By the rules of certain building societies it was provided that, "On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and, should more than one member give notice to withdraw at one time, the members so giving notice shall be paid in rotation according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society." Notices of withdrawal were given by certain subscribing and in-

vesting members after the insolvency of the society had become known, but before the winding up order had been made.

Held, that the withdrawing members were not entitled to be paid the amount of their subscriptions in priority to other shareholders in the winding up.

Held, also, that, in the absence of a determination by the committee under the above rule, no interest accrued in respect of the amount due to a withdrawing member.—*Rawlinson* v. *King, Rawlinson* v. *Oliver, Rawlinson* v. *Wilkinson*, Q.B.D. 509—24 Q. B. D. 394; 59 L. J. Q. B. 217; 62 L. T. 293.

See also LIMITATIONS, STATUTES OF, 6; VENDOR AND PURCHASER, 9.

BYE-LAW.—See FISHERY, 2; LOCAL GOVERNMENT, 3.

CALLS.—See COMPANY, 1, 2a, 34.

CANADA, LAW of :—

1. *Appeal to Privy Council—Special leave.*—Even if a case is of a substantial character, and may involve matters of great public interest, and give rise to an important question of law, the judgment sought to be appealed from may be so plainly right or unattended with sufficient doubt as to justify the refusal of special leave to appeal.

A petition for special leave to appeal from a judgment of the Supreme Court of Canada, exempting the respondents from a tax specially imposed by a corporation, was refused because the statute under which the exemption was claimed did not appear to have been erroneously construed.—*Montreal Corporation* v. *Ecclesiastiques de St. Sulpice*, P.C.—14 App. 660; 59 L. J. P. C. 20; 61 L. T. 653.

2. *Quebec, law of—Contract—Pledge—Tender.*—Under the Civil Code of Lower Canada if the owner of a thing pledged for a specific debt tenders the amount of the debt and the lender is unable to restore the chattel, the tender is sufficient to prevent the lender from detaining the chattel for other debts of the borrower.

If a document purports to be an unilateral contract, binding the signor for an indefinite time to sell certain specified debentures of a company to one of its officers at a specified price, but the circumstances under which the contract was executed show that the intention of the parties was to limit for the common benefit their claims against the company, to facilitate a contemplated financial transaction, the said intention will control the contract, which cannot be treated as an agreement for sale.—*Senecal* v. *Pause*, P.C.—14 App. 637.

3. *Quebec, law of—Corporation General Clauses Act*, 1876, *ss.* 323, 326, 327—*Taxation—Railway—Appeal to Privy Council—Special leave.*—By the Quebec Corporation General Clauses Act, 1876, no part of a railway is taxable, except the land occupied as a road, and bridges and other superstructures are excluded.

If special leave to appeal is granted on the ground that the appellant desires to raise a question of general importance, the appellant cannot at the hearing contend that no such question arises, nor argue the appeal on a question of fact.—*St. John's Corporation* v. *Central Vermont Railway Co.*, P.C.—14 App. 590; 59 L. J. P. C. 15; 61 L. T. 441.

4. *Quebec, law of—Domicil*—Acte de mariage.—By the Code of Lower Canada movable property is subject to the law of the owner's international domicil, and domicil, for purposes of marriage, is used in the sense of marriage.

An *acte de mariage*, signed in 1828, by the husband and wife, recited that the husband was a day labourer in the City of Quebec.

Held, that the recital did not amount to such a declaration by the husband of a Canadian domicil as would amount to a contract that his wife should have a *commune en biens* with him.—*McMullen* v. *Wadsworth*, P.C.—14 App. 631; 59 L. J. P. C. 7; 61 L. T. 487.

5. *Quebec, law of—Public lands—Forest reserve—Location ticket—Timber cutting licence—Injunction.*—The plaintiffs obtained from the Crown a location ticket within the boundaries of a forest reserve, any such grant by the Crown being prohibited by the Quebec Forest Act, 1883.

Held, that the plaintiffs, being in possession of land under the Crown for valuable consideration, were entitled to an injunction against interference by the holder of a timber cutting licence from which the plaintiffs' land was excepted.—*Gilmour* v. *Maurott*, P.C.—14 App. 645; 59 L. J. P. C. 38; 61 L. T. 442.

CAPITAL.—See COMPANY, 1—3.

CARGO.—See DAMAGES, 4; INSURANCE, 5; SHIPPING, 4.

CARRIER :—

Injury to goods—Insurance risks.—The plaintiffs wrote to the defendants asking for their rates of shipment from Leghorn to Glasgow of marble and terra cotta busts and other goods. The defendants replied that they charged 1s. per cubic foot, except for goods described as "statuary." They afterwards stated that their rates did not include insurance risks. The plaintiffs' agent afterwards shipped with the defendants at Leghorn eight cases of goods described as "terra cotta bronzed." The goods were damaged on the voyage.

Held, that the exception of insurance risks did not relieve the defendants from their liabilities as common carriers.—*Sutton* v. *Ciceri*, H.L.—15 App. 144; 62 L. T. 742.

See also RAILWAY, 3.

CERTIFICATE.—See COMPANY, 17a, 18; JUSTICE OF THE PEACE, 3.

CERTIORARI.—See MUNICIPAL CORPORATION, 1.

CHARGING ORDER.—See LUNACY, 2; SOLICITOR, 2—4.

CHARITY :—

1. *Corporation—Investment—Trust Investment Act*, 1889 (52 & 53 *Vict. c.* 32), *ss.* 3, 5—7, 9.—A corporation incorporated by a special Act holding funds for charitable purposes is a trustee within the meaning of section 3 of the Trust Investment Act, 1889, and is entitled to invest any trust moneys in its hands on any of the securities mentioned or referred to in that section, unless expressly forbidden to do so by the instrument, if any, creating the trust; but a trustee cannot sell existing securities for the purpose of reinvesting the proceeds in the securities authorized by section 3, unless the instrument creating the trust contains a power to vary securities.—*Manchester Royal Infirmary* v. *Attorney-General*, CH.D. NOR., J. 460—43 Ch. D. 420; 59 L. J. Ch. 370; 62 L. T. 419.

2. *Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *ss.* 5, 11, 13, 29 — *Christ's Hospital.*—The endowments of Christ's Hospital are educational endowments within section 5 of the Endowed Schools Act, 1869, and the endowments for maintenance of scholars are educational endowments within section 29. Rights of patronage are not vested interests within section 13, nor educational interests within section 11.—*In re Christ's Hospital*, P.C. 758—15 App. Cas. 172; 59 L. J. P. C. 52.

3. *Mortmain—Bridge tolls—Assignment—Mort-*

gage—Mortmain Act (9 *Geo.* 2, *c.* 36).—Trustees, incorporated by a special Act for the purpose of managing a harbour, were empowered to demand certain rates for the use of the harbour, to levy toll for the passage over certain bridges, and to lease any of the rates, dues, and tolls at a rent; and also to borrow, for the purposes of the Act, money, not exceeding a certain specified sum, "on mortgage of the several tolls, rates, and dues" by the Act authorized, the mortgagees being empowered to enforce payment of arrears of interest by appointing a receiver. All the moneys received by the trustees were to be paid to the credit of the harbour fund, and it was provided that the moneys from time to time carried to the credit of the harbour fund should be applied, first, in paying the interest on moneys borrowed under the Act and certain previous Acts; secondly, in maintaining the harbour, &c.; thirdly, in paying certain rent-charges; and fourthly, in paying sums required to be set apart to form a sinking fund to pay off the sums borrowed. The approaches to, and the land under, the bridges belonged to the trustees. The trustees borrowed under the Act money upon the security of bonds by which, in consideration of the payment of the amount expressed to be secured by the bonds respectively, the trustees granted and assigned to the persons named therein, their executors, administrators, and assigns, "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £ doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys, to hold to the said [assignee] until the said sum of £ , with interest at per cent. per annum, shall be lawfully paid and satisfied," &c., &c.

Held, that the bonds amounted to an assignment specifically of the rates, tolls, and dues expressed to be assigned by them, which included the bridge tolls, but not to an assignment of the entire harbour fund, or an assignment of the general undertaking of the harbour trust; that the bridge tolls were payments made for permission to pass over the bridges, and therefore, the land leading to and supporting the bridges being the property of the trustees, over land belonging to the trustees, which land might, moreover, be had recourse to under the mortgagees' power of appointing a receiver; that such tolls were an interest in land; and that the bonds assigning them were within 9 Geo. 2, c. 36, and could not be given to a charity.

Knapp v. *Williams*, 4 Ves. 430n, discussed.

In re Christmas, 34 W. R. 8, 33 Ch. D. 332, and *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 201, distinguished.

Judgment of North, J. (37 W. R. 613, 41 Ch. D. 168), affirmed.—*Buckley* v. *Royal National Lifeboat Institution*, C.A. 162—43 Ch. D. 27; 59 L. J. Ch. 87; 62 L. T. 141.

4. *Mortmain—Corporation—Debentures—Bonds—Mortmain Act* (9 *Geo.* 2, *c.* 36).—A. bequeathed various sums of money to charities. The greater part of his estate consisted of bonds of the following corporations—viz., Batley, Bradford, Keighley, Dewsbury, Wakefield, and Leeds.

Held, that all the bonds, with the exception of that of the Keighley Corporation, constituted interests in land within 9 Geo. 2, c. 36, and could not validly be bequeathed to charities.—*Bedford* v. *Teal*, CH.D. STI., J. 249—59 L. J. Ch. 249; 61 L. T. 671.

5. *Schoolmaster—Dismissal—Action—Consent of Charity Commissioners.*—Section 17 of the Charitable Trusts Act, 1853, applies only to actions or proceedings whereby administration of the trusts of a charity is sought; but, where an action is brought merely to enforce common law rights or obtain equitable relief in respect of such rights, or to enforce an individual equitable right not relating to the administration of the trusts of the charity, the section does not apply, even though a question relating to the charity may incidentally be decided.

A schoolmaster, having received notice of dismissal from persons claiming to be the trustees or managers of a charity school, brought an action for an injunction to restrain them (on the ground that they were not duly appointed trustees or managers within the trust deed) from dismissing him, and from appointing anyone else in his place, and from ejecting him from the school-house. The plaintiff had not, before commencing his action, obtained a certificate from the Charity Commissioners under section 17 of the Charitable Trusts Act, 1853.

Held (reversing the decision of Kay, J.), that, even in the case of an action to which section 17 does apply, the obtaining of a certificate under that section is not a condition precedent to bringing the action, and that such an action ought not to be at once dismissed at the hearing if the certificate has not been previously obtained, but that the hearing ought to be allowed to stand over to see if the certificate can be procured.

Held, also, by Bowen and Fry, L.JJ. (Cotton, L.J., dissenting), that the present action was one coming within the class (above described) to which section 17 does not apply; that an action is not taken out of that class by the mere fact that a question relating to the charity may incidentally be decided; and that, even though such an action should be ultimately found to involve the decision of something further, which might bring it within the scope of the section, it would be time enough for the court, when that occurred, to bring the section into application; all the court has to do at the time the case comes before it is to judge whether the action, as it is then presented, is one to which the section applies.

Observations in *Glen* v. *Gregg*, 30 W. R. 633, 31 W. R. 149, 21 Ch. D. 513, as to *Attorney-General* v. *Sidney Sussex College, Cambridge*, 15 W. R. 162, 21 Ch. D. 514, note (1), explained.—*Rendall* v. *Blair*, C.A. 689.

6. *University—College—Exhibitions—Universities Act*, 1877 (40 & 41 *Vict. c.* 48), *ss.* 2, 12, 14, 17, 51.—P., who died in 1726, by his will, dated in 1723, gave certain property to a corporation upon trust that the income thereof should "be equally divided between ten of the servitors of Christ Church College in Oxford, such as the dean, two of the canons, and six of the senior students of the said college shall recommend under their hands for their sobriety, diligence at their studies, and of parts fit for a minister of the Gospel and designed for holy orders." By the Universities Act, 1877, commissioners were appointed, who were empowered to make new statutes for any college (*inter alia*) for altering or regulating the conditions of eligibility or appointment to any emolument or office held in and connected with a college. The Act also provided for appeals against such statutes when made, and enacted that, in framing them, the commissioners should have regard to the original intention of the founder. Under this Act the commissioners made certain statutes for Christ Church, one of which provided that the P. foundation should be applied to the support of college exhibitioners, who should be elected after examination in such subjects and in such manner as the governing body should determine. No appeal was made by the corporation against this provision.

Held, that the commissioners had power under the Act to make this provision, and that, inasmuch as no

appeal against it had been made by the corporation, it was now binding, and that the P. exhibitions must now be regulated thereby, without regard to the provision contained in the will relative to the fitness of the exhibitioners for ministers of the Gospel and designed for holy orders.—*Sons of the Clergy Corporation* v. *Christ Church, Oxford*, CH.D. STI., J. 172—42 Ch. D. 624; 58 L. J. Ch. 578; 61 L. T. 109.

See also ADMINISTRATION, 8; COMMON LODGING HOUSE; INHABITED HOUSE DUTY, 1; WILL, 5, 9, 10.

CHARTER-PARTY.—See SHIPPING, 4, 21, 22, 23, 24, 25.

CHEQUE.—See GIFT, 2.

CHOSE IN ACTION:—

Assignment—Mortgage—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—A mortgage of debts due to the mortgagor, and containing the usual proviso for redemption and reconveyance, is an absolute assignment not purporting to be by way of charge only within the Judicature Act, 1873, s. 25, sub-section 6, and the mortgagee is entitled to sue in his own name for the debts.

Burlinson v. *Hall*, 32 W. R. 492, 12 Q. B. D. 347, followed.

National Provincial Bank v. *Harle*, 29 W. R. 564, 6 Q. B. D. 626, disapproved.—*Tancred* v. *Delagoa Bay Railway Co.*, Q.B.D. 15—23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229.

See also BANKRUPTCY, 28; EXECUTOR, 3; INTERPLEADER, 1.

CHRIST'S HOSPITAL.—See CHARITY, 2.

CHURCH BUILDING ACTS.—See VENDOR AND PURCHASER, 13.

CITATION.—See DIVORCE, 3, 4.

COALS.—See WEIGHTS AND MEASURES, 1, 2.

CODICIL.—See POWER OF APPOINTMENT, 1; WILL, 20, 49, 53.

COLLISION.—See COSTS, 2; DAMAGES, 3; INSURANCE, 4; SHIPPING, 5—19.

COLLUSION.—See DIVORCE, 5.

COMMISSION.—See PRINCIPAL AND AGENT, 3.

COMMON.—See INCLOSURE.

COMMON LODGING HOUSE:—

Charitable institution—Common Lodging Houses Acts, 1851 (14 & 15 *Vict. c.* 25) *and* 1853 (16 & 17 *Vict. c.* 41).—A lodging house was established and maintained, not for any primary purpose of gain, but for the accommodation of the poorest class of persons, partly with a charitable and partly with a religious object. It was not open to everybody, but only to such persons and at such times as the proprietor thought fit.

Held, that it was not a "common lodging house" within the meaning of the Common Lodging Houses Acts, 1851 and 1853.—*Booth* v. *Ferrett*, Q.B.D. 718—25 Q. B. D. 87.

COMPANY:—

CAPITAL—

1. *Calls—Mortgage—Uncalled capital*—Ultrà vires—*Priority—Unsecured creditors.*—The Companies Acts, 1862 and 1867, contain no prohibition, either in express terms or by necessary implication, against mortgaging the uncalled capital of a company limited by shares.

In the case of a company limited by shares, calls made by the liquidator in the winding up form part of the capital of the company; and, accordingly, where the memorandum and articles of association of a company limited by shares give a power to mortgage the uncalled capital of the company, such a mortgage, when made by the directors while the company is a going concern, is effectual to operate after the winding up upon calls made in the winding up by the liquidator, and entitles the mortgagee to be paid out of such calls in priority to the unsecured creditors of the company.

Decision of Stirling, J. (*ante*, p. 282), affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.; Lopes, L.J., *dubitante*).

In re Phœnix Bessemer Steel Co., 44 L. J. Ch. 683, 23 W. R. Dig. 45, approved.

Ex parte Stanley, 12 W. R. 894, 4 De G. J. & S. 407; *Black & Co.'s case*, 21 W. R. 249, L. R. 8 Ch. 254; and *In re Whitehouse & Co.*, 27 W. R. 181, 9 Ch. D. 595, discussed.—*In re Pyle Works*, C.A. 674—44 Ch. D. 534; 59 L. J. Ch. 489; 62 L. T. 887.

2. *Reduction—Advertisements—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 15—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 4.—The minutes of an order confirming resolutions for reduction of the capital of a company need not, unless under special circumstances, state the original capital in addition to the reduced capital.

An application for an order to dispense with the words "and reduced" after the name of a company until the hearing of a petition for the confirmation of duly passed resolutions for reduction of capital should be made in chambers.—*In re Solway Steamship Co.*, CH.D. CHI., J.—61 L. T. 659.

2a. *Reduction—Confirmation—Calls in arrear—Minutes for registration.*—Form of minute for registration approved by the court on the confirmation of a special resolution for the reduction of the capital of a company in a case in which calls on some of the shares are in arrear.—*In re American Pastoral Co.*, CH.D. NOR., J.—62 L. T. 625.

3. *Reduction—Preference shares*—Ultrà vires.—There is nothing in the Companies Acts, 1867 and 1877, which prevents a company reducing some of its shares without reducing the others.

In re Barrow Hæmatite Steel Co., 37 W. R. 249, 39 Ch. D. 582, and *In re Quebrada Railway, Land, and Copper Co.*, 33 SOLICITORS' JOURNAL, 202, 40 Ch. D. 363, followed.

In re Union Plate Glass Co., 37 W. R. 792, 42 Ch. D. 513, not followed.—*In re Gatling Gun Co.*, CH.D. NOR., J. 315—43 Ch. D. 628; 59 L. J. Ch. 279; 62 L. T. 312.

CONTRIBUTORY—

4. *Allotment—Contract—Repudiation—Relief after commencement of winding up.*—In May, 1889, S. applied for shares in a company, believing that the directors had subscribed for and would pay for their qualification shares in the ordinary way. In June, 1889, he received notice of allotment of the shares; but, as S. had not paid the application money, he being absent at the time, no certificate of shares was sent to him. Shortly afterwards S. ascertained that the directors had not paid, and did not intend to pay, for the shares taken by them; that they had in fact obtained their shares for nothing, with the exception of one small sum; and that, as he said, the company was a bogus company. S. then gave notice to the secretary that he withdrew his name from the company. A few days later S. received a letter from the secretary informing him that the affairs of the company had been placed on an entirely different footing, but S. destroyed the letter without answering it. On a subsequent occasion the managing director informed

S. that the directors had been advised that they could not make S. pay as a shareholder. Accordingly S. never took any steps to have his name removed from the register of shareholders.

In November, 1889, an order was made for the winding up of the company, and S.'s name was placed on the list of contributories. Thereupon S. applied to the court that his name might be removed from such list.

Held, that S.'s application could not, under the circumstances, be acceded to, his name being properly on the list of contributories.

Oakes v. *Turquand*, L. R. 2 E. & I. App. 325, followed.—*In re Lennox Publishing Co., Ex parte Storey*, CH.D. KAY, J.—62 L. T. 791.

5. *Evidence—Allotment—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 154.—On the 20th of August, 1888, K. had been validly allotted 200 ordinary shares, and he subsequently, as was admitted, applied for 300 preference shares, and received an allotment of them. No minutes were kept after the 20th of August, but the company's allotment book showed that 300 shares were alloted to K. on the 29th of September, 1888. The company was afterwards ordered to be wound up, K.'s name being then on the register as the holder of 500 shares.

Held, that, as K. was a contributory in respect of the 200 shares, the allotment book was, under section 154 of the Companies Act, 1862, *primâ facie* evidence against him of an allotment made on the 29th of September, 1888, and threw upon him the burden of proving that the allotment was invalid.

D'Arcy v. *Tamar, Kit Hill, and Cullington Railway Co.*, L. R. 2 Ex. 158, distinguished.

Dictum of Wood, V.C., in *Hallows* v. *Fernie* adopted and followed.—*In re Great Northern Salt and Chemical Works, Ex parte Kennedy*, CH.D. STI., J.—44 Ch. D. 472; 59 L. J. Ch. 288.

6. *Paid-up shares—Registration—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—The conditions required by section 25 of the Companies Act, 1867, to exempt shares from being issued and held subject to the payment of the whole amount thereof in cash are (1) the existence of a contract; (2) that the contract be duly made in writing (3) that the contract be filed with the Registrar of Joint-Stock Companies, and these three things must be in existence and be done at or before the date of the issue of the shares, and, therefore, a document containing what purported to be an agreement to issue shares as fully paid up, which is executed by one of the parties thereto only, and, being so executed, is filed at or before the date of the issue of the shares, does not, by reason of the acceptance of its terms by the other party after the issue of the shares, constitute a contract "duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares" within section 25.—*In re New Eberhardt Co., Ex parte Menzies*, C.A. 97—43 Ch. D. 118; 59 L. J. Ch. 73; 62 L. T. 301.

DEBENTURE—

7. *Mortgage—Winding up—Receiver—Possession of assets—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 24.—Where a limited company, which has mortgaged property to debenture-holders, is being wound up, a receiver appointed by the debenture-holders under their deed, has a right to possession of the mortgaged property, though it is necessary, in order to avoid committing a contempt of court, to apply for the permission of the court for him to take possession.

A limited company charged all its present and future property and undertaking with payment of debentures, which provided that, at any time after a winding-up petition against the company had been presented, the debenture-holders might appoint a receiver of all the property charged, as if they were mortgagees within the Conveyancing Act, 1881, and that such receiver should have power to take possession of the property, carry on the business of the company, sell or let the property, and call up capital. After a petition had been presented, and an order made to wind up the company, the debenture-holders appointed a receiver, and applied to the court for leave for him, notwithstanding the appointment of an official liquidator, to take possession of the assets.

Held, that leave to the receiver to take possession ought to be given, the applicants consenting that it should be without prejudice to any question as to the receiver's powers other than the powers to take possession of and sell the property.

Judgment of Kay, J., 37 W. R. 726, reversed.—*In re Pound, Son, & Hutchins, Ex parte Debenture Corporation*, C.A. 18—42 Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137.

DIRECTOR—

8. *Appointment—Evidence—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Table A., arts.* 52, 53, 58, 61, 62, 66.—All the subscribers to a memorandum of association had signed a document appointing four persons to be the first directors. These four did not retire from office at the first ordinary meeting of shareholders as provided by art. 58 of Table A., but a resolution was passed at the meeting authorizing them to continue to act as directors.

Held, that, though the subscribers to the memorandum had not met together to appoint the first directors, the appointment in writing signed by them was a valid appointment; that the resolution passed at the general meeting was valid to the extent of continuing in office the then directors, and that allotments of shares made by those directors were binding.—*In re Great Northern Salt and Chemical Works, Ex parte Kennedy*, CH.D. STI., J.—44 Ch. D. 472; 59 L. J. Ch. 288.

8a. *Bill of exchange—Acceptance on behalf of company—Incorrect name of company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 41, 42.—A bill of exchange payable to order, and addressed to the "Salt Water Baths Co. (Limited), South Shields," which was registered as the "South Shields Salt Water Baths Co. (Limited)," and had no power to accept bills, was accepted by the defendants, who were the chairman and two of the directors of the company, as follows: "Accepted, payable Messrs. Hodgkin, Barnett, & Co.'s Bank, South Shields, John S. Wardle, Chairman; Thomas S. Blues, Joseph Pollard, Directors; South Shields Salt Water Baths Co."

Held, that the two variations from the proper designation of the company were sufficient to bring the defendants within the provisions of section 42 of the Companies Act, 1862, and to render them personally liable to the plaintiff for the amount of the bill by reason of their having signed a bill, being officers of the company, on its behalf, wherein the name of the company was not mentioned as required by section 41 of that Act.—*Atkin* v. *Wardle*, Q.B.D.—61 L. T. 23.

8b. *Calls—Validity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.—Certain directors of a company were appointed at a meeting which was convened after a notice of only thirteen days had been given of such meeting, whereas by the deed of settlement of the company fourteen days' notice of such meeting ought to have been given. The appointment of such directors was afterwards confirmed by a confirming meeting and at the next annual general

meeting. The directors made a call, which the defendant resisted on the ground that it was an invalid act, as the directors had been illegally appointed. The defect in the appointment was not discovered till after the making of the call.

Held, that the call was properly made, as the defect in the appointment of the directors had been cured, and their acts validated by section 67 of 25 & 26 Vict. c. 89; and that there was nothing in that section to limit its operation to the validation of acts and contracts affecting persons outside, and not members of the company.—*Briton Medical General and Life Assurance Association* v. *Jones* (*No.* 2), Q.B.D.—61 L. T. 384.

9. *Meeting—Misfeasance—Negligence—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.—The summary process under section 165 of the Companies Act, 1862, is not limited to acts partaking of a criminal character, but applies to every case in which misfeasance by the directors can be established. Misfeasance includes such nonfeasance as is negligence amounting to a breach of trust.

Directors of a company (acting within their authority) resolved that all the powers of the directors (other than to make calls) be delegated to three of the directors as a committee. The resolution did not appoint a quorum.

Held, (1) that, though unanimity of the committee might not be necessary to make their acts valid, they must all be present at a meeting; (2) that they had no power to appoint other members of the committee, either in addition to or to fill a vacancy on the committee.—*In re Liverpool Household Store Association*, CH.D. KEK., J.—62 L. T. 873.

10. *Promoter—Gift of shares.*—During the negotiations between the promoters of a company and the company, one of the promoters gave to one of the directors certain shares in the company.

Held, that the company had the option of claiming from such director the shares, or their highest value while held by him.—*Eden* v. *Ridsdale's Railway Lamp and Lighting Co.*, C.A. 55—23 Q. B. D. 368; 58 L. J. Q. B. 579; 61 L. T. 444.

11. *Remuneration — Trustee — Prospectus — Misfeasance—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.—The articles of association of a company provided that the remuneration of the directors should be by way of annual salary. The directors issued a prospectus which contained a statement that "the vendor pays all expenses up to allotment." An insufficient number of applications for shares having been received, no allotment was made on the faith of that prospectus. The directors continued to carry on the business of the company to the best of their ability, and issued a second prospectus which did not contain the statement in question. Before allotment, and before the expiration of a year from the incorporation of the company, the directors voted themselves certain sums in respect of their quarter's salary, which were applied in payment of the amounts uncalled up on the shares which they had agreed to take. Six months later the company was ordered to be wound up.

Held, (1) that, as no shares were allotted on the faith of the first prospectus, the directors were not bound by the statement contained in it; (2) that the directors were not trustees for the creditors of the company; (3) that the directors, having acted *bonâ fide* in the interests of the company, were entitled to vote themselves remuneration before the expiration of the year.

In re Liverpool and London Guarantee and Accident Insurance Co., Gallagher and Others' case, 46 L. T. N. S. 54, followed.

In re European Central Railway Co., Sykes's case, L. R. 13 Eq. 255, not followed.—*In re Wood's Ships' Woodite Protection Co.*, CH.D. STI., J.—62 L. T. 760.

LIQUIDATOR—

12. *Discovery—Examination of witnesses—Discretion of court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 115, 117.—A liquidator is not entitled as of right to an order for examination of a person under section 115 of the Companies Act, 1862; it is in the discretion of the court to grant or refuse such an order. There is no hard and fast rule as to when it would be proper and when improper to make such an order; but the pendency of an action by the liquidating company, and the fact of discovery in such action having been ordered or refused, are material considerations.

A company, after the passing of a resolution for voluntary winding up under the supervision of the court, instituted an action against another company, and made an application in that action that the defendant company should give immediate discovery, which application had been refused by the judge, on the ground of its being premature. The liquidator of the plaintiff company then obtained an order in the winding up under section 115 for examination of the secretary of the defendant company, and in the course of examination put a question to the secretary for the purpose of obtaining the discovery sought in the action, but the secretary refused to answer. The liquidator then applied for and obtained from the judge in the winding up an order that the secretary should attend at his own expense and answer the question.

Held, that the order should be discharged, on the ground that the question had been put in aid of the discovery for the purposes of the action which had been refused by the judge in the action, and that the information sought to be elicited by the question was not wanted for the purposes of the winding up.

Semble, a person who is summoned to attend for examination by an order under section 115 has a *locus standi* to appeal from such order.

Observations of Jessel, M.R., in *In re Gold Co.*, 27 W. R. 757, 12 Ch. D. 77, doubted.

In re Metropolitan Bank, Heiron's case, 15 Ch. D. 139, 29 W. R. Dig. 45, approved.—*In re North Australian Territory Co.*, C.A. 561.

13. *Provisional liquidator.*—A provisional liquidator was appointed on the application of creditors of a company "to carry on the business of the company as now carried on."

Held, that the provisional liquidator could not carry on any new business without the leave of the court.—*In re Alexandra Palace and Park Co.*, CH.D. KAY, J.—61 L. T. 325.

MEETING—

14. *Notice—Extraordinary meeting—Special resolution—Injunction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.—The construction of a notice convening an extraordinary general meeting of shareholders is not a technical matter. It is of the greatest importance that such notices should be perfectly clear, and bear the sense in which the business men to whom they are addressed would reasonably understand them.

The articles of association of a company provided that seven days' notice in writing, specifying the place, day, and hour of meeting, and, in the case of special business, the general nature of such business, should be given to the members before any general meeting. On the 3rd of July, 1889, notice was sent to the shareholders that an extraordinary general meeting would be held on the 12th of July at a given hour and day, for the purpose of passing special resolutions for the voluntary liquidation and reconstruction

of the company, and adding that, "should such resolutions be duly passed, the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company which will be held on the 29th of July, 1888, at the same time and place." The first meeting having been held and the resolutions duly passed, a financial newspaper, containing a full report of the meeting, the report being specially marked to call attention to it, was, on the 15th of July, sent by post to every shareholder.

Held (affirming the judgment of Chitty, J.), that the notice ought to be construed in the sense in which business men in the position of the shareholders to whom it was addressed would, as reasonable men, understand it at the time they received it; that such men would understand from the notice in question that the second meeting would only be held in the event of the proposed resolutions being passed at the first meeting, and the notice was therefore a notice conditional upon an uncertain future event, and that such a notice was not sufficient; that the subsequent sending of the newspapers did not cure the defect or make a good notice; and that the resolutions were invalid, and an injunction ought to be granted.—*Alexander* v. *Simpson*, C.A. 161—43 Ch. D. 139; 59 L. J. Ch. 133; 61 L. T. 708.

15. *Notice — Validity — Amendment — Decision of chairman—Waiver.*—By the provisions of the deed of settlement of a bank, notice of an extraordinary general meeting had to be advertised at least twenty-one days before the holding of such meeting, and the objects for holding the meeting had to be specified. Notice of an extraordinary general meeting for the 4th of April, 1889, was advertised by the directors of the bank on the 7th of March, 1889, stating that a special resolution would be proposed for altering the deed of settlement of the bank in the following particulars: "To alter the scale of voting by giving to every qualified proprietor one vote for every share held by him or her." On the 1st of April, 1889, the directors issued a circular to the proprietors stating that the full resolution to be proposed would be, "That every proprietor shall have one vote for every share, provided that no proprietor shall be entitled to vote at any general meeting in respect of any share unless registered as holder of such share for at least six calendar months prior to such general meeting."

The plaintiff, a proprietor, attended the meeting and made a speech objecting to the disqualification of a shareholder by the resolution unless some words could be added with reference to the qualification of a director, and intimated that he proposed to move an amendment, but the chairman ruled that the resolution as it stood must be either accepted or rejected, and the plaintiff then said he would move the rejection of the resolution. The plaintiff did not put before the chairman, either orally or in writing, the terms of his proposed amendment. The resolution was put and carried, and was confirmed at a subsequent meeting.

The plaintiff brought an action against the bank for a declaration that the resolution was invalid, on the grounds that it was not covered by the notice convening the meeting, and also that his amendment was not put to the meeting.

Held, that the notice was valid, and that, as the plaintiff had not challenged the ruling of the chairman, he must be taken to have waived any irregularity in the chairman's ruling.—*Henderson* v. *Bank of Australasia*, CH.D. CHI., J.—62 L. T. 869.

15a. *Notice—Validity—Directors.*—The articles of association of a company provided that the number of the directors should not be less than three; that the continuing directors might act, notwithstanding any vacancies in their body, as long as there remained three directors qualified to act; that the office of a director should be vacated if he should absent himself from the meetings of the directors during the three calendar months without special leave of absence from the directors. Of the four directors of the company, two—D. and R.—were both absent at the same time. D. was resident in Nova Scotia, and was appointed a director to secure his influence there, and was charged with duties for the performance of which residence there was essential. R. was travelling abroad, and it was not known where he was.

Held, that, during such absence of D. and R., it was not essential for the validity of every board meeting that notice of the meeting should be sent to them, and the other two directors were entitled to act as a board to bind the company.—*Halifax Sugar Refining Co.* v. *Francklyn*, CH.D. STI., J.—59 L. J. Ch. 591; 62 L. T. 563.

15b. *Notice—Validity—Directors.*—The articles of association of a company, which was incorporated on the 20th Oct., 1888, provided that there should be not more than ten nor less than three directors; that the first directors should be appointed by the subscribers of the memorandum of association; that the directors should hold meetings for the despatch of business at such times and places, and might adjourn and otherwise regulate such meetings as they thought fit, and might determine the quorum necessary for the transaction of business; and that a resolution in writing signed by all the directors should be as valid as if passed at a meeting duly called and constituted. They also provided that the shares should be allotted by the directors to such persons at such times and on such terms as they should think fit. On the 22nd Oct., 1888, the subscribers of the memorandum of association duly appointed five directors. On the 24th Oct. a meeting was held at which only two directors were present. The two directors passed a resolution that two directors should be a quorum, and allotted to S. one hundred £5 shares, for which he had applied, and then adjourned the meeting to the 26th Oct. On the 25th Oct. S. withdrew his application. On the same day a third director signed a resolution appointing two directors a quorum; and on the 26th Oct. I., a fourth director, handed in his written assent to the same resolution. At the adjourned meeting on the 26th Oct. the previous allotments were confirmed.

Held, that there was no evidence that I., who was not present at the meetings of the 24th or the 26th Oct., but who signed the document on the 26th Oct., had received proper notice of the meeting of the 24th Oct.; that he had not waived his right to the notice which he ought to have received; that the meetings of 24th Oct. and 26th Oct. were both irregular; and that S. was entitled to have his name removed from the register.—*In re Portuguese Consolidated Copper Mines, Steele's case*, C.A.—42 Ch. D. 160; 62 L. T. 88.

PROSPECTUS—

16. *Contract — Illegality — Concession — Foreign lottery—9 Geo. 1, c. 19, s. 4—6 & 7 Will. 4, c. 66, s. 1.*—A company, incorporated in England for the purpose of carrying on financial and other operations in Persia, issued a prospectus stating that it was intended to acquire under a certain contract a concession from the Shah, which granted the exclusive privilege of floating lotteries and similar loans in Persia; that the headquarters of the scheme would be in Persia, but that agents would be employed in the chief cities of Eastern Europe for the purpose of obtaining subscriptions; and that "five issues have to be made annually in Persia, with minimum drawings of £10,000, and it is estimated that these operations should return continuously-increasing dividends."

A shareholder moved to restrain the company from acquiring the concession, or advertising the lottery loans or similar enterprises.

Held, that the purchase of the concession was legal, and that the issue of the prospectus containing the statement of the five annual issues was not a notice of a foreign lottery within 6 & 7 Will. 4, c. 66.—*Macnee v. Persian Investment Corporation*, CH.D. CHI., J. 596—44 Ch. D. 306; 62 L. T. 894.

16a. *Contract — Misrepresentation — Rescission.* — W. applied for shares on the faith of a statement in the prospectus that certain persons were members of the council of administration of the company (which statement was untrue), and certain material facts were further suppressed from the statement in the prospectus.

Held, that the statement was so materially untrue as to be calculated to deceive, and that W.'s contract must be rescinded and the deposit money repaid.—*Metropolitan Coal Consumers' Association, Wainwright's case*, CH.D. KAY, J.—62 L. T. 30.

SHARES—

17. *Allotment—Contract—Ratification.*—A. and B. applied for and were allotted shares in a company on the 24th of October, 1888. The allotment was made at a meeting of directors of which no notice had been given to one of the directors, so that the directors who made the allotment were not able to bind the company. On the 25th of October A. returned the letter of allotment, and asked to be excused taking the shares, but he never, in fact, repudiated the contract. On the 24th of December the company brought an action against A. to enforce payment of the moneys payable by him on allotment of the shares. On the 31st of October B. paid the allotment moneys on the shares allotted to him, alleging, however, that he paid "under protest," but there was no evidence that this protest was communicated to the company.

At a meeting of directors held subsequently to the above dates, and before either A. or B. had, in fact, repudiated, the allotment of shares made at the meeting of the 24th of October, 1888, was confirmed and ratified by the company.

Held, following *Bolton v. Lambert*, 37 W. R. 434, that this subsequent ratification related back to and confirmed the invalid allotment of the 24th of October, 1888, and that A. and B. were bound thereby.—*In re Portuguese Consolidated Copper Mines, Badman's and Bosanquet's cases*, CH.D. NOR., J.—62 L. T. 179.

17a. *Certificate—Executor—Pledge—Brokers—Mercantile law—Estoppel — Domicil.* — The registered owner of shares in a New York company held certificates which stated that the shares were held by him and were transferable in person or by attorney only on the surrender and cancellation of the certificate by an indorsement thereon.

The indorsement was in the form of a transfer for value received, blank in the names of transferor and transferee with a power of attorney in blank to carry out the transfer. On the death of the owner, his executors, who had proved his will and, in order that the shares might be registered in their names, signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank, who took them, *bonâ fide* and without notice, as security for advances.

The bank retained the certificates and took no steps to obtain registration. By the mercantile usage of both the New York and the London Stock Exchange, transfers so signed by executors are not treated as being in order unless duly authenticated.

The executors brought an action against the bank to establish their title to the certificates.

Held, that as all the dealings with the certificates were transacted in England by persons domiciled there, the rights of the parties must be determined by English law; that the conduct of the executors was consistent either with an intention to sell or pledge the shares, or to have themselves registered as owners, and did not estop them from setting up their title as against the bank.

Decision of the Court of Appeal (38 Ch. D. 388) affirmed.—*Colonial Bank v. Cady and Williams, London Chartered Bank of Australia v. Cady and Williams*, H.L.—15 App. Cas. 267.

18. *Transfer—Want of title in transferor—Certification*—Ultrà vires—*Representation as to credit or ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6.—The plaintiffs were the transferees of certain shares in the defendant company. Before the transfer form had been executed by the plaintiffs, or the price paid, the stockbrokers procured the defendants to place upon it (partly by means of a stamp, partly in writing) the following words:—"Certificate lodged. The Balkis Consolidated Co. (Limited). J. V. Thomas, for secretary." The defendants subsequently discovered that the transferor had had no title to the shares specified in the transfer, and thereupon, notwithstanding their "certification," refused to recognise the plaintiffs' title to the shares. The plaintiffs then brought an action to recover the price of the shares paid by the brokers upon the faith of the "certification."

Held, that, although the "certification" was a representation by the defendants that a genuine certificate covering the shares denoted by the numbers in the transfer had been lodged with them, and that the transferor had a good title to the same, and, further, that such representation was made with the intent that a subsequent purchaser should act upon it, yet the action was not maintainable, upon the grounds (1) that the "certification" was *ultrà vires*, and (2) that it was a representation as to the credit and ability of the transferor within the 6th section of Lord Tenterden's Act, and, not being under the seal of the defendants, could not bind them.—*Bishop v. Balkis Consolidated Co.*, Q.B.D. 750—25 Q. B. D. 77.

WINDING UP—

19. *Execution—Sheriff in possession—Companies Act*, 1862, *ss.* 85, 87, 163.—The sheriff, before the presentation of a winding-up petition, entered the premises and took possession of the chattels of a company, and after the commencement of the winding up received moneys paid by the public for admission to the premises.

Held, that the execution was, as to these moneys, put in force after the commencement of the winding up, and was void under section 163 of the Companies Act, 1862.—*In re Opera Co.*, CH.D. NOR., J. 637; 62 L. T. 859.

20. *Failure of object of company.*—A company was incorporated to purchase and work the R. mine. Other objects mentioned in the articles of association were to acquire mines and other properties in New South Wales and elsewhere, and to carry on the business of mining and milling in all its branches. Nearly two years after the incorporation of the company the directors reported to the shareholders that the R. mine was a failure. The shareholders then passed a resolution requesting the directors to endeavour to obtain suitable property in which to invest the remaining assets.

Held, that, the main object of the company's incor-

poration having failed, the company must be wound up.—*In re Red Rock Gold Mining Co.*, CH.D. KAY, J. —61 L. T. 785.

21. *Jurisdiction—English company carrying on business in Australia—Subsequent compulsory winding-up order in Australia—Practice.*—Where a company, having its registered office in England, but having a branch office and the bulk of its business in Australia, resolved to wind up voluntarily, and shortly afterwards an order was made in Australia for the compulsory winding up of the company, it was held that the compulsory order in Australia did not supersede, or interfere with, the voluntary winding up in this country, any order made by the Australian courts for winding up in Australia being merely ancillary to any winding up taking place in this country.—*North Australian Territory Co.* v. *Goldsbrough & Co.*, CH.D. KAY, J.—61 L. T. 716.

21a. *Jurisdiction—Resolution for voluntary winding-up after presentation of petition—Amendment of petition—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 147.—Where a company has passed resolutions to wind up voluntarily after the presentation of a petition for a compulsory winding up, but before the same comes on for hearing, the court has jurisdiction to make a supervision order dispensing with the amendment of the petition by stating the resolutions to wind up voluntarily, and also with re-advertisements. The court will exercise this jurisdiction where the resolutions to wind up voluntarily appear in the affidavits filed in support of the petition.—*In re Marine and General Land, Building, and Investment Co.*—CH.D. CHI., J.—62 L. T. 723.

21b. *Jurisdiction—Sale of undertaking.*—The court has jurisdiction to wind up a company whose undertaking is constituted for the public benefit, and will make a winding-up order in such a case on the petition of a shareholder who makes out a case for such an order, although it may possibly be necessary to obtain an Act of Parliament to authorize a sale of the company's undertaking.

Blaker v. *Herts and Essex Waterworks Co.*, 37 W. R. 601, 41 Ch. D. 399, discussed.—*In re Barton-upon-Humber and District Water Co.*, CH.D. NOR., J. 8—42 Ch. D. 585; 58 L. J. Ch. 613; 61 L. T. 803.

22. *Life assurance company—Scheme of arrangement—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 14.—Where annuities are secured by the guarantee, under seal, of a life assurance company, to trustees for the annuitants, such trustees are policy-holders within the meaning of sections 2 and 14 of the Life Assurance Companies Act, 1870; and if a life assurance company has, under its deed of settlement, no power to sell or transfer its life assurance business, it cannot, under section 14, enter into any arrangement for the sale or transfer of its life assurance business.—*In re Sovereign Life Assurance Co.*, CH.D. CHI., J. 58—58 L. J. Ch. 811; 61 L. T. 455.

23. *Petition—Business—Abandonment — Substitution of business not authorized—"Just and equitable" that the company should be wound up.*—A company was formed for the purpose of carrying on a banking business in Northamptonshire, but, after about seven months, closed the local bank, changed its name, took an office in London, and carried on a business consisting of speculations in stocks and shares.

Held, on the petition of a shareholder for the winding up of the company, that it was "just and equitable" that it should be wound up.—*In re The Crown Bank*, CH.D. NOR., J. 666—44 Ch. D. 634; 62 L. T. 823.

24. *Petition—Creditor—Garnishee order—Companies Act*, 1862, *s.* 82—*Ord.* 45, *r.* 2.—A person who has obtained a garnishee order against a company as garnishee is not thereby constituted a creditor of the company, and cannot present a petition, as a creditor, to wind up the company.—*In re Combined Weighing and Advertising Machine Co.*, C.A. 67—43 Ch. D. 99; 59 L. J. Ch. 26; 61 L. T. 582.

25. *Petition — Creditor — Mortgage — Covenant — Executor—Companies Act*, 1862, *ss.* 80, 82.—The P. company mortgaged property, A., with other directors, being a party to the deed and covenanting for payment of the debt and interest by the company. The P. company afterwards conveyed the equity of redemption in the property with the L. company, which covenanted to pay the mortgage debt and to indemnify the P. company in respect thereof. C. and the other directors were not parties to this conveyance. The P. company was wound up, and after A.'s death his executors paid money under his covenant.

Held, that A.'s executors could not petition, as creditors, for the winding up of the L. company.—*In re Law Courts Chambers Co.*, CH.D. STI., J.—61 L. T. 669.

26. *Petition — Priority — Dismissal — Costs.* — A creditor who presents a petition to wind up a company, with notice of a previous petition, will have his petition dismissed with costs, even if it has been advertised first.—*In re Standard Portland Cement Co.*, CH.D. NOR., J.—59 L. J. Ch. 408; 62 L. T. 822.

27. *Petition—Priority—Presentation—Advertisement—Costs—General Order, November*, 1862, *r.* 2.—Where two petitions to wind up a company have been presented, of which the second in date of presentation is first advertised, and the same day has been fixed for answering both petitions, the order will be made upon the petition first presented, unless it be proved that it is not presented *bonâ fide*. A petitioner is entitled to a reasonable delay in the day for which his petition is to be answered, subject to the risk of losing his priority.

In re Norton Iron Co., 26 W. R. 92, approved and followed.

In re United Ports Co., 39 L. J. Ch. 146, 18 W. R. Ch. Dig. 73, commented on.—*In re Building Societies Trust Co., Ex parte Laughton, Ex parte Pooley*, CH.D. CHI., J. 458—44 Ch. D. 140; 59 L. J. Ch. 638; 62 L. T. 360.

28. *Proof — Managing director — Salary — Companies Act*, 1862, *s.* 38.—A company was formed for the purpose of buying and carrying on a business formerly carried on by the vendor, and it was agreed that the vendor should, for a period of ten years, act as the managing director of the company. The articles of association provided that the vendor should receive a fixed annual salary as the managing director, and that every director should be the holder of a certain number of shares. The company having gone into liquidation before the ten years expired, the vendor claimed in the winding up as a creditor for a sum due to him for arrears of salary as managing director, and for a sum assessed as damages for breach of the contract to employ him as such for ten years.

Held, that these sums were not due to the claimant "in his character of a member, by way of dividends, profits, or otherwise," within section 38 (7) of the Companies Act, 1862, and therefore he was entitled to prove for them in the winding up, in competition with the other creditors.—*In re Dale & Plant*, CH.D. KAY, J. 409—43 Ch. D. 255; 59 L. J. Ch. 180; 62 L. T. 215.

29. *Proof — Priority — Voluntary winding up—Damages due before winding up — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 133, 163.—Section 133

of the Companies Act, 1862, which provides that, on the voluntary winding up of a company, its property shall be applied in satisfaction of its liabilities *pari passu*, has the effect of disentitling a person who has established a right to damages against the company, but has not enforced it by execution, before the date of the winding up, from obtaining priority over the creditors of the company, although, under section 163 proceedings to recover such damages against the estate and effects of the company would not be void, that section applying only to the case of a company being wound up by the court, or subject to supervision.—*In re Thurso New Gas Co.*, CH.D. KAY, J. 156—42 Ch. D. 486; 61 L. T. 351.

30. *Proof—Rent-charge—Mortgage—Covenant remaining with land.*—G. conveyed land to the use that an annual rent-charge should be paid thereout to himself, his heirs and assigns, with powers of distress and entry in case of default, and subject thereto to the use of L. in fee, and L. covenanted for himself, his heirs and assigns, for payment of the rent-charge. A building society having become mortgagees in fee in possession of the land, leased it to W., who sub-let it to a tenant. The society was now being wound up as an unregistered company under section 203 of the Companies Act, 1862, and the assets having, by an order of the court, been vested in the liquidators, they continued for some time to receive the rent from the tenant and pay the rent-charge. Finding that they were paying more than they were receiving for the land, they got the permission of the court to dispose of it, and gave notice both to the tenant and to G. that they renounced their possession of, and interest in, the property. They afterwards conveyed it to a person for a nominal consideration. G. having died, the executors and trustees of his will brought in a claim to prove in the winding up for arrears of the rent-charge accrued due between the dates of the notice to renounce and the conveyance for a nominal consideration.

Held, that at the commencement of the winding up there was no liability for future payments of the rent-charge capable of being valued and proved as a debt in the winding up within section 158 of the Companies Act, 1862; that the society were only liable to pay the rent-charge as long as they were holders of the land; that the notice to renounce was sufficient to put, and did put, an end to their holding of it; and that the covenant to pay the rent-charge did not run with the land.

Thomas v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368, explained.—*In re Blackburn and District Building Society, Ex parte Graham*, C.A. 178—42 Ch. D. 343; 59 L. J. Ch. 183; 61 L. T. 745.

31. *Reserve fund—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80—*Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 5.—The capital of a company was divided into £10 shares, of which £5 per share was not to be called up except in the event of a winding up. The company never made any profits during the six years of its existence; it was now doing no business, and all the paid-up capital had been lost, except enough to show a balance of £337 of assets over liabilities. It still had offices. 2,400 shares out of 100,000 had been issued. There were no debts, except directors' fees, which would not be claimed except in a winding up. A contributory, supported by a minority of shareholders, presented a winding-up petition.

Held, that the court had power, where the substratum of a company had gone, to order a winding up, even against the wishes of the majority of the shareholders, where there were no debts, and on a shareholder's petition; that the shareholders had a right to refuse to have the business continued at the cost of the reserve fund, which they had contracted to subscribe to only in the event of a winding up; that the subject-matter of the company had failed; and that a winding-up order must be made.—*In re Bristol Joint-Stock Bank*, CH.D. KEK., J. 574—44 Ch. D. 703; 62 L. T. 745.

32. *Sale of business—Voluntary winding up—Special resolution—Notice of dissent—Companies Act*, 1862, *s.* 161.—A company passed a special resolution for winding up and for the sale of its business to another company, but before such special resolution had been confirmed in the manner required by section 51 of the Companies Act, 1862, a dissentient member gave notice of dissent to U., the secretary of the company, who was afterwards appointed liquidator when the special resolution was confirmed. The notice of dissent, wherein U. was styled the liquidator, was never returned to the dissentient member, and no objection was made to it until one month after the date of the meeting at which the special resolution was confirmed. The liquidator moved to restrain the dissentient member from proceeding to arbitration.

Held, that the notice of dissent was a continuing notice and valid, and that the liquidator's motion must be dismissed.—*In re London and Westminster Bread Co.*, CH.D. CHI., J. 277—59 L. J. Ch. 155; 62 L. T. 224.

33. *Scheme of arrangement—Debenture-holders—Jurisdiction—Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.—The court has jurisdiction under section 2 of the Joint-Stock Companies Arrangement Act, 1870, to sanction a scheme of arrangement between a company and its creditors which has the effect of depriving dissentient debenture-holders of their security, and substituting therefor fully paid shares in satisfaction of their claims. The court, however, before sanctioning such a scheme, must be satisfied that it is fair and equitable.—*In re Empire Mining Co.*, CH.D. NOR., J. 747—44 Ch. D. 402; 59 L. J. Ch. 345; 62 L. T. 493.

34. *Set-off — Calls.* — If a company is being liquidated voluntarily, a shareholder who has been sued by the liquidator for calls cannot set off a debt due to him from the company.—*Hoby* v. *Birch*, Q.B.D.—59 L. J. Q. B. 247; 62 L. T. 404.

35. *Surplus assets—Distribution—Preference shares—Paid-up shares—Companies Act*, 1862, *s.* 133.—In the liquidation of a company limited by shares, the surplus assets, after providing for debts and liabilities and for the adjustment of the rights of the contributories, or to be distributed amongst all shareholders, whether ordinary or preference, in proportion to their shares; and this is the case even if some of the shares are only partly paid up.

A company incorporated under the Companies Act, 1862, was voluntarily wound up, and, after paying all expenses and returning the capital advanced by each shareholder, there was a large surplus. The shares consisted of preference shares fully paid up and ordinary shares partly paid up. There were no provisions in the articles regulating the distribution of assets in case of a winding up.

Held (reversing the decision of the Court of Appeal, 36 W. R. 769, 39 Ch. D. 1), that the surplus must be divided amongst the holders of all the shares in proportion to the shares held by them respectively.—*Birch* v. *Cropper*, H.L. 401—14 App. 525; 59 L. J. Ch. 22; 61 L. T. 621.

36. *Transfer of assets—New company—Shares in new company — Dissentient shareholder — Delay —*

Companies Act, 1862, *s.* 161.—A company passed a special resolution to wind up the company and to transfer the assets to a new company, every shareholder to be at liberty to exchange his shares for shares in the new company on giving notice within a month to the liquidator. By a later resolution a further period of a month was allowed for exercise of the option. The plaintiff, a shareholder in the company, did not then exercise the option. Afterwards, by an agreement between the new company and the liquidator of the old company for the transfer of the undertaking, it was agreed that each member of the old company should be entitled to demand shares in the new company paid up for 17s. 6d. each. The plaintiff wrote to the liquidator expressing dissent from this arrangement. The shares in the new company rose in value.

Held (Fry, L.J., *diss*) that the plaintiff could not claim an allotment of shares in the new company.—*Weston* v. *New Guston Co.* C.A.—62 L. T. 275.

37. *Transfer of assets—New company—Option to shareholders—Time for exercise—Companies Act*, 1862, *s.* 161.—Where a company is being wound up, and its business and assets are to be transferred to a new company in consideration of shares in the new company, in pursuance of section 161 of the Companies Act, 1862, the scheme may fix a reasonable limit of time within which a shareholder in the old company must exercise his option to take up the shares in the new company to which, under the scheme, he is entitled.—*Postlethwaite* v. *Port Philip Gold Mining Co.*, CH.D. STI., J. 246—43 Ch. D. 462; 59 L. J. Ch. 201; 62 L. T. 60.

38. *Transfer of assets—New company—Special resolution—Sanction of court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, §161.—The sanction of the court to a special resolution for the transfer, under section 161 of the Companies Act, 1862, of the business or property of a company to another company, without which sanction the special resolution, in the event of an order being made within a year for winding up the old company by, or under the supervision of, the court, will be of no validity, cannot be obtained under section 138 in a voluntary winding up, but must be obtained in the matter of the winding up, either at the time of the making of an order for winding up by, or under the supervision of, the court, or at the time of the making of any order subsequent thereto.

Judgment of North, J., affirmed.—*In re Callao Bis Co.*, C.A. 21—42 Ch. D. 169; 58 L. J. Ch. 826; 61 L. T. 534.

39. *Transfer of assets—New company—Specific performance—Injunction—Companies, Act*, 1862, *s.* 23.—In 1883 the N. company was incorporated, and purchased gold mines from a syndicate, of which M. was a member, the consideration being principally fully paid-up shares in the purchasing company. The plaintiff and others became entitled to M.'s interest as a member of the syndicate, but the shares were never allotted to him, and in 1885 the N. company was wound up voluntarily. The assets were transferred to the new N. company, formed for the purpose of purchasing and working the mines of the old N. company. By the agreement each member of the old company was entitled to require an allotment of as many shares in the new company as he held in the old one, subject to the immediate payment of 2s. per share, and the payment of 1s. per share at some future time. The new company had notice of the position of M. and those claiming under him. The 2s. per share was never paid to the new company on shares claimed by them. In 1886 the new company was wound up, and the mines sold to the V. company, the consideration consisting partly of cash and partly of paid-up shares in the V. company, which were afterwards at a premium. Before the sale was completed an action was brought to decide whether the plaintiff and others were entitled to participate in the consideration given by the V. company to the new N. company in respect of M.'s interest.

Held, that the plaintiff was entitled neither to specific performance nor to an injunction.

Decision of Kekewich, J., reversed.—*Zuccani* v. *Nacupai Gold Mining Co.*, C.A.—61 L. T. 176.

39a. *Transfer of assets—New company—Shares in new company—Joint-Stock Companies Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 160, 161.—A company in voluntary liquidation had passed a special resolution at a general meeting enabling the liquidator to transfer the assets to a new company, on the terms of an arrangement entered into between the liquidator and a trustee for the new company, the consideration being that the shareholders in the old company should be entitled to £1 shares in the new company credited with fifteen shillings per share paid up, and this arrangement had been sanctioned by the court.

Held (affirming Kekewich, J.), that the arrangement was not *ultra vires*.—*Nicholl* v. *Eberhardt Co.*, C.A.—61 L. T. 489.

40. *Unregistered association—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.—An unregistered association, not established for the purpose of gain, but for the promotion of literary and scientific purposes, cannot be wound up under section 199 of the Companies Act, 1862, which is only applicable to trading associations.

Such a literary or scientific association, though consisting of members who are shareholders, is not a joint-stock company within the proviso in section 30 of the Literary and Scientific Institutions Act, 1854, and on its dissolution its property must be given to some kindred institution, to be determined in manner prescribed under section 30 of the Literary and Scientific Institutions Act, 1854, even if the rules of the association contain a provision that the property of the society on its dissolution shall be divided amongst its shareholders, for such a provision is contrary to the Act.—*In re Bristol Athenæum*, CH.D. KAY, J. 396—43 Ch. D. 226; 59 L. J. Ch. 116; 61 L. T. 795.

See also ATTACHMENT, 2; BANKRUPTCY, 22; BILL OF SALE, 9; COSTS, 17; ESTOPPEL, 2; EVIDENCE, 2; INTERPLEADER, 1; JURISDICTION, 2; MARRIED WOMAN, 11; MISREPRESENTATION, 1, 2; RAILWAY, 7, 8, 9; SAVINGS BANK; TRADE NAME, 2; TRUSTEE, 9; WILL, 26, 32, 39.

COMPENSATION.—See ARBITRATION, 4; BANKER, 1; INTEREST, 1; LANDLORD AND TENANT, 1; LANDS CLAUSES ACTS, 4; MORTGAGE, 23; VENDOR AND PURCHASER, 12.

COMPOSITION.—See BANKRUPTCY, 4, 11, 29.

COMPROMISE.—See ADMINISTRATION, 9, 24; BANKRUPTCY, 29; JURISDICTION, 1; SOLICITOR, 4; TRUSTEE, 5.

CONFESSION.—See DIVORCE, 2, 2a.

CONFLICT of LAWS.—See BANKRUPTCY, 25; SETTLEMENT, 8.

CONSIDERATION.—See MORTGAGE, 2a; SOLICITOR, 7; VENDOR AND PURCHASER, 6.

CONSPIRACY.—See CRIMINAL LAW, 6; MASTER AND SERVANT, 1.

CONTAGIOUS DISEASES ANIMALS ACTS.—See LOCAL GOVERNMENT, 4, 6.

CONTEMPT of COURT.—See ATTACHMENT, 1, 2; HABEAS CORPUS; PRACTICE, 3.

CONTINGENT REMAINDER.—See SETTLEMENT, 6; WILL, 35.

CONTRACT:—

1. *Acceptance—Withdrawal—Additional terms—Sale of land—Statute of Frauds—Specific performance.*—The defendant wrote a letter to the plaintiff offering to sell him a lease and goodwill at a certain price, the offer to remain open for ten days; and the plaintiff, in reply, accepted the offer. The solicitors of the parties prepared a memorandum of agreement, containing additional formal terms, and the plaintiff wished also to insert a clause restraining the defendant from carrying on business within five miles. After further negotiations about this clause, the defendant, before the expiration of the ten days, declined to proceed further in the sale. The plaintiff claimed specific performance of the contract contained in the two letters, without regard to the subsequent communication.

Held, that the clause in question was a substantial, not a formal, addition; that the question whether the two letters were evidence of a complete contract was independent of the Statute of Frauds; that the whole correspondence must be considered, and that showed that the plaintiff himself thought that the contract was not concluded; that the circumstances that the withdrawal of the offer was within the ten days, and that the negotiations were partly by the principals and partly by the solicitors, made no difference; and that specific performance must be refused.

Hussey v. *Horne-Payne*, 27 W. R. 585, 4 App. 311, followed.

Observations on *Bolton* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295.—*Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs*, CH.D. KAY, J. 393—44 Ch. D. 616, 59 L. J. Ch. 472; 62 L. T. 416.

2. *Corporation—Seal—Extra work—Metropolitan Burials Act*, 1852 (15 & 16 *Vict.* c. 85), *ss.* 24, 31.—A builder had entered into a contract with a burial board under the seal of the board for the execution of certain repairs to the buildings at the board's cemetery; the repairs to be done and the terms upon which they were to be done were specified in the contract. Further repairs were necessary, and were executed by the builder at the instance of the board's surveyor, and approved by him when done.

Held (Mathew, J., dissenting), that the builder was not entitled to recover in respect of the further repairs, there being no contract under seal as to them.—*Stevens* v. *Hounslow Burial Board*, Q.B.D. 236—61 L. T. 839.

3. *Illegality—Highway—Prosecution for obstructing—Agreement for withdrawal—Stifling a prosecution—Specific performance.*—There can be no valid agreement for the withdrawal of a prosecution where the offence is a matter of public concern, because, even though there may be no injury to the public, the determination of what ought to be done in such a matter ought not to be withdrawn from the ordinary administration of the law and taken into the hands of private individuals. Such an agreement amounts to stifling the prosecution—*i.e.*, putting a stop to it otherwise than in the ordinary course of law, and is none the less a diversion of the course of justice, though the terms of the contract be in fact such as to carry out the object of the prosecution.

At the trial of an indictment brought by a local board against certain persons for obstructing a highway, an agreement was come to that the defendants should restore the highway within seven years; that in the meantime the indictment should lie in the office; and that when the defendants had carried out their undertaking to restore the highway the board should consent to a verdict of "Not guilty." The terms were approved by the court. The defendants not having restored the highway within the agreed term, the board brought an action for specific performance of the agreement.

Held (affirming the decision of Stirling, J.), that the prosecution in the present case was in respect of a matter of public concern; that the effect of the agreement was to put an end to that prosecution in a manner not depending on the ordinary course of the administration of justice; and, consequently, though the agreement was not entered into in consideration of any personal benefit to the prosecutors, it was illegal, and could not be enforced.

Keir v. *Leeman*, 6 Q. B. 308, 9 *Ib.* 371; followed.—*Windhill Local Board of Health* v. *Vint*, C.A. 738—59 L. J. Ch. 608.

4. *Illegality—Part performance—Money paid.*—If money has been paid in pursuance of an illegal agreement, and any substantial part of the illegal purpose has been performed, the money cannot be recovered back, even if part of the agreement still remains unperformed.

Taylor v. *Bowers*, 24 W. R. 499, 1 Q. B. D. 291, distinguished.

Judgment of the Queen's Bench Division affirmed.—*Kearley* v. *Thomson*, C.A. 614—24 Q. B. D. 472; 59 L. J. Q. B. 288.

5. *Lunatic—Necessaries—Implied contract.*—Where sums of money have been expended for necessaries supplied to a lunatic not so found by inquisition, by a person who intends to be repaid for so doing, an obligation will be implied on the part of the lunatic to repay out of his estate the sums so expended.

Whether the sums so expended were for necessaries or not must be determined according to the circumstances in each particular case.

A lunatic, not so found by inquisition, lived for many years in an asylum partly at her own cost and partly at the cost of other persons. After her death her estate was administered in court, and these persons applied for repayment to them out of her estate of the amount paid by them in maintaining her beyond her own income.

Held, that an obligation could be implied to indemnify them for money spent in supplying her with necessaries; but, on the evidence, that repayment had not been expected, and could not be allowed.

In re Weaver, 31 W. R. 224, 21 Ch. D. 615, discussed.

Judgment of Kay, J., affirmed.—*Rhodes* v. *Rhodes*, C.A. 385—44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342.

6. *Money lent—Mortgage.*—A. and B. agreed in writing that A. should let five fields to B. in consideration of the sum of £50 for six years; B. was to pay the rent of the land to A., who was to get back the fields when B. paid him the said £50. There was no express agreement to repay the £50. After more than six years had expired, A.'s administrator sued B. for the £50 as money lent.

Held, that the action could not be maintained.—*Cassidy* v. *Cassidy*, Q.B.D. (Ir.)—24 L. R. Ir. 577.

7. *Necessaries—Implied contract—Poor law.*—A person suffering from *delirium tremens* became violent in his own house, used threats, and broke the windows and furniture; a relieving officer of the union was sent for, who ordered his removal to the workhouse, where he was kept for some days. He

was then examined by a doctor and brought before the magistrates as a lunatic, but, as the magistrates held that he was not a lunatic, he was discharged. Certain expenses were incurred by the guardians in respect of these services.

Held, that, apart from the Lunacy Acts, there was a common law liability upon such person to repay to the guardians the expenses so incurred, and that the guardians, therefore, could recover such money as necessaries expended by them.—*West Ham Guardians* v. *Pearson*, Q.B.D.—62 L. T. 638.

See also BANKER, 4; CANADA, LAW OF, 2; COMPANY, 4, 16, 16a, 17; FRAUDS, STATUTE OF, 1—3; INFANT, 2, 3; INSURANCE, 1, 32; MARRIED WOMAN, 3, 4; MASTER AND SERVANT, 2; MUNICIPAL CORPORATION, 2; PAWNBROKER; PRACTICE, 48; RAILWAY, 3; SAVINGS BANK; SHIPPING, 30, 31; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 11, 12, 14, 15.

CONTRIBUTION.—See LANDLORD AND TENANT, 6; PRINCIPAL AND SURETY, 1.

CONTRIBUTORY.—See BUILDING SOCIETY, 6; COMPANY, 4—6; SAVINGS BANK.

CONTRIBUTORY NEGLIGENCE.—See MASTER AND SERVANT, 7; RAILWAY, 6.

CONVERSION.—See ADMINISTRATION, 5; LIMITATIONS, STATUTES OF, 13; LEGACY DUTY; PARTNERSHIP, 3, 4; TRUSTEE, 10.

CONVEYANCING ACTS.—See COMPANY, 7; COPYHOLD, 1; INFANT, 4; MARRIED WOMAN, 11; MORTGAGE, 2a, 18, 21; SPECIFIC PERFORMANCE; TRUSTEE, 1; VENDOR AND PURCHASER, 9, 10.

CONVICTION.—See ADULTERATION, 2; CRIMINAL LAW, 2, 5—7; ECCLESIASTICAL LAW, 3; FISHERY, 3; JUSTICE OF THE PEACE, 2, 2a.

COPYHOLD:—

1. *Enfranchisement — Rent-charge — Boundaries— Costs of inquiry—Copyhold Act*, 1852 (15 & 16 *Vict. c.* 51), *s.* 24—*Copyhold Act*, 1887 (50 & 51 *Vict. c.* 73), *ss.* 16, 42—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 44.—In 1880 copyhold land was compulsorily enfranchised at the instance of the lord of the manor, in consideration of annual rent-charges. The boundaries of the copyhold land were then incapable of identification, but on the enfranchisement no proceedings were taken to identify the parcels. The rent-charges were paid till February, 1887, but not afterwards.

Held, that the purchaser of the rent-charges was entitled to personal judgment for the rent-charges and arrears, and to an inquiry to ascertain the parcels.

Judgment of Kay, J., 37 W. R. 730, affirmed.—*Searle* v. *Cooke*, C.A.—43 Ch. D. 519; 59 L. J. Ch. 259; 62 L. T. 209.

2. *Enfranchisement — Tenancy in tail — Barring the entail.*—A tenant in tail of land forming part of a copyhold manor in which there was a custom to entail died, having by his will devised his real estate to trustees upon certain trusts, under which his only daughter (who was his heiress in tail) was beneficially entitled to such real estate. The trustees were admitted tenants of the copyhold land upon the trusts of the will, and in 1876 the lord of the manor executed an enfranchisement to the trustees upon the trusts of the will, and the trustees shortly afterwards executed a conveyance to the testator's daughter in fee. The enfranchisement was not made under the Copyhold Acts.

Held, that the effect of the enfranchisement and conveyance was to bar the estate tail in the copyholds.—*Ex parte School Board for London*, CH.D. NOR., J. 61—58 L. J. Ch. 752.

3. *Inclosure Act—Reservation to lord of manor— Shooting rights.*—Where, under an Inclosure Act, lands in a manor have been inclosed and allotted as freehold, and, by a reservation clause, certain rights over the lands so allotted are reserved to the lord, the reservation clause, being in derogation of the right of freehold given by the Act, will be construed most strictly against the lord, and nothing short of a positive reservation to the lord, either expressly or by necessary implication, of rights, such as the right of shooting, will suffice to entail upon the lands allotted as freehold a burden inconsistent with the ownership in fee.

Sowerby v. *Smith*, 23 W. R. 79, L. R. 9 C. P. 524, followed.

Lord Leconfield v. *Dixon*, 16 W. R. 157, L. R. 3 Ex. 30, discussed.—*Duke of Devonshire* v. *O'Connor*, Q.B.D. 420—24 Q. B. D. 468; 59 L. J. Q. B. 189; 62 L. T. 917.

See also INCLOSURE; PRESCRIPTION.

COPYRIGHT:—

Infringement—Works of art—Drawings—Author —Copyright (Works of Art) Act, 1862 (25 & 26 *Vict. c.* 68).—J., a member of a firm of printers, being himself unable to draw, employed an artist in the service of the firm to make, under J.s' directions, a drawing on cards, used at elections, representing a hand holding a pencil in the act of completing a cross within a square; the object being to instruct illiterate voters. The firm registered the drawing under the Copyright (Works of Art) Act, 1862, and in the memorandum stated J. to be the author.

The defendants subsequently published similar cards with a similar drawing, which was not, however, an exact reproduction of the other. Neither drawings were works of artistic merit.

Held, that the printers' firm could not maintain an action for infringement of copyright (1) because the defendants' drawing was not an exact reproduction of the registered copyright drawing, and (2) because J. was not the author.—*Kenrick* v. *Lawrence*, Q.B.D. 779—25 Q. B. D. 99.

CORPORATION.—See CANADA, LAW OF, 3; CHARITY, 1, 4; CONTRACT, 2; DISCOVERY, 8; ELECTION LAW, 1—3; MUNICIPAL CORPORATION, 1, 2; PRINCIPAL AND AGENT, 2.

COSTS:—

1. *Administration action—Unnecessary inquiries— Ord.* 65, *r.* 38.—The plaintiff was the sole executor and trustee under the will of D., the testator, who died in 1878, having left his property in trust for his wife during widowhood, with power to carry on his business, and on her death or marriage on trust for sale, the residue to be divided among the testator's children and the then living issue of any deceased children. In 1879 the plaintiff issued a writ, and in 1880 he delivered a statement of claim, alleging difficulties in the administration of the trust. The defendants were the testator's widow and son. The plaintiffs obtained an order for accounts and inquiries, but no certificate was made till 1879. The estate was realized in the action for £370.

Held, that the plaintiff should not be ordered to pay the costs of the action.—*Stubbs* v. *Dale*, CH.D. KAY, J.—62 L. T. 28.

2. *Appeal—Admiralty action—Collision—Inevitable accident.*—It is a general rule in all cases that, in the absence of special circumstances, the successful party

obtains the costs of an appeal and the unsuccessful party has to pay them.

In an admiralty action the Court of Appeal, reversing the decision of the court below, held that a collision was the result of inevitable accident.

Held, that the case fell within the general rule, but that, having regard to the particular manner in which the case had been conducted, there were such special circumstances as to entitle the court to order that each party should pay their own costs in the court below.—*The Batavier*, C.A. 522—15 P. D. 37; 59 L. J. P. D. & A. 54; 62 L. T. 406.

3. *Appeal—Documents for use of judges—Ord.* 58, *r.* 8.—It is the duty of the appellant on the hearing of an appeal involving the construction of documents to supply the Court of Appeal with three copies of each material document, and it is the practice to allow the costs of such copies on taxation.

Where the appellant in such a case failed to supply three copies of such documents, the appeal was ordered to stand over, the costs of the adjournment to be borne by the appellant.—*Cannot* v. *Oppenheim*, C.A. 1.

4. *Bankruptcy—Deposit on appeal—Bankruptcy Rules*, 1886, *r.* 131.—Where an appellant who has paid the £20 into court as security for the costs of his appeal under the provisions of rule 131 of the Bankruptcy Rules, 1886, afterwards abandons his appeal and pays the costs, such money will be paid out to him on his application, and will not be made subject to a claim for costs incurred by the appellant at an earlier stage of the litigation which remains unpaid at the time of abandoning his appeal.—*In re Scott & Mitchell, Ex parte Scott*, Q.B.D.—62 L. T. 840.

5. *Bankruptcy—Witness—Solicitor—Loss of time—Bankruptcy Rules*, 1886, *r.* 71—*County Court Rules*, 1889, *ord.* 50, *r.* 16.—The decision in *Collins* v. *Godefroy*, 1 B. & Ad. 950, that an attorney who has attended on subpœna as a witness in a civil suit cannot maintain an action against the party who subpœnaed him for compensation for loss of time, does not interfere with the statutory right of a witness in a bankruptcy proceeding to payment for expenses and loss of time.—*Chamberlain* v. *Stoneham*, Q.B.D. 107—24 Q. B. D. 113; 59 L. J. Q. B. 95; 61 L. T. 560.

6. *County court—Discretion of judge—Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—A writ in an action founded on contract was specially indorsed for a sum of £49 10s. 11d. More than twenty-one days after service of the writ the plaintiff obtained, under order 14, final judgment for £23 15s., leave being given to the defendant to defend as to the remainder. An order was afterwards made directing the case to be tried in a county court, but subsequently the plaintiff abandoned the remainder, except £4, which was by consent ordered to be paid to the plaintiff, with costs to be taxed. A judge at chambers gave the plaintiff his costs on the High Court scale. The defendant appealed.

Held, that, under section 116 of the County Courts Act, 1888, the judge at chambers had a discretion to give costs on the High Court scale, and that, having exercised his discretion as to the costs, no appeal lay from his order.—*Bazett* v. *Morgan*, Q.B.D. 108—24 Q. B. D. 48; 59 L. J. Q. B. 54; 61 L. T. 434.

7. *Divorce.*—A wife, who had been a prostitute before her marriage, left her husband in Australia without his consent, and came to England, where she repeatedly committed adultery with the co-respondent, who did not at first know she was married, though he had had intercourse with her before her marriage. The intercourse continued after the co-respondent had become aware of the marriage.

The court refused to condemn the co-respondent in costs.—*Learmouth* v. *Learmouth and Austin*, P.D. & A.D.—59 L. J. P. D. & A. 14; 62 L. T. 608.

8. *Divorce—Appeal—Queen's Proctor—Wife's costs—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 2—*Judicature Act*, 1877 (36 & 37 *Vict. c.* 66), *s.* 49.—Although, in proceedings for divorce, a wife as a general rule is allowed her costs, the allowance is, under the Divorce Act, 1857, s. 51, in the discretion of the court, and there is no appeal from the refusal of the court to order the wife's costs to be paid.

Costs occasioned to a wife by the Queen's Proctor's intervention are also within the discretion of the court, and no appeal will lie from an order refusing them.—*Butler* v. *Butler*, C.A.—15 P. D. 126; 62 L. T. 344.

9. *Divorce—Damages—Apportionment.*—The costs of settling a scheme for apportionment of damages are recoverable from the co-respondent.—*Irwin* v. *Irwin and Layard*, P.D. & A.D.—59 L. J. P. D. & A. 53; 62 L. T. 612.

10. *Patent—Infringement.*—The defendant in an action for infringement of a patent denied the infringement. Judgment was given for the plaintiff on the issue as to infringement, but for the defendant on the ground of want of novelty.

Held, that the defendant was not entitled to the costs of the issue as to the infringement.—*Phillips* v. *Ivel Cycle Co.*, CH.D. KEK., J.—62 L. T. 392.

11. *Patent—Infringement—Particulars of objection—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29 (6)—*Ord.* 65, *r.* 27, *sub-rules* 20, 21.—In an action for infringement of a patent, the defendant denied the infringement and also delivered particulars of objections to the validity of the patent. The action was dismissed with costs, on the ground that there had been no infringement, the question of validity not being gone into. The defendant did not apply to the judge to certify, under section 29 (6) of the Patents, Designs, and Trade-Marks Act, 1883, that his particulars of objections were reasonable and proper, and his costs of those particulars were, on that ground, disallowed *en bloc* by the taxing master, without being gone into in detail as on taxation. The plaintiff then brought in a bill of costs alleged to have been occasioned by the defendant's particulars of objections, and claimed to have such costs set off, under ord. 65, r. 27, against the costs payable by him to the defendant, but the taxing master considered he had no power to go into the question of the propriety of the objections, or, consequently, to allow the plaintiff the costs he claimed.

Held (affirming the decision of Kay, J.), that disallowance of costs, or some specified costs, of a party, on the particular grounds specified by sub-rule 20, as that the proceedings in respect of which those costs had been incurred were improper, vexatious, or unnecessary, is, in the absence of an express direction under the same rule by the judge to the taxing officer, a condition precedent to the right of the other parties to have any costs occasioned to them by such proceedings paid by the offending party or set off against costs payable to him; and that, the costs of the defendant's particulars having been disallowed merely because they were not certified for by the judge, the condition precedent was not fulfilled, and the taxing master, having no jurisdiction to go into those costs as on taxation, nor to consider the question whether the proceedings in respect of which they were incurred were improper, unnecessary, or vexa-

tious within sub-rule 20, had no power to allow the plaintiff's claim to set off or to payment of any costs occasioned him by such proceedings.

Parties who desire, under such circumstances, to raise the question whether, in consequence of any proceedings improperly taken by other parties, such first-mentioned parties have been put to costs, ought to ask the judge to direct the taxing master to look into that question, and, if he finds in the affirmative, tax those costs and order them to be paid by the parties by whose proceedings they have been occasioned.—*Garrard* v. *Edge*, C.A. 455—44 Ch. D. 224; 59 L. J. Ch. 379; 62 L. T. 510.

12. *Priority—Administration action.*—The conduct of an administration action was given to the B. company, as a creditor. A summons by the company for an order on a firm of solicitors to refund money received out of the estate for costs was dismissed, the company being ordered to pay the costs of the solicitors. The company was wound up, and proved to be insolvent. All the costs of the action had been paid except those of the summons against the solicitors. The fund in court was not sufficient to pay the costs of either the company or the solicitors.

Held, that the fund in court must be paid to the solicitors.—*Blundell* v. *Blundell*, C.A. 707—44 Ch. D. 1; 59 L. J. Ch. 269; 62 L. T. 620.

13. *Priority—Harbour commissioners—Mortgage—Receiver—Commissioners Clauses Act*, 1847 (10 & 11 *Vict. c.* 16), *s.* 60.—The plaintiffs were solicitors, who had recovered judgment against commissioners for the amount of their bill of costs incurred in litigation on their behalf, and in an action brought to enforce the judgment obtained the appointment of a receiver and an order for inquiries as to the commissioners' property and debts and the priorities of incumbrancers. The chief clerk made his certificate, and the plaintiffs, on further consideration, asked for their costs of the action out of funds in court in priority to those of other parties. The funds were derived from rates and tolls, and formed part of the property mortgaged to the various incumbrancers.

Held, that the plaintiffs were entitled, in priority to other parties except the commissioners, to their costs of the action so far as they had been incurred for the benefit of the other parties except the commissioners.

The commissioners were constituted by special Acts of Parliament, one of which incorporated the Commissioners Clauses Act, 1847.

Held, that, under section 60, the commissioners were entitled to their costs of the action as between solicitor and client out of the funds in court in priority to the claims of all the other parties.—*Batten* v. *Dartmouth Harbour Commissioners*, CH.D. KEK., J. 603—62 L. T. 861.

13a. *Priority—Mortgage—Administration action—Trustees' costs.*—Where a puisne incumbrancer brought an action against other incumbrancers and the trustees of a will for administration of the estate,

Held, that, so far as the administration proceedings were proper, and for the benefit of the prior mortgagees, the plaintiff was entitled to his costs of such proceedings out of the estate in priority to the prior mortgagees, but must add the rest of the costs to his security.

Held, also, that the trustees' costs of the action, so far as such costs were costs of administration of which the prior mortgagees had had the benefit, must come out of the fund as between solicitor and client.—*Lee* v. *Barne*, CH.D. KAY, J.—62 L. T. 922.

14. *Security—Appeal—Married woman—Separate estate—Restraint on anticipation—Ord.* 58, *r.* 15.—The fact that an appellant is a married woman having only separate estate subject to a restraint on anticipation, is a special circumstance which will induce the Court of Appeal to require such appellant to give security for the costs of the appeal.—*Whitaker* v. *Kershaw*, C.A. 497—44 Ch. D. 296; 62 L. T. 776.

15. *Security—Assets of plaintiff in defendant's hands—Delay.*—An order for security for costs will not be made if the defendant holds money of the plaintiff, nor if there has been delay in making the application, and the plaintiff has since incurred expense.—*Duffy* v. *Joyce*, M.R. (Ir.)—25 L. R. Ir. 42.

16. *Security—Bankruptcy of plaintiff—Rent—Estoppel.*—The plaintiff having brought an action for the rent of certain premises demised by him to the defendant, the defendant discovered that at the time of the lease the plaintiff was a bankrupt, and that his discharge had been made conditional upon his paying his creditors 5s. in the pound. This sum had not been paid. The defendant thereupon applied that the trustee in bankruptcy should be made plaintiff, or that the defendant should be ordered to give security for the costs of the action.

Held (affirming the judgment of the Queen's Bench Division), that the defendant was estopped from denying the plaintiff's title and setting up the title of the trustee; that the mere fact of bankruptcy was not of itself sufficient ground for ordering security for costs; and that the plaintiff was not a mere nominal plaintiff suing on behalf of his trustee in bankruptcy, as he would gain a benefit if he succeeded in the action, and that he could not be required upon that ground to give security for costs.

Rhodes v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548, followed.—*Cook* v. *Whellock*, C.A. 534—24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 695.

17. *Security—Company in liquidation.*—The fact of a plaintiff company being in liquidation is a reason for believing, in the absence of evidence to the contrary, that it will be unable to pay costs if the action is unsuccessful. Therefore, in such case the defendant is entitled to security for costs under section 69 of the Companies Act, 1862.—*Pure Spirit Co.* v. *Fowler*, Q.B.D. 686—25 Q. B. D. 235.

18. *Stay of proceedings—Unpaid costs of former action.*—Where a plaintiff, having failed in one action, commences a second action for substantially the same matter, the second action will be stayed until the costs of the first action have been paid.

Martin v. *Earl Beauchamp*, 32 W. R. 17, 25 Ch. D. 12, approved.—*McCabe* v. *Bank of Ireland*, H.L. 257—14 App. Cas. 413; 61 L. T. 416.

19. *Taxation—Death of client.*—Costs incurred after the death of a client will be disallowed on taxation, even if the solicitor could not possibly have been aware of his client's death when the costs were incurred.—*Pool* v. *Pool*, P.D. & A.D.—58 L. J. P. D. & A. 67; 61 L. T. 401.

20. *Taxation—Lien of solicitor—Statute of Limitations.*—M. acted for many years as solicitor for C. In June, 1888, C., becoming dissatisfied with M., signed an authority to other solicitors to obtain and receive from M. all deeds and documents in M.'s possession belonging to C. or relating to his property. The new solicitors wrote to M. requesting him, if he had any claim to a lien upon C.'s deeds, &c., to send them full particulars, and inclosing a copy of their authority. In further correspondence they asked for an early appointment for delivery up of C.'s deeds and documents, and intimated that C. only required M. to deliver particulars of any unsettled bill of costs M. might have against him. In July, 1888, C. took out an originating summons as plaintiff against M. as defendant for taxation and delivery up of deeds, &c.,

instead of proceeding by the usual petition of course (the summons containing no undertaking by C., such as would have been contained in a petition of course, to pay what should be found due on the taxation), and obtained an order for delivery by M. to C., within fifteen days of service of the order, of a bill of M.'s fees and disbursements in all matters in which M. had been employed as solicitor for C., with a reference to the taxing master to tax and settle "the said bill," and to certify the amount due on either side, and for payment of the amount certified. It was further ordered that C. should be at liberty to pay £350 into court, and that M. should thereupon deliver up to C. on oath all C.'s documents which were in M.'s possession or power, and that M.'s lien on such documents should attach to the £350 when paid into court, and that the delivery of the documents should be without prejudice to M.'s lien. The taxing master, in taxing the bill, struck out the items incurred more than six years previous to the proceedings, on the ground that they were statute-barred, without reference to their propriety in other respects.

Held, that, the real object of the proceeding being clearly to obtain delivery up of C.'s documents, and for that purpose to ascertain the amount of M.'s lien on them, it must have been intended by the order to treat all the items as "due," whether they were recoverable by action or not, and that the taxing master ought to have taxed them all, whether barred or otherwise.

Decision of North, J., affirmed.

Quære, whether there was in the correspondence any acknowledgment sufficient to take the items, which would otherwise have been barred, out of the Statute of Limitations.—*Curwen* v. *Milburn*, C.A. 49—42 Ch. D. 424; 62 L. T. 278.

21. *Taxation—London agent—Payment into court—Jurisdiction—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73) *s.* 37.—Section 37 of the Solicitors Act, 1843, does not empower the court to direct taxation of a part of a bill of costs; but the court has an inherent jurisdiction so to direct.

Taxation of a part of a London agency bill may be directed on the terms of payment into court of the amount claimed by the agent.

Decision of the Court of Appeal (36 W. R. 374, 37 Ch. D. 433) affirmed, with a variation.—*Storer* v. *Johnson*, H.L. 756—15 App. Cas. 263; 62 L. T. 710.

22. *Taxation—Party and party costs—Advice of counsel.*—The costs of procuring the advice of counsel to institute a motion to attach a person for contempt of court are not taxable against such person as party and party costs.—*Lynch* v. *Macan* (2), EX.D. (Ir.)—26 L. R. Ir. 388.

23. *Taxation—Review—"Objection in writing"—Ord.* 65, *r.* 27 (39) (41).—An application by a party to a judge under ord. 65, r. 27 (41), for an order for a review of taxation of a bill of costs as to any item or part of an item contained therein cannot be entertained unless the party applying has first carried in an objection in writing with respect to each such item or part of an item.

Decision of Stirling, J., affirmed.—*Strousberg* v. *Sanders*, C.A. 117.

24. *Taxation—Separate actions by one solicitor—Ord.* 65, *r.* 27.—Three shareholders in a company, W., T., and G., brought separate actions to have their names removed from the list of shareholder. The same solicitor acted for the plaintiff in each action. W.'s action was decided first, and it was arranged that the evidence taken in that action should be used in the other two, which subsequently came on and were decided by the same judge on the same day, judgment being given for the plaintiff in each case, with costs. T.'s costs were taxed in the usual way, but the taxing master struck out *en bloc* a number of items in G.'s bill, on the ground that the two actions were similar, and that duplicate copies of documents ought not to have been prepared; he therefore disallowed the charges for copies which had already been allowed in T.'s bill. The same counsel appeared for the plaintiff in each case, and the taxing master reduced their fees in G.'s bill.

Held, that the whole bill must be referred back to the taxing master, with the direction that, except as regards attendance or other matters which were, or ought to have been, done at one and the same time in both actions, the plaintiff's solicitor was entitled to charge in G.'s action as if he had not been engaged in T.'s action.—*In re Metropolitan Coal Consumers' Association, Grieb's case*, CH.D. KEK., J. 462—59 L. J. Ch. 532; 62 L. T. 561.

25. *Taxation—Shorthand notes—Ord.* 58, *r.* 4—*Ord.* 78, *r.* 1.—The costs of shorthand notes of evidence are never allowed on taxation without a special direction, and though the court, in the exercise of its discretion, can give such a direction, the discretion is only exercised under very special circumstances, and any application to the court to exercise such discretion should be made at or immediately after the time when the judgment is given.—*Glasier* v. *Rolls*, C.A. 113—59 L. J. Ch. 63; 62 L. T. 305.

26. *Taxation — Special circumstances — Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—Solicitors to trustees delivered to their clients in the years 1883 and 1884 bills of costs for work done for them as trustees, which were paid without taxation, the solicitors not having informed their clients that, if administration proceedings were subsequently brought and the bills were moderated in those proceedings, the trustees would have to pay out of their own pockets the amounts by which the bills were reduced on moderation. The solicitors also delivered to the manager of an asylum carried on by the trustees as part of the trust estate, other bills of costs for work done for the trustees. It was admitted that the bills delivered to the trustees were honest and not excessive.

Held, as to the bills paid without taxation, that the fact of the solicitors not having given such information to their clients was not a special circumstance justifying taxation after payment; and, as to the bills delivered to the manager of the asylum, that delivery to him was not, in the absence of proof that he was authorized to receive bills for the trustees, delivery to the trustees.

In re F——, 16 W. R. 749, distinguished.—*In re Layton*, CH.D. NOR., J. 652.

27. *Taxation—Third party—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.—The common form allegation in a petition of course that the solicitor "delivered to your petitioners his bill of fees and disbursements" is a material allegation which is not satisfied by a merely constructive delivery.

The ordinary practice as to delivery of bills of costs by mortgagees' and by trustees' solicitors stated.—*In re Robertson*, CH.D. CHI., J. 170—42 Ch. D. 553; 58 L. J. Ch. 833; 62 L. T. 38.

28. *Tender—Payment into court—Ord.* 22, r. 7.—In an action for money lent the statement of defence alleged that the only sum due was £38, which the defendants had tendered and brought into court in satisfaction of the whole claim, it not being stated that the tender was made before action. The plaintiff took the £38 out of court in satisfaction of his claim.

Held, that the plaintiff was not entitled to have his costs taxed, as there was a plea of tender on the record, which was not disposed of, and that it was

not essential to allege that the tender was before action if that fact could be inferred.—*Griffiths* v. *Ystradfodwg School Board*, Q.B.D. 425—24 Q. B. D. 307; 59 L. J. Q. B. 116; 62 L. T. 151.

29. *Third party—Indemnity.*—At the trial of an action for specific performance the defendant was held to be liable to the plaintiff on the contract, but entitled to an indemnity from the third party.

Held, that the third party must pay the costs of the third-party proceedings between him and the defendant, but that the defendant must pay the costs of his unsuccessful defence.—*Blore* v. *Ashby*, CH.D. KEK., J. 141—42 Ch. D. 682; 58 L. J. Ch. 779; 61 L. T. 766.

See also ATTACHMENT, 2; COMPANY, 26, 27; COPYHOLD, 1; COUNTY COURT, 1—3, 9; CRIMINAL LAW, 1; DISCOVERY, 9; DIVORCE, 18; INTERPLEADER, 2; LANDS CLAUSES ACTS, 6—8; LOCAL GOVERNMENT, 7; MARRIED WOMAN, 9; MISREPRESENTATION, 2; MORTGAGE, 5; MUNICIPAL CORPORATION, 1; NEGLIGENCE, 2; NUISANCE, 3; PATENT, 3, 7; PRACTICE, 31a.; SHERIFF, 1, 2; SHIPPING, 28; SOLICITOR, 3a, 4, 8—11.

COUNSEL.—See BANKRUPTCY, 26; COSTS, 22.

COUNTY COUNCIL.—See ELECTION LAW, 1, 2; LOCAL GOVERNMENT, 4—7.

COUNTY COURT:—

1. *Appeal — Admiralty — Interlocutory order — County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 26—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Costs—County Court Rules*, 1889, *ord.* 50, *r.* 16.—There is no appeal from any interlocutory decree or order of a county court having admiralty jurisdiction in an admiralty cause without the permission of the judge where the decree or order appealed from is not made at the hearing of the suit.

Section 120 of the County Courts Act, 1888, providing for the manner in which, and the conditions subject to which, appeals may be brought from the judgment, direction, or decision of a county court judge where any party is dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, has not given a right of appeal from interlocutory orders made in admiralty actions previous to or after the hearing of the suit.

Semble, ord. 50, r. 16, of the County Court Rules, 1889, directing that "the costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed, though they have not been summoned," is not to be construed as authorizing a judge of county courts to order, as a general rule of practice, that in admiralty actions the costs of witnesses not called shall be disallowed, unless it be otherwise ordered by himself. — *The Cashmere*, P.D. & A.D. 623 — 15 P. D. 121; 59 L. J. P. D. & A. 57; 62 L. T. 814.

2. *Appeal—Security for costs.*—The court will not, as a rule, require security for the costs of an appeal from a county court where the judge has given unconditional leave to appeal.—*Ex parte Apothecaries' Society*, Q.B.D. 478.

3. *Costs—Scale—Certificate—County Court Rules*, 1889, *ord.* 50, *r.* 8—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 119.—Ord. 50, r. 8, of the County Court Rules, 1889, provides that, "where a judge certifies under section 119 of the County Courts Act, 1888, the certificate shall be entered at the end of the minutes of the court of the day on which it is given, and shall be signed by the judge."

In an action brought in the City of London Court the judge made an order for costs on the higher scale, but omitted to give the certificate required by section 119 of the County Courts Act, 1888, on the same day. On a subsequent day he signed a certificate, which was entered at the end of the minutes of the court of the day on which he gave the order.

Held, that the judge was not prevented by ord. 50, r. 8, from adopting this course.—*Badcock* v. *Hunt*, Q.B.D. 255.

4. *Jurisdiction—Admiralty—Wages—Action* in rem —*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3 (2).—The mate of a vessel who has finished his articles and been paid off, but remains on board as chief officer and superintends the unloading of the cargo, and generally looks after the vessel while in port, is entitled to proceed *in rem* in the county court against the vessel for his remuneration.—*Reg.* v. *Judge of City of London Court*, Q.B.D. 638—59 L. J. Q. B. 427.

5. *Jurisdiction—Administration action—Metropolitan district—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 75, 84.—Section 84 of the County Courts Act, 1888, must be construed as forming an exception to section 75 (3), and, therefore, where the plaintiff or the defendant in administration proceedings carries on business within the district of a metropolitan county court, the judge of that court has jurisdiction, even if neither the deceased nor his executor had their place of abode within that district.—*Reg.* v. *Judge of Bloomsbury County Court*, Q.B.D. 320—24 Q. B. D. 309; 62 L. T. 286.

6. *Jurisdiction — Carrying on business — Scotch defendants—Branch office—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 164.—A Scotch firm carrying on business in Scotland, but having a branch office within the jurisdiction of a county court, was served at the branch office with a county court summons.

Held, that the service was valid.—*Weatherley* v. *Calder*, Q.B.D.—61 L. T. 508.

7. *Jurisdiction—Defendant residing out of jurisdiction—Waiver—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 74.—A summons from a county court having being issued at the instance of a plaintiff and served upon a defendant residing out of the jurisdiction without leave for the commencement of the action having been first obtained under section 74 of the County Courts Act, 1888, the defendant appeared, but, after one of the causes of action had been heard and determined againt him, objected to the jurisdiction.

Held, that the practice under this section was analogous to that in the High Court in cases requiring leave for notice of service of a writ upon a defendant residing out of the jurisdiction, and that the defendant, having appeared and contested the action, had waived his right to raise any objection to the jurisdiction of the court.—*Moore* v. *Gamgee*, Q.B.D. 669—25 Q. B. D. 244.

7a. *Jurisdiction—High bailiff—Notice of proceedings—Bankruptcy—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 53, 54, 186—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.—Where a motion made in the county court by the trustee in the bankruptcy for an order declaring that he was entitled to certain property of the bankrupt which had been seized by the high bailiff under a writ of execution was dismissed by the county court judge, on the preliminary objection being taken that formal notice of the motion had not been given,

Held, that the provisions of section 53 of the County Courts Act, 1888, by which, before an action is commenced against any person for anything done

in pursuance of the Act, formal notice in writing must be given to the defendant, do not apply to a motion made in a bankruptcy; and that the case must go back to the county court judge to be heard upon the merits.—*Ex parte Poppleton, In re Locke*, Q.B.D., BKCY.—62 L. T. 942.

8. *Jurisdiction — Set-off — "Admitted set-off"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 57.—Section 57 of the County Courts Act, 1888, gives the county court jurisdiction to try a case "where the debt or demand claimed consists of a balance not exceeding £50, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff."

Held, that a set-off, to be an "admitted set-off" within the meaning of this section, must be a set-off admitted by both parties, so that, in a claim above £50, a plaintiff cannot, by giving credit for a sum which is not admitted by the defendant, reduce his claim below £50, so as to give the court jurisdiction to try the case.—*Hubbard* v. *Goodley*, Q.B.D. 639—25 Q. B. D. 256; 59 L. J. Q. B. 285; 62 L. T. 736.

9. *Particulars — Signature by solicitor — Lithographed stamp—County Court Rules*, 1889, *ord.* 6, *r.* 10.—Under ord. 6, r. 10, of the County Court Rules, 1889, read with the Appendix, in order to entitle a plaintiff to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and it is not sufficient for him to enter them on a form which bears his lithographed name (Lord Esher, M.R., dissenting).

Decision of the Queen's Bench Division (38 W. R. 207, 24 Q. B. D. 60), affirmed.—*Reg.* v. *Cowper*, C.A. 408—24 Q. B. D. 533; 59 L. J. Q. B. 275; 62 L. T. 583.

10. *Payment into court—Return day—Transfer of action—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 107, 186—*County Court Rules*, 1889, *ord.* 9, *r.* 11 (1).—A summons was issued in a county court on the 14th of March; the return day was the 12th of April; on the 1st of April the action was transferred to another county court, where the return day was the 15th of April. The defendants paid money into court under County Court Rules, 1889, ord. 9, r. 11 (1), on the 8th of April.

Held, that the return day was the 15th of April, not the 12th of April, and that the payment in was made five clear days before the return day within the meaning of the rule.—*Stevens* v. *Hounslow Burial Board*, Q.B.D. 236—61 L. T. 839.

11. *Remitting action—Payment after action—Reduction below £100—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—Where, in an action of contract, the claim indorsed on the writ is reduced to a sum not exceeding £100 by payment of part after action brought, there is no jurisdiction under section 65 of the County Courts Act, 1888, to remit the action for trial in a county court.—*Hodgson* v. *Bell*, C.A. 325—24 Q. B. D. 525; 59 L. J. Q. B. 231; 62 L. T. 481.

12. *New trial—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.—A judge of a county court can only grant a new trial upon the grounds on which a new trial can be granted in the High Court, and he is bound by the principles laid down by the High Court as applicable to the granting of new trials, notwithstanding the terms of section 93 of the County Courts Act, 1888.—*Murtagh* v. *Barry*, Q.B.D. 526—24 Q. B. D. 632; 59 L. J. Q. B. 388.

See also COSTS, 5, 6; LANDLORD AND TENANT, 4; NEGLIGENCE, 2; PRACTICE, 15; SHIPPING, 24.

COVENANT:—

1. *Restraint of trade—Injunction.*—The plaintiff carried on the business of "ladies' outfitting" on premises held under lease containing a covenant by the lessor not to consent to the business of "ladies' outfitting" being carried on at or upon the adjoining premises, also belonging to the lessor. The defendants became lessees of these adjoining premises, with notice of this covenant, and began to carry on thereat the business of "fancy drapers and hosiers," in the course of which they sold some articles the sale of which constituted part of the business of "ladies' outfitting" also. The plaintiff brought an action to restrain the defendants from carrying on the business of ladies' outfitting. It appeared that the businesses of "fancy draper and hosier" and "ladies' outfitting" overlapped in respect of the sale of the above articles.

Held, assuming that the effect of the covenant was such as to make it obligatory upon the defendants, having notice of the covenant, not to carry on the business of "ladies' outfitting," as to which the court gave no decision, that such an obligation was not broken by reason of the defendants selling, in the course of their business as "fancy drapers and hosiers," some of the articles the sale of which constituted part of the business also of "ladies' outfitting," as the terms of the covenant did not prohibit the sale of any specific articles sold in the course of the business of "ladies' outfitting."

Fielden v. *Slater*, 17 W. R. 485, L. R. 7 Eq. 523, distinguished.

Decision of Kekewich, J., reversed.—*Stuart* v. *Diplock*, C.A. 223—43 Ch. D. 343; 59 L. J. Ch. 142; 62 L. T. 333.

2. *Restrictive covenant—Covenant not to carry on the trade of retailer of wine, spirits, or beer—Sale at refreshment bar of theatre—Injunction.*—The lessee of a theatre, for the purpose of facilitating egress therefrom, bought a plot of ground adjoining it, which (as he had notice) was subject to a covenant against carrying on the trade of a retailer of wine, spirits, or beer, and upon that plot he built an annexe to the theatre containing a staircase and exits from the theatre. He also put up on each floor or landing of the annexe a refreshment bar, at which any person paying for admission to see the theatrical performances could purchase wine, spirits, and beer to be drunk on the premises, but which was not otherwise open to the public.

Held (affirming the decision of Kekewich, J.) that the lessee's conduct amounted to carrying on the trade of a retailer of wine, spirits, and beer, and was a breach of the covenant which must be restrained by injunction.

Jones v. *Bone*, 18 W. R. 489, L. R. 9 Eq. 674, distinguished.—*Buckle* v. *Fredericks*, C.A. 742—44 Ch. D. 244; 62 L. T. 884.

See also COMPANY, 25, 30; DEED, 2; INFANT, 1; LANDLORD AND TENANT, 7—9; LANDLORD AND TENANT (IRELAND) 6; LIMITATIONS, STATUTES OF, 10; LOCAL GOVERNMENT, 13; MARRIED WOMAN, 13; MORTGAGE, 3—5; SETTLEMENT, 1, 2; VENDOR AND PURCHASER, 11, 12.

CRIMINAL LAW:—

1. *Acquittal—Costs—Director of Public Prosecutions—Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35), *s.* 2—*Prosecution of Offences Act*, 1879 (42 & 43 *Vict. c.* 22), *s.* 7.—By section 7 of the Prosecution of Offences Act, 1879, where any criminal proceeding is undertaken by the Director of Public Prosecutions, it shall not be necessary to bind over any person to prosecute, "and, if any person is so

bound over, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person."

In a prosecution for conspiracy, the justices refused to commit; the prosecutor was bound over to prosecute, but no security for costs was given. On the finding of a true bill the Director of Public Prosecutions undertook the case. The defendants were acquitted.

Held, that the section only transferred to the Director of Public Prosecutions the burden of the costs, if any, for which the original prosecutor was liable under his security, and that an order made against the Director of Public Prosecutions to pay the costs was invalid.—*Stubbs* v. *Director of Public Prosecutions*, Q.B.D. 607—24 Q. B. D. 577; 59 L. J. Q. B. 201; 62 L. T. 399.

2. *Assault*—Autrefois convict—*Security for good behaviour—Estoppel.*—To an indictment for unlawfully wounding, unlawfully inflicting grievous bodily harm, assault occasioning actual bodily harm, and common assault, the prisoner pleaded as a plea in bar a conviction before a court of summary jurisdiction upon the same facts; but that court had inflicted no punishment beyond requiring the defendant to give security to be of good behaviour.

Held, that the conviction was a good plea in bar.—*Reg.* v. *Miles*, C.C.R. 334—24 Q. B. D. 423; 59 L. J. M. C. 56; 62 L. T. 572.

3. *Assault — Distress warrant — Sewers rates — Sewers Law Amendment Act*, 1849 (12 & 13 *Vict. c.* 50), *s.* 7.—A warrant of distress for sewers rates can be lawfully executed only by the person to whom it is directed, and any other person executing it may be convicted of an assault.—*Symonds* v. *Kurtz*, Q.B.D.—61 L. T. 559.

4. *Attempt — Bestiality — "Animal" — Fowl — Crown case reserved—Plea of guilty—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 61.—A conviction for an attempt at an offence may be supported, even if the attempt could not possibly have culminated in the full offence in the manner intended.

Reg. v. *Collins*, 12 W. R. 886, L. & C. 47, overruled.

A fowl is an "animal" within section 61 of the Offences against the Person Act, 1861.

It is not a condition precedent to give jurisdiction to the Court for the Consideration of Crown Cases Reserved that a point of law arising at the trial should be formally taken at the trial.

Reg. v. *Clark*, 15 W. R. 48, L. R. 1 C. C. R. 64 disapproved.—*Reg.* v. *Brown*, C.C.R. 95—24 Q. B. D., 357; 59 L. J. M. C. 47; 61 L. T. 596.

5. *Bankruptcy—Destruction of documents—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 163.—A bankrupt can be convicted of concealing or destroying documents within four months before his presentation of a petition.—*Reg.* v. *Beck*, C.C.R.—61 L. T. 596.

6. *Conspiracy—Abortion—Woman not pregnant.*—A woman was jointly indicted with others for conspiring to procure her miscarriage by unlawful means. There was no evidence of her being with child so as to render the acts criminal if done by herself alone.

Held, that she might nevertheless rightly be convicted of conspiracy to commit a felony.—*Reg.* v. *Cross*, C.C.R. 336—24 Q. B. D. 420; 59 L. J. M. C. 77; 62 L. T. 124.

7. *Grievous bodily harm — Threats — Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 20.—The prosecutrix, being on reasonable grounds frightened by the prisoner's threats, climbed out of a window to escape, and was injured.

Held, that the prisoner was rightly convicted of inflicting grievous bodily harm under section 20 of the Offences against the Person Act, 1861.

Reg. v. *Martin*, 30 W. R. 106, 8 Q. B. D. 54, followed.—*Reg.* v. *Halliday*, C.C.R. 256—61 L. T. 701.

8. *Larceny—Accessory before fact—Incitement to steal—Larceny Act*, 1861 (24 & 25 *Vict. c.* 94), *s.* 1.—A person who induces a post office servant to intercept and deliver up a letter when in the course of transmission by the post may be prosecuted for larceny as a principal felon or as an accessory before the fact.—*Reg.* v. *James*, C.C.R.—24 Q. B. D. 439; 59 L. J. M. C. 96.

9. *Larceny—Trespass—Cutting grass.*—A trespasser cut growing grass and took it away.

Held, that he had been guilty of larceny.—*Reg.* v. *Foley*, C.C.R. (Ir.)—26 L. R. Ir. 299.

See also EVIDENCE, 4, 5, 10; JUSTICE OF THE PEACE, 1, 2a; MASTER AND SERVANT, 1; MERCHANDISE MARK, 1, 2; PRACTICE, 1; PRIVY COUNCIL.

CROSS-EXAMINATION.—See ADMINISTRATION, 2; EVIDENCE, 2, 6, 7.

CYPRES.—See WILL, 9, 10.

DAMAGES:—

1. *Libel—Apology—Payment into court—Excessive damages.*—In giving evidence in a London police court D. stated that the plaintiff was not an "Invincible." This was correctly reported in a newspaper of which the defendant was proprietor. On the following day it was stated in the next issue of the same newspaper that D. had sworn that the plaintiff was an "Invincible." The plaintiff brought an action for libel, and the defendant paid £50 into court, with an apology. The jury found that the apology was insufficient, but they could not agree as to whether there was actual malice, and they assessed the damages at £1,000.

Held, that the damages were excessive, and that the verdict must be set aside.—*Harris* v. *Arnott*, C.A. (Ir.)—26 L. R. Ir. 55.

2. *Railway—Compulsory purchase—Minerals—Evidence.*—In an action for the value of land compulsorily taken the jury assessed damages in respect of subjacent coal, though the expert evidence on the subject was conflicting

Held, that the verdict ought not to be set aside.—*Brown* v. *New South Wales Railway Commissioner*, P.C.—15 App. 241; 62 L. T. 469.

3. *Shipping—Collision—Profits—Future voyage.*—A collision occurred between the ships *A.* and *B.* after the owners of *The A.* had contracted to proceed on another voyage after the completion of the voyage then in progress. The repairs necessitated by the collision delayed the ship from sailing till after the time fixed for commencing the second voyage.

Held, that damages in respect of the loss of the earnings of the second voyage were not too remote to be recovered from *The B.* in respect of the collision.

Judgment of the Court of Appeal (reported 37 W. R. 210, 13 P. D. 191) affirmed.—*The Argentino*, H.L.—14 App. 519; 61 L. T. 706.

4. *Shipping—Wrongful detention of cargoes—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2.—Lord Cairns' Act gives no jurisdiction to award damages where no wrongful act has been committed; and therefore, if an action is brought for an injunction in respect of a threatened injury, and no actual wrong

has been committed by the defendant, the court cannot award damages instead of an injunction.

The plaintiff sued for delivery of certain goods then at sea, for an injunction to prevent the defendants from receiving them, and for damages for detention. The defendants claimed the right to receive the cargoes. By a consent order the defendants received some of the cargoes, on the terms of rendering accounts for the proceeds. At the trial the judge ordered an inquiry as to the damages sustained by the defendants' wrongful detention of the goods. The case was ultimately taken to the House of Lords, when the judgment was varied by allowing to the defendants the expenses incurred in respect of the cargoes received under the consent order. The chief clerk made a certificate, awarding damages in respect of the detention of the cargoes.

Held (Bowen, L.J., dissenting), that the chief clerk's certificate was correct, and that he could not award nominal damages.—*Dreyfus* v. *Peruvian Guano Co.*, C.A.—43 Ch. D. 317; 62 L. T. 511.

5. *Trespass—Excessive damages—New trial.*—A new trial will not be granted on the ground of the damages being excessive, unless the court is of opinion that there was no reasonable proportion between the damages and the facts as proved.

In an action of trespass to land the jury may give exemplary damages if they believe that the defendant knew that his mode of entry was illegal.—*Reeves* v. *Penrose*, EX.D. (Ir.)—26 L. R. Ir. 141.

See also APPRENTICE; COMPANY, 29; COSTS, 9; DIVORCE, 6; INJUNCTION, 2; INTEREST, 1, 3; LANDLORD AND TENANT, 5; LANDS CLAUSES CONSOLIDATION ACT, 2, 3; LIBEL, 1, 2; LIGHT, 1, 3; MARRIED WOMAN, 4; NUISANCE, 2, 3; PATENT, 2, 5; PRACTICE, 22; PRINCIPAL AND AGENT, 2; RIVER, 2; SHIPPING, 5, 25a.

DEBENTURE.—See BILL OF SALE, 9; CHARITY, 4; COMPANY, 7, 33; WILL, 26, 32.

DEBTORS ACT.—See ATTACHMENT, 5, 7, 8; CRIMINAL LAW, 5.

DECEIT.—See MISREPRESENTATION, 1, 2.

DEDICATION.—See RIVER, 3.

DEDUCTION.—See INCOME TAX, 3, 4.

DEED:—

1. *Assignment of assets for creditors—Resulting trust.*—A trading firm, by a deed, which recited the inability of the firm to pay its creditors in full, assigned the business and all the estate and effects of the firm to trustees on trust in their discretion either to carry on the business or at any time to sell the same, and to divide the clear residue after payment of all costs incurred in the execution of the trusts of the profits of the business while carried on, and of the moneys arising from the sale when sold, among the creditors of the firm, in rateable proportions according to the amounts of their debts; and the creditors, whose names were scheduled to the deed and who were parties to and executed the deed, thereby released the assignors from all debts and claims of such creditors. The deed contained a declaration that the trustees might pay off in full, or compromise with, any of the creditors whose debts or claims were under £30. There was no express declaration of trust as to any ultimate surplus remaining after all the creditors had been paid in full.

Held (reversing the decision of Kekewich, J.), that, on the true construction of the deed, there was a resulting trust of such surplus in favour of the assignors.—*Cooke* v. *Smith*, C.A. 641.

2. *Covenant—Deed poll—Restrictive covenant—Injunction.*—The plaintiffs bought part of a building estate under conditions of sale which referred to stipulations contained in a "deed poll of mutual covenants which has been or is intended to be executed by the vendors, and shall be executed by each of the purchasers." The deed was executed by the vendors and the plaintiffs. It recited that "it is intended that the respective purchasers shall set and subscribe their respective names and seals to this deed," "and, whereas it was a part of the various contracts, and it is intended to be a part of all future contracts for sale of the said plots or parcels of land respectively, that the several purchasers respectively should execute this deed and should thereby be severally and respectively bound by all the stipulations hereinafter contained." The deed then witnessed that, "in consideration of the premises," the purchasers covenanted with each other, and with all persons entitled to the land, not to build except upon certain conditions. The deed contained no covenant by the vendors, who now proposed to sell some of the unsold lots upon conditions which were admittedly inconsistent with the original scheme, and without requiring that the purchasers should execute the deed poll.

Held, that the deed poll must be treated as made *inter partes*; that the intention of the vendors had been expressed in order to induce the plaintiffs to buy, and that they were not at liberty to alter that intention; that, if not bound by covenant, they were bound by implied agreement; that the agreement was not void for remoteness; that it made no difference that there was no covenant by the proposed purchasers; and that the vendors must be restrained from authorizing any purchaser to build contrary to the terms of the building scheme.—*Mackenzie* v. *Childers*, CH.D. KAY, J. 243—43 Ch. D. 205; 59 L. J. Ch. 188; 62 L. T. 98.

See also BUILDING SOCIETY, 7; DISCOVERY, 2; DIVORCE, 11; ESTOPPEL, 3; MARRIED WOMAN, 2; MORTGAGE, 2a, 6, 13, 15, 20; POWER OF APPOINTMENT, 5; SCOTLAND, LAW OF, 3; STAMP, 2; WAY, 1; WILL, 55.

DELAY.—See COMPANY, 4, 27, 36, 37; COSTS, 15; DIVORCE, 8; JUSTICE OF THE PEACE, 2, 9.

DEMURRAGE.—See SHIPPING, 21—25.

DENTIST:—

Erasing name from Dentists' Register—Discretionary duty—Judicial or ministerial act—Action for wrongfully erasing name—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 11.—Section 11 of the Dentists Act, 1878, provides that a register of dentists shall be kept by the registrar, and sub-section 5 provides that every registrar shall in all respects in the execution of his discretion and duty in relation to any register under the Act conform to any special directions given by the general council.

The general council having wrongfully directed the name of a person to be erased from the register on the ground that he had lost his qualification, a *mandamus* was issued directing them to restore his name to the register. In an action to recover damages for such wrongful erasure.

Held, that, as the duty imposed upon the general council by the Act as to giving directions to the registrar in regard to the register was discretionary, the duty was of a judicial character, and not merely ministerial, and the action was not maintainable without proof of malice.—*Partridge* v. *General Council of Medical Education and Registration*, C.A. 729—25 Q. B. D. 90.

DEPOSIT.—See BANKER, 3; COSTS, 4; INTEREST, 3; JURISDICTION, 2; LIMITATIONS, STATUTES OF, 6; VENDOR AND PURCHASER,

DEPOSITIONS.—See EVIDENCE, 6, 7.

DESERTION.—See DIVORCE, 7; HUSBAND AND WIFE, 2.

DESIGN:—

1. *Infringement—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 60.—The respondents registered a design for a kitchen range fire door with a moulding on the top which had the effect of closing the range to cold air. The appellants manufactured a range fire door with a moulding on the top which had the same effect.

Held, that, in considering whether there had been an infringement, the court ought not to take into consideration whether the two designs accomplished the same useful object; but that there had in fact been infringement by obvious imitation.—*Hecla Foundry Co.* v. *Walker*, H.L.—14 App. 550; 59 L. J. P. C. 46; 61 L. T. 736.

2. *Registration—Different classes—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 47, 58, 60, 90—*Designs Rules*, 1883, *schedule* 3.—Where a person has registered a design in one of the classes specified in schedule 3 to the Designs Rules, 1883, another person cannot register a similar design in another class for similar articles made of different materials.—*In re Read's Design*, CH.D. CHI., J. 88—42 Ch. D. 260; 58 L. J. Ch. 624; 61 L. T. 450.

3. *Registration—Novelty—Rectification of register—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 7.—A design which was already registered in one class was registered in another class for a similar article, but made of a different material.

Held, that the difference of material did not make the design "new or original" within section 47 of the Patents, Designs, and Trade-Marks Act, 1883, and that it must be removed from the register.

Le May v. *Welch*, 33 W. R. 33, 28 Ch. D. 24, followed.—*In re Bach's Design*, CH.D. KEK., J. 174—42 Ch. D. 661; 61 L. T. 763.

See also TRADE-MARK, 8.

DIRECTOR.—See BUILDING SOCIETY, 3, 4; COMPANY, 8—11, 15a, 15b, 28; MISREPRESENTATION, 1, 2.

DIRECTOR of PUBLIC PROSECUTIONS.—See CRIMINAL LAW, 1; EVIDENCE, 4.

DISCLAIMER.—See BANKRUPTCY, 30, 31; PATENT, 3; TRADE-MARK, 10.

DISCOVERY:—

1. *Inspection—Privilege—Communication with legal advisers—Instructions to counsel.*—L. brought an action of libel against B. in respect of an advertisement in a newspaper containing an account of certain chancery proceedings in which B. had successfully sued L. and others for infringement of his rights in a trade-mark. In an affidavit by B. mention was made of a draft advertisement prepared by him and settled by counsel before the publication complained of.

Held, that L. was not entitled to an order for the production of the draft advertisement for inspection.

Minet v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. 361, followed.—*Lowden* v. *Blakey*, Q.B.D. 64—23 Q. B. D. 332; 58 L. J. Q. B. 617; 61 L. T. 251.

2. *Inspection—Title deeds—Specific performance—Lease—Right of way—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78), *s.* 2.—The defendant agreed to accept from the plaintiff a lease of a house and land, with stipulations for the free use of a drive leading to the house. In an action for specific performance of the agreement to accept the lease, the defendant denied the plaintiff's title, alleging restrictive covenants, and that the drive was not on the land of the plaintiff, who had no power to grant an easement over it. The defendant applied for production of plaintiff's title deeds, which had been scheduled as referring only to the freehold title.

Held (varying the order of North, J.), that the defendant was not entitled to the deeds showing the plaintiff's title to the right of way, nor of any other title deeds to the property.—*Jones* v. *Watts*, C.A. 725—43 Ch. D. 574; 62 L. T. 471.

3. *Interrogatories—Infant.*—An infant will not be ordered to file an affidavit in answer to interrogatories.—*Mayor* v. *Collins*, Q.B.D. 349—24 Q. B. D. 361; 59 L. J. Q. B. 199; 62 L. T. 326.

4. *Interrogatories—Libel—Payment into court—Newspaper.*—In an action of libel against a newspaper, where the defendant takes upon himself the responsibility of defending the action, the plaintiff ought not to be allowed to inquire by interrogatories as to the sources of the defendant's information, even though the only issue in the action is as to the amount of damages, and the object of the interrogatories is to increase the damages by showing gross recklessness on the part of the defendant.

Hennessy v. *Wright*, 36 W. R. 879, followed.

Where the plaintiff asks how many copies of the paper containing the libel were issued to the public, the defendant cannot decline to give the number on the ground that it is inconvenient or even impossible to do so, but he must give the number approximately.—*Parnell* v. *Walter*, Q.B.D. 270—24 Q. B. D. 441; 59 L. J. Q. B. 125; 62 L. T. 76.

5. *Interrogatories—Privilege—Fraudulent removal of goods by tenant—Action by landlord for double value*—11 *Geo.* 2, *c.* 19, *s.* 3.—An action brought by a landlord under 11 Geo. 2, c. 19, s. 3, to recover double the value of goods fraudulently removed to avoid distress is a penal action, and the plaintiff cannot administer interrogatories to the defendants.

Decision of the Queen's Bench Division (*ante*, p. 639) affirmed.

Jones v. *Jones*, 37 W. R. 479, 22 Q. B. D. 425, approved.—*Hobbs* v. *Hudson*, C.A. 682—25 Q. B. D. 232; 62 L. T. 764.

6. *Interrogatories—Privilege—Incrimination—Jurisdiction.*—Where a person refuses to answer an interrogatory on the ground that his answer might tend to incriminate him, the court has jurisdiction to compel an answer if it be clearly satisfied that there is no reasonable ground for believing the answer would have that effect. But if a *corpus delicti* is shown to exist, very clear evidence must be produced to the court that danger to the deponent cannot reasonably be apprehended in order to induce the court to compel an answer.—*Bradley* v. *Clayton*, Q.B.D. (Ir.)—26 L. R. Ir. 405.

7. *Interrogatories—Privilege—Libel—Newspaper—Name of author of libel.*—If the proprietor of a newspaper when sued for libel admits the publication of the words complained of, the plaintiff cannot interrogate him as to the name of the writer of those words, unless the writer's identity is a fact material to one of the issues raised in the case.—*Gibson* v. *Evans*, Q.B.D.—23 Q. B. D. 384; 58 L. J. Q. B. 612; 61 L. T. 388.

8. *Interrogatories—Privilege—Solicitor—Corporation—Town clerk.*—In an action by a corporation the defendant administered interrogatories for the examination of the town clerk.

Held, that the town clerk could not object to answer any of the interrogatories on the ground that the information had been obtained by him as solicitor to the plaintiffs for the purpose of the action.—*Mayor, &c.*,

of Salford v. *Lever*, Q.B.D.—24 Q. B. D. 695; 59 L. J. Q. B. 248; 62 L. T. 434.

9. *Interrogatories—Security for costs—Discretion of court—Jurisdiction—Ord.* 31, *r.* 25, 26—The court or a judge has power to dispense with payment of the deposit imposed by ord. 31, r. 26, on a party seeking discovery.

Boarder v. *Lindsay*, 34 W. R. 473, disapproved.—*Newman* v. *London and South-Western Railway Co.*, Q.B.D. 348—24 Q. B. D. 454; 59 L. J. Q. B. 341; 62 L. T. 290.

10. *Interrogatories — Shipping — Collision.* — Two vessels, *The A.* and *The B.*, came into collision, and, in consequence of the collision, *The A.* sunk, and many of those persons on board her who would have been material witnesses on her behalf were drowned. Subsequently the owners of *The A.* instituted an action of damage against *The B.*, for the recovery of the damages they had sustained, and, before delivering their statement of claim, caused interrogatories to be administered to the owners of *The B.*, interrogating them respecting the circumstances of the collision. The owners of *The B.* refused to answer certain of such interrogatories, which, if answered, would have supplied the same information as was contained in their preliminary act.

The court, taking into consideration the difficulty the plaintiffs would have in obtaining evidence in support of their claim if the interrogatories were not fully answered, made an order requiring the owners of *The B.* to file a further and better answer.—*The Isle of Cyprus*, P.D. & A.D. 719—15 P. D. 134.

11. *Interrogatories—Striking out—Prolixity—Ord.* 31, *r.* 7.—Under ord. 31, r. 7, there is no power to strike out any part of a set of interrogatories. The objection that any particular interrogatories are prolix and unnecessary must be taken in the affidavit in answer.—*Sammons* v. *Bailey*, Q.B.D. 605—24 Q. B. D. 727; 59 L. J. Q. B. 342.

12. *Production of documents — Order on third party—Jurisdiction—Ord.* 37, *r.* 7.—The court has no jurisdiction under ord. 7, r. 37, to order the production before trial of documents by persons not parties to the action.

The object of that rule was not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist.

Decision of the Queen's Bench Division reversed.—*Elder* v. *Carter*, C.A. 612—25 Q. B. D. 194; 59 L. J. Q. B. 281; 62 L. T. 516.

13. *Production of documents—Privilege—Affairs of State—Agent of Colonial Government—Jurisdiction—Ord.* 31, *rr.* 12—14.—An action was brought against the Agent-General to a Colonial Government by persons who had entered into a contract with that Government and who claimed relief in respect of a sum of money which they alleged had been received by the defendant from that Government as trustee for the plaintiffs, and afterwards, in breach of trust, repaid by him to that Government. The defendant made an affidavit specifying certain documents, but objecting to produce some of them on the ground that they were the property of the Colonial Government (which was not a party to the action) and had been acquired by him merely in his capacity of Agent-General, and subject to the directions of that Government; and that the Prime Minister of the colony had directed him not to produce the documents, except under an order of the court, and to object to their production on the ground of the interest of the State and of the public service.

Held, that the court had no jurisdiction to order him to produce the documents in question.—*Wright* v. *Mills*, CH.D. KEK., J.—62 L. T. 558.

See also COMPANY, 12.

DISCRETION.—See ADMINISTRATION, 2, 8; ARBITRATION, 6; BANKRUPTCY, 10, 13; COMPANY, 12; DENTIST; DISCOVERY, 9; DIVORCE, 11; ECCLESIASTICAL LAW, 1; PRACTICE, 11; TRUSTEE, 5a.

DISTRESS.—See CRIMINAL LAW, 3; LANDLORD AND TENANT, 2—4.

DIVORCE:—

1. *Adultery of petitioner — Divorce — Marriage before decree absolute.*—A. obtained a decree *nisi* for a dissolution of his marriage on the ground of his wife's adultery. He married B. before the decree was made absolute, though six months had expired since the decree *nisi*. The decree was made absolute with the Queen's Proctor's consent, and A. and B. were remarried. B. afterwards committed adultery.

Held, that A.'s cohabitation with B. before the decree absolute did not bar his claim to relief.—*Styles* v. *Styles and Jackson*, P.D. & A.D.—62 L. T. 613.

2. *Adultery—Confession of wife—Dispensing with co-respondent.*—A wife confessed to having committed adultery with A., but her statement was the only evidence against A. A.'s address was unknown to the petitioner.

Held, that A. must be made a co-respondent.—*Cornish* v. *Cornish*, P.D. & A.D.—15 P. D. 131; 62 L. T. 667.

2a. *Adultery—Confession of wife—Dispensing with co-respondent.*—Where no evidence was obtainable against the man whom the respondent had indicated as the father of one of her illegitimate children, and who was believed to be in America, the court gave the petitioner leave to proceed without citing the alleged adulterer as a co-respondent.—*Bagot* v. *Bagot*, P.D. & A.D.—62 L. T. 612.

3. *Citation—Service out of the jurisdiction.*—The respondent and co-respondent were living in Switzerland. The co-respondent was a foreigner, and, by the Swiss law, anyone serving him with the citation would be liable to an action for damages.

The court dispensed with personal service, and allowed the petitioner to serve the citation by inclosing it in a registered letter, sending also in the same way a copy to the respondent, who was living in the same house with the co-respondent.—*Trubner* v. *Trubner and Christiani*, P.D. & A.D. 464—15 P. D. 24; 59 L. J. P. D. & A. 56; 62 L. T. 186.

4. *Petition—Substituted service—Registered letter.*—The court ordered substituted service on a husband of a divorce petition and citation by registered letter, the service not to be deemed complete service till the court should be satisfied that the respondent had actually received the registered letter.—*Cox* v. *Cox*, P.D. & A.D.—61 L. T. 698.

5. *Collusion — Concealment of material facts — Cross suits—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 30, 31—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 7.—An agreement between the parties to a divorce suit to withhold from the court knowledge of material facts tending to support a counter-charge of adultery amounts to collusion within the meaning of section 30 of the Divorce Act, 1857, and section 7 of the Matrimonial Causes Act, 1860, even if the facts suppressed prove insufficient in the event to establish the counter-charge; and therefore a party petitioning for dissolution of marriage is, by those sections, deprived of the right to a decree, where such an

agreement has been entered into by such party and has been acted upon, though the suppressed facts in the event come to the knowledge of the court and prove insufficient to establish a matrimonial offence against such petitioning party.

A wife presented a petition for dissolution of marriage against her husband for cruelty and adultery with four named persons, and the husband presented a counter-petition against the wife for adultery with a named person. After the trial had begun it was agreed between them that the charge against the wife and the charges of adultery against the husband with three of the four persons named should be dropped, but that his adultery with the fourth should be proved, together with the charge of cruelty, so as to allow the wife to get a decree. The husband acted on the agreement, and, though the wife's counsel refused to do so, the jury found the wife not guilty of the adultery charged against her, and the husband not guilty of adultery with the three named persons, but guilty with the fourth, and guilty of cruelty. The court granted a decree *nisi*, but referred the case to the Queen's Proctor, who accordingly intervened. At the second trial the jury found that there had been collusion, and that material facts had been withheld from the knowledge of the court, but, on the question whether the wife had committed adultery, they disagreed and brought in no finding. Upon these findings Butt, J., discharged the decree *nisi*.

Held, that the decree *nisi* was rightly discharged, although the facts withheld had, when disclosed, proved insufficient to establish the wife's adultery.

Hunt v. *Hunt*, 47 L. J. P. D. & A. 22, 26 W. R. Dig. 79, approved.

Alexandre v. *Alexandre*, 18 W. R. 1087, L. R. 2 P. & D. 164, doubted.—*Butler* v. *Butler* (2); *Butler* v. *Butler and Burnham* (2), C.A. 390—15 P. D. 66; 59 L. J. P. D. & A. 25; 62 L. T. 344.

6. *Damages.*—A claim for damages for adultery is founded on the assumption that the husband has suffered injury by the co-respondent's acts, and it must be proved that the injury was caused by the latter, without any fault of the husband. The duty of the jury is not to punish the co-respondent, but to compensate the petitioner. In estimating the damages, the jury may consider the wife's life before marriage, and also any earnings of hers of which the husband has had the benefit.—*Darbishire* v. *Darbishire and Baird*, P.D. & A.D.—62 L. T. 664.

7. *Desertion.*—A husband brought to his house a woman with whom he had had immoral intercourse. The wife said that either she or the other woman must leave the house. The husband said that she might do as she pleased, but the other woman would remain. The wife left the house, and no further cohabitation took place.

Held, that the husband had been guilty of desertion. —*Dickinson* v. *Dickinson*, P.D. & A.D.—62 L. T. 330.

8. *Dismissal of suit—Decree* nisi—*Decree absolute—Delay.*—A wife obtained a decree *nisi* for a dissolution of marriage, and afterwards presented a petition for permanent maintenance. While the petition was before the registrar, the respondent applied to dismiss the suit for want of prosecution, on the ground that there had not been an application to make the decree absolute.

Held, that the application must be refused with costs.—*Southern* v. *Southern*, P.D. & A.D.—62 L. T. 668.

9. *Evidence.*—In a husband's suit for divorce it was proved that the petitioner and a police officer traced the respondent and co-respondent to the house of the sister of the latter, and that admissions were there made by the respondent, also that certain allegations were made against the co-respondent, who said nothing in reply.

Held, that there was not sufficient evidence of adultery.—*White* v. *White and Jerome*, P.D. & A.D.—62 L. T. 663.

10. *Lunacy of petitioner—Guardian* ad litem—*Jurisdiction—Divorce Rules, r.* 196.—An order ought not to be made, under rule 196 of the Divorce Rules, appointing a guardian *ad litem* to a person alleged to be of unsound mind where there is a substantial and *bonâ fide* dispute whether such person is or is not of unsound mind.

Order of Butt, J., affirmed.

Semble (*per* Lindley and Lopes, L.JJ.), that the power given by rule 196 to appoint a guardian *ad litem* to a person of unsound mind is only exercisable where such person has been so found by inquisition.—*Routh* (otherwise *Fry*) v. *Fry*, C.A. 615—15 P. D. 50; 59 L. J. P. D. & A. 43; 62 L. T. 501.

11. *Maintenance—Deed*—Dum sola *clause—Discretion of judge—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.—It is within the discretion of the judge, under the 32nd section of the Divorce Act, 1857, upon a decree for dissolution of marriage being made, to order the husband to secure to the wife, by way of maintenance, an annual sum for her life absolutely, without limiting the payment of it by a "*dum sola* clause." This discretion ought to be exercised in each case with regard to the facts thereof and the conduct and circumstances of the parties, as prescribed in the section, and no *primâ facie* rule ought to be laid down with reference to the insertion or omission of the above words limiting the payment of the annual sum to the wife with respect to the contingency of her marrying again.

Decision of Butt, J., affirmed.—*Lister* v. *Lister*, C.A. 81—15 P. D. 4; 62 L. T. 90.

12. *Misconduct of petitioner—Cruelty—Previous suit—Alimony—Non-payment.*—In 1887 a wife obtained a judicial separation on the ground of cruelty, and an order for the custody of her only child. In 1888 the husband was ordered to pay £80 a year for permanent alimony, but did not do so. A deed was afterwards signed, whereby the wife relinquished the custody of the child, in consideration of a sum of £75. The husband afterwards filed a petition for a divorce on the ground of his wife's adultery, of which he had become aware before the deed was signed.

Held, that the husband was not precluded by the previous decree nor by the deed from obtaining a decree.—*Badham* v. *Badham and Gorst*, P.D. & A.D.—62 L. T. 663.

13. *Misconduct of petitioner—Neglect.*—The parties were married in 1876, the husband's wages being about twenty-four shillings per week. They separated in 1878, and the wife became a domestic servant. The only complaint made by the husband was that his wife had got him into debt. The wife afterwards committed adultery.

Held, that the husband had been guilty of such misconduct as to justify the court, in its discretion, in refusing to dissolve the marriage.—*Starbuck* v. *Starbuck and Oliver*, P.D. & A.D.—61 L. T. 876.

13a. *Misconduct of petitioner—Wilful separation——Reasonable excuse—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—The petitioner, an officer of marines, when only twenty years of age, in December, 1883, married the respondent, relying upon statements made by her as to her having been previously entrapped into a ceremony of marriage with a man whom she afterwards found had a wife then living. The petitioner, soon after his marriage, found that his

wife's statements as to the alleged bigamous marriage were false, and that she had, in fact, been guilty of pre-marital incontinence, and was in an advanced state of pregnancy. Still believing, however, that her former statements, as to her being possessed of private means, were true, the petitioner told her to go to her friends, and he never contributed to her support, and did not see her again for about seven years, being most of that time on service. During that time the respondent committed adultery.

Held, that the petitioner's conduct did not disentitle him to relief.—*Kennedy* v. *Kennedy and Schurch*, P.D. & A.D.—62 L. T. 705.

14. *Parties — Wife's suit — Counter-charges of adultery—Appearance by alleged adulterer—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 2.—In a wife's suit for a dissolution of marriage the respondent charged the petitioner with adultery with A., but did not pray for a dissolution of marriage.

The court allowed A. to file an answer.—*Wheeler* v. *Wheeler and Rhodes*, P.D. & A.D.—14 P. D. 154; 58 L. J. P. D. & A. 65; 61 L. T. 306.

15. *Petition — Affidavit — Verification — British consul petitioner—Matrimonial Causes Act*, 1858 (21 & 22 *Vict. c.* 108), *s.* 20.—Where the petitioner was a British consul in a foreign country, and the only person there before whom the affidavit in support of the petition could be filed, the court allowed the affidavit to be verified by the petitioner's solicitor to the best of his knowledge and belief.—*Russell* v. *Russell and Maclaren*, P.D. & A.D.—59 L. J. P. D. & A. 13.

16. *Variation of settlements—Appointment of new trustees—Matrimonial Causes Act*, 1859 (32 & 33 *Vict. c.* 61), *s.* 5.—A marriage was dissolved on the ground of the wife's adultery. The marriage settlement gave the wife a first life interest in the half the income derived from herself. There was a joint power to appoint new trustees. The husband held a public appointment, and his income was likely to be increased by promotion. An order was made for variation of the settlement, the wife's interest in the income derived from the husband being extinguished, the trustees to pay to the husband £50 a year for the maintenance of the infant child of the marriage.

Held, that the joint power to appoint new trustees must be retained.—*Tupper* v. *Tupper and Terrell*, P.D. & A.D.—62 L. T. 665.

17. *Variation of settlements—Variation of order—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—An order for the variation of a marriage settlement after a decree dissolving a marriage cannot be afterwards further varied on the ground of a change of circumstances after the order.

Decision of Butt, J., affirmed.—*Benyon* v. *Benyon and O'Callaghan*, C.A.—15 P. D. 54; 59 L. J. P. D. & A. 39; 62 L. T. 381.

18. *Wife's costs—Decree nisi—Payment into court—Payment out.*—Where a sum of money had been paid into court before trial, on the order of a registrar, to secure the wife's costs at the trial, and a decree *nisi* was pronounced on her petition, the court, on appeal from chambers, refused to order payment out to the wife or her solicitor of such sum of money before the decree was made absolute.—*Butler* v. *Butler, Butler* v. *Butler and Burnham*, P.D. & A.D. 272—14 P. D. 160; 58 L. J. P. D. & A. 70; 62 L. T. 477.

See also ATTACHMENT, 1, 2; COSTS, 7—9; HUSBAND AND WIFE, 1—9; JUSTICE OF THE PEACE, 4; PRACTICE, 3, 38.

DOGS ACT.—See JUSTICE OF THE PEACE, 7.

DOMICILE.—See ADMINISTRATION, 18; BANKRUPTCY, 24; CANADA, LAW OF, 4; COMPANY, 17B.

DONATIO MORTIS CAUSA.—See GIFT, 2.

EASEMENT.—See LANDS CLAUSES CONSOLIDATION ACT, 3; LIGHT, 1, 2; WAY, 1.

ECCLESIASTICAL LAW:—

1. *Jurisdiction—Bishop—Discretion—Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9—Mandamus.—A representation under section 9 of the Public Worship Regulation Act, 1874, was made by qualified persons to the bishop to the effect that certain sculptured figures in a reredos erected in the cathedral church of his diocese tended to encourage superstitious ideas and unauthorized devotions. The bishop declined to forward the representation to the ecclesiastical court, on the ground that, having considered all the circumstances of the case, he had come to the opinion that the main question of principle at issue had been already decided in a former case, and that, the difference of detail in the present reredos from that complained of in the former case being of so little importance in principle, further litigation would be mischievous.

Held (reversing the judgment of the Queen's Bench Division), that the bishop, having declared that he had considered all the circumstances of the case, and not having been shown to have declined to consider any circumstance of the case brought before him, nor to have considered and acted upon any circumstance outside the case before him, had acted within his jurisdiction; that this jurisdiction gave him a discretionary power to stay the proceedings; and that the court had no power to review his reasons for the exercise of such discretion, provided he had acted within his jurisdiction.—*Reg.* v. *Bishop of London*, C.A. 214—24 Q. B. D. 213; 59 L. J. Q. B. 169; 62 L. T. 167.

2. *Jurisdiction—Court of Archbishop of Canterbury.*—The Archbishop of Canterbury has jurisdiction, either sitting alone or with assessors in the archiepiscopal court of his province, to cite a bishop of the province to appear and answer a petition alleging offences on his part against the ecclesiastical law in reference to matters of ritual.—*Read* v. *Lincoln (Bishop of)*, COURT OF ARCHBISHOP OF CANTERBURY—14 P. D. 88; 61 L. T. 403.

3. *Jurisdiction—Misconduct of clerk—Scandal Suspension.*—In a suit in the Court of Arches against a clerk in orders, the articles alleged a conviction against the clerk for drunkenness and riotous conduct in a public place, and prayed that he might be punished for the scandal thereby caused. The respondent by his plea alleged that the conviction had been obtained by perjury, denied the charges of drunkenness, &c., and that the conviction had caused scandal, and asked for a full inquiry into the facts.

Held, that the plea must be struck out, and that the Court of Arches had jurisdiction to suspend the clerk *ab officio* on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed.—*Borough* v. *Collins*, ARCHES COURT—15 P. D. 81.

4. *Minister—Bishop—Rubrics—Acts of Uniformity* (1 *Eliz. c.* 2 *and* 13 & 14 *Car.* 2, *c.* 4).—The word "minister" in the rubrics relating to the administration of the Holy Communion must be taken to include a bishop, and, therefore, a bishop officiating as minister in the service of the Holy Communion is bound to celebrate it in the order and form prescribed by the Book of Common Prayer.—*Read* v. *Lincoln*

(*Bishop of*), *No.* (2), COURT OF ARCHBISHOP OF CANTERBURY—14 P. D. 148.

See also VENDOR AND PURCHASER, 13.

ELECTION.—See MARRIED WOMAN, 2.

ELECTION LAW:—

1. *County council—Occupation—Service franchise—Poor Rate Assessment Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 7, 19—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 32—*Representation of the People Act*, 1885 (48 & 49 *Vict. c.* 3), *ss.* 2, 3—*County Electors Act*, 1888 (51 & 52 *Vict. c.* 10), *s.* 2 (1).—Certain labourers resided in cottages situated on the farms of their employers; they were permitted, but not required, to live in the cottages, on condition that they were to give up possession when their employment ceased, and the rent was either calculated in their wages or was reduced in consequence of their employment. The rates for the cottages were paid by the farmers who employed them, but the names of the labourers appeared in the rate-book as occupiers. They claimed to be registered in Division 1 as parliamentary voters in respect of their occupation, and to be enrolled as burgesses.

Held, that the facts showed an occupation by the claimants as householders, and not by virtue of service; that it was not necessary for the claimants to actually pay or tender the rates in accordance with section 32 of the Municipal Corporations Act, 1882; and that the claimants possessed a burgess qualification, and were entitled to be registered as both parliamentary and county electors.—*Marsh* v. *Estcourt*, Q.B.D. 495—24 Q. B. D. 147; 59 L. J. Q. B. 100.

2. *County council—Separate divisions—Separate qualifications—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 2, 75—*County Electors Act*, 1888 (51 & 52 *Vict. c.* 10), *s.* 7 (4)—*Municipal Corporations Act* 1882 (45 & 46 *Vict. c.* 50), *ss.* 45, 51 (2) 59.—Under the Local Government Act, 1888, an elector is not entitled to vote at an election of county councillors in more than one electoral division of an administrative county, although duly registered under the County Electors Act, 1888, in more than one division of the same county.

Judgment of the Queen's Bench Division (38 W. R. 383, 24 Q. B. D. 186) affirmed.—*Knill* v. *Towse*, C.A. 521—24 Q. B. D. 697; 59 L. J. Q. B. 455; 62 L. T. 259.

3. *Municipal election—Corrupt practices—Report of commissioner—Setting aside—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 92, 93, 100—*Corrupt Practices Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 38—*Municipal Elections* (*Corrupt Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23.—When a commissioner appointed to try a municipal election petition has reported persons guilty of corrupt practices, the High Court has no power to interfere with his report on the ground that the notices prescribed by section 38 of the Corrupt Practices Act, 1883, which is incorporated in part 2 of schedule 3 of the Municipal Elections (Corrupt Practices) Act, 1884, were not given to the persons so reported.—*Preece* v. *Harding*, Q.B.D. 350—24 Q. B. D. 110; 59 L. J. Q. B. 82; 61 L. T. 837.

4. *Parliamentary election—Amendment—Lodger—Declaration—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 26—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28 (2)—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 18, *schedule* 2.—A lodger, claiming as a sole lodger, omitted to erase in his form of declaration the words "or as joint tenant with."

Held, that the revising barrister had power to amend the declaration by striking out the above words.—*Ainsley* v. *Nicholson*, Q.B.D.—24 Q. B. D. 144; 59 L. J. Q. B. 102; 61 L. T. 809.

5. *Parliamentary election—Claim—Lodger—Claim not signed by claimant—Ratification of signature*—31 & 32 *Vict. c.* 49, *ss.* 4 (3), 5—48 *Vict. c.* 17, *schedule* 1, *Part III.*, *Form No.* 31.—A lodger's claim must (if he can write) be signed or marked by his own hand; the subscription of the claimant's name by another person, though at the request and in the presence of the claimant, is not sufficient.—*Hanbridge* v. *Beveridge* C.A. (Ir.)—26 L. R. Ir. 423.

6. *Parliamentary election — Claim — Lodger — Delay—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 22—*Registration Act*, 1885 (47 & 48 *Vict. c.* 15), *s.* 18.—If a voter on the list of lodgers does not send a new claim to the overseers by the appointed day, his claim will not be allowed, even if he has on the appointed day sent it to another person, to be forwarded by the latter to the overseers, and the revising barrister cannot in such a case allow the lodger's claim.—*Whitwell* v. *Yeoman*, Q.B.D.—59 L. J. Q. B. 96; 61 L. T. 811.

7. *Parliamentary election — Disqualification — Absence—Detention in police station.*—A. was arrested during his qualifying year, and taken to a police station on a charge of being drunk and disorderly. A few hours later he was released on bail. On the following day he was fined, and he paid the fine and costs.

Held, that A. was not disqualified as a voter.—*Criglington* v. *Gallagher*, C.A. (Ir.)—26 L. R. Ir. 134.

8. *Parliamentary election — Disqualification — Absence—Seaman—Coasting trade.*—A sailor engaged in the coasting trade who has entered into an agreement under the Merchant Shipping Acts to serve for a period of six months during his qualifying period, with a liability to be called upon to serve at any time during the six months, is disqualified by such absence from the occupying franchise.—*Duffy* v. *Chambers*, C.A. (Ir.)—26 L. R. Ir. 100.

9. *Parliamentary election — Inhabitant occupier—Valueless dwelling-house*—30 & 31 *Vict. c.* 102, *s.* 3 (b).—The inhabitant occupier of a dwelling-house which the official valuer has found to be of no value was so entered in the valuation book, and in respect of which accordingly no rate was struck.

Held, not entitled to the franchise.—*Owens* v. *Hanrahan*, C.A. (Ir.)—26 L. R. Ir. 418.

10. *Parliamentary election—Lodger—Rent—Value of lodgings—Representation of the People* (*Ireland*) *Act*, 1868 (31 & 32 *Vict. c.* 49), *s.* 4.—The clear yearly value of lodgings must be ascertained by what they actually produce.—*Macrea* v. *Buchanan*, C.A. (Ir.)—26 L. R. Ir. 129.

11. *Parliamentary election — Objection—Notice—Service—Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 17.—An objector caused a notice of objection to be placed in the letter-box of a house said to be occupied by the voter objected to. The voter had not resided there for two years, the objector did not know his right address, and there was no reason to suppose that the notice had reached him.

Held, that the notice had not been duly served within section 17 of the Parliamentary Registration Act, 1843.—*Gifford* v. *Chelsea Overseers*, Q.B.D.—24 Q. B. D. 141; 59 L. J. Q. B. 98; 61 L. T. 810.

12. *Parliamentary election — Occupation—Successive occupation—Service franchise—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 26—*Representation of the People Act*, 1885 (48 & 49 *Vict.*

c. 3), *ss.* 2, 3.—Occupation during the qualifying period of two dwelling-houses in immediate succession, the first as by virtue of service, and the second as a householder, will confer a qualification for the parliamentary occupation franchise.—*Nicholson* v. *Yeoman*, Q.B.D.—24 Q. B. D. 145; 59 L. J. Q. B. 104; 61 L. T. 833.

13. *Parliamentary election—Poor rates—Arrears—Non-payment—Poor Law Amendment (Ireland) Act*, 1849 (12 & 13 *Vict. c.* 104), *s.* 19—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.—An occupier of premises is not disqualified by the non-payment of arrears of poor rate, the recovery of which is barred by statute.—*Macgrath* v. *Buchanan*, C.A. (Ir.)—26 L. R. Ir. 124.

ELEPHANT.—See TRESPASS.

EMPLOYERS' LIABILITY ACT.—See MASTER AND SERVANT, 3—5.

ENDOWED SCHOOLS ACT.—See CHARITY, 2.

EQUITABLE EXECUTION.—See PRACTICE, 20.

EQUITABLE MORTGAGE.—See MORTGAGE, 6, 13, 14.

EQUITY of REDEMPTION.—See MORTGAGE, 19—22; TRUSTEE, 5.

EQUITY to SETTLEMENT.—See MARRIED WOMAN, 2.

ESCROW.—See MORTGAGE, 2a.

ESTOPPEL:—

1. *Bailment*—Jus tertii.—An action was brought by bailors against bailees for non-delivery of goods.

Held, that the bailees were estopped from setting up the title of third parties, under whose authority they did not claim to defend, and to whom they had not delivered the goods, although the property in the goods might have passed to such third parties since the date of bailment.—*Rogers* v. *Lambert*, Q.B.D. 542—24 Q. B. D. 573; 59 L. J. Q. B. 250; 62 L. T. 694.

2. *Company—Transfer of stock—Forgery by executor—Liability of co-executor—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 18.—One of two executors cannot make a valid transfer of shares or stock registered in their names under section 18 of the Companies Clauses Consolidation Act, 1845, though their names are entered in the register as executors.

Railway stock was registered in the names of two executors as such. One of them sold certain portions of the stock without the knowledge of the other, and executed transfers to the purchasers, to which he forged the signature of his co-executor, and the transfers were duly registered by the company. On discovering the frauds, the executor whose signature had been forged brought an action against the company to compel them to replace the stock.

Held, that, under section 18 of the Companies Clauses Consolidation Act, 1845, the two executors in whose names the stock was registered became joint shareholders in respect of such stock, though their names were entered in the register as executors; and that the stock could only be transferred by a transfer duly executed by both, and therefore the transfers were void.

Upon the occasion of the last forged transfer, the company sent the plaintiff notice that the transfer was at their office, and would be registered unless the company received notice to the contrary. The plaintiff, acting on the advice of her co-executor, did not answer this notice.

Held, that the plaintiff was not estopped from alleging the invalidity of the transfer.—*Barton* v. *London and North-Western Railway Co.*, C.A. 197—24 Q. B. D. 77; 59 L. J. Q. B. 33; 62 L. T. 164.

3. *Deed—Recital.*—In 1869 A. mortgaged land to B. In 1877, after B.'s death, the trustees for sale under his will assigned the mortgage to D., A. joining in the deed. A. had in 1872 leased the land to M. for ten years from 1870. After the expiration of the lease M. continued to pay rent to A. In 1887 the Irish Land Commission made an order, on M.'s application, fixing a fair rent. In the same year D. sued for possession. At the trial he produced the deed of 1877, which recited B.'s devise to trustees for sale, but he did not produce the will itself.

Held, that M., who claimed through A., was estopped by the recital in the deed.—*Clarke* v. *Hall*, C.A. (Ir.)—24 L. R. Ir. 316.

4. Res judicata—*Foreign judgment—Interlocutory judgment.*—In order that an action may be brought in this country on a foreign judgment, such judgment must be final and unalterable in the court which pronounced it.

Decision of the Court of Appeal affirmed.—*Nouvion* v. *Freeman*, H.L. 581—15 App. 1; 59 L. J. Ch. 337; 62 L. T. 189.

5. Res judicata—*Judgment—Foreign judgment—Fraud.*—In an action brought in England to enforce a foreign judgment, it is competent for the defendant to raise a defence alleging fraud, even if the fraud alleged is such as necessitates a re-trial in England of the merits adjudicated upon by the foreign court.

Abouloff v. *Oppenheimer*, 31 W. R. 57, 10 Q. B. D. 295, followed.

Decision of the Queen's Bench Division affirmed.—*Vadala* v. *Lawes*, C.A. 594—25 Q. B. D. 310; 62 L. T. 701.

See also COMPANY, 17a; COSTS, 16; CRIMINAL LAW, 2; INSURANCE, 6; LANDLORD AND TENANT (IRELAND), 11; TRUSTEE, 5.

EVIDENCE:—

1. *Affidavit—Commissioner to administer oaths—Ord.* 36, *r.* 34.—Observations on the manner in which affidavits are sworn before commissioners to administer oaths.—*Bourke* v. *Davis*, CH.D. KAY, *J.* 167—62 L. T. 34.

2. *Affidavit—Company—Cross-examination before examiner—Practice—Ord*, 37, *rr.* 21, 22.—An application was made by a shareholder for the rectification of the register of a company. When the application came on for hearing, the shareholder applied to have the witnesses who had made affidavits on behalf of the company cross-examined upon their affidavits, and an order was made that the witnesses on both sides should attend for cross-examination before an examiner. On attending before the examiner, the question was raised whether the shareholder's witnesses or the company's witnesses ought to be cross-examined first.

Held, that the shareholder's witnesses should be cross-examined first if the company desired to cross-examine them.—*In re Doré Gallery Co.*, CH.D. NOR., *J.* 491—62 L. T. 758.

3. *Affidavit—Description of deponent—Married woman.*—The affidavit of a married woman must state the description of her husband.—*Ellam* v. *Ellam*, P.D. & A.D.—62 L. T. 331.

4. *Criminal law—Director of Public Prosecutions—Public prosecution—Disclosure of name of informer—Prosecution of Offences Act*, 1879 (42 & 43 *Vict. c.* 22), *ss.* 2, 7.—In an action for conspiracy to procure the Director of Public Prosecutions to institute a criminal prosecution against the plaintiff, the Director

of Public Prosecutions was called as a witness for the plaintiff, and asked to state the name of the informer, and, if he had a statement in writing, to produce it.

Held, that, as a prosecution instituted by the Director of Public Prosecutions is a public prosecution, the question was not admissible.

Attorney-General v. *Briant*, 15 M. & W. 169, approved and followed.—*Marks* v. *Beyfus*, C.A. 705.

5. *Criminal law—Unsworn evidence of girl under thirteen—Conviction on a count for indecent assault—24 & 25 Vict. c. 100—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict.* c. 69), *s.* 4.—The prisoner was indicted under the Criminal Law Amendment Act, 1885, for an attempt to defile a girl under the age of thirteen years. The child's evidence was, under that section, received, though not given upon oath. In a second count the prisoner was charged with an indecent assault under 24 & 25 Vict. c. 100. He was acquitted upon the first count, and found guilty upon the second on the evidence of the child.

Held, that the unsworn evidence was inadmissible on the second count, and the conviction was wrong.

Reg. v. *Wealand*, 36 W. R. 576, 20 Q. B. D. 827, distinguished.—*Reg.* v. *Paul*, C.C.R. 704—25 Q. B. D. 202; 62 L. T. 845.

6. *Depositions—Cross-examination—Information.*—On the trial of an indictment for the murder of A., a police officer, who had been killed while endeavouring to execute a warrant of arrest, a police officer, who was called as a witness for the prosecution, swore that he knew the prisoner, and saw him strike A. In cross-examination, the witness stated that he believed he had stated before the magistrates the names of all the persons present when A. was killed, but that he had made a mistake. The prisoner's name was not mentioned in his deposition then taken. The counsel for the Crown then put in evidence an earlier information by the witness, in which he had referred to the prisoner as taking part in the attack on A. The judge allowed the witness to be asked whether he had, at the date of the information, stated on oath that he saw the prisoner throw stones at A., who was lying on the ground. The witness answered the question in the affirmative.

Held, that the evidence was admissible.—*Reg.* v. *Coll*, C.C.R. (Ir.)—24 L. R. Ir. 522.

7. *Depositions—Cross-examination—Summing up.*—Upon a trial at quarter sessions a witness for the prosecution admitted in cross-examination that her evidence differed from the evidence which she had given before the magistrates. Neither the counsel for the prosecution nor the counsel for the defence put in the witness's deposition, but the chairman of the court read the deposition in his summing up.

Held, that the reading of the deposition to the jury was not a misreception of evidence.—*Reg.* v. *Garner*, C.C.R.—61 L. T. 699.

8. *Legitimacy — Baptismal register — Entry in course of business.*—To prove the legitimacy of A. the defendant tendered an entry in a Roman Catholic parochial register of marriages and baptisms of a parish in Ireland, dated in 1804, and signed by a deceased curate of the parish, and describing A. as the child of H. and M., his wife. It was the curate's duty, when baptizing a child, to register the baptism, and to state therein whether the child was legitimate or not.

Held, that the entry was inadmissible in evidence, because it was not proved to be contemporaneous.—*Ryan* v. *Ring*, P. & D.D. (Ir.)—25 L. R. Ir. 184.

9. *Legitimacy—Conduct—Bastardizing issue—Law of Evidence Amendment Act*, 1869 (32 & 33 *Vict.* c. 68), *s.* 3—*Settlement—Revocation.*—By a marriage settlement a sum of £10,000 was vested in trustees upon trust (subject to trusts of the income in favour of the husband and wife successively) for the issue of the marriage as the husband and wife should by deed, with or without power of revocation and new appointment, jointly appoint, with a trust in default of such appointment and of any appointment by the survivor, if there should be only one child who should attain twenty-one or marry, as to one moiety of the trust fund, for that only child, and, as to the other moiety, for the husband. The marriage took place on the 30th of April, 1878. A legitimate child, R., was born on the 2nd of July, 1881, and two illegitimate children, L. and M., on the 26th of April, 1885, and the 25th of June, 1886, respectively. A decree *nisi* for the dissolution of the marriage was obtained by the husband on the 3rd of November, 1886, on account of the wife's adultery with W. By a deed dated the 11th of May, 1887, the husband and wife irrevocably appointed that, subject to the interests of the husband and wife, one moiety of the fund should be held in trust for R. absolutely if and when she should attain twenty-one or marry under that age; and they also appointed the other moiety to R. in the same way, but subject to a power of revocation and new appointment reserved to the husband. The decree *nisi* was made absolute on the 17th of May, 1887, and, by a deed dated the 18th of May, 1887, and made between the husband and divorced wife, the latter released her interest in the trust fund in the event of her surviving, and also her power of appointment over the fund. By a deed poll dated the 30th of November, 1887, the husband revoked the appointment of the second moiety of the trust fund to R., to the intent that it might go as if that appointment had not been made, but might be subject to any further appointment by him. The husband claimed a declaration that one moiety of the trust fund ought to be held by the trustees of the marriage settlement upon the trusts affecting the same in case there was no child of the marriage—that is, for the husband absolutely—on the ground that the children L. and M. were illegitimate.

Held, (1) that statements by W. respecting the birth of L. were admissible as evidence of conduct tending to prove that W. was the father of L.; (2) that the contents of the entry of the birth of the second child could be proved by a copy, which had been compared by a witness with the original, and been found to be accurate; (3) that the evidence of the husband was not admissible, after the dissolution of marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born before the date of such dissolution; (4) that the reservation in the deed of the 11th of May, 1887, of the power of revocation to the husband was invalid.—*Burnaby* v. *Baillie*, CH.D. NOR., J. 125—42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634.

10. *Newspaper—Printer and publisher—Newspaper Libel and Registration Act* (44 & 45 *Vict.* c. 60)—*Criminal Law* (*Ireland*) *Act* (50 & 51 *Vict.* c. 20), *s.* 19.—"Intimidation" in section 19 of 50 & 51 Vict. c. 20 may be by words published, and "personal intent" may be inferred from the words themselves. A statement contained in the issue of a newspaper that A. was the printer and publisher of the same at the office, and the fact that the return of the proprietor's name, address, and residence required by the Newspaper Libel Act purported to be made and signed by A., after whose name the words "printer and publisher" appeared, is not evidence that A. was the printer and publisher of particular issues of the paper.—*Whelan* v. *Fisher*, Q.B.D. (Ir.)—26 L. R. Ir. 340.

11. *Pedigree—Parish registers—Scotch registers—*

Certified copies—Scotch parochial registers and certified extracts therefrom are receivable in evidence in England.—Proceedings in a sheriff's court in Scotland are admissible in cases of pedigree.

Judgment of the Court of Appeal (35 W. R. 75, 18 Q. B. D. 796) affirmed.—*Kennedy* v. *Lyell*, H.L. 353—14 App. 437; 59 L. J. Q. B. 268; 62 L. T. 77.

12. *Presumption of death—Probate—Dispensing with advertisements.*—Where a testator had gone abroad and had not been heard of for many years, and the estate was of very small value, the court made a grant of probate without advertisements.—*In the Goods of Patton*, P. & D.D. (Ir.)—23 L. R. Ir. 435.

See also BILL OF EXCHANGE; COMPANY, 5, 8, 12; COSTS, 25; DAMAGES, 2; DIVORCE, 9; FRAUDS, STATUTE OF, 2; JUSTICE OF THE PEACE, 4; MARRIED WOMAN, 6; MISREPRESENTATION, 1; POOR LAW, 5; PRACTICE, 16, 17; SHIPPING, 6; TRUSTEE, 6.

EXECUTION.—See ARBITRATION, 4; COMPANY, 19, 24; COUNTY COURT, 7a; LANDLORD AND TENANT, 4; MARRIED WOMAN, 9; MORTGAGE, 10; PRINCIPAL AND AGENT, 6; SHERIFF, 1, 2; WILL, 49—51.

EXECUTOR:—

1. *Administration action—Parties—Creditor—Executor universal legatee.*—An executor cannot maintain an administration action against one creditor, even if the executor is universal legatee.—*Mandeville* v. *Mandeville*, C.A. (Ir.)—23 L. R. Ir. 339.

2. *Distribution of assets—Advertisements for creditors—Lord St. Leonards' Act* (22 & 23 *Vict.* c. 35), *s.* 29—*Ord.* 55, *rr.* 44, 46.—There is no rule of practice in the Chancery Division rendering it in every case necessary for the sufficiency of the publication of notices to creditors and others, under section 29 of Lord St. Leonards' Act, to have an advertisement of such notice inserted in the *Times*, or some other London daily newspaper, in addition to the *London Gazette*.

On the death of a testator, who had for many years previously resided in Lancashire, where he had carried on the business of a farmer, the usual statutory notice to creditors and others was published by his executor in the *London Gazette* and in three local weekly newspapers, but not in the *Times* nor in any other London daily newspaper.

Held, that there had been sufficient publication of the notice to discharge the executor from liability.

The notice was dated the 16th of September, 1875, and the advertisement was published in the local newspapers on the 17th and 18th of September, and in the *London Gazette* on the 21st of September. The time limited by the notice for sending in claims was, not one month from the date of publication of the last advertisement, but one month from the date of the notice.

Held, that the notice was sufficient.—*Doughty* v. *Townson*, C.A. 48—43 Ch. D. 1; 59 L. J. Ch. 18; 61 L. T. 531.

3. *Married woman—Will—Probate*—Choses in action—*Rights of husband—Probate Rules*, 1887, *r.* 15.—A married woman—married before the Married Women's Property Act, 1882—possessing no separate estate, and no testamentary capacity by assent of her husband or otherwise, made a will, by which she appointed an executor and bequeathed all her property to persons other than her husband. She died in July, 1887, and probate of the will was granted to the executor in the ordinary form, in pursuance of rule 15 of the Probate Rules of March, 1887. The husband brought an action in the Chancery Division against the executor to recover certain *choses in action* to which the wife was entitled at the time of her death.

Held, that the effect of the grant of probate in general form to the executor was to entitle the executor to get in all assets of the wife, including the *choses in action* which the wife had no power to dispose of by will, but that the husband was beneficially entitled to these *choses in action*, and was entitled to have them transferred to him by the executor, subject to the same deductions as they would have been subject to if the husband had taken out administration under the old practice.

Decision of Kay, J. (37 W. R. 213, 40 Ch. D. 165) reversed.—*Smart* v. *Tranter*, C.A. 530—43 Ch. D. 587; 59 L. J. Ch. 363; 62 L. T. 356.

4. Plene administravit—*Payment—Preference—Simple contract creditors—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 25 (11).—After action brought against an administrator by a creditor of the intestate, the administrator paid another creditor in full, and pleaded that he had no assets out of which to satisfy the debt.

Held, that the payment was a good answer to the action.—*Vibart* v. *Coles*, C.A. 359—24 Q. B. D. 364; 59 L. J. Q. B. 152; 62 L. T. 551.

5. *Retainer—Executor of executor.*—B., as executor of A., received £2,010, the amount of a policy of insurance of A. on his own life. B. died, and E., his executor, made his assets liable for £8,250, as security for A.

Held, that E. was bound to retain the £2,010 as security against the £8,250.—*Poe* v. *Shortt*, M.R. (Ir.)—23 L. R. Ir. 328.

See also ADMINISTRATION, 1, 8, 11, 22, 25; COMPANY, 17a, 25; ESTOPPEL, 2; EVIDENCE, 12; GUIANA, LAW OF; MARRIED WOMAN, 1; PRACTICE, 14, 22; WILL, 15, 16, 30, 37.

EXONERATION.—See MORTGAGE, 24.

FAIR.—See LOCAL GOVERNMENT, 9; MARKET.

FALSE IMPRISONMENT:—

Reasonable and probable cause—Police constable—Issue of warrant.—Knowledge by a police constable that a warrant has been issued by a duly authorised magistrate for the arrest of a person for felony is a sufficient ground of reasonable suspicion that a felony has been committed so as to authorize an arrest by such constable.

If an act is done in a legal manner, the person directing such act is not responsible for its being carried out in an illegal manner, unless the relation of master and servant exists between the person giving and the person carrying out the direction.—*Creagh* v. *Gamble*, EX.D. (Ir.)—24 L. R. Ir. 458.

See also MASTER AND SERVANT, 6.

FELONY.—See LICENSED HOUSE, 1.

FIRE INSURANCE.—See INSURANCE, 1.

FISHERY:—

1. *Arm of sea—Navigability—Custom—Crown rights.*—A creek or arm of the sea, in order to be navigable, in the legal sense of the term, must be affected by the ebb and flow of ordinary or neap tides. The circumstance that it can be traversed by small boats does not make navigable a creek which is not so affected. The rights of private owners over the foreshore extend down to ordinary high-water mark, and there is no legal right for fishermen, apart from exceptional circumstances, such as stress of weather, to draw up or leave their boats above that line.

The expressions "navigable" and "ebb and flow"

considered and explained.—*Earl of Ilchester* v. *Raishley*, CH.D. KEK., J. 104.

2. *Bye-law*—Ultrà vires—*Fisheries (Ireland) Act*, 1869 (32 & 33 *Vict. c.* 92), *s.* 10.—A bye-law made by the Inspectors of Irish Fisheries, and approved of by the Lord-Lieutenant in Council, imposed a penalty for having nets on board a fishing boat at times when fishing is illegal, and also rendered the nets liable to confiscation.

Held, that the bye-law was not *ultrà vires*.—*Jones* v. *Clancy*, Q.B.D. (Ir.)—26 L. R. Ir. 161.

3. *Fishery Acts—Offence—Conservators—Justices—Penalty—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *ss.* 27, 35—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *ss.* 36, 62—*Freshwater Fishery Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 7.—A person was convicted by justices for fishing without a licence in a fishing district subject to a board of conservators, upon the complaint of a water bailiff duly appointed by the conservators, but who was not proved to have been authorized by them to institute the proceedings.

Held, that the penalty for the offence could only be recovered by the conservators, and that the conviction must be quashed.—*Anderson* v. *Hamlin*, Q.B.D.—25 Q. B. D. 221.

4. *Non-tidal lake—Riparian owner—Injunction.*—The plaintiffs were owners of lands adjoining, and of islands in a lake; the defendants were tenants of a part of one of the islands. The lake is a freshwater lake, varying in width from one to four miles, and is discharged into a smaller lake, whence the water flows by a river to the sea. The public had for many years fished in the larger lake without the plaintiffs' permission, but had recently used cross lines, with many hooks, which were destructive to fish. The defendants fished in all parts of the lake with cross lines.

Held, that the plaintiffs were entitled to an injunction restraining the defendants from fishing with cross lines.—*Percy* v. *Thornton*, V.C. (Ir.)—23 L. R. Ir. 402.

See also PRESCRIPTION; SCOTLAND, LAW OF, 2.

FOG.—See SHIPPING, 10—12.

FORECLOSURE.—See MORTGAGE, 7—9; PRACTICE, 23.

FOREIGN LAW.—See BANKRUPTCY, 25; ESTOPPEL, 4, 5; LEGITIMACY DECLARATION ACT, 1; SETTLEMENT, 8.

FORFEITURE.—See INSURANCE, 6; MARRIED WOMAN, 10; VENDOR AND PURCHASER, 4; WILL, 17, 18.

FRAUD.—See ADMINISTRATION, 10; BILL OF EXCHANGE; ESTOPPEL, 5; LIMITATIONS, STATUTES OF, 5; MISREPRESENTATION, 1, 2; MORTGAGE, 13; POWER OF APPOINTMENT, 6.

FRAUDS, STATUTE OF:—

1. *Sale of land—Memorandum—Misdescription of vendor—Specific performance.*—The memorandum at the foot of the particulars and conditions of sale stated that V. & Son were agents for the "vendor," who was so described throughout the conditions. The particulars stated that the sale was by direction of the "owner." The conditions erroneously stated that the vendor was a trustee for sale.

Held, that the vendor was not sufficiently designated.—*Butcher* v. *Nash*, CH.D. KEK., J.—61 L. T. 72.

2. *Sale of land—Memorandum—Parol evidence.*—H. signed a memorandum of agreement between himself and O. for the sale to O. of a freehold estate for £2,375. The memorandum contained all the terms of the contract except a statement of the property agreed to be sold. Two days later O. sent to H. a cheque for £375 as a deposit and in part payment of the purchase-money of £2,375. H. answered by letter as follows:—"I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the F. Estate."

Held, that the circumstances under which the letter was written might be explained by parol evidence; and that, as such evidence showed a connection between the letter and the memorandum, the two documents might be read together, and constituted a sufficient memorandum under the Statute of Frauds.—*Oliver* v. *Hunting*, CH.D. KEK., J. 618—44 Ch. D. 205; 59 L. J. Ch. 255; 62 L. T. 108.

3. *Lease—Contract—Landlord and tenant—Omission of name in body of memorandum—Signature of lessee*—29 *Car.* 2, *c.* 3, *s.* 4.—By a memorandum of agreement the plaintiff agreed to let a certain brickfield for five years, "the tenant" to pay a certain rent and royalty. Only the name of the plaintiff appeared in the body of the agreement, but it was signed by the defendant and plaintiff.

Held, that it could not be reasonably inferred that the defendant signed the agreement in any other capacity than that of tenant, and therefore so far as regarded the Statute of Frauds the agreement was valid.—*Stokell* v. *Niven*, C.A.—61 L. T. 18.

See also CONTRACT, 1; PARTNERSHIP, 1.

FRIENDLY SOCIETY:—

1. *Illegality—Restraint of trade—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 23—*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.—Where the objects of a friendly society are themselves legal, but some of the rules are illegal, being in restraint of trade, the society may sue and be sued upon such of its rules as are legal.

Collins v. *Locke*, 28 W. R. 189, 4 App. 674, discussed.—*Swaine* v. *Wilson*, C.A. 261—24 Q. B. D. 252; 59 L. J. Q. B. 76; 62 L. T. 309.

2. *Illegality—Restraint of trade—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 2—*Jurisdiction of justices.*—The Amalgamated Society of Carpenters and Joiners was registered as a trade union under the Trade Union Act, 1871. The rules contained the usual rules in restraint of trade, providing for the fining, suspending, and expelling of members for violating the rules of the society as to trade matters. They also contained rules similar to those of a friendly society, giving to members allowances in cases of sickness, infirmity, and want of employment, and other benefits.

Held, that, as the objects of the society were partly in restraint of trade, the society was, at common law, an illegal association, and by section 4 of the Trade Union Act, 1871, no agreement between members to provide benefits to members could be enforced in any court of law.—*Old* v. *Robson*, Q.B.D. 415—59 L. J. M. C. 41; 62 L. T. 282.

GAME.—See LICENSED HOUSE, 5.

GAMING:—

Betting—Occupier of place—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—A. went to a room at a public-house on three successive days and made bets on horse racing. He had no interest in the public-house.

Held, that A. could not be convicted under section 3 of the Betting Houses Act, 1853.—*Whitehurst* v. *Fincher*, Q.B.D.—62 L. T. 433.

See also LICENSED HOUSE, 2.

GARNISHEE. — See ATTACHMENT, 4; COMPANY, 24; MARRIED WOMAN, 7, 9; SOLICITOR, 1.

GAS COMPANY:—

1. *Appeal to chief gas examiner—Counsel—Agents—Gaslight and Coke and other Companies Acts Amendment Act*, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 12.—By a section of a Metropolitan Gas Act a gas company is entitled to appeal from the decision of a gas examiner to the chief gas examiner, whose decision, after hearing the parties, shall be final and conclusive.

Held, that, although the gas company could appear on the hearing of such appeal by their "agents," they could not, as a matter of right, appear by "counsel," as counsel cannot be "agents" in such cases, and that it is in the discretion of the chief gas examiner whether he will hear counsel or not.—*Reg.* v. *Williamson*, Q.B.D. 769.

2. *Supply — Demand — Notice — Metropolitan Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 17—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 36.—A metropolitan gas company is bound to give a supply of gas within a reasonable time after notice, and is not entitled to seven days' notice. — *South Metropolitan Gas Co.* v. *Noakes*, Q.B.D.—61 L. T. 556.

3. *Supply—User in district of another company—Railway company—Metropolitan Gas Act*, 1860 (23 & 24 *Vict. c.* 41), *ss.* 6, 14.—By section 6 of the Metropolis Gas Act, 1860, a certain district was assigned to each metropolitan gas company, and it was provided that no other company or person should "supply gas for sale within the said limits," unless authorized by Parliament to do so. By section 14 the supply of gas to owners or occupiers of premises within or partly within the company's district requiring such supply was made compulsory. A railway company had a station which was partly within the district of the appellant company and partly within that of the respondent company. The respondents, on being required to do so by the railway company, provided a meter at a point within their own district from which they supplied gas which was used for lighting the whole station, including the part within the appellants' district, to which it was conducted though pipes laid on the premises of the railway company.

Held, that this was an infringement of the provisions in section 6 of the Metropolis Gas Act, 1860.

Decision of the Court of Appeal, 36 W. R. 455, reversed.—*Gas Light and Coke Co.* v. *South Metropolitan Gas Co.*, H.L.—62 L. T. 126.

GENERAL AVERAGE.—See SHIPPING, 26.

GIFT:—

1. *Delivery—Chattel—Bill of sale.*—A verbal gift of chattels capable of delivery, though assented to by the donee, passes no property to the donee if it is unaccompanied by possession.

Irons v. *Smallpiece*, 2 B. & Al. 551, approved.

Danby v. *Tucker*, 31 W. R. 578, overruled.—*Cochrane* v. *Moore*, C.A. 588—25 Q. B. D. 57; 59 L. J. Q. B. 377.

2. Donatio mortis causâ—*Banker's deposit note—Cheque—Death of donor.*—Four days before his death, D., being ill, gave his sister-in-law a banker's deposit receipt for £580 and interest. On the deposit receipt was a memorandum intimating that it was not transferable, that the amount was repayable on demand, and that, when the money was withdrawn or the interest paid, the depositor must sign the cheque on the back of the receipt after affixing a penny stamp, and that, if part were withdrawn, a new receipt would be given for the balance. A form of cheque was indorsed on the back of the receipt, which form was filled up for £580 and signed by the donor, but the document was not presented for payment at the bank till after his death, when the bankers said their authority to cash it was at an end.

Held (affirming the decision of Kekewich, J.), that there was a good *donatio mortis causâ* of the deposit receipt and the money represented by it, that the form of cheque, the filling up of which was merely a convenient means of obtaining, and preserving evidence of, the payment of the money, was not such an essential part of the document as to prevent it being made the subject of a good *donatio mortis causâ*, and that any difficulty arising from the non-negotiable character of the instrument was removed by the case of *Duffield* v. *Elwes*, 1 Bli. N. R. 497, which case was a conclusive authority to show that the donor's executors would, in such circumstances, be constituted trustees for the donee, and be bound to do whatever might be necessary to effectuate the gift.

Austin v. *Mead*, 28 W. R. 891, 15 Ch. D. 651, distinguished.—*Duffin* v. *Duffin*, C.A., 369—44 Ch. D. 76; 59 L. J. Ch. 420; 62 L. T. 614.

See also COMPANY, 10; MARRIED WOMAN, 10; WILL, 7, 14, 19—23.

GOODWILL.—See STAMP, 1; VENDOR AND PURCHASER, 5.

GUARDIAN.—See ADMINISTRATION, 16 DIVORCE, 10.

GUIANA, LAW of:—

Will — Construction — Executors — Substitution.—A., who died domiciled in British Guiana, by his will appointed four persons, two of whom took in succession, his executors for the purpose of paying debts and legacies, and administrators of his residuary estate, with all powers incident to that office by law or custom, and with further specified powers, and also "the powers of assumption, surrogation, and substitution to any of them to the two last surviving of them and to any by them assumed, surrogated, and substituted for the purposes aforesaid."

Held, (1) that the testator's intention was to provide for the continuous management of his estate by a series of private administrators, and to give a power of substitution to the two last survivors; (2) that the nomination of the Administrator-General of British Guiana by one of the last survivors was null and void. —*Farnum* v. *Administrator-General of British Guiana*, P.C.—14 App. 651; 59 L. J. P. C. 10; 61 L. T. 438.

HABEAS CORPUS:—

Writ—Non-compliance—Contempt of court.—The defendant, having permission from the parent of a child to keep the child in his institution, without the leave of the parent handed the child over to a person to be adopted by him and taken out of the country. No address was given to the defendant by this person, and the defendant alleged that it was impossible for him to find this person. On a subsequent application for a writ of *habeas corpus*,

Held, that a writ of *habeas corpus* must issue, *per* Lord Esher, M.R., on the ground that it had been decided in *The Queen* v. *Barnardo*, 37 W. R. 789, 23 Q. B. D. 305, that, where a child had been intrusted to a person other than its lawful guardian, and he wrongfully parted with the custody of the child, a writ of *habeas corpus* would issue to compel him to produce the child, unless he was able to convince the court that it was absolutely impossible for him to do so; *per* Fry, L.J., on the ground that, although a writ of *habeas corpus* would not issue where it was plain that obedience to it was impossible, that the writ would issue where this was not plain, and where the defendant wilfully and with intent to defeat the

process of the court had, by an act done before the application for the writ, put it out of his power to obey the writ when issued.—*Reg.* v. *Barnardo*, C.A. 315—24 Q. B. D. 283; 59 L. J. Q. B. 345; 62 L. T. 44.

HACKNEY CARRIAGE:—

Licence—Omnibus—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict.* c. 8), s. 4 (1) (3).—An omnibus running on a fixed route is a "hackney carriage" within section 4 of the Customs and Inland Revenue Act, 1888.—*Hickman* v. *Birch*, Q.B.D.—24 Q. B. D. 172.

HARBOUR COMMISSIONERS.—See COSTS, 13; SHIPPING, 25a.

HIGHWAY:—

Repair—Indictment—Owner not in occupation—Liability ratione tenuræ — *Turnpike trust.* — An owner of land who is not the occupier cannot be charged *ratione tenuræ* with the repair of a common highway.

The liability to repair *ratione tenuræ* ceases when the highway so repairable has been under statutory powers so altered in its course and nature as to be practically destroyed. An ancient highway repaired *ratione tenuræ* was paved to the width of nine feet in the centre with stone got from the land charged with the repair. Trustees, under a Turnpike Act, converted the road into a macadamized road by taking up the old pavement and substituting macadam to the width of fifteen feet in the centre, and they also diverted the course of the road. On the expiration of the turnpike trust the defendant, the non-occupying owner of the land charged, was indicted and convicted for non-repair of the road *ratione tenuræ*.

Held, (1) that the defendant, not being occupier of the land, was not liable; and (2) that the ancient road, the subject of repair, must be deemed to have been destroyed, and that the liability to repair *ratione tenuræ* had, therefore, ceased.—*Reg.* v. *Barker*, C.C.R.—25 Q. B. D. 213; 59 L. J. M. C. 105; 62 L. T. 578.

See also JUSTICE OF THE PEACE, 5; LOCAL GOVERNMENT, 7, 9, 14, 16; RAILWAY, 2.

HIRING AGREEMENT.—See BILL OF SALE, 11—13.

HOTCHPOT.—See SETTLEMENT, 5.

HOUSING of the WORKING CLASSES ACT.—See LANDLORD AND TENANT, 5.

HUSBAND and WIFE:—

1. *Aggravated assault—Judicial separation—Order of justices — Injunction — Receiver — Matrimonial Causes Act*, 1878 (41 & 42 *Vict.* c. 19), s. 4.—The High Court has no power to enforce an order made by a court of summary jurisdiction under section 4 of the Matrimonial Causes Act, 1878, for a weekly payment of money by a husband convicted of an aggravated assault upon his wife.

On a wife's petition for dissolution of marriage, on the grounds of her husband's cruelty and adultery, two orders were made for payment by the husband of £16 and £45, the wife's costs, which he had not complied with. The cruelty alleged was an aggravated assault, for which the husband had been convicted, and the court of summary jurisdiction had, under section 4 of the Matrimonial Causes Act, 1878, made an order that the wife was no longer bound to cohabit with her husband, and that the husband should pay her a weekly sum. The husband was £58 in arrear of such payments. The husband was entitled to a sum of money under a will. The petitioner obtained an *ex parte* injunction to restrain the husband from receiving the money payable to him under the will, on the ground that he had not paid to his wife the amounts before stated.

The court, on an application to continue the injunction, and for the appointment of a receiver, continued the injunction till the hearing of the petition as to the two sums of £16 and £45 payable under the order of this court; but refused to continue it in respect of the sum of £58 payable under the order of the court of summary jurisdiction.—*Gillett* v. *Gillett*, P.D. & A.D. 144—14 P. D. 158; 58 L. J. P. D. & A. 84; 61 L.T. 401.

2. *Desertion — Maintenance — Married Women's Maintenance Act*, 1886 (49 & 50 *Vict.* c. 52), s. 1—*Desertion before Act—Jurisdiction of justices.*—In 1881 a husband deserted his wife, and went abroad. In 1886 he returned to England, and his wife applied to two justices for an order for maintenance.

Held, that the Married Women's Maintenance Act, 1886, was retrospective, and the justices had power to make an order upon the husband.—*Reg.* v. *Birwistle*, Q.B.D.—58 L. J. M. C. 158.

3. *Judicial separation—Custody of children—Death of petitioner — Matrimonial Causes Act*, 1859 (22 & 23 *Vict.* c. 61), s. 4.—On the death of a parent entitled to the custody of a child under a decree for judicial separation the court has no jurisdiction to entertain an application by a stranger for the custody of the child.—*Davis* v. *Davis*, P.D. & A.D.—14 P. D. 162; 58 L. J. P. D. & A. 88.

4. *Restitution of conjugal rights—Decree—Non-compliance — Permanent alimony — Matrimonial Causes Act*, 1884 (47 & 48 *Vict.* c. 68), s. 2.—A husband having failed to comply with a decree for restitution of conjugal rights within the time specified in such decree, the court, under section 2 of the Matrimonial Causes Act, 1884, ordered him to secure to the petitioner, for their joint lives, a periodical payment, equal to one-third of their joint income.—*Theobald* v. *Theobald*, P.D. & A.D.—15 P. D. 26; 59 L. J. P. D. & A. 21; 62 L. T. 187.

5. *Restitution of conjugal rights—Decree—Non-compliance by wife—Permanent maintenance—Matrimonial Causes Act*, 1884 (47 & 48 *Vict.* c. 68), s. 3.—A wife who had a separate income refused to comply with a decree for restitution of conjugal rights.

The court ordered the wife to pay permanent maintenance to her husband.—*Swift* v. *Swift*, P.D. & A.D.—15 P. D. 118; 59 L. J. P. D. & A. 61; 62 L. T. 669.

6. *Restitution of conjugal rights—Demand of cohabitation—Divorce Rules, rr.* 2, 175, 176.—A wife, before commencing proceedings against her husband, who had been living apart from her for eleven years, for restitution of conjugal rights, served upon him a letter signed by herself giving him notice of her desire to cohabit and live with him, and demanding from him a full restitution of conjugal rights, and notifying to him that, in the event of his not receiving her and providing a suitable home and habitation for her, she intended to apply to the High Court for restitution of her conjugal rights. The husband sent a reply the same day acknowledging the receipt of the letter and stating that he declined to receive back his wife or make a home for her. The wife's affidavit filed with her petition set out the letters.

Held (reversing the decision of Butt, J.), that the case was distinguished from *Field* v. *Field*, 37 W. R. 134, 14 P. D. 26, by the facts that the letter was the wife's own and not a solicitor's letter that it expressed her desire to cohabit and live with her husband, and that he answered it with an unqualified refusal; and that the wife's letter was a sufficient compliance with rule 175 of the Divorce Rules, and a decree for restitu-

tion ought to be made.—*Smith* v. *Smith*, C.A. 276—15 P. D. 47; 59 L. J. P. D. & A. 19; 62 L. T. 237.

7. *Restitution of conjugal rights—Demand of cohabitation—Evidence.*—In a wife's suit for restitution of conjugal rights conciliatory applications by the petitioner, followed by a solicitor's letter, demanding restitution, and threatening legal proceedings in default of compliance, and by a formal demand by the petitioner herself, were held to be a sufficient demand for cohabitation.

In a wife's suit for restitution of conjugal rights evidence of the petitioner's pre-marital incontinence is inadmissible.—*Mason* v. *Mason*, P.D. & A.D.—61 L. T. 304.

8. *Restitution of conjugal rights—Demand of cohabitation—Substituted service—Divorce Rules*, 1869, *r.* 175.—If the petitioner in a suit for restitution of conjugal rights is unable to find the respondent, the written demand for cohabitation may be served on the respondent's solicitor.—*Macarthur* v. *Macarthur*, P.D. & A.D.—58 L. J. P. D. & A. 70; 61 L. T. 308.

9. *Separate estate—Divorce suit—Inquiry by registrar—Report—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.—In a divorce suit a registrar has no jurisdiction to determine questions between husband and wife as to property under section 17 of the Married Women's Property Act, 1882. Such questions must be determined by the court or a judge.

Where a registrar on a summons made an order against a husband that he should deliver up certain articles, the court discharged the order and referred the question to the registrar for inquiry and report.—*Wood* v. *Wood and White*, P.D. & A.D. 208—14 P. D. 157; 58 L. J. P. D. & A. 68.

10. *Will—Construction—Gift to husband and wife and third person.*—A. gave the residue of his estate to W.; E., the wife of W.; S., the wife of H.; J., the wife of G.; B.; C.; and D., the wife of C., to be equally divided between them, share and share alike.

Held, that W., and E., the wife of W., took one share each, and not one share between them; and that C., and D., the wife of C., also took one share each, not one share between them.

Warrington v. *Warrington*, 2 Hare, 54, followed.—*Byram* v. *Tull*, CH.D. NOR., J. 91—42 Ch. D. 306; 61 L. T. 718.

See also ADMINISTRATION, 19; ATTACHMENT, 1; CANADA, LAW OF, 4; COSTS, 7—9; DIVORCE, 1—3, 10; EXECUTOR, 3; JUSTICE OF THE PEACE, 4; LEGITIMACY DECLARATION ACT, 1; MARRIED WOMAN, 1, 2, 8; SCOTLAND, LAW OF, 3; SETTLEMENT, 1, 2.

ILLEGALITY.—See COMPANY, 16; CONTRACT, 3, 4; FRIENDLY SOCIETY, 1, 2.

IMPROVEMENTS.—See SETTLEMENT, 12—14.

INCLOSURE:—

Common—Lord of manor—Injunction.—The tenants of a manor sued to restrain the lord of the manor from inclosing parts of the waste, and digging or removing any part of its soil so as to interfere with their right of pasture. The tenants proved rights of common appendant over the waste for sheep. Certain landowners, not tenants of the manor, had rights of common appurtenant for sheep, and an exercise of all the rights would turn out more sheep than the waste could carry, though it was improbable that so many would ever be turned out.

Held, that the lord of the manor must be restrained from diminishing the pasturage.

Judgment of Stirling, J., affirmed.—*Robertson* v. *Hartopp*, C.A.—43 Ch. D. 484; 59 L. J. Ch. 553; 62 L. T. 585.

See also COPYHOLD.

INCOME TAX:—

1. *Annuity—Annuity for formation of sinking fund*—16 & 17 *Vict. c.* 34, *schedule D.*—A company was formed to carry out an agreement with the Nizam of Hyderabad for the purpose of making and carrying on a certain railway in India. By the agreement the capital of the company was to consist of a certain share capital and a certain debenture capital, the latter to bear interest at 4 per cent per annum. The Nizam was to pay to the company for twenty years an annuity equal to 5 per cent. on both share and debenture capital, and the company were to apply this sum in paying 5 per cent. on the share capital, 4 per cent. on the debenture capital, and in using the remaining 1 per cent. for providing a sinking fund for the redemption of debenture capital. This sum of 1 per cent. was to be paid to trustees to be invested and accumulated for the purposes of the sinking fund. The company claimed an exemption from income tax with regard to this balance.

Held, that this balance of 1 per cent., which was to be accumulated and applied for the sinking fund, was a profit or annuity to the company within the meaning of the Income Tax Acts, and was not exempt from the tax, and that the company were liable to income tax in respect of the whole annual sum received by them from the Nizam.—*Nizam's Guaranteed State Railways Co.* v. *Wyatt*, Q.B.D.—24 Q. B. D. 548; 59 L. J. Q. B. 430; 62 L. T. 765.

2. *Annuity — Life insurance company — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102.—A life assurance company which, in addition to its ordinary business, carries on the business of selling annuities for a lump sum paid down, is not entitled to deduct the amount paid in respect of such annuities from their gross income for income tax purposes, but such annuities are liable to income tax in the hands of the company as sums "payable out of profits and gains" within the meaning of section 102 of the Income Tax Act, 1842.—*Gresham Life Assurance Society* v. *Styles*, C.A. 696—24 Q. B. D. 500; 62 L. T. 464.

3. *Deduction—Life insurance premium—Foreign company—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 54—*Insurance Companies Registration Act*, 1853 (16 & 17 *Vict. c.* 91), *s.* 1.—The Insurance Companies Registration Act, 1853, provides that any person who shall have made any such insurance or contracted for any such deferred annuity, as in the provision mentioned in section 54 of the Income Tax Act, 1853, in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act of 7 & 8 Vict. c. 110, shall be entitled to all the benefits and advantages which, by the said provision, are expressed to be given." Section 54 of the Income Tax Act, 1853, provides that "any person who shall have made an insurance on his life in or with any insurance company which should become registered under any Act to be passed in the present session for that purpose . . . should be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he should be liable to be assessed under schedule D." of the income tax.

Held (Fry, L.J., *dubitante*), that the words "any insurance company" only apply to companies in the United Kingdom existing at the date mentioned, and subject to the jurisdiction of Parliament, and not to foreign companies outside that jurisdiction at that date.

Judgment of the Queen's Bench Division (38 W. R. 366, 24 Q. B. D. 491) affirmed.—*Colquhoun* v. *Heddon*, C.A. 545—25 Q. B. D. 129; 62 L. T. 853.

4. *Deduction—Manorial dues—Cost of collection—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60, 159, *schedule A.*—In estimating the value of manorial dues under schedule (A) of the Income Tax Act, 1842, the lord of the manor is not entitled to deduct the costs of collection, such costs not being specified in the Act as an authorized deduction.—*Duke of Norfolk* v. *Lamarque*, Q.B.D. 382—24 Q. B. D. 485; 59 L. J. Q. B. 119; 62 L. T. 153.

5. *Profits—Foreign business—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 39, 100, 106, 108—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *schedule D.*—A merchant residing and carrying on business in the United Kingdom, and who, at the same time, is a partner in a totally separate business carried on in Australia, is not liable to income tax in respect of the profits of the trade in Australia which are not brought to this country.

Decision of the Court of Appeal (36 W. R. 657, 21 Q. B. D. 52) affirmed on different grounds.—*Colquhoun* v. *Brooks*, H.L. 289—14 App. 493; 61 L. T. 518.

6. *Profits — Life insurance company — Mutual insurance bonus*—16 & 17 *Vict. c.* 34, *schedule D.*—The appellants carried on the business of a mutual life insurance company. There were no shares, and the members were the policy-holders. The premiums were calculated at a rate which left a surplus after providing for the yearly expenditure, and the surplus was either returned to the assured as bonuses, or applied in reduction of premiums, or carried to the credit of the members.

Held (Lords Halsbury, C., and Fitzgerald dissenting), that the surplus did not constitute profits liable to be assessed to income tax.

Last v. *London Assurance Corporation* (34 W. R. 233, 10 App. Cas. 438) distinguished.

Judgment of the Court of Appeal reversed.—*New York Life Insurance Co.* v. *Styles*, H.L.—14 App. 381; 61 L. T. 201.

INDEMNITY.—See Costs, 29; Mortgage, 20; Principal and Surety, 1; Shipping, 20.

INDICTMENT.—See Highway; Privy Council.

INFANT:—

1. *Apprentice—Covenant—Injunction.*—An infant cannot be sued upon a covenant purporting to be entered into by the infant in an apprenticeship deed, and therefore an injunction will not be granted to restrain an infant from committing a breach of a negative stipulation contained in a deed of apprenticeship executed by the infant.—*Francesco* v. *Barnum*, CH.D. CHI., J. 187—43 Ch. D. 165; 59 L. J. Ch. 151; 62 L. T. 40.

2. *Contract—Money paid—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.—An infant is not entitled to recover money paid under a contract void under section 1 of the Infants' Relief Act, 1874, in respect of goods which he has used or consumed.—*Valentini* v. *Canali*, Q.B.D. 331—24 Q. B. D. 165; 59 L. J. Q. B. 75; 61 L. T. 731.

3. *Contract — Settlement — Voidability — Infants' Relief Act*, 1884 (37 & 38 *Vict. c.* 62), *ss.* 1, 2.—A settlement of property made by an infant on her marriage is not void under the Infants' Relief Act, 1884.—*Duncan* v. *Dixon*, CH.D. KEK., J. 700—44 Ch. D. 211; 59 L. J. Ch. 437; 62 L. T. 319.

4. *Maintenance—Accumulation—Tenancy for life—Vested estate—Contingent estate—Apportionment—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43 (2).—Under the trusts of a will, an infant granddaughter of the testator was entitled to a life interest in the moiety of the annual income, of a pecuniary legacy and of a freehold house, contingently on her attaining twenty-one or marrying; and power was given to the trustees in their discretion to apply the whole or part of the income arising therefrom for the maintenance of the granddaughter during her minority; the granddaughter was also entitled under the will to a vested life interest in one-sixth share of the income of the testator's residuary estate. After the testator's death, and while the granddaughter was still an infant and unmarried, an order was made in chambers appointing a guardian of the granddaughter, and directing that the trustees of the will should, out of the funds subject to the trusts by the will declared in favour of the granddaughter, pay on account of her maintenance, £100 per annum to her guardian. After the date of this order, and thenceforth during the minority of the granddaughter, the trustees paid the £100 to the guardian out of the whole income arising from the granddaughter's share of the trust property, without distinguishing between the income arising from her share of the pecuniary legacy and the freehold house on the one hand, and the share of residue on the other; and they accumulated the surplus income. On the granddaughter attaining the age of twenty-one years, the question was raised whether she was absolutely entitled to the whole of the accumulations of income arising from her share of residue, and also in what manner the payments made for her maintenance were to be apportioned as between the income arising from her share of the pecuniary legacy and the freehold house on the one hand, and the one-sixth of residue on the other. There was an affidavit by the trustees that they had not exercised any discretion in the matter. The income arising from the granddaughter's share of the pecuniary legacy and of the freehold house was less than £100 per annum.

Held, that the granddaughter was absolutely entitled to the accumulations of income which had arisen from the share of the residue.

Held, also, that the moneys paid for maintenance were primarily payable out of the granddaughter's share of the pecuniary legacy and freehold house, that being most for her benefit, and that, as the trustees had not exercised any discretion, the court could exercise it for them.—*Wells* v. *Wells*, CH.D. NOR., J. 327—43 Ch. D. 281; 59 L. J. Ch. 113; 61 L. T. 806.

See also Administration, 16; Discovery, 3; Husband and Wife, 3; Married Woman, 14; Partition, 2; Trustee, 5.

INFRINGEMENT.—See Copyright; Costs, 10, 11; Design, 1; Patent, 1—8; Practice, 30; Trade-Mark, 1—5; Trade Name, 1, 2.

INHABITED HOUSE DUTY:—

1. *Exemption — "Hospital or charity school" — School mainly self-supporting*—48 *Geo.* 3. *c.* 55, *schedule B., case IV.*—14 & 15 *Vict. c.* 36, *s.* 2.—The Charterhouse School was established in London by charter as a hospital for the reception and relief of poor people, and as a free school for the maintenance and education of poor children, not to exceed forty. It was a hospital and free charity school within the exemption contained in 48 Geo. 3, c. 55, schedule B. (which was repealed, but subsequently re-enacted by 14 & 15 Vict. c. 36, *s.* 2). In 1867 the school was removed, under statutory powers, from London to Godalming, the hospital remaining in London. In 1888 the governors were assessed to inhabited house duty in respect of the school buildings. No portion

of the school buildings was set apart for the use of boys holding scholarships or exhibitions. The school had then become a public school of 500 boys, and the parents of the boys not on the foundation paid for their support and tuition.

Held, that the liability of the governors to pay inhabited house duty depended on the character of the school buildings at the time of the assessment, as that, Charterhouse School having substantially ceased to be a charity school at that time, the exemption of 48 Geo. 3, c. 55, did not apply, and that the governors were liable.—*Governors of Charterhouse School* v. *Lamarque*, Q.B.D. 776—25 Q. B. D. 121.

2. *Exemption — Servant — Library — Attendant sleeping on premises—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13 (2).—A house was occupied by the London Library and used as a library and reading rooms for the use of members, who paid subscriptions thereto, but who derived no pecuniary profit therefrom. The use of a sitting room and bed room was given to an attendant, in addition to his wages, and the attendant and his wife dwelt in the rooms both by day and at night for the protection of the premises. No other person dwelt on the premises.

Held, that the library was liable to inhabited house duty, and was not exempt therefrom by the provisions of section 13 (2) of the Customs and Inland Revenue Act, 1878.—*London Library* v. *Carter*, Q.B.D. 478—62 L. T. 466.

INJUNCTION :—

1. *Bankruptcy—Stay of action—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 37.—In 1886 B., who had acted as agent in Australia for a London firm, brought an action in Victoria against the firm for wrongful dismissal. A bond with sureties to meet the damages was executed. In 1887 a member of the firm died, and in 1889 a receiving order was made against the firm and an *interim* injunction restraining B.'s action was granted.

Held, that an application to continue the injunction must be refused.—*Ex parte Official Receiver, In re Spalding*, Q.B.D., BKCY.—61 L. T. 83.

2. *Damages—Undertaking—Damages sustained by others than parties restrained.*—As a general rule, where an *interim* or interlocutory injunction is granted, the undertaking as to damages should not be limited to the damages sustained by the party restrained.

An action was brought against A., B., and the C. Co. for an injunction to restrain the C. Co. from confirming by general meeting certain agreements between them and the other defendants. An *interim* injunction having been granted, A.'s counsel asked for the usual undertaking as to damages, and plaintiff's counsel replied that it would, of course, be given. B. did not appear, not having been served with notice of the motion for the injunction. In drawing up the order the registrar limited the undertaking to damages sustained by the C. Co. (as being the only parties restrained by the injunction), and the order was passed and entered in that form. A. and B. having appealed, and asked that the undertaking might be extended to damages sustained by them respectively,

Held, that, A. having asked for an undertaking, and the plaintiff's counsel having assented, the order must be set right by extending the undertaking to damages sustained by A., but that B., not having applied for or been promised an undertaking, could not now get it extended to damages incurred by him, for that, the court having no power to order an undertaking to be given (an undertaking being merely a condition which the court has power to impose upon the granting of an injunction), the court cannot extend such an undertaking subsequently in the way proposed, as the party might, if asked at the time, have preferred to forego his injunction.

Held, further, that A. ought to have applied to the judge below to set the order right, even after it has been passed and entered, as not correctly expressing the effect of the judgment pronounced.—*Tucker* v. *New Brunswick Trading Co. of London*, C.A. 741—44 Ch. D. 249; 59 L. J. Ch. 551.

See also ARBITRATION, 7; BANKRUPTCY, 11; CANADA, LAW OF, 5; COMPANY, 14, 39; COVENANT, 1, 2; DAMAGES, 4; DEED, 2; FISHERY, 4; INCLOSURE; INFANT, 1; HUSBAND AND WIFE, 1; LANDLORD AND TENANT (IRELAND), 19, 20; LANDS CLAUSES CONSOLIDATION ACT, 1; LIGHT, 2, 3; LOCAL GOVERNMENT, 9, 16; MASTER AND SERVANT, 2; NUISANCE, 2—5; PATENT, 5, 6, 8; PRACTICE, 22; PRINCIPAL AND AGENT, 3; RIVER, 2, 3; SETTLEMENT, 16; TRADE-MARK, 5; TRADE NAME, 1, 2; WAY, 2.

INLAND REVENUE.—See HACKNEY CARRIAGE; INCOME TAX, 1—6; INHABITED HOUSE DUTY, 2; LEGACY DUTY; LICENSED HOUSE, 5; STAMP, 1—3.

INNUENDO.—See SLANDER.

INSPECTION.—See DISCOVERY, 1, 2.

INSURANCE :—

1. *Fire — Contract — Policy — Tender — Initialled slip.*—In October, 1886, the plaintiffs, who were merchants in New Zealand, employed insurance brokers in London to effect an insurance against fire on goods in New Zealand. The brokers instructed B., who was also an insurance broker, to effect a part of the insurance. B. prepared a slip, stating the particulars of the risk, which was initialled by the defendant and other members of Lloyds. Through a misunderstanding between the brokers, no policy was signed, and in 1887 the goods were destroyed by fire. No premium had then been paid, but two days after the premium was paid by the plaintiff to the broker. The defendant refused to sign a policy which was afterwards tendered to him.

Held, that the slip was a binding policy of insurance, and was not subject to the implied condition of the tender of a policy within a reasonable time.—*Thompson* v. *Adams*, Q.B.D.—23 Q. B. D. 361.

2. *Life insurance—Accident—Exception—"Obvious risk of injury."*—A policy of insurance against death or injury caused by accident contained an exception in the case of "the exposure of the insured to obvious risk of injury." The insured was killed by a train while he was attempting to cross the main line of a railway in daylight. There was no regular crossing at the spot; there was nothing to prevent a person about to cross from seeing an approaching train. The accused was neither short-sighted nor deaf.

Held, that the risk would have been obvious to the insured if he had been paying reasonable attention to what he was doing, and that the exception applied.—*Cornish* v. *Accident Insurance Co.*, C.A. 139—23 Q. B. D. 453; 58 L. J. Q. B. 591.

2a. *Life insurance — Accident — Poison.* — By a policy of insurance a company agreed to pay £1,000 to the representatives of the person insured if "the insured shall sustain any personal injury caused by accidental, external, and visible means within the intention of this policy and provisions and conditions thereof, and the direct effects of such injury shall occasion the death of the insured within three calendar months from the happening of such injury." The policy also contained the following proviso:—"The insured shall not be entitled to make any claim under

this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means. . . . And that this insurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, or by any medical or surgical treatment or operation rendered necessary by disease, although such death may have been accelerated by accident, or to any death or injury caused by duelling or fighting, or any other breach of the law on the part of the insured, or by poison or intentional self-injury." While the policy was in force the insured, by accident, drank some poison in mistake for medicine, which he was in the habit of taking, and died from the effects.

Held, that the accident came within the proviso, and that the representatives of the insured were not entitled to recover.—*Cole* v. *Accident Insurance Co.*, Q.B.D.—61 L. T. 227.

3. *Life insurance company—Payment out of deposit Amalgamation—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 3—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7.—In order to entitle a life assurance company to receive back the deposit made by them under section 3 of the Life Assurance Companies Act, 1870, the sum of £40,000 required by that section to be accumulated must have been accumulated out of the premiums received on the policies of the company.

Where, therefore, the S. Assurance Co. had entered into an agreement for amalgamation with the M. Co., who had, for the security of their then policy-holders, accumulated a sum considerably exceeding £40,000, and the policy-holders of the S. Co. had accepted the liability of the M. Co., but had not abandoned the liability of the S. Co.

Held, that, before the S. Co. could become entitled to receive back the deposit made by them, an accumulation of £40,000 must be made out of the policies of the M. Co. in addition to the amount already accumulated by them.—*Ex parte Scottish Economic Life Assurance Co.*, CH.D. KAY, J. 684—62 L. T. 926.

3a. *Life insurance—Policy—Premiums—Payment by stranger—Lien—Contract.*—A., the owner of land, and also of a policy of life assurance on his own life in the office of the B. company, mortgaged both these properties to the B. company. It was provided that the mortgage debt should be reduced by instalments, and the mortgage deed contained a covenant by A. to pay the premiums on the policy, and a power of sale was given to the mortgagees (*inter alia*), if there should be a breach of the covenant, to keep up the policy. A. sold the land subject to the mortgage to C., but retained the policy, and agreed to pay the premiums. He afterwards failed to pay the premiums. The B. company thereupon called upon C. to pay the premiums, and threatened to call in the mortgage and exercise their power of sale if he failed to do so. C. accordingly paid the premiums, and claimed to have it declared that he was entitled to a lien on the policy for the premiums so paid.

Held, that C. was not under the circumstances entitled to any lien on the policy.

Held, further, *per* Lindley L.J., that C. might have been entitled to a lien if the terms of the agreement between him and A. had not by implication excluded it, and that the list given in *In re Leslie, Leslie* v. *French*, 23 Ch. D. 552, of persons who may obtain a lien on a policy is not exhaustive.—*Strutt* v. *Tippett*, C.A.—62 L. T. 475.

4. *Marine insurance—Collision—Both ships to blame —Lloyd's "running-down" clause.*—The defendants insured their ship at Lloyds on a policy containing a running-down clause to the effect that the underwriters should pay three-fourths of any sum which the ship-owners might become liable to pay, and might pay, to the owners of any other vessel for damage caused by a collision. They then insured with the plaintiffs against damage to any other vessel, so far as not covered by the running-down clause in the Lloyd's policy. Subsequently the defendants' ship came into collision with another vessel, both being to blame. Both vessels were injured, but the damage done to the defendants' ship exceeded that sustained by the other. The owners of the other ship paid to the defendants the difference between half the damage sustained by their ship and half the damage sustained by the defendants' ship.

Held (affirming the decision of the Queen's Bench Division, 38 W. R. 190, 24 Q. B. D. 32), that the defendants had not incurred any liability to pay to the owners of the other ship half the damage sustained, and that they could not recover a proportion of that sum from the plaintiffs under the policy.—*London Steamship Owners' Mutual Insurance Association* v. *Grampian Steamship Co.*, C.A. 651—24 Q. B. D. 663; 62 L. T. 784.

5. *Marine insurance—"Improper navigation"—Improper condition of ship.*—By the rules of a mutual insurance association, the plaintiffs, who had entered their ship on the books of the association, were entitled to protection in respect of loss of, or damage to, any goods or merchandise on board the ship caused by the "improper navigation" of the ship. A cargo of wheat was loaded on board the ship, and on arrival at its destination it was found that the wheat was tainted with the smell of paraffin, and it was rejected by the consignee. The smell arose from a cargo of liquid composition, carried on the previous voyage, which had leaked into the hold and saturated the limber boards and ceiling of the ship.

Held, that the damage to the cargo was not caused by "improper navigation" of the ship within the meaning of the rules, and that the plaintiffs were not entitled to recover the loss.—*Canada Shipping Co.* v. *Shipowners' Mutual Protection Association*, C.A. 87—23 Q. B. D. 342; 58 L. J. Q. B. 462; 61 L. T. 312.

6. *Marine insurance — Mutual insurance—Forfeiture—Double insurance — Mortgage — Estoppel.*—The rules of a mutual marine insurance company provided that ships of a certain class should not be insured for more than three-quarters of their value, and that if any member should insure, or attempt to insure, elsewhere any ship, or shares in any ship, already insured by the society, he should be liable to immediate expulsion, and a forfeiture of all claims. Every member becoming aware of the mortgage of a ship insured by the company was to give immediate notice, whereupon the directors might call on the mortgagee to give security for all sums due on account of the insurance. In default of such notice, or of security by the mortgagee, the member in whose name the insurance was registered was to forfeit during the existence of the mortgage all claims in respect of the vessel or share to the extent of the mortgage. P., on behalf of the owner of *The B.*, insured that ship with the company for £600, and the policy was issued to him. The ship was already insured with another company for £300, as the directors knew, and £900 was more than three-quarters, but less than the whole, of the sum at which the ship was valued. P. afterwards became aware that the ship had been mortgaged, but no notice of the mortgage was given to the company.

Held, that the company was estopped from enforcing the rule as to double insurance; but that the amount of the mortgage must be deducted from the

sum due to P. on the policy.—*Jones* v. *Bangor Mutual Shipping Insurance Society*, Q.B.D.—61 L. T. 727.

See also BILL OF SALE, 8; CARRIER; COMPANY, 22; INCOME TAX, 2, 3, 6; JURISDICTION, 2; MORTGAGE, 19; PRACTICE, 44.

INTEREST:—

1. *Compensation—Minerals—Damages—3 & 4 Will. 4, c. 42, s. 29.*—The defendants had in 1871 been declared liable in respect of minerals removed by them from under the plaintiff's land, and an inquiry had been directed as to the quantity of minerals taken and their value, with an allowance for cost of carrying to pit's mouth, but not for working.

After this decree the defendants died. The inquiry was continued against their representatives, and the official referee had reported as to the value of the minerals taken.

The plaintiffs claimed on further consideration to be entitled to interest on the sum named in the report with half-yearly rests.

Held, (1) that the action must be treated as in the nature of an action for money had and received, and interest could not be given as damages under section 29 of 3 & 4 Will. 4, c. 42, which did not apply to such an action; (2) that there was no fiduciary relation between the parties on which such a claim could be based; (3) that the claim ought to have been made at the trial, and that it was too late to make it on further consideration.—*Phillips* v. *Homfray*, CH.D. STL., J.—44 Ch. D. 694; 59 L. J. Ch. 547; 62 L. T. 897.

2. *Demand—3 & 4 Will. 4, c. 42, s. 28—Railway company.*—A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of 3 & 4 Will. 4, c. 42, s. 28.—*Rhymney Railway Co.* v. *Rhymney Iron Co.*, C.A. 764—25 Q. B. D. 146; 59 L. J. Q. B. 414.

3. *Rate of interest—Deposit moneys—Contract to take shares—Rescission—Damages.*—W. had contracted to take shares in a company and had paid the deposit moneys. W. subsequently brought an action and obtained rescission of the contract on the ground of misrepresentation, and the deposit moneys were ordered to be repaid.

Held, that W. was also entitled to interest on the deposit moneys from the date on which he paid them. There is no hard and fast rule as to the rate of interest, but having regard to the present mercantile rate of interest 4 per cent. is generally sufficient.—*Metropolitan Coal Consumers' Association, Wainwright's case*, CH.D. KAY, J.—62 L. T. 30.

See also ADMINISTRATION, 12; BANKER, 4; BANKRUPTCY, 19a; BUILDING SOCIETY, 8; LIMITATIONS, STATUTES OF, 8a, 10; MORTGAGE, 3, 4, 22a; SOLICITOR, 5; WILL, 44.

INTERPLEADER:—

1. Chose in action—*Shares in company—Ord. 57, rr. 1, 2.*—Shares are chattels within the meaning of ord. 57, r. 1, and therefore an interpleader issue can be directed in respect of them.

Decision of the Queen's Bench Division affirmed.—*Robinson* v. *Jenkins*, C.A. 360—24 Q. B. D. 275; 59 L. J. Q. B. 147; 62 L. T. 439.

2. *Costs—Ord. 57, rr. 2, 15.*—The court has power, under ord. 57, r. 15, to order one of the parties to an interpleader issue to pay the charges of the person claiming the interpleader, although such charges were incurred before the interpleader issue was directed.—*Rothschild* v. *Morrison, Banque de France* v. *Morrison, Banque de Paris* v. *Morrison*, C.A. 635—24 Q. B. D. 750.

See also PRACTICE, 18.

INTERROGATORIES.—See DISCOVERY, 3—11.

INVESTMENT.—See BUILDING SOCIETY, 3, 4; CHARITY, 1; JURISDICTION, 2; LANDS CLAUSES CONSOLIDATION ACT, 7; TRUSTEE, 5—9; WILL, 26.

JETTISON.—See SHIPPING, 26.

JOINT-TENANCY.—See BANKER, 2; HUSBAND AND WIFE, 10; PARTNERSHIP, 3; WILL, 19, 28, 28a.

JUDGMENT.—See ATTACHMENT, 4, 5; BANKRUPTCY, 19a; BILL OF SALE, 4; COMPANY, 24; ESTOPPEL, 4, 5; LIBEL, 3, 4; LUNACY, 2; MARRIED WOMAN, 6, 7, 8, 9, 14; MORTGAGE, 7, 9, 10; PRACTICE, 4—8, 13, 20, 28, 30, 31a, 34, 36.

JUDICIAL SEPARATION.—See ATTACHMENT, 1; HUSBAND AND WIFE, 1, 3; JUSTICE OF THE PEACE, 4.

JURISDICTION:—

1. *Compromise—Setting aside.*—An agreement for the compromise of an action cannot be set aside on a summons in the action; but a fresh action must be brought for the purpose.—*Emeris* v. *Woodward*, CH.D. NOR., J. 346—43 Ch. D. 185; 61 L. T. 661; 59 L. J. Ch. 230.

2. *Life insurance company—Deposit—Change of investment—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 3—*Board of Trade Rules*, 1872, *r.* 4.—The court has power under rule 4 of the Board of Trade Rules of 1872 to authorize an investment in Annuities (Class B) of the East Indian Railway Co. of money deposited in court by an insurance company under the provisions of the Life Assurance Companies Act, 1870.—*In re Blue Ribbon Life, Accident, Mutual, and Industrial Assurance Co.*, CH. D. NOR., J. 104—59 L. J. Ch. 277.

3. *Libel—Pending civil proceedings arising out of the same matter—Different parties.*—There is no jurisdiction to adjourn the hearing of a summons for libel because there are pending civil proceedings between different parties for a different libel though arising out of the same subject-matter.—*Reg.* v. *Evans*, Q.B.D.—62 L. T. 570.

See also ARBITRATION, 2, 7; BANKRUPTCY, 6; CHARITY, 5; COMPANY, 21, 21a, 21b, 40; COSTS, 6, 8, 21; COUNTY COURT, 1, 3—9; DISCOVERY, 6, 9, 12, 13; DIVORCE, 10; ECCLESIASTICAL LAW, 1—3; FRIENDLY SOCIETY, 2; HUSBAND AND WIFE, 2, 3, 9; JUSTICE OF THE PEACE, 2, 3—6, 8; LICENSED HOUSE, 4; MEDICAL ACTS; NUISANCE, 2; PARTNERSHIP, 2; PRACTICE, 6, 8, 14—20, 34; TRUSTEE, 10.

JUSTICE of the PEACE:—

1. *Appeal—Reduction of sentence—Sureties for good behaviour — Criminal Law and Procedure (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 20), *s.* 11.—On an appeal from a sentence of imprisonment by a court of summary jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, a county court judge has jurisdiction, while varying the sentence of imprisonment, to order the prisoner, at the end of his sentence, to find security for good behaviour, and to be further imprisoned in default of sureties.—*Ex parte Harken*, EX.D. (Ir.)—24 L. R. Ir. 427.

1a. *Bye-law—New building—Notice to surveyor—Local Improvement Act.*—Section 111 of a Local Improvement Act enacted that "the erection of any building . . . the conversion into a dwelling-house of any building not originally constructed for human habitation," and "the making of any addition to an existing building by raising any part thereof, or making any projection therefrom," should, for the purposes of the Act and the Public Health Acts, and of any bye-laws thereunder respectively, "be deemed

to be an erection of a new building," and that the word "building" should, for all such purposes, include "an erection of a building of a permanent character of whatever material constructed." By one of the bye-laws it was provided that "every person before beginning to erect a building or execute any work to which any bye-law relating to new buildings may apply, shall deliver or send to the surveyor a written notice of the date on which he will begin to build or execute the work"; and by another bye-law a penalty was imposed for offences against the bye-laws. The respondent, a builder, at the west side of his dwelling-house, immediately over the ground-floor portion of it occupied by a brick-built scullery, had erected, in accordance with duly approved plans, a conservatory, the west, north, and south walls of which consisted of a framework of wood, filled in with glass, the access to it being through a French window or door in the western external wall of the first-floor room of the house. Subsequently he pulled the conservatory down, bricked up the French window or door, and raised the external walls of the scullery to the same height as that to which the conservatory had reached, and thereby erected over the scullery a brick-built bedroom, occupying the same position and no greater space than the conservatory had done. On summons for infringing the bye-laws, by omitting to give the required notice to the surveyor, the justices dismissed the summons, on the ground that, inasmuch as the bedroom occupied no greater space than the conservatory previously occupied, it was not an "addition to an existing building" within section 111 of the local Act.

Held, on case stated, that the justices were wrong in dismissing the summons on that ground; as, although no greater space was occupied by the bedroom than by the conservatory, it was "an addition to an existing building" within section 111.—*Meadows* v. *Taylor*, Q.B.D.—59 L. J. M. C. 99; 62 L. T. 658.

2. *Conviction—Appeal—Recognizances—Delay—Jurisdiction of quarter sessions—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31 (3).—An appellant from a conviction of a court of summary jurisdiction to a court of quarter session had entered into the recognizance specified by section 31 (3) of the Summary Jurisdiction Act, 1879, but not, as that section requires, within three days after the day on which he gave notice of appeal. The appeal was accordingly dismissed, with costs.

Held, that the recognizance was not void, and might be estreated by the court of quarter sessions for non-payment of the costs awarded upon the dismissal of the appeal.—*Reg.* v. *Justices of Glamorganshire*, Q.B.D. 640—24 Q. B. D. 675; 62 L. T. 730.

2a. *Conviction—Information—Defect—Alternative offences—Penalty.*—A driver of a steam tramcar was prosecuted and convicted for having permitted smoke to escape from his engine "contrary to the bye-laws of the Board of Trade, made for the regulation of traffic on the said company's lines."

The bye-law in question provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public" under a penalty.

Held, that the bye-law created offences in the alternative, and that, as the information and conviction did not set forth distinctly with which of these alternative offences the defendant was charged, the conviction was bad.—*Cotterill* v. *Lempriere*, Q.B.D.—24 Q. B. D. 634; 62 L. T. 695.

3. *Jurisdiction—Assault—Certificate of dismissal—Withdrawal of charge*—Res judicata—*Offences against the Person Act* (24 & 25 *Vict. c.* 100), *ss.* 44, 45.—A. obtained a summons for assault against B. A. gave notice to B. that he would not proceed with the charge, and did not attend or offer evidence at the hearing. B. attended and obtained from the magistrate a certificate of dismissal under section 44 of the Offences against the Person Act, 1861. A. brought an action in a county court against B. in respect of the same assault.

Held, (1) that, there having been no hearing on the merits, the magistrate had no jurisdiction to grant the certificate, which was no bar to the action under section 45; (2) (Lord Coleridge, C.J., doubting) that the county court judge had power to inquire into the validity of the certificate.—*Reed* v. *Nutt*, Q.B.D. 621—24 Q. B. D. 669; 59 L. J. Q. B. 311; 62 L. T. 635.

4. *Jurisdiction—Husband and wife—Aggravated assault—Judicial separation—Evidence—Appeal—Affidavit—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *ss.* 42, 43—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.—A husband was convicted of an aggravated assault on his wife, and the justices ordered that she should not be bound to cohabit with him, and that he should pay a weekly sum for her maintenance, and they refused to admit the husband's evidence as to his means.

Held, (1) that the husband's evidence was rightly rejected; (2) that, on an appeal to the Probate, Divorce, and Admiralty Division, the court could not receive affidavits as to the merits of the case.—*Powell* v. *Powell*, P.D. & A.D.—14 P. D. 177; 61 L. T. 436.

5. *Jurisdiction—Malicious injury—Highway—Removal of post—Malicious Injuries Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52.—The respondent, whose wife was the owner of the land at each side of a public footpath, and also of the land over which the footpath passed, erected two wooden posts in the middle of the footpath to prevent his cattle from straying down the path, one post being at the entrance to the footpath and the other some distance along the path. There was a space of two feet at each side of the posts through which foot passengers could pass. The appellants, with a number of others, inhabitants of the district, assembled and pulled up one of these posts and threw it over the fence; they were convicted, under section 52 of the Malicious Injuries Act, 1861, of having committed wilful damage to the post.

Held, that the conviction was wrong, as the appellants, in pulling up the post, had acted under a fair and reasonable supposition that they had a right to do what they did; that the case came within the proviso of the section; and that the jurisdiction of the justices was ousted.—*Usher* v. *Luxmore*, Q.B.D. 254.—62 L. T. 110.

6. *Jurisdiction—Prohibition—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *ss.* 25, 59—*Sale of goods—Post office.*—Weights and scales supplied by the Post Office authorities are not within the operation of section 25 of the Weights and Measures Act, 1878, so that, if such weights or scales are supplied to a postmaster who, at the same time, is carrying on, in the same shop as the post-office, some other business requiring weights and scales, an inspector of weights has no right to seize such post-office weights or scales, even though they are unjust, and even though it be shown that the postmaster has in the shop no other suitable weights or scales for his ordinary business, provided it do not appear that he used such weights or scales in his business.

If, in such a case, an information is preferred against the postmaster under section 25 of the Act, for having in his possession unjust weights, the justices have no jurisdiction to entertain such a question, and a prohibition will go to prohibit them

from entering on the inquiry.—*Reg.* v. *Justices of Bromley*, Q.B.D. 253.—24 Q. B. D. 181; 59 L. J. M. C. 51; 62 L. T. 117.

7. Res judicata—*Dismissal of summons—Dogs Act*, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.—A. was charged before justices with non-compliance with an order to keep a dangerous dog under control, and the charge was dismissed.

Held, that A. could not be again summoned for not having the dog under control at a time before the date of the former hearing.—*Ryley* v. *Brown*, Q.B.D.—62 L. T. 458.

8. *Special case—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 129—*Trade refuse*—Mandamus.—The decision of a magistrate under section 129 of the Metropolis Management Act, 1855, as to what is "trade refuse" within the meaning of that Act is a decision involving a question of law, and a person aggrieved thereby may require the magistrate to state a case for the opinion of the High Court, section 33 of the Summary Jurisdiction Act, 1879, having modified section 129 of the former Act, which states that the magisterial decision shall be "final and conclusive."—*Reg.* v. *Bridge*, Q.B.D. 464—24 Q. B. D. 609; 59 L. J. M. C. 49; 62 L. T. 297.

9. *Summons—Service—Delay—Sale of Food and Drugs Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10.—By section 10 of the Sale of Food and Drugs Act, 1879, "in all prosecutions under" the Sale of Food and Drugs Act, 1875, "the summons to appear before the magistrates shall be served upon the person charged . . . within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days, from the time of the purchase from such person for test purposes of the food or drug, ... and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."

A complaint was made before two justices against the appellant for having sold adulterated milk, and a summons was granted, but not signed. The summons was afterwards signed and issued by a magistrate who had not heard the complaint. The appellant appeared on the return day under protest, and was convicted.

Held, that the summons was void, and that, the period of twenty-eight days having expired at the date of the hearing, the magistrate had no jurisdiction to hear the case, and the conviction must be quashed.

Reg. v. *Hughes*, 4 Q. B. D. 614, 27 W. R. Dig. 67; distinguished.—*Dixon* v. *Wells*, Q.B.D. 606—25 Q. B. D. 249; 59 L. J. M. C. 116; 62 L. T. 812.

See also Fishery, 3; Friendly Society, 3; Husband and Wife, 1, 2; Licensed House, 4; Malicious Prosecution.

LAND CHARGES REGISTRATION ACT.—See Local Government, 11; Practice, 38.

LANDLORD and TENANT:—

1. *Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 7—*Compensation—Notice of claim—Notice to quit—Holding over—Custom of county.*—The tenant of a farm was entitled under the custom of the county to hold over a part of the land for four months after the expiration of the notice to quit.

Held, that the "determination of the tenancy," within section 7 of the Agricultural Holdings Act, 1883, took place when the tenant's holding under the custom of the county ended, and that a notice of his claim for compensation given two months before that time was good.—*In re Paul*, Q.B.D.—24 Q. B. D. 247; 59 L. J. Q. B. 30; 61 L. T. 835.

2. *Distress—Bailiff—Percentage fee—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 49, 2nd *schedule.*—In a distress for rent the bailiff, and not the landlord, is entitled to the percentage fee for "levying distress" specified in the 2nd schedule to the Agricultural Holdings Act, 1883.

Coode v. *Johns*, 35 W. R. 47, 17 Q. B. D. 714, dissented from.—*Phillips* v. *Rees*, C.A. 53—24 Q. B. D. 17; 59 L. J. Q. B. 1; 61 L. T. 713.

3. *Distress—Fraudulent removal of goods—Bill of sale*—11 *Geo.* 2, *c.* 19, *ss.* 1, 3—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 13.—11 Geo. 2, c. 19, giving a landlord power to sue for the fraudulent removal of the goods of a tenant in order to avoid a distress does not apply where the goods have become, by the execution of a bill of sale by the tenant, the property of the bill of sale holder.

The landlord has no power to sue under section 13 of the Bills of Sale Act, 1882, where goods of the tenant granted by him under a bill of sale have been removed by the grantee, with the consent of the tenant, within five days after seizure.

Decision of the Queen's Bench Division reversed.

Lane v. *Tyler*, 56 L. J. Q. B. 461, 35 W. R. Dig. 32, approved.—*Tomlinson* v. *Consolidated Credit and Mortgage Corporation*, C.A. 118—24 Q. B. D. 135; 62 L. T. 162.

4. *Distress—Goods of third party—Execution—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 160.—Goods of the defendant's were taken in execution of a county court judgment obtained against the defendant. The goods so taken were in a house of which the defendant's wife was lessee. The landlord of the house, before the sale of the goods taken in execution, gave to the bailiff making the levy notice, under section 160 of the County Courts Act, 1888, claiming arrears of rent due from the defendant's wife.

Held, that, as there was a rightful execution against the defendant's goods, the claim of the landlord to distrain for the arrears of rent was good, and must prevail against the claims of the execution creditor.—*Hughes* v. *Smallwood*, Q.B.D.—25 Q. B. D. 306.

5. *Housing of the Working Classes Act*, 1885 (48 & 49 *Vict. c.* 72), *s.* 12—*Condition of tenancy—Fitness for habitation—Damages.*—A tenant residing in premises which came under the Housing of the Working Classes Act, 1885, was injured by the fall of a ceiling.

Held, that he was entitled to sue the landlord for damages for breach of the implied condition that the premises were reasonably fit for habitation as provided for by section 12 of the Housing of the Working Classing Act, 1885.—*Walker* v. *Hobbs*, Q.B.D. 63—23 Q. B. D. 458; 59 L. J. Q. B. 93; 61 L. T. 688.

6. *Lease—Assignment—Sub-lessees—Rent—Contribution.*—C. demised to M. a piece of land for 999 years, at a yearly rent of £11 7s. 8d. M. assigned by way of mortgage a part, at an apportioned rent, to A., the predecessor in title of the plaintiff, for the residue of the term, and also assigned by underlease another part, at an apportioned rent, to W., the predecessor in title of the defendants, for the residue of the term, less ten days. The defendant subsequently bought this apportioned rent from M. The plaintiff paid, under threat of distress, the whole chief rent to C., M. being insolvent, and sought to recover from the defendants a proportionate part of the rent.

Held, that no right to contribution existed, for there was no common demand to which the parties were liable, there being no one entitled to sue the defendants for their proportion of the rent.—*Johnson* v. *Wild*, Ch.D. Chl., J. 500—44 Ch. D. 146; 59 L. J. Ch. 322; 62 L. T. 537.

7. *Lease—Covenant—"Good tenantable repair."*—Under an agreement to keep a house in "good tenantable repair," and to so leave it at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class likely to take it.—*Proudfoot* v. *Hart*, C.A. 730—25 Q. B. D. 42; 59 L. J. Q. B. 389.

8. *Lease — Covenant — Restrictive covenant — Licensed house—Sale of beer.*—By a lease made between C. & W., thereinafter called "the lessors," "including in such term each of them, their, each, and every of their heirs, executors, administrators, and assigns" of the one part, and H. of the other part, a public-house was demised to H. for a term of years, and he covenanted with the lessors not to take, sell, or deal in upon the demised premises any beer other than beer purchased from the lessors or from either of them, either alone or jointly with any other person or persons who might thereafter become a partner or partners with them or either of them, provided they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at the fair current market price thereof. At the date of the lease C. & W. carried on business as brewers at the A. Brewery, but they subsequently sold the A. Brewery, with their plant, business, and goodwill, to N. They also conveyed their reversion in the lease of the public-house to him, with the benefits of the covenants in the lease, and expressly assigned to him the benefit of the aforesaid covenant; and about the same time, or soon afterwards, ceased to carry on business and dissolved partnership. N. did not use the A. Brewery as a brewery, but carried on his brewing business at his adjacent M. Brewery. H. having declined to take his beer from N., the latter brought an action in his own name and those of C. & W. for an injunction in the terms of the covenant to restrain H. from taking or selling beer other than such as should have been purchased from N., either directly or through C. & W.

Held, (1) that, upon the true construction of the covenant taken in connection with the clause in the lease defining "lessors," it was a covenant which included C. & W.'s assigns of the reversion in the demised premises, and was not confined to such of their assigns as should continue to carry on the business of brewers at the A. Brewery, and was, therefore, not a mere personal covenant, nor incapable of being assigned; (2) that the covenant was one which did, in fact, touch or concern the demises premised, and the benefit of it would accordingly run at law with the reversion; (3) that, even if the covenant were one the benefit of which would not at law run with the reversion of the demised premises, the fact of the assignment to N. of the brewery business, which must have included the goodwill, and of the benefit of the covenant having been also expressly assigned to N. with the reversion of the demised premises, entitled him in equity to sue upon the covenant; (4) that H., having presumably got the premises at a lower rent in consideration of his entering into the covenant, and it being in effect restrictive, and not affirmative, the principle of *Tulk* v. *Moxhay*, 2 Ph. 774, applied, and an injunction ought to be granted.

Decision of Bristowe, V.C., affirmed.

Doe v. *Reid*, 10 B. & C. 849, and *Renals* v. *Cowlishaw*, 26 W. R. 754, 28 W. R. 9, 9 Ch. D. 125, 11 Ch. D. 866, distinguished.—*Clegg* v. *Hands*, C.A. 433—44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502.

8a. *Lease—Notice to quit.*—By an agreement for a lease for five years it was provided that the tenancy might be determined "after the expiration of the term of three years out of the term of five years" by six months' notice in writing expiring at the corresponding quarter day at which the tenancy commenced. The tenant entered into possession on the 29th of September, 1885, and on the 23rd of March, 1888, gave notice to the landlord in the following terms:—"Kindly take notice that I intend to surrender to you the tenancy of this house on or before the 29th of September, 1888."

Held, that the notice to quit was equivocal in its terms, and therefore bad.

Thompson v. *Maberly*, 2 Camp. 573, questioned.—*Gardner* v. *Ingram*, Q.B.D.—61 L. T. 729.

9. *Tenancy from year to year—Implied covenant—Quiet enjoyment.*—In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest, and if, on such determination, the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his landlord for damages for such eviction by the superior landlord.—*Schwartz* v. *Locket*, Q.B.D. 142—61 L. T. 719.

See also ARBITRATION, 4; BANKRUPTCY, 31; COSTS, 16; COVENANT, 2; DISCOVERY, 5; FRAUDS, STATUTES OF, 3; MORTGAGE, 1, 2; SPECIFIC PERFORMANCE.

LANDLORD and TENANT (IRELAND):—

1. *Improvements — Compensation — Ejectment — Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 1.—A tenant ejected for non-payment of rent does not lose his right to compensation for improvements.—*Kelly* v. *Lord Massareene*, C.A. (Ir.)—26 L. R. Ir. 199.

2. *Judgment against tenant — Execution against holding—Stay of execution—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 30.—The defendant was tenant of two farms, the value of one of which was less than £50, though the aggregate value of both exceeded that amount. The plaintiff obtained judgment against the defendant on a bill of exchange. The defendant applied for a stay of execution against his interest in the farm, which was worth less than £50.

Held, that the case was not within section 30 of the Land Law (Ireland) Act, 1887, and that the application must be refused.—*Bank of Ireland* v. *Watkins*, Q.B.D. (Ir.)—26 L. R. Ir. 258.

3. *Lease—Compulsory sale—Rent—Arbitration—Award—Railways (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 70), *s.* 9.—Land held by A. as lessee to B. was compulsorily acquired under a local Act, incorporating the Railways (Ireland) Act, 1851. An arbitrator awarded that the rent should be wholly abated. The compensation money was not paid into court till after the award.

Held, that B. was entitled to receive rent from A. from the date of the award till the payment of the compensation into court.—*Callow* v. *Flynn*, Q.B.D. (Ir.)—26 L. R. Ir. 179.

4. *Lease—Covenant—Forfeiture—Fair rent—Stay of proceedings—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 13.—In an action of ejectment for forfeiture by assignment of a lease, contrary to covenant, the defendant alleging a waiver, there ought not to be a stay of proceedings under section 13 of the Land Law (Ireland) Act, 1881.—*McNeill* v. *Thompson*, Q.B.D. (Ir.)—24 L. R. Ir. 444.

5. *Lease — Covenant — Renewal — Enforcement by lessor—Waiver.*—A lessor of church lands with a perpetual covenant for renewal was entitled to enforce renewal by the tenant, but for twenty-five years

neglected to do so, and permitted the latter to deal with the holding as an ordinary tenancy from year to year.

Held, that the court could not now enforce the covenant in favour of the lessor.—*Pilson* v. *Allen*, L.J. (Ir.)—25 L. R. Ir. 5.

6. *Lease—Covenant—Renewal*—Laches.—A tenant under a lease for lives renewable for ever may be compelled to accept a fee-farm grant though the lease contains no express covenant by the lessee to renew.

A landlord's ignorance of the death of the last life in the lease displaces the presumption of *laches*.—*Ward* v. *McRoberts*, L.J. (Ir.)—25 L. R. Ir. 224.

7. *Lease—Mistake—Rectification.*—A lease was made for twenty-one years, from the 29th of September, 1867, at £80 a year, payable half-yearly, in consideration of £40 paid by the lessee, and it was provided that the lessor, his heirs and assigns, should allow to the lessee, his executors or administrators, the said sum of £40 in discharge of the half-year's rent which would accrue due on the 29th of September, 1898, provided that the term should not have been previously forfeited. In an action by the lessor against the assignee of the lease for rent due on the 29th of September, 1888, the defendant averred that the date 1898 had been inserted, by mutual mistake, instead of 1888. The plaintiff alleged in his reply that the agreement was that the £40 should be allowed on the termination of the tenancy, and on giving up possession and on due performance of the covenants in the lease, but that the defendant had not given up possession, and had served a notice to fix a fair rent. The jury found that 1898 was a mutual mistake for 1888.

Held, that the court could treat the lease as reformed by substituting 1888 for 1898, and that the defendant was entitled to credit for the £40.—*Borrowes* v. *Delaney*, EX.D. (Ir.)—24 L. R. Ir. 503.

8. *Lease—Rent—Fair rent—Ejectment—Covenant for quiet enjoyment—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *s.* 8.—If a landlord lets leasehold lands to a tenant from year to year, and is afterwards ejected for non-payment of rent, his tenant having previously fixed a fair rent, the landlord's executor is not liable to the tenant for damages for breach of an implied covenant for quiet enjoyment.—*Kearns* v. *Oliver*, Q.B.D. (Ir.)—24 L. R. Ir. 473.

9. *Lease—Rent—Fair rent—Order of Land Commission—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 33), *s.* 1.—An order of the Land Commission, fixing a fair rent on the application of the assignee of the lease, discharges the original lessee from liability for rent accruing afterwards. — *Sturgess* v. *Ryan*, Q.B.D. (Ir.)—24 L. R. Ir. 305.

10. *Lease—Rent—Fair rent—Temporary letting—Resumption—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *s.* 58—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 33), *s.* 1.—B. was tenant under a lease which permitted the lessor to resume, for building purposes, half of the holding. B. served a notice to fix a fair rent.

Held, that the notice must be dismissed.—*Butterly* v. *Carroll*, C.A. (Ir.)—26 L. R. Ir. 93.

11. *Lease—Tenancy from year to year—Estoppel—Bonâ fide occupation—Land Law (Ireland) Act*, 1881 (45 & 45 *Vict.* c. 49), *s.* 21—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 33), *s.* 4.—A lessee for twenty years, with a clause against alienation, died intestate. His widow remained in possession for over twelve years. She never took out administration, but was treated as tenant by the lessor. After marrying again she resided on the farm for three years, and afterwards removed elsewhere, but still carried on the farm. The lessor consented to the house and garden being underlet. The lessor afterwards sued the widow of the original lessee and the sub-tenant for possession.

Held, (1) that the lessee's widow was lessee within section 21 of the Land Law (Ireland) Act, 1881; (2) (Holmes, J., dissenting) that the plaintiff was estopped from denying the widow's title; (3) that the defendants were in *bonâ fide* possession when the lease expired.—*Rankin* v. *McMurtry*, Q.B.D. (Ir.)—24 L. R. Ir. 290.

12. *Notice to quit—Demand of possession—Service by agent—Land (Ireland) Act*, 1860 (23 & 24 *Vict.* c. 124), *s.* 86.—It is not necessary that a demand for possession under section 86 of the Land (Ireland) Act, 1860, should be personally made by the known agent of the landlord.

The agent of a landlord signed a written demand of possession and a written authority to a bailiff to serve the demand. The bailiff served the demand on the caretaker.

Held, that the service was sufficiently served.—*Lord Massareene* v. *Bellew*, Q.B.D. (Ir.)—24 L. R. Ir. 420.

13. *Recovery of land—Lease—Rent—Non-payment—Administration—Land (Ireland) Act*, 1860 (23 & 24 *Vict.* c. 154), *s.* 52.—The reversion of a lease was vested in the plaintiff as heir-at-law of A. The plaintiff had obtained letters of administration to A.'s estate. One year's rent was due to the plaintiff as administrator, and six months' rent as heir-at-law and owner of the reversion.

Held, that A. could not maintain an action to recover the land for non-payment of rent.—*Mennons* v. *Burke*, EX.D. (Ir.)—26 L. R. Ir. 193.

14. *Rent—Fair rent—Receiver—Application by receiver*—A receiver appointed by the court on a petition for sale of the lessee's interest in a holding took possession of the holding, and, pursuant to the order of the Land Judge, applied on behalf of the lessee to have a fair rent fixed.

Held, that the lessee was *bonâ fide* in occupation of the holding, and that a fair rent could be fixed.—*Moir* v. *Blacker*, C.A (Ir.)—26 L. R. Ir. 375.

15. *Rent — Fair rent — Re-hearing — Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *s.* 3.—In 1883 a sub-commission fixed the fair rent of a holding at £64. In 1888 the Land Commission re-heard the case and varied the order by fixing the fair rent at £60. The landlord then sued the tenant for the difference between the old rent, which was £87, and £64, between the dates of the two orders.

Held, that the rent of £60 only was payable from the date of the first payment due after the order of 1883.—*Davies* v. *McMahon*, C.A. (Ir.)—24 L. R. Ir. 447.

16. *Rent—Fair rent—Special contract—Agreement for lease—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *ss.* 8, 22, 57.—A., who was tenant of land at the passing of the Land Law (Ireland) Act, 1881, afterwards agreed in writing with the landlord for a lease for thirty-one years at £225 per annum, and not to sell without the landlord's consent. A. afterwards served a notice to fix a fair rent.

Held, that A. had contracted himself out of the benefit of the Act.—*Ronaldson* v. *Latouche*, C.A. (Ir.)—24 L. R. Ir. 344.

17. *Rent—Non-payment—Ejectment—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 33), *s.* 7.—The plaintiff obtained judgment against the defendant for possession of two farms held by the latter at a fair rent fixed by the Land Commission. On the 27th of May, 1888, the plaintiff served a notice in lieu of execution under section 7 of the Land Law (Ireland)

Act, 1887. On the 4th of June, 1889, the plaintiff commenced an action to recover the land for non-payment of rent. The defendant had paid no rent since 1884, but he had never been out of possession of farm A.

Held (Murphy, J., *diss.*), that the plaintiff was not entitled to a verdict for possession of A.—*Marquis of Clanricarde* v. *Clarke*, EX.D. (Ir.)—26 L. R. Ir. 261.

18. *Rent—Non-payment—Redemption—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 7.—The period of six months for redemption under section 7 of the Land Law (Ireland) Act, 1887, runs from the day of the posting to the tenant of the statutory notice, and not from the day on which he receives it.—*Reg.* v. *Justices of Carlow*, Q.B.D. (Ir.)—24 L. R. Ir. 492.

19. *Waste—Ancient pasture—Injunction.*—By a settlement dated in 1838 P. was tenant for life of land, with remainder to the plaintiff in tail male, with power to P. to grant leases for three lives or any term not exceeding thirty-one years, provided that the lessees should not be exempt from impeachment of waste. In 1871 P. made a lease to the defendant of a part of the settled land, with a house and garden, at a yearly rent of £79. The lease provided that if any part of the land should be broken up or tilled, it should, at least two years before the expiration of the lease, be planted with grass seed, and delivered up properly laid down in grass. There was a power of surrender, after six months' written notice, at the expiration of any three years of the term. From 1838 till 1871 the land had never been broken up. The defendant ploughed up a small part of the land to drain it.

Held, that it was open to the defendant to show that the act complained of was meliorative waste, and that an injunction could not be granted against him.—*Palmer* v. *McCormick*, C.A. (Ir.)—25 L. R. Ir. 110.

20. *Waste—Illegal conspiracy—Injunction.*—A. was tenant to S., for a statutory term, of twelve acres of land on which was a house, which A. occupied. G. was tenant of land only separated from A.'s holding by a road, under a different landlord, and was evicted for non-payment of rent. On the day of G.'s eviction, A. and other persons, without S.'s consent, erected a wooden hut on A.'s holding, opposite to G.'s former house. G. and his family then resided in the hut.

Held, that S. was entitled to an injunction to prevent the continuance of the hut on his land.—*Steele* v. *Tiernan*, V.C. (Ir.)—23 L. R. Ir. 583.

LANDS CLAUSES CONSOLIDATION ACT :—

1. *Arbitration—Award—Appeal—Entry on land—Injunction—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 85.—An arbitrator decided that a part of the plaintiff's land which was required by the defendants for the purpose of the defendants' railway could be severed from the rest without material detriment. He awarded damages for the value of the land taken, and for the severance. The plaintiff applied to the High Court to set aside the award. The defendants paid the amount of the award into court, and took possession of the land.

Held, that the defendants' entry was lawful, and could not be restrained by injunction on the ground that proceedings to set aside the award were still pending.—*Lambert* v. *Dublin, Wicklow, and Wexford Railway Co.*, C.A. (Ir.)—24 L. R. Ir. 164.

2. *Compulsory powers—Damages—Severance of land—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 49, 63.—Where land is compulsorily taken under the Lands Clauses Consolidation Act, 1845, the owner is entitled to compensation for depreciation of the value of his other lands, though such depreciation is due to the anticipated legal use of works to be constructed upon the land taken.

When the unity of ownership of parcels of land conduces to the advantage of the property as one holding, they are held together within the meaning of section 49 of the Lands Clauses Consolidation Act, 1845, and actual contact is not essential.

Reg. v. *Clerk of Peace for Cheshire*, 12 W. R. 762, approved.

Decision of the Court of Appeal, 34 W. R. 587, 17 Q. B. D. 447, reversed.—*Cowper Essex* v. *Acton Local Board*, H.L. 209—14 App. 183; 58 L. J. Q. B. 594; 61 L. T. 1.

3. *Compulsory powers—Damages—Light—Loss of easement—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16.—The owner of certain ancient lights pulled down the old buildings and erected others, of which some of the windows corresponded, and others did not correspond, with the ancient lights. Before any right to the access of light had been acquired by the new windows, a railway company, under statutory powers, erected a building on adjacent land which obstructed the light of all the windows.

Held, affirming the decision of the Queen's Bench Division (38 W. R. 332, 24 Q. B. D. 40), that compensation must be given in respect of all the windows obstructed, and not merely in respect of those which corresponded with ancient lights.—*In re London, Tilbury, and Southend Railway Co.*, C.A. 343—24 Q. B. D. 326; 59 L. J. Q. B. 162; 62 L. T. 306.

4. *Compulsory powers—Injury to land—Trial—Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *ss.* 41, 43—*Ord.* 36, *r.* 7a.—Upon a claim for compensation against a railway company for lands alleged to be injuriously affected, the railway company disputed the title of the complainant to the lands in question, and, on an application of the railway company under section 41 of the Regulation of Railways Act, 1868, to a judge at chambers, an order was made directing that the questions of liability and the amount of compensation, if any, should be tried before a judge of the High Court sitting without a jury.

Held, that the order exceeded the jurisdiction given to a judge at chambers under the section, and that "the question between the parties" mentioned in the section only embraced the question of compensation.

Semble, that the question of compensation, if ordered to be transferred to the High Court under the section, can only be tried by a judge with a jury.—*In re East London Railway Co.*, C.A. 312—24 Q. B. D. 507.

5. *Compulsory powers—Limits of deviation—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 85, 92—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 13, 15.—A railway company authorized to take such of the lands shown on and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special Act has power to take lands outside the limits of deviation if such lands are reasonably required for the purpose of constructing the line of railway within the limits of deviation, provided that such lands are properly shown and described in the deposited plans and books of reference.

Wrigley v. *Lancashire and Yorkshire Railway Co.*, 4 Giff. 352, 11 W. R. Ch. Dig. 92, explained.

Dowling v. *Pontypool Railway Co.*, L. R. 18 Eq. 714, 23 W. R. Dig. 203, approved.

The deposited plans and books of reference showed

two tenements, marked as Nos. 122 and 123, which consisted of two houses, with their respective curtilages. One of the two houses and part of the other house, as well as parts of the curtilages of both houses, were within the limits of deviation, and the remaining parts of the two tenements were outside those limits. The tenant of the house partly within and partly without the limits of deviation required the company to take the whole of his tenement, but the lessor refused to sell the whole of the two tenements to the company.

Held, that it became reasonably necessary for the company to take the whole of the two tenements numbered 122 and 123, and that, as the whole of these two tenements were shown and described in the deposited plans and books of reference, the company were entitled to take the whole.

Pulling v. *London, Chatham, and Dover Railway Co.*, 12 W. R. 969, 3 De G. J. & S. 661, distinguished.

Decision of Kay, J. (37 W. R. 375), affirmed.—*Fincke* v. *London and South-Western Railway Co.*, C.A. 513—44 Ch. D. 330; 59 L. J. Ch. 453; 62 L. T. 881.

6. *Costs — Conveyance of outstanding interest—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18) *s.* 82.—Lands held under a lease for life and term of years, but which for twelve years had been in the possession of A., were taken by a company under compulsory powers. The company required that administration should be taken out to B., the assignee of the lease, through whom A. claimed. C. accordingly took out administration to B., and conveyed her interest in the lands as administratrix to A.

Held, that under section 82 of the Lands Clauses Act, 1845, the cost of this conveyance should be borne by the company.

In re Liverpool Improvement Act, L. R. 5 Eq. 282, followed.—*In re Dublin (South) City Market Co., Ex parte Keatley*, M.R. (Ir.)—25 L. R. Ir. 265.

7. *Payment into court — Lunacy—Investment—Consols—Conversion—Redemption—Petition for re-investment—Cash under control of court—Costs—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 80—*Lord St. Leonards' Act* (23 & 24 *Vict. c.* 38), *s.* 10—*Ord.* 22, *r.* 17.—The purchase-money of land belonging to a lunatic and taken by a railway company had been paid into court and invested in Three per Cent. Consols. The committee not having assented to their conversion, the Consols were redeemed by the Government, and the redemption-money was paid into court to the account of the lunatic, *ex parte* the railway company.

Held, on a petition by the committee that the redemption-money might be invested in railway preference stock, that the redemption-money was "cash under the control of the court" within the meaning of section 10 of Lord St. Leonards' Act, 1860, and ord. 22, r. 17, and that there was power to direct its investment in the manner sought.

Ex parte St. John's College, Oxford, 31 W. R. 55, 22 Ch. D. 93, followed.

Held, also, that the railway company should pay the costs, as the re-investment was rendered reasonably necessary by the Act of the Legislature, and was not occasioned by the mere caprice of the holder.—*In re Brown*, LUN. 529; 59 L. J. Ch. 830.

8. *Payment out of court—Costs—Incumbrancers.*—On petition for payment out of purchase-money paid into court under the Lands Clauses Consolidation Act, 1845, the company or local authority must pay the costs, not exceeding 42s., of incumbrancers on the fund, and the costs of an affidavit of service of the petition upon the incumbrancers, even if the incumbrance is created after the payment into court.

Eden v. *Thompson*, 12 W. R. 789, 2 H. & M. 6, followed.

In re Gough's Trusts, 32 W. R. 147, 24 Ch. D. 561, commented on.—*In re Olive*, CH.D. NOR., *J.* 459—44 Ch. D. 46; 59 L. J. Ch. 360; 62 L. T. 626.

9. *Payment out of court—Tenancy for life—Petition—Costs—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 80.—An order was made for payment to a tenant for life of dividends on the purchase-money of land compulsorily acquired by a railway company, the costs being paid by the railway company. The tenant for life afterwards petitioned to apply the purchase-money in discharge of incumbrances.

Held, that the railway company was not liable to pay the costs of the second petition.—*In re Dublin, Wicklow, & Wexford Railway Co.*, M.R. (Ir.)—25 L. R. Ir. 175.

LAY DAYS.—See SHIPPING, 21, 24, 25.

LEASE.—See ADMINISTRATION, 5; BANKRUPTCY, 30, 31; CONTRACT, 1; COVENANT, 1, 2; DISCOVERY, 2; LANDLORD AND TENANT, 6—8; LANDLORD AND TENANT (IRELAND), 5—13; MORTGAGE, 11; PARTNERSHIP, 1; SETTLEMENT, 10; SOLICITOR, 7; SPECIFIC PERFORMANCE; TRUSTEE, 10; VENDOR AND PURCHASER, 6; 8; 11.

LEGACY DUTY:—

Real estate abroad — Partnership — Conversion.—A., who died in 1880, and who at the time of his death was domiciled in England, had for many years previous to his death carried on the business of sheep-breeding in partnership with his brother, S., in New Zealand. Part of the partnership property consisted of a freehold estate in New Zealand, known as the Milbourne Estate. By articles of partnership dated the 14th of February, 1879, made between the testator and S., it was agreed that the Milbourne Estate should be forthwith sold in the manner which the parties should mutually agree upon, and the articles contained provisions for sale in case of no agreement and for carrying on the partnership. S. died in January, 1880. A. was entitled to four-sevenths of the partnership property. No sale of the estate was made in the lifetime either of S. or of the testator. A., by his will, gave his four-sevenths in the Milbourne Estate to trustees upon trust to sell, with powers of management until sale, and subject to the payment of an annuity, and of the income of one-seventh to the widow of S. during her life, to divide the proceeds and produce until sale among thirteen charities. The Milbourne Estate had never been sold, but the income since the death of the testator had from time to time been paid into court in an action to administer the testator's estate which was commenced in 1881. Under an order made in the action in April, 1888, the funds then in court were divided, and legacy duty had been paid upon the moneys arising from the Milbourne Estate. The duty had been paid under an arrangement that it should be repaid if it was ultimately decided that it should not be payable. The governors of the London Hospital, who had been appointed to represent the other charities, presented a petition asking for distribution of the fund which had accumulated in court, without payment of legacy duty, on the ground that, inasmuch as it represented proceeds of sale of real estate in New Zealand, it was not subject to English legacy duty.

Held, that, as the testator's interest in the property was personal estate, legacy duty was payable according to the law of the testator's domicil.

Forbes v. *Steven*, 18 W. R. 686, L. R. 10 Eq. 178, followed.—*Stokes* v. *Ducros*, CH.D. NOR., *J.* 535—41 L. T. 176.

LEGITIMACY. — See EVIDENCE, 8, 9; LEGITIMACY DECLARATION ACT, 1, 2.

LEGITIMACY DECLARATION ACT:—

1. *Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93), *s.* 1—*Foreign marriage—Japan, law of.*—The petitioner, a British subject with an Irish domicil of origin, being temporarily resident in Japan, married a Japanese woman in accordance with the formalities required by Japanese law. By the Japanese law the petitioner would be unable to marry any other woman during the continuance of the marriage.

Held, that the marriage was valid.—*Brinkley* v. *Attorney-General*, P.D. & A.D.—15 P. D. 76; 59 L. J. P. D. & A. 51; 62 L. T. 911.

2. *Probate action—Writ—Joinder of claims.*—In a probate action the court refused to allow the plaintiff to include in the writ a prayer for a declaration of legitimacy.—*Warter* v. *Warter*, P.D. & A.D.—15 P. D. 35; 59 L. J. P. D. & A. 45; 62 L. T. 328.

LIBEL:—

1. *New trial—Excessive damages.*—In an action *ex delicto* in the nature of an action of libel a new trial ought not to be granted on the ground that the damages are excessive unless the court comes to the conclusion, upon all the circumstances, that the damages awarded by the jury are so large that no twelve reasonable men could have given them.—*Praed* v. *Graham*, C.A. 103—24 Q. B. D. 53; 59 L. J. Q. B. 230.

2. *Pleading—Aggravation of damages—Ord.* 19, *r.* 27.—In an action for libel published in a newspaper the statement of claim alleged that the defendant knew that the words published would be, and they were in fact, repeated and published in other editions of the same newspaper.

Held, that the allegation was relevant, and ought not to be struck out.—*Whitney* v. *Moignard*, Q.B.D.—24 Q. B. D. 630; 59 L. J. Q. B. 324.

3. *Privilege—Legal proceedings—Report of judgment.*—A jury found that an alleged libel was a fair, accurate, and honest report of the judgment of a judge; that it was published *bonâ fide* and with the honest intention of making known the true facts of the case, in order to protect the reputation of the defendants, and in reasonable self-defence; and that the publication was not malicious.

Held, that it was too late after the trial to raise the question whether or not the judgment truly represented all the evidence given.

Decision of the Court of Appeal (34 W. R. 727, 17 Q. B. D. 636) affirmed on different grounds.—*Macdougall* v. *Knight*, H.L. 44—14 App. 194; 58 L. J. Q. B. 537; 60 L. T. 762.

4. *Privilege — Register of judgments.*—Judgment was obtained against A. in England as executor of his deceased father. The judgment was afterwards registered in Ireland, and in the registered memorandum the judgment was stated to have been recovered against A. personally. The particulars of the judgment as registered were published by the defendants in their weekly gazette, which contains a list of all judgments. The defendants did not act with malice, and had no knowledge of the actual facts.

Held, that the publication was privileged, and that the plaintiff could not maintain an action for libel.—*Lord Annaly* v. *Trade Auxiliary Co.*, EX.D. (Ir.)—26 L. R. Ir. 11.

5. *Privilege—Second action—Stay of action.*—The defendants published in the form of a pamphlet a report of a judgment delivered in a former action brought against them by the plaintiff. The pamphlet contained no separate report of the evidence. The plaintiff brought an action for libel in respect of the pamphlet, and specified certain passages in it as defamatory. A jury having found that the report was accurate, and was published *bonâ fide* and without malice, judgment was given for the defendants, and a new trial was refused by a divisional court, the Court of Appeal, and the House of Lords. The plaintiff then brought a second action in respect of the same pamphlet, specifying, however, other passages as defamatory, and raising as a point of law a question suggested as a doubt by Lord Halsbury, C., in the House of Lords (38 W. R. 44, 14 App. 194)—namely, whether, if the report did not give reasonable opportunities to the reader to form his own judgment as to the conclusion to be drawn from the evidence given, it might be the subject of an action for libel and not be privileged.

Held, that the action must be stayed, as being frivolous and vexatious.—*Macdougall* v. *Knight* (2), C.A. 553—25 Q. B. D. 1.

See also DAMAGES, 1; DISCOVERY, 4, 7; EVIDENCE, 10; JURISDICTION, 3.

LICENSED HOUSE:—

1. *Disqualification—Felony—Conviction — Pardon* —9 *Geo.* 4, *c.* 32, *s.* 3—*Wine and Beerhouse Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 14.—A free pardon under the Queen's sign manual relieves the convict not only of the sentence inflicted on him by the court, but of all penal consequences of the conviction; and, therefore, where a man has been convicted of felony, and has afterwards received the Queen's pardon, he is not subject to the permanent disability to hold a licence to sell spirits by retail imposed by section 14 of the Wine and Beerhouse Act, 1870.—*Hay* v. *Tower Justices*, Q.B.D. 414—24 Q. B. D. 557; 59 L. J. M. C. 79; 62 L. T. 290.

2. *Permitting gaming—Betting—Money brought to house after receipt outside—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.—The appellant was a keeper of a licensed tavern, in close proximity to which were a piece of waste ground and a public footway. On the day of a race meeting a betting man was for some hours on the waste ground and the footway, receiving from persons who resorted thither packets containing money, which they deposited with him for the purpose of backing various horses. The packets were brought into the tavern at intervals by the appellant's daughter. The plan was adopted for the purpose of evading the provisions of the Betting Act, 1853, and with the connivance of the appellant.

Held, that the appellant was not liable to be convicted under section 17 of the Licensing Act, 1872, of having suffered his house to be used in contravention of the Betting Act, 1853.—*Davis* v. *Stephenson*, Q.B.D. 492—24 Q. B. D. 529; 59 L. J. Q. B. 305; 62 L. T. 436.

3. *Provisional licence—Renewal—Refusal—Appeal* —9 *Geo.* 4, *c.* 61, *s.* 27—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 22.—A provisional grant of a licence under section 22 of the Licensing Act, 1874, may be renewed from year to year like an ordinary licence, and an appeal to quarter sessions lies from a refusal of the licensing justices to renew such a licence.—*Reg.* v. *Justices of London*, Q.B.D. 269—24 Q. B. D. 341; 59 L. J. M. C. 71; 62 L. T. 458.

4. *Renewal of licence—Transfer—Jurisdiction of justices—Appeal*—9 *Geo.* 4, *c.* 61, *ss.* 4, 14—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 75, *schedule* 2. —A licensee, convicted of an offence under the Licensing Acts, declined to quit until the last day of the adjournment of the general annual licensing sessions.

J., a new tenant, obtained a temporary licence, and applied at the next special sessions for a transfer of the former licence under 9 Geo. 4, s. 14, on the ground that the former holder had "wilfully omitted or neglected to apply" for a renewal at the general licensing sessions. The licensing justices refused the application, and, on appeal, the justices at quarter sessions held that they had no jurisdiction to hear the appeal, on the ground that the application was one for a new licence and not for a transfer, and that the powers of appeals in that respect were repealed by the Licensing Act, 1872, s. 75, schedule 2.

Held, that the application was one for the transfer of a licence, as contemplated by sections 4 and 14 of 9 Geo. 4, c. 61, and that the justices had jurisdiction, as it came within the exception contained in the Licensing Act, 1872, s. 75, schedule 2.—*Thornton* v. *Clegg*, Q.B.D. 160—24 Q. B. D. 132; 58 L. J. M. C. 6.

5. *Sale of beer—Sale of game—Game Act* (1 & 2 *Will.* 3, *c.* 32), *s.* 18—*Inland Revenue Act*, 1863 (26 & 27 *Vict. c.* 33), *s.* 1.—The holder of a licence to sell beer in bottles to be drunk off the premises under the Inland Revenue Act, 1863, is, by section 18 of the Game Act, disqualified from holding a licence to deal in game.— *Shoolbred* v. *Justices of St. Pancras*, Q.B.D. 399—24 Q. B. D. 346; 59 L. J. M. C. 63; 62 L. T. 287.

6. *Sale of beer—Sale by retail—6 Geo.* 4, *c.* 81, *s.* 2—4 & 5 *Will.* 4, *c.* 85, *s.* 19—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 74.—The plaintiff, not being a brewer, held a licence under 6 Geo. 4, c. 81, s. 2, "to sell strong beer in casks of not less than four gallons and a half imperial gallon measure, or of not less than two dozen reputed quart bottles at one time, to be consumed elsewhere than on his premises." He was summoned under section 3 of the Licensing Act, 1872, for having sold beer by retail without being licensed to do so, in that he had sold beer in two dozen imperial pint or half-pint bottles instead of in the manner stated in the licence, and he was convicted and fined for the said offence.

Held, that the conviction must be quashed, on the ground that, by section 74 of the Licensing Act, 1872, when read with 4 & 5 Will. 4, c. 85, s. 19, a sale of beer by retail is defined to be selling in less quantity than four gallons and a half; that the quantity sold was the criterion of the offence; and that here there had been no offence shown under the Licensing Acts, as the quantity sold was in excess of the measurement statutably imposed.—*Fairclough* v. *Roberts*, Q.B.D. 330—24 Q. B. D. 350; 59 L. J. M. C. 54; 62 L. T. 700.

7. *Transfer — Refusal — Application by second tenant*—Mandamus.—A. applied for a transfer of the licence of a public-house, the holder of the licence having left the house several months before. The justices refused the application. An application for a new licence was afterwards refused. While the original licence was still in force B. entered on the premises and applied for a transfer of the licence, but the judge refused to hear the application.

The court issued a *mandamus* directing the justices to hear B.'s application.—*Reg.* v. *Justices of Goldcross*, Q.B.D.—62 L. T. 112.

See also GAMING; LANDLORD AND TENANT, 8; MORTGAGE, 1.

LIEN.—See BANKRUPTCY, 22; COSTS, 20; INSURANCE, 3a; PRACTICE, 33; SHIPPING, 22, 26, 27, 32; SOLICITOR, 4; VENDOR AND PURCHASER, 6; WILL, 38.

LIFE INSURANCE.—See BILL OF SALE, 8; COMPANY, 22; INCOME TAX, 2, 3, 6; INSURANCE, 2—3a; JURISDICTION, 2; MORTGAGE, 19; PRACTICE, 44.

LIGHT:—

1. *Easement—Extinguishment—Damages—Artisans' Dwellings Act*, 1875 (38 & 39 *Vict. c.* 36), *s.* 20.—The plaintiff built a house in 1867. In 1877 the land adjoining it was acquired by a local authority under the provisions of the Artisans' Dwellings Act, 1875. In 1888 the defendant, the lessee, erected on the land buildings which obstructed the access of light to the plaintiff's house.

Held, in an action to recover damages for the obstruction, that the defendant was protected by section 20 of the Artisans' Dwellings Act, 1875, since the plaintiff had in 1877 an inchoate right over the land acquired by the local authority, which was extinguished by the section, and in respect of which compensation was payable.—*Barlow* v. *Ross*, C.A. 372—24 Q. B. D. 381; 59 L. J. Q. B. 183; 62 L. T. 552.

2. *Easement—Implied grant—Railway company—Superfluous land—Injunction.*—A railway company sold to the plaintiff a piece of surplus land, with a house erected thereon, facing the railway, which ran over a series of brick arches, through which there was access of light to the lower windows of the house. The company retained lands adjoining the property sold, and the conveyance contained a recital that the company required all the land other than that sold to the plaintiff for the construction of their railway; but it contained no express grant of a right to light. The defendant's predecessor in title subsequently acquired from the company the fee simple of the lands opposite the plaintiff's house, on which he erected buildings, and took a lease of the arches. Afterwards the defendant acquired the property, and blocked up the openings of the arches on the side nearest the plaintiff's house with hoardings.

Held, that the company, on selling the land, entered into an implied obligation not to do anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land purchased by him, except what was necessary for the construction of their railway; and that, the hoarding erected by the defendant not being necessary for that purpose, an injunction ought to be granted.

Decision of Kekewich, J., affirmed.—*Myers* v. *Catterson*, C.A. 488—43 Ch. D. 470; 59 L. J. Ch. 315; 62 L. T. 205.

3. *Obstruction—Mandatory injunction—Damages—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *ss.* 1, 2.—A mandatory injunction may be granted for the removal of a building obstructing ancient lights, although it was completed before the writ was issued.

The circumstances under which the court will grant such an injunction in lieu of damages under Lord Cairns' Act considered.—*Lawrence* v. *Horton*, CH.D. CHI., J. 555—59 L. J. Ch. 440; 62 L. T. 749.

See also LANDS CLAUSES CONSOLIDATION ACT, 3.

LIMITATIONS, STATUTE of:—

1. *Acknowledgment.* — In 1882 E. gave B. a promissory note to B. for £2,000, payable in advance. B. died in 1884, and in 1885 E. addressed the following letter to B.'s son, who was one of his executors and residuary legatee:—"The great kindness of your father on every occasion, and more especially the money that he lent me to purchase my seat on the New York Stock Exchange, place me now in your debt. I must now leave it to your generosity whether you will have me liquidate the loan on the sale of my seat." E. sold his seat in 1887, and died in 1888.

Held, that a new period of limitation ran from the date of E.'s letter.—*Duke of Buccleugh* v. *Eden*, CH.D. KAY, J.—61 L. T. 360.

2. *Acknowledgment to stranger.*—An acknowledgment of a debt barred by the Statute of Limitations given to a person who is neither the agent of, nor in privity with, the creditor, will not revive the liability.—*Rogers* v. *Quinn*, EX.D. (Ir.)—26 L. R. Ir. 137.

3. *Acknowledgment — Principal and surety — Payment by principal—Discharge.*—Five directors of a company gave, in the years 1871 and 1874 respectively, two joint and several promissory notes to secure an advance to the company. The advance was also secured by a mortgage by assignment by the company of certain leasehold collieries. The company was wound up, and at that date a considerable sum was due to the lenders. The collieries could not be profitably worked. One of the five directors afterwards became bankrupt, and the lenders proved against his estate for the balance due on the promissory notes. The proof was afterwards withdrawn, in pursuance of certain arrangements which the lenders had entered into for the purpose of relieving themselves from the rents and covenants under the colliery leases to which they had become liable, and a general receipt had been given to the trustee in bankruptcy. The lenders now claimed to prove for the balance due on the promissory notes against the estate of another of the signatories which was being administered by the court. This claim was first made in 1879.

Held, that the claim on the first promissory note was barred by the Statute of Limitations, since the fact that the principal debtor, the company, had made payments in respect of the debt did not prevent the statute from running in favour of the surety, and an affidavit by the testator's representatives as to creditor's claims was not a sufficient acknowledgment to take it out of the statute. The receipt given to the trustee in bankruptcy could not release the other sureties, because, although a release to one of several joint debtors is a release to all, the liability became on the bankruptcy several only, and the release was given to one of a number of persons severally liable, and the receipt was not intended to be a release of the whole liability, but merely a compromise of the claim against the bankrupt's estate.

Held, also, that the withdrawal by the creditors of their proof against the bankrupt's estate was a *pro tanto* discharge to the co-sureties.—*Wolmershausen* v. *Wolmershausen*, CH.D. STI., J. 537—62 L. T. 541.

4. *Breach of trust—Express trust—Heir-at-law—3 & 4 Will. 4, c. 27, s. 25.*—P. devised a house and the rest of his real estate to his executors upon trust, the declaration of trust being as to the house only. He died possessed of two other houses. The executors took possession and received the rents for more than twelve years. The heir-at-law sued the executors, claiming execution of the trust.

Held, that the action was not barred by the Statute of Limitations.—*Patrick* v. *Simpson*, Q.B.D. — 24 Q. B. D. 128; 59 L. J. Q. B. 7; 61 L. T. 686.

5. *Concealed fraud—Specific allegations—Dismissal of action—3 & 4 Will. 4, c. 27, s. 26.*—In a case of concealed fraud within 3 & 4 Will. 4, c. 27, s. 26, the plaintiff must prove that he or the person through whom he claims has been deprived of possession of the land which he claims, and that the fraud could not have been with reasonable diligence discovered during the statutory period. A general allegation of fraud is not sufficient, but all the facts must be fully and precisely set forth in the statement of claim, and, in default of such precise allegations, the court may dismiss the action.—*Lawrance* v. *Lord Norreys*, H.L. 753—15 App. 210; 62 L. T. 706.

6. *Deposit—Building society—Death of depositor—Action by administrator.*—A sum of money was deposited with the defendants by way of loan, upon certain conditions contained in a loan pass-book, which was handed to the depositor at the time of the loan. Those conditions were that notice of withdrawal was required, that the money was payable according to the terms stated when the notice was given, and that no money would be paid out except on production of the pass-book, and the depositor must either attend personally or send a written authority. The depositor having given notice of withdrawal, the defendants sent him a memorandum stating that the sum would be payable on or after a certain day, between 10 a.m. and 5 p.m., and that the memorandum and pass-book must be produced when the money was applied for. Upon the day named in the memorandum for repayment the depositor died intestate, without having applied for or received the money. The plaintiff, who had taken out letters of administration to the estate, brought an action to recover the amount of the deposit more than six years after the date named in the memorandum for repayment, but within six years from the grant of the letters of administration.

Held, that the conditions contained in the pass-book were conditions precedent to any liability in the defendants to repay the money, and that, as these conditions had not been fulfilled by the depositor, no cause of action accrued to him in his lifetime, and the Statute of Limitations did not begin to run until the letters of administration had been taken out.

Held, also, that, even assuming the conditions—except that as to notice—were not conditions precedent, in the absence of proof by the defendants that the depositor died after the hour named for the repayment, it was not proved that a cause of action accrued to him in his lifetime, and the Statute of Limitations did not begin to run until letters of administration had been taken out.—*Atkinson* v. *Bradford Equitable Benefit Building Society*, C.A. 630, 657n; 59 L. J. Q. B. 360; 62 L. T. 857.

7. *Estate tail—Infant—Disability—Accruer of right—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 3, 9.—The plaintiff's mother was tenant in tail by descent of certain property which was entailed by the will of a testator who died in January, 1811, and she became entitled to the possession of the property on the death of R. W., which took place in November, 1871, at which time the plaintiff's mother was under no disability either of coverture or infancy. She married in 1875, and died in 1882, without ever having acquired possession of the property. Upon her death the plaintiff became entitled to possession as her issue in tail, and in 1889 he commenced an action to enforce his right to such possession.

On a point of law as to whether the plaintiff, not having claimed or taken possession until after the expiration of twelve years from November, 1871, and who was an infant on his mother's death, and also at the date of the action, was entitled to the benefit of his infancy to prevent the Statute of Limitations from running.

Held, that as the plaintiff claimed through his mother, as a tenant in tail, the right to possession first accrued to her; that, as there had been no possession by either of them for twelve years, the statute applied; and that, therefore, the plaintiff was not now entitled to claim the property.—*Murray* v. *Watkins*, CH.D. CHI., J.—62 L. T. 796.

8. *Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 62—*Street—Paving, &c.—Expenses—Charge on premises—Real Property Limitation Act*, 1874 (37

& 38 *Vict.* c. 57), s. 8.—A local authority which had incurred, in 1875, expenses which, by section 62 of the Local Government Act, 1858, were made a charge upon the premises in respect of which they were incurred, did not apportion the expenses till 1885, and in 1889 brought an action against the then owner of the premises to effectuate the charge.

Held, that the expenses became a charge upon the premises at the date at which they were incurred; that the period of twelve years limited by section 8 of the Real Property Limitation Act, 1874, commenced to run then, and that the action was brought too late.

Judgment of the Queen's Bench Division (reported 37 W. R. 556, 23 Q. B. D. 149) affirmed.—*Hornsey Local Board* v. *Monarch Building Society*, C.A. 85—24 Q. B. D. 1; 59 L. J. Q. B. 105; 61 L. T. 867.

8a. *Mortgage—Foreclosure—Interest—Evidence.*—In a foreclosure action on an equitable mortgage to secure a simple contract debt the mortgagor pleaded the Statutes of Limitation.

Held, that there was no evidence of a payment of interest sufficient to take the case out of the statute.

Judgment of the Court of Appeal (33 Ch. D. 127) affirmed upon the facts and evidence, without any expression of opinion as to the propositions of law laid down therein. — *Newbould* v. *Smith*, H.L.—14 App. Cas. 423; 61 L. T. 814.

9. *Possession—Agent—Trustee*—3 & 4 *Will.* 4, c. 27, ss. 2, 3, 8, 9, 14, 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57), s. 1.—D. was devisee in fee of certain hereditaments let to yearly and weekly tenants under the will of B., who died in 1859. D. and K. were executors of the will, but as such had no interest in the property in question. K., by arrangement, managed this property in the name of "the executors of B.," gave receipts for rents, and paid them into an account so entitled. D. died in 1867, intestate as to this property, but no change was made in the management of the property. K. frequently acknowledged that he was acting for D.'s heir down to 1880, when he claimed to be in receipt of the rents and profits for himself. L., the assignee of the co-heiresses of D., brought an action in 1881 against K. to recover possession of the land, and for an account of the rents and profits.

Held (reversing the decision of the Court of Appeal, 35 W. R. 725, 18 Q. B. D. 796), that K. was an agent, whose acts were ratified by bringing this action; that he was never in actual possession, which was in the heirs; that the rents were received in a fiduciary character; and that, subject to the existing tendencies and all just allowances, L. was entitled to judgment.—*Lyell* v. *Kennedy*, H.L. 353—14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77.

10. *Principal and surety—Acknowledgment—Mortgage—Covenant—Interest—Payment by principal*—3 & 4 *Will.* 4, c. 27, s. 40—3 & 4 *Will.* 4, c. 42, ss. 3, 5—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict.* c. 97), s. 14—*Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57), s. 8.—If section 8 of the Real Property Limitation Act, 1874, applies at all to actions brought against one who, covenanting expressly as surety, has, jointly and severally with a mortgagor, covenanted for payment of the mortgage debt, then payments made by the principal debtor keep alive the remedy against the surety.

Decision of Kay, J. (37 W. R. 603), affirmed.

Quære, whether section 8 applies to actions brought against a surety on such a covenant.—*Allison* v. *Frisby*, C.A. 65—43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632.

11. *Rent—Payment to third person*—3 & 4 *Will.* 4, c. 27, ss. 2, 3, 8.—The owner of land, subject to a yearly tenancy vested in the defendant, devised it to G. for life, with remainder to G.'s issue, as G. should appoint. G. received rent from the defendant till 1872, when G. died. G. by his will appointed land to W. in fee, and devised other land to M. on certain trusts. From 1872 till 1879 M. received rent from the defendant, his agents giving receipts for rent due to the representatives of G. W. died in 1879, having devised the land to J., and the defendant did not afterwards pay any rent. In 1888 M. and J. sued the defendant for rent.

Held, that the claim was not barred by the Statute of Limitations.—*McAuliffe* v. *Fitzsimons*, EX.D. (Ir.)—26 L. R. Ir. 29.

12. *Solicitor—Negligence—Mortgage.*—A client sued a solicitor for negligence in advising an investment in an insufficient mortgage, the defendant not having disclosed the fact that he had not had an independent valuation.

Held, that the Statute of Limitations ran from the date when the negligence was discovered.—*Wood* v. *Jones*, CH.D. KEK., J.—61 L. T. 551.

13. *Will—Real estate—Conversion—Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57), ss. 8, 10.—The testator left all his property upon trust for sale and conversion into money, and, "after payment thereout" of debts and funeral and testamentary expenses, to be held on certain trusts. In answer to an advertisement for creditors, A. sent in a claim to the executor.

Held, that, as against the real estate, A.'s claim could not be barred within twelve years.—*Warburton* v. *Stephens*, CH.D. KEK., J.—43 Ch. D. 39; 59 L. J. Ch. 109; 61 L. T. 609.

See also Costs, 20; Married Woman, 8; Practice, 45.

LITERARY INSTITUTIONS ACT.—See Company, 40.

LOCAL GOVERNMENT:—

1. *Building line — Unfinished houses — Public Health Act*, 1888 (51 & 52 *Vict.* c. 52), s. 3.—A. began to erect the front main wall of a new house. B. had at that time raised the front main wall of a house which he was building on the same side of the same street to a height of five inches above the ground. The two houses were more than 300 feet apart, there being no other house between them. The front main wall of A.'s house was six feet nearer to the road than that of B.'s house.

Held, that A. had not erected any part of a house beyond the front main wall of the house on either side within section 3 of the Public Health Act, 1888.—*Ravensthorpe* v. *Local Board of Hinchcliffe*, Q.B.D.—24 Q. B. D. 168; 59 L. J. M. C. 19; 61 L. T. 80.

2. *Building without approval of board—Demolition—Notice—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), s. 158.—A local board cannot, under section 158 of the Public Health Act, 1875, pull down buildings erected without their approval until it has given the building owner notice of its intention to pull them down.

Cooper v. *Wandsworth District Board*, 11 W. R. 646, 14 C. B. N. S. 180, and *Masters* v. *Pontypool Local Government Board*, 9 Ch. D. 677, 27 W. R. Dig. 121, approved.

Judgment of the Queen's Bench Division affirmed.—*Hopkins* v. *Smethwick Local Board*, C.A. 499—24 Q. B. D. 712; 59 L. J. Q. B. 250; 62 L. T. 783.

3. *Bye-law*—Ultrà vires—*New street—Width of entrance—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), s. 157.—One of the bye-laws of a local board, which had been allowed by the Local Government Board, provided as follows:—"Every person who

shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street and open from the ground upwards."

Held, that, upon the right construction of the bye-law, it prevented a landowner from constructing a new street and building upon his own land until he had provided an entrance to the new street of the requisite width; and that the bye-law was not *ultrà vires*, but applied not merely to the making of the roadway, with sewers and footpaths, but also to the construction of the houses on each side and the gardens attached to them; and that, if the landowner could not provide the requisite entrance, either over his own land or by arrangement with some other landowner, he could not utilize his land by constructing a new street and building houses upon it.

Baker v. *Mayor of Portsmouth*, 25 W. R. 677, 3 Ex. D. 4, followed.—*Hendon Local Board* v. *Pounce*, CH.D. NOR., J. 377—43 Ch. D. 682; 61 L. T. 465.

4. *County council—Contagious Diseases (Animals) Act*, 1869—*Contributions by borough authority—Action to recover contributions*—Mandamus.—The plaintiffs, as the local authority of a borough, having brought an action against the defendants, as the local authority for the county, to recover the proportionate amount contributed by the plaintiffs between the years 1869 and 1878 to the expenses incurred by the local authority for the county under the Contagious Diseases (Animals) Act of 1869.

Held, that no action would lie against the defendant for the amount claimed, and that the plaintiffs' remedy under the Act of 1869 against the local authority for the county was by *mandamus*.—*Salford (Mayor of)* v. *County Council of Lancashire*, C.A. 661—25 Q. B. D. 384.

5. *County council—Joint committee—Maintenance of buildings—Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *s.* 30 (4).—The standing joint committee of a quarter sessions and county council has exclusive control of buildings used for quarter sessions, or for the accommodation of justices out of session, or their clerks, or by the police. All questions as to the maintenance or repair of such buildings must be determined by the joint committee, and the county council must raise such sums as the joint committee may in their discretion think it necessary to expend on the building.—*Ex parte Somersetshire County Council*, Q.B.D.—58 L. J. Q. B. 513.

6. *County council—Contagious Diseases (Animals) Act*, 1878 (41 & 42 *Vict.* c. 74)—*Local Government Act*, 1888 (50 & 51 *Vict.* c. 41), *s.* 28.—A county council, as the local authority for carrying out the provisions of the Contagious Diseases (Animals) Act, 1878, appointed an executive committee, who had delegated to a sub-committee, as authorized by schedule 6 (5) (6), the exercise of powers under that Act. Subsequently an Order in Council was issued, calling upon the local authorities to take steps against rabies under the powers given them by the Act, and the executive committee thereupon issued regulations against rabies on their own authority, for breach of which regulations the appellant had been fined.

Held, that the executive committee had the right to issue such regulations, since, in delegating their powers to a sub-committee, they had in no way parted with their original powers as local authority.—*Huth* v. *Clarke*, Q.B.D. 655—25 Q. B. D. 391; 59 L. J. M. C. 120.

7. *County council—Street—Paving expenses—Main roads—Highways Amendment Act*, 1878, *ss.* 13, 15—*Local Government Act*, 1888, *s.* 11, *sub-sections* 1, 2.—The county council of the county is liable to the local board of an urban sanitary district for the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair, of paved or pitched crossings over what are "main roads" within the meaning of the Highways and Locomotives Act, 1878, and if the local board alter the flagging or pavement of the footways in the streets of the town, the county council is liable for the cost of such alteration, if it be a reasonable improvement, and if there be any dispute as to the reasonableness, such dispute is to be settled by arbitration of the Local Government Board.—*Warminster Local Board* v. *Wilts County Council*, Q.B.D. 671—59 L. J. Q. B. 434; 62 L. T. 902.

8. *District rate—Improvement rate—Special Acts—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 207, 211.—Improvement commissioners were empowered by special Acts to levy a rate not exceeding 1s. in the pound on the annual value of all houses, buildings, and hereditaments within the town of Cambridge, for the purpose of certain specified improvements. When the special Acts were passed the colleges at Cambridge were not liable for the improvement rate. After the passing of the Public Health Act, 1875, the commissioners, acting as an urban sanitary authority, assessed the appellant railway company at the full net annual value of its land and property for the purposes of the special Acts and of the Public Health Act, 1875.

Held, that the rate to be levied under the special Acts was not a "rate in the nature of a general district rate leviable throughout the whole of the district" within section 207 of the Public Health Act, 1875, and that, as regards the rate to be levied under that Act, the appellants were liable to be rated at only one-fourth of the net annual value.—*Great Eastern Railway Co.* v. *Cambridge Improvement Commissioners*, Q.B.D.—61 L. T. 243.

9. *Markets and Fairs Act*, 1887 (50 & 51 *Vict.* c. 27), *s.* 4—*Weighing machine—Highway—Nuisance—Injunction.*—The plaintiffs, the market authority under the Markets and Fairs Act, 1887, provided a weighing-machine for cattle in a market-place which consisted of two strips in the town separated by the highway. The defendants interfered on the ground that the market-place was a highway dedicated to the use of the public, subject only to the right of the owner of the soil or his lessees to hold markets, and was vested in the defendants, as the urban authority, and that the proposed machine would be a public nuisance, and interfere with their rights in the highway and with the public right of passage.

Held, that section 4 of the Markets and Fairs Act, 1887, was imperative, and the market authority was bound to provide a weighing-machine for the market, which must be a permanent structure and not a movable machine, and that the defendants must be restrained from interfering with the plaintiffs.—*Macintosh* v. *Romford Local Board*, CH.D. KAY, J.—61 L. T. 185.

10. *Penalty—Officer—"Allowance"—Town clerk—Solicitor—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 189, 193.—The defendant was clerk to an urban sanitary authority at a fixed salary. After the fixing of the defendant's salary the sanitary authority promoted a sewage scheme, in connection with which a large amount of extra labour, which was not in contemplation when the defendant's salary was fixed, was thrown upon him. On the completion of the works the authority resolved that he should be paid a sum of money for his services in connection with the scheme.

Held, that the defendant, in accepting the money, did not render himself liable to the penalties imposed by section 193 of the Public Health Act, 1875, on

officers or servants of local authorities accepting, under colour of their office or employment, any fee or reward other than their proper wages, salaries, or allowances.

Semble, the word "allowances" in section 193 of the Public Health Act, 1875, includes extra payment for extra work.—*Edwards* v. *Salmon*, C.A. 166—23 Q. B. D. 531; 58 L. J. Q. B. 571.

11. *Sanitary expenses—Charge on land—Registration*—Mandamus—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Land Charges Registration Act*, 1888 (51 & 52 *Vict. c.* 51), *ss.* 4, 10.—Expenses incurred in respect of premises by a local authority in carrying out the provisions of the Public Health Act, 1875, for the repayment of which the owner of the premises is liable, are, by section 257 of that Act, made "a charge on the premises in respect of which they were incurred."

Held, that such charges are not "land charges" within the meaning of the Land Charges Registration Act, 1888, and do not require registration.—*Reg.* v. *Holt*, Q.B.D. 236—24 Q. B. D. 178; 59 L. J. Q. B. 113; 62 L. T. 117.

12. *Street—Apportioned expenses—"Owner"—Validity of notice—Receiver appointed in action—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 2, 4, 150.—A receiver of rents and profits appointed in an action is not within the term "owner" in section 4 of the Public Health Act, 1875.—*Bacup (Corporation of)* v. *Smith*.—CH.D. CHI., J. 697—44 Ch. D. 395; 59 L. J. Ch. 518.

12a. *Street—Lighting expenses—General expenses—Railway—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 230, 276.—An order was made by the Local Government Board under section 276 of the Public Health Act, 1875, which directed that the provisions of the first paragraph of section 161 of that Act (which gives powers to urban authorities for lighting the streets in their districts with gas) should be in force within certain contributory districts of a rural sanitary authority, and the rural sanitary authority should be invested with the powers of an urban sanitary authority "under those provisions." The rural authorities issued their precept under section 230 for payment of the expenses of the lighting. A railway company, having property in one of the contributory districts, contended that they ought to be assessed under section 211 at one-fourth only of the rateable value of their property.

Held, that the expenses were general expenses, and not special expenses under section 229.

Held, also, that, on the true construction of the order of the Local Government Board, it did not invest the rural authority with the powers of the urban authority as to rating, and they were only entitled to issue the precept under their ordinary powers; and that, therefore, the railway company must be rated at the full rateable value of their property.—*Lancashire and Yorkshire Railway Co.* v. *Bolton Union Assessment Committee*, C.A.—23 Q. B. D. 555; 58 L. J. Q. B. 256; 61 L. T. 782.

13. *Street—Paving, &c.—Expenses—Charge on land—Restrictive covenant—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257, 276.—The charge upon premises for expenses for improvements created by section 257 of the Public Health Act, 1875, is a charge upon the whole proprietorship of the land, and not merely a charge upon the estate in fee simple.

Premises subject to a restrictive covenant against building, which become liable to such a charge, may, for the purpose of satisfying the charge, be sold free from the covenant.—*Tendring Guardians* v. *Dowton*, CH.D. STI., J. 653—59 L. J. Ch. 528; 62 L. T. 805.

14. *Street—Paving, &c.—Expenses—Highway—Additional land—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.—Where a street has been formed by an old footpath and by strips of land newly added to it, and the old footpath was repairable by the parish, the frontagers are liable to pay the expenses incurred in improving the whole street under section 150 of the Public Health Act, 1875.—*Evans* v. *Newport Urban Sanitary Authority*, Q.B.D. 400—24 Q. B. D. 264; 59 L. J. M. C. 8; 61 L. T. 684.

15. *Street—Paving, &c.—Expenses—Sale of property before notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—In January, 1883, a local board passed a resolution to pave a street, and in May, 1883, a notice was served on P. requiring him to carry out the works. P. had been the owner of the whole of the land on which the street was formed, but in April, 1883, he had sold the property to A.

Held, that A. was not liable for the paving expenses. *Wallsend Local Board* v. *Murphy*, Q.B.D.—61 L. T. 777.

16. *Street—Tramway—Paving—Right of road authority to alter pavement—Difference between company and road authority—Reference to arbitration—Injunction—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 33.—The defendants, who were the road authority, gave notice to the plaintiffs, a tramway company, of their intention to re-lay the whole of the roadway of certain streets, along which the plaintiffs' tramways were laid, including the part between the tramway rails, with a particular kind of pavement, and for this purpose to take up the existing pavement. The plaintiffs objected, and brought an action for an injunction to restrain the defendants from interfering with the pavement between and contiguous to their tramway rails until the matter in difference had been settled by a referee nominated by the Board of Trade under section 33 of the Tramways Act, 1870.

Held, that, as the defendants were acting under the general powers vested in them as road authority of altering and improving the roads, section 33 was not applicable, and an injunction could not be granted.

Reg. v. *Croydon and Norwood Tramways Co.*, 35 W. R. 299, 18 Q. B. D. 39, distinguished.—*Bristol Trams and Carriage Co.* v. *Bristol (Mayor of)*, C.A. 693—59 L. J. Q. B. 441.

See also ELECTION LAW, 2; JUSTICE OF THE PEACE, 1a; LIMITATIONS, STATUTES OF, 8; METROPOLIS MANAGEMENT ACTS, 3; POOR RATE, 3.

LOCKE KING'S ACT.—See MORTGAGE, 24.

LONDON AGENT.—See COSTS, 21; SOLICITOR, 5.

LORD CAIRNS' ACT.—See DAMAGES, 4; LIGHT, 3; NUISANCE, 2.

LORD ST. LEONARDS' ACT.—See EXECUTOR, 2; LANDS CLAUSES CONSOLIDATION ACT, 7.

LORD TENTERDEN'S ACT.—See COMPANY, 18.

LOTTERY.—See COMPANY, 16.

LUNACY:—

1. *Asylum—Chaplain—Pension—Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *s.* 57.—A chaplain of a lunatic asylum, appointed under the Lunatic Asylums Act, 1853, is an officer of the asylum, although he does not reside therein or give his whole time to the duties of his office therein, and as an officer of or in the asylum he is qualified to receive a superannuation allowance, under the 57th section of

the Act, if the visitors in their discretion think right to grant him such allowance.—*Reg.* v. *Hereford County Council*, Q.B.D. 775.

2. *Judgment—Charging order—Fund in court.*—A fund was standing in the books of the Paymaster-General of the Chancery Division to the credit of P., "a person of unsound mind." A judgment creditor of the lunatic applied for an order charging the fund, and a judge at chambers ordered that "so much of the defendant's interest in the fund so standing as aforesaid should stand charged with the payment of the . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt."

Held, that the proper form of order upon such an application was to make an order charging the fund, or such part of it as the judge should think fit, and that the judge had no jurisdiction to leave it to the discretion of the Lords Justices sitting in Lunacy to say how much should be so charged.—*Horne* v. *Pountain*, Q.B.D. 240—23 Q. B. D. 354; 58 L. J. Q. B. 413; 61 L. T. 510.

See also ADMINISTRATION, 7, 17; CONTRACT, 5, 7; DIVORCE, 10; LANDS CLAUSES CONSOLIDATION ACT, 7; PRINCIPAL AND SURETY, 2.

MAINTENANCE.—See ATTACHMENT, 3; DIVORCE, 11; HUSBAND AND WIFE, 2, 5; INFANT, 4; SCOTLAND, LAW OF, 5; TRUSTEE, 5a; WILL, 43.

MALICIOUS INJURIES ACT.—See JUSTICE OF THE PEACE, 5.

MALICIOUS PROSECUTION:—

Reasonable and probable cause—Justice of the Peace—Search warrant—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 10.—Judgment of the Queen's Bench Division (reported 37 W. R. 736) affirmed.—*Lea* v. *Charrington*, C.A.—23 Q. B. D. 372; 58 L. J. Q. B. 460; 61 L. T. 450.

MANDAMUS.—See BANKER, 2; ECCLESIASTICAL LAW, 1; JUSTICE OF THE PEACE, 8; LICENSED HOUSE, 7; LOCAL GOVERNMENT, 4, 11; METROPOLIS MANAGEMENT ACTS, 4.

MANDATORY INJUNCTION.—See LIGHT, 3.

MANOR.—See COPYHOLD, 3; INCLOSURE; INCOME TAX, 4.

MANSION HOUSE.—See SETTLEMENT, 2a.

MARGARINE ACT.—See ADULTERATION, 1.

MARINE INSURANCE.—See CARRIER; INSURANCE, 4—6; PRACTICE, 44.

MARKET:—

Disturbance—Sale of animals out of market—Penalty.—The Abergavenny Improvement Commissioners were by private Acts, incorporating the Markets and Fairs Clauses Act, 1847, authorized to set up a market and to take tolls for animals sold there, tolls and penalties being imposed on all persons selling such animals within the district, except in their own dwelling-houses or shops or premises in their own occupation. The defendant, an auctioneer, held sales of such animals in a field in his own occupation.

Held, that this did not constitute a disturbance of the market, though it would have been otherwise but for the special Acts, as the defendant's conduct would have been a disturbance of an ancient market.—*Abergavenny Improvement Commissioners* v. *Straker*, CH.D. REF., J. 158—42 Ch. D. 83; 58 L. J. Ch. 717; 60 L. T. 756.

See also LOCAL GOVERNMENT, 9.

MARRIAGE.—See LEGITIMACY DECLARATION ACT, 1; WILL, 8, 21, 58.

MARRIED WOMAN:—

1. *Administratrix—Retainer—Loan by wife to husband—Death of husband intestate and insolvent—Administration of husband's estate — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—A married woman advanced money to her husband for the purposes of his business. The husband died intestate and insolvent without repaying the advance, and the widow became his administratrix. An action was brought by creditors for the administration of the husband's estate. The widow, as administratrix, received considerable personal estate of her husband, and claimed to retain out of the balance in her hands the amount of her advance to him. On a summons in the administration action for payment of the balance into court,

Held, that the widow, as administratrix, was entitled to retain out of the balance of the personal estate the amount of the advance made by her to her husband.—*In re May, Crawford* v. *May*, CH.D. NOR., J. 765.

2. *Equity to settlement—Waiver—Election—Deed—Acknowledgment.*—In 1866 A., who was a married woman and one of the presumptive next of kin of a lunatic, in consideration of money advanced to her husband, and of a covenant by B. to repay to her on the lunatic's death two sums of £400 and £500, with interest on the former amount, for her separate use, joined with her husband in assigning to B. her prospective share in the lunatic's estate, the husband covenanting for a good title and for further assurance. The interest on the £400 was paid till the lunatic's death in 1881, but not afterwards. In a suit to administer the lunatic's estate A. was declared one of the next of kin. In 1883 A., being then the administratrix of the lunatic, acknowledged the deed of 1866 before commissioners. Part of the lunatic's property had been lent on the security of real estate.

Held, (1) that the deed of 1866 was void against A., and could not be confirmed by her; (2) that A. had not elected to take under the deed, nor waived her equity to a settlement.—*Druitt* v. *Willens*, M.R. (Ir.)—23 L. R. Ir. 436.

3. *Separate estate—Contract—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (3).—An action of contract against a married woman under section 1 (3) of the Married Women's Property Act, 1882, is answered if it appears that, at the time of entering into the contract, the married woman had not any separate property which she could reasonably be supposed to have intended to bind.

A married woman was entitled to the income of certain stock for her separate use without power of anticipation. At the time of entering into the contract sued upon, she had spent all the income then accrued in clothing for herself and her children.

Held, that it was unreasonable to suppose that the wife intended to bind the clothing by her contract.—*Leake* v. *Driffield*, Q.B.D. 93—24 Q. B. D. 143; 59 L. J. Q. B. 89; 61 L. T. 771.

4. *Separate estate—Contract—Damages—Agreement for lease—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (2).—In 1876 A., a married woman, agreed to grant a lease to B., when he should have built a house on the land, with an option of buying the freehold. In 1877 B. assigned the agreement to D. by way of mortgage. In 1878 A. conveyed the land to B.

Held, that section 1 (2) of the Married Women's Property Act, 1882, is not retrospective, and that A.'s breach of contract did not bind her separate

estate.—*Davies* v. *Stanford*, CH.D. KEK., J.—61 L. T. 234.

5. *Separate estate—Contingent title*—Spes successionis—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 57), *s.* 5.—J. S. by his will left property to trustees upon trust for his daughter, E. B., for life, with an ultimate remainder, upon failure of issue of E. B., to "such person or persons as, at the time of the failure of the preceding trust, would be my next of kin and entitled to my personal estate under the statutes for distribution of the personal estate of intestates if I had then died intestate." J. S. died in 1879; E. B. died in 1886 without having had any issue. E. P., who would have been one of the next of kin of J. S. if he had died at the same time as E. B., and who was married before the commencement of the Married Women's Property Act, 1882, made her will in 1887, and died in 1889, leaving her husband her surviving.

Held, that the property first accrued in title and interest to E. P. on the death of E. B. in 1886, and that by section 5 of the above-mentioned Act E. P. was entitled to it for her separate use, and that it passed by her will.

In re Beaupré's Trust, 21 L. R. Ir. 397, dissented from.—*In re Parsons, Stockley* v. *Parsons*, CH.D. KAY., J. 712—62 L. T. 929.

6. *Separate estate—Evidence—Burden of proof—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (3).—In an action against a married woman for jewellery supplied, the jury found that she had purchased the goods "on her own credit for her own use as her separate estate." According to the evidence, the only separate estate existing at the time of the contract was certain other jewellery previously supplied by the plaintiffs and a wardrobe of dresses, furs, and jackets, and there was no evidence of any separate property being subsequently acquired other than these.

Held, on a motion for judgment, that the plaintiffs were entitled to judgment, on the ground that such separate property was property in respect of which the married woman might reasonably be deemed to have contracted credit within the meaning of the Married Women's Property Act, 1882, and that the words "unless the contrary be shown" in section 1 (3) only admit evidence of the fact of there being no such separate property in respect of which a married woman could reasonably be deemed to have contracted, and not of any intention, or absence of intention, of the married woman so to contract, at the time of making the contract or getting credit.

Leake v. *Driffield*, 38 W. R. 93, 24 Q. B. D. 98, distinguished.—*Bonner* v. *Lyon*, Q.B.D. 54.

7. *Separate estate—Judgment—Garnishee order—Relation back of judgment—Ord.* 41, *r.* 3; *ord.* 45, *r.* 1—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1.—The plaintiff in 1887 recovered judgment against the defendant, a married woman, in the form laid down in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. On the 23rd of July, 1889, the defendant obtained a verdict for £150 against a third person for malicious prosecution, and the judge at the trial gave judgment, but judgment was not entered till October. On the 31st of July, 1889, the plaintiff, whose judgment remained unsatisfied, obtained an order attaching the £150 to answer his judgment.

Held, affirming the judgment of the Queen's Bench Division, that the order was rightly made, as the plaintiff had obtained a "judgment" against the defendant within the meaning of ord. 45, r. 1, and the £150 was a "debt owing" to the defendant within that order.

Held, also, that, by ord. 41, r. 3, the judgment, when entered, related back to the day on which it was pronounced, and that there was a debt at the date of the garnishee proceedings.—*Holtby* v. *Hodgson*, C.A. 68—24 Q. B. D. 103; 59 L. J. Q. B. 46; 62 L. T. 145.

8. *Separate estate—Judgment against wife—Action against husband—Statute of Limitations—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13—15.—A husband who is sued for the ante-nuptial debts of his wife is entitled to the benefit of the Statute of Limitations from the time when such debts first accrued against her.

The plaintiff having recovered judgment against a married woman for a debt incurred by her before her marriage, and such judgment being unsatisfied because she had no separate estate, sued her husband, who had received property from his wife, for the amount of the debt.

Held, that the action was not barred by the prior judgment against the wife.—*Beck* v. *Pierce*, C.A. 29—23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448.

9. *Separate estate — Restraint on anticipation—Judgment — Costs — Execution—Garnishee order on trustee—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (2).—An order, with costs, against a married woman suing under the Married Women's Property Act, 1882, in respect of her separate property must state that the costs are "payable out of her separate property, and not otherwise," and execution must be limited to separate property not subject to restraint on anticipation.

Money in the hands of a trustee for a married woman in respect of separate property subject to restraint on anticipation, and accruing due after a judgment against her, is not liable to attachment by the judgment creditor.—*Galmoye* v. *Cowan*, CH.D. CHI., J.—58 L. J. Ch. 769.

10. *Separate estate—Restraint on anticipation—Life estate — Gift over — Forfeiture—Mortgage.*—A married woman entitled to a life interest in a fund for her separate use without power of anticipation, and with a gift over "on her anticipating" the income, assigned her life interest by way of mortgage.

Held, that, as the assignment was wholly inoperative, the married woman had not in fact anticipated her income, and therefore her life interest had not determined.—*Frank* v. *Muzeen*, CH.D. NOR., J. 425—43 Ch. D. 630; 59 L. J. Ch. 404; 62 L. T. 433.

11. *Separate estate—Restraint on anticipation—Removal—Annuity— Partnership — Company—Preference shares—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 39), *ss.* 39, 69.—A married woman was entitled to a life annuity, with restraint on anticipation, charged on a third share of a partnership. It was proposed to convert the partnership into a limited company.

The court sanctioned the removal of the restraint on anticipation to enable the annuity to be released on being satisfied that it was for the woman's advantage to receive preference shares in the company producing an income equal to the annuity, to be settled on her for life, with a restraint on anticipation, and with a power of appointment on her death.—*In re Millar*, M.R. (Ir.)—25 L. R. Ir. 107.

12. *Separate estate—Restraint on anticipation—Second marriage — Married Women's Property Act*, 1882 (44 & 45 *Vict. c.* 75), *ss.* 13, 19.—Section 13 of the Married Women's Property Act, 1882, by which a woman, after her marriage, is made liable in respect and to the extent of her separate property for all debts contracted by her before her marriage, and section 19, by which a restraint on anticipation imposed by a woman in a settlement of

her own property is invalid against debts contracted by her before marriage, refer not only to debts contracted by her while a *feme sole*, but also to those contracted by her under the powers of the Act during a previous coverture.

Judgment of the Queen's Bench Division reversed. —*Jay* v. *Robinson*, C.A. 550; 59 L. J. Q. B. 367.

13. *Separate estate—Restraint on anticipation—Settlement — After-acquired property — Covenant to settle.*—A. by a deed appointed, under a power contained in a will, that after her death the trustees of the will should hold her share in certain real and personal estate as to £1,000 upon trust for her daughter, and as to part of the residue in trust for such daughter and two others equally, the £1,000 and the daughter's share in the residue to be for the latter's separate use, and her receipt to be a sufficient discharge as each sum should become due, and not by way of anticipation. The daughter married in 1882, and covenanted by her settlement to settle the appointed property. A. died in 1889.

Held, that the restraint on anticipation was removed by the covenant in the settlement.—*Wood* v. *Hooper*, CH.D. KEK., J.—61 L. T. 197.

14. *Separate estate—Restraint on anticipation—Settlement—Infancy—Judgment—Receiver—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *ss.* 1 (3), 19.—A married woman, who was an infant at the time of her marriage, was then entitled to a fund for her separate use, and to freeholds. After marriage, and while still an infant, she contracted a debt, for which judgment was recovered against her separate estate. After contracting the debt, but before attaining the age of twenty-one, a post-nuptial settlement was made of all her property for separate use, with a restraint on anticipation, and after her death for her husband and children. The settlement was approved by the court.

Held, that the settlement was valid against creditors, and that the judgment creditor was entitled to a receiver.—*Hemingway* v. *Braithwaite*, Q.B.D.—61 L. T. 224.

15. *Separate estate—Will—Power of appointment—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *ss.* 1 (1), 2, 5.—Section 1 (1) of the Married Women's Property Act, 1882, must be construed with sections 2 and 5, and does not give a married woman power to dispose of property not falling within either of the two latter sections.

In 1863, by a marriage settlement, the wife's property was, in default of issue, limited upon trust for the wife absolutely if she survived her husband, but if she should predecease him upon such trusts as she should by will appoint, and in default of appointment for her next of kin. In 1886 the wife made a will appointing, if she should die during coverture, the fund to trusts on certain trusts. She also bequeathed to the trustees on the same trusts all property of which she could dispose by will. She survived her husband, and died without having had issue.

Held, that the settled property did not pass under the will.

Judgment of Kay, J., affirmed.—*Mansfield* v. *Mansfield, In re Ouno*, C.A.—43 Ch. D. 12.

See also ADMINISTRATION, 18, 19, 25; COSTS, 14; EVIDENCE, 3; EXECUTORS, 3; HUSBAND AND WIFE, 9; SETTLEMENT, 10; WILL, 55.

MARSHALLING.—See ADMINISTRATION, 20.

MASTER and SERVANT:—

1. *Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict.* c. 86), *s.* 7—*Persistent following —Prevention of lawful act.*—A., a workman on strike, stood as a picket outside a certain manufactory, and, when the workmen employed in the place of the strikers came out, followed B., one of the foremen, down two streets. A crowd also followed B. with hostile words and gestures.

Held, that A. was properly convicted under section 7 of the Conspiracy and Protection of Property Act, 1875, of persistently following B. from place to place. —*Smith* v. *Thomasson*, Q.B.D.—62 L. T. 68.

2. *Contract—Engaging in business—Injunction.*—S. agreed, in writing, with B. not to engage in a similar business within half a mile of B.'s premises for six months after leaving the same. S. left B.'s service and entered the service of D., who carried on the same business next door to B.

Held, that the defendant must be restrained by injunction from entering D.'s service for six months after leaving B.'s service.—*Watts* v. *Smith*, CH.D. KEK., J.—62 L. T. 453.

3. *Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), *s.* 1 (4)—*Conforming to order.*—The plaintiff was employed by the defendant, the owner of a saw mill, containing saws driven by steam power, and was told by the defendant's foreman to cut some wood in specified lengths with the circular saw. This work was generally performed by two men, one "feeding" the saw and the other taking the wood out from it. A. was engaged by the defendant to attend to the engine and boiler, and to assist generally in the saw mill, and was also told "not to neglect the engine." At the time in question the plaintiff was at one end of the saw frame pushing the wood through it, and A. was at the other end receiving the wood coming out from the saw. Hearing steam blowing off, A. suddenly, and without notice to the plaintiff, let go the wood and ran to the engine-room, whereupon the wood, becoming unsteady, shook the plaintiff's hand against the saw, which cut and injured his fingers.

Held, that the plaintiff was not entitled to recover, on the ground that, although the injury was caused by "the act or omission" of A. in leaving the saw without notice to the plaintiff, there was no evidence that such act or omission was "done or made in obedience to any rule or bye-law of the employer, or to instructions by any delegate of his.—*Whatley* v. *Holloway*, Q.B.D.—62 L. T. 639.

4. *Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), *s.* 1 (3)—*Conforming to order—Negligence—Contributory negligence.*—A workman sought to recover compensation from his employer under section 1 (3) of the Employers' Liability Act, 1880, for injury caused by reason of the negligence of a person in the service of his employer, to whose orders the plaintiff, at the time of the injury, was bound to conform, and did conform, it being alleged that the injury resulted from his having so conformed. It appeared that on a certain morning the plaintiff was ordered to do a piece of work by S., a carpenter in the service of the defendant. The plaintiff was bound to obey the orders of S. as to what work he should do, but S. had no authority to specify any particular place where the work should be done. In the evening the plaintiff was working overtime at the piece of work in a shed which was his usual place of work. S., in stacking timber in the same shed, negligently let fall a beam which injured the plaintiff.

Held, that the injury did not result from the plaintiff having conformed to any order to do a particular piece of work, and that he was not entitled to recover.

Decision of the Divisional Court (38 W. R. 558, 24 Q. B. D. 568) affirmed.—*Snowden* v. *Baynes*, C.A. 744 —25 Q. B. D. 193; 59 L. J. Q. B. 325.

5. *Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), s. 1 (1)—*Negligence—Defective machinery.*—The fact of a machine being dangerous to the workman whose duty it is to use it, although it is perfectly effective for the purpose for which it is used, is "a defect in the condition of the machinery" within section 1 (1) of the Employers' Liability Act, 1880, which, when combined with negligence on the part of the employer, entitles the workman to recover damages in an action brought under that subsection.

Walsh v. *Whiteley*, 36 W. R. 876, 21 Q. B. D. 371, explained.—*Morgan* v. *Hutchins*, Q.B.D. 412—59 L. J. Q. B. 197.

6. *False imprisonment—Assault—Scope of employment.*—A servant of a company having been directed to exclude the public from the inclosed portion of a street, which was being repaired by the company under a private statute empowering the company to exclude the public, and imposing a fine for resisting its servants, forcibly prevented the plaintiff from driving into the inclosure, and caused him to be arrested.

Held, that the company was not liable for damages for the plaintiff's arrest.—*Barry* v. *Dublin United Tramways Co.*, Q.B.D. (Ir.)—26 L. R. Ir. 150.

7. *Negligence—Contributory negligence—Voluntary risk.*—Where a workman is engaged by an employer to do work which the employer has contracted with a third person to do on the premises of such third person, and the work is dangerous without help, it is not the duty of the third person to furnish such help.

The maxim *Volenti non fit injuria* considered.

Judgment of the Court of Appeal affirmed.—*Membery* v. *Great Western Railway Co.*, H.L. 145—14 App. 179; 58 L. J. H. L. 563; 61 L. T. 566.

8. *Negligence—Sub-contractor.*—J., a workman, was employed with others by H., a builder, in carrying out certain works which H. had contracted to do. Under the contract, L., an ironfounder, was to do certain special work required to be done by a specialist at a price to be paid out of the contract price for the whole work, but L. paid and had control over his own workmen. J., having been injured by the negligence of L.'s workmen, brought an action for damages against L.

Held (*dissentiente* Fry, L.J.), that L. was a sub-contractor under H., and was, with his workmen, in the employment and under the control of H., who was accordingly the common master of the injuring and injured workmen; that the case was governed by *Wiggett* v. *Fox*, 4 W. R. 254, 11 Ex. 832, and the action could not be maintained.

Decision of the Queen's Bench Division affirmed.

Abraham v. *Reynolds*, 8 W. R. 181, 5 H. & N. 143, explained and distinguished.

Per Fry, L.J., L. was not a sub-contractor under H.; the burden of proving that H. had control over L.'s part of the work and over the workmen engaged on it lay upon L., and he had not discharged that burden; even if there was common employment, there was no common master; and the case was not within *Wiggett* v. *Fox*, and the defence of common employment was not maintainable.—*Johnson* v. *Lindsay*, C.A. 119—23 Q. B. D. 508; 58 L. J. Q. B. 581; 61 L. T. 864.

9. *Truck Acts—Wages—Payment otherwise than in coin*—1 & 2 *Will.* 4, c. 37, s. 1—*Truck Act*, 1881 (50 & 51 *Vict.* c. 46), ss. 2, 5.—A., who was both a licensed victualler and a brickmaker, supplied certain labourers employed by him at brickmaking with intoxicating liquors, debiting them with the price, which was 3s. 10d. On the same day in his public-house he handed 4s. to one of the labourers, who returned him two-pence, and 4s. was deducted from the labourers' wages.

Held, that A. had committed an offence under the Truck Acts.—*Gould* v. *Haynes*, Q.B.D.—59 L. J. M.C. 9; 61 L. T. 732.

See also APPRENTICE; ELECTION LAW, 1, 12; RAILWAY, 6; WEIGHTS AND MEASURES, 2.

MEDICAL ACTS:—

General Medical Council—Jurisdiction—Medical Act, 1858 (21 & 22 *Vict.* c. 90), s. 29.—The defendants, the General Medical Council, had held an inquiry into a charge preferred against the plaintiff, a registered medical practitioner, of "infamous conduct in a professional respect," the particulars of which charge were, that the plaintiff, being a registered medical practitioner, did act as "cover of," or by his presence, advice, and assistance, did enable H., an unqualified person, "to carry on the business or profession of a medical electrican, and to practise as if he were duly qualified, under the style of the Medical Battery Co." The inquiry resulted in the defendants finding that the plaintiff had been guilty of the acts charged against him, and the defendants ordered the name of the plaintiff to be erased from the register of medical practitioners. The charge against the plaintiff was preferred in the name of and by the Medical Defence Union, which was an association incorporated under the Companies Act, 1862, as a company limited by guarantee, having for its objects the protection of the interests of medical practitioners, the promotion of honourable practice, the prosecution of unauthorized practitioners, and the defence of members of the association where proceedings involving questions of professional principle were brought against them. By the articles of association, the management of the business and the control of the Medical Defence Union was vested in a council, which was thereby authorized to exercise all powers and do all acts which might be exercised or done by the Medical Defence Union in general meeting. Two persons who were members of the Medical Defence Union and subscribers to its funds were also members of the General Medical Council, and, as members of the General Medical Council, were present at the inquiry into, and adjudicated upon, the charge against the plaintiff. These persons were not members of the council of the Medical Defence Union, and had no pecuniary interest in the success of the accusation brought against the plaintiff.

Held, that the charge in question, on the true construction of its terms, amounted to a charge that the plaintiff had assisted an unqualified person to practise as if he were a medical practitioner duly qualified to practise as such; that the charge was therefore one which the defendants had power to deal with, and did in fact deal with, under section 29 of the Medical Act, 1858; and that, as the defendants, acting *bonâ fide* and after due inquiry, had adjudged the plaintiff guilty of infamous conduct in a professional respect, the courts of law had no jurisdiction to review their decision. (2) (Fry, L.J., dissenting), that the two persons were not, either actually or constructively, accusers or *quasi*-prosecutors in the charge preferred against the plaintiff, and that the tribunal which adjudicated on the charge preferred against the plaintiff was a tribunal competent to do so.

Reg. v. *Allan*, 12 W. R. 423, 4 B. & S. 915, distinguished.

Judgment of North, J., affirmed.—*Lesson* v. *General Medical Council*, C.A. 304—43 Ch. D. 366; 59 L. J. Ch. 253; 61 L. T. 869.

MEETING.—See COMPANY, 9, 14—15b.

MERCHANDISE MARK:—

1. *Sale of goods—False description—Intent to defraud—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2 (1), (2); *s.* 3 (1) (3).—B., a mineral water manufacturer, made use of certain bottles, the property of, and moulded with the name of, W., with the intention of selling therein mineral water of his own make to his customers. On the bottles B. affixed a label bearing his own name, and he sent with the bottles an invoice which left no doubt that B. was the sender.

Held, that B. was guilty of using a false trade description under sections 2 and 3 of the Merchandise Marks Act, 1887.—*Wood* v. *Burgess*, Q.B.D. 331—24 Q. B. D. 46; 59 L. J. M. C. 11; 61 L. T. 593.

2. *Sale of goods—Misdescription—Intent to defraud—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2 (1) (2).—The defendants, a firm of gunpowder manufacturers, had contracted to deliver to her Majesty's Government a large amount of gunpowder, which they were in the habit of manufacturing under the trade name of "R. L. G. No. 4." Being prevented by an explosion from manufacturing the required amount, they imported similar gunpowder from Germany. This they placed in the barrels ordinarily supplied by the Government, and labelled the same "Chilworth Gunpowder Co., Ltd. R. L. G. No. 4"; and so delivered them to the Government. Upon an information being laid against them under the Merchandise Marks Act, 1887, for "having unlawfully applied a false trade description" to the said gunpowder, the magistrates found that the name of the firm had been placed on the label where the name of the contractor was required to be inserted by the Government; that there had been no intent by the defendants to defraud the Government; and that there was no stipulation between the parties that the gunpowder to be supplied should be of English manufacture; but that the defendants were in fact manufacturers of gunpowder, and the gunpowder so delivered was not in fact manufactured by them.

Held, that the magistrates ought to have convicted the defendants, under the Merchandise Marks Act, 1887, of the offence of applying to or selling goods with a false trade description with intent to defraud, as such a description as was attached implied that the defendants were delivering gunpowder of their own manufacture when, in fact, it was not such; and that an intent to defraud under this Act did not necessarily imply an intent to cheat a customer as to the quality of the goods delivered, nor any fraud in a pecuniary sense, but such intent was implied from the fact that the manufacturer or vendor supplied something else than that which the customer, from the description given to the goods, thought he was getting.—*Storey* v. *Chilworth Gunpowder Co.*, Q.B.D. 204—24 Q. B. D. 90; 59 L. J. M. C. 13; 62 L. T. 73.

MERGER.—See MORTGAGE, 3, 14; PRACTICE, 28.

METROPOLIS MANAGEMENT ACTS:—

1. *Building—Party wall—Height—Story—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 83, 85, *schedule* 1.—A "topmost story" within the meaning of rules 5 and 6 of the schedule to the Metropolitan Building Act, 1855, need not necessarily be contained within four vertical walls; floors or rooms inclosed on three sides by vertical walls, and in front by the sloping roof of the house are "stories" within the meaning of the schedule and rules.—*Foot* v. *Hodgson*, Q.B.D.—25 Q. B. D. 160; 59 L. J. Q. B. 343.

2. *Domestic refuse—Hotel—Refuse of furnace used for electric lighting—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 125, 128.—Ashes and clinkers produced in the furnace of boilers used at an hotel for electric lighting and for working lifts, pumping water, and cooking are domestic refuse, and not the refuse of a trade manufacturer or business, and consequently the vestry is bound to remove the same without being entitled to extra payment.—*St. Martin's Vestry* v. *Gordon*, Q.B.D.—62 L. T. 835.

3. *Street—Obstruction—Removal—Seizure of goods by vestry—Local government*—57 *Geo.* 3, *c. xxix.*, *s.* 65.—The local authority having the control of the streets and public places in the metropolis has power, under section 65 of 57 Geo. 3, c. xxix., after giving due notice, to seize and detain the articles therein enumerated which are placed by any person in any street or public place within the district of the local authority, even if the person so offending has not been convicted of the offence before a magistrate.

Judgment of the Queen's Bench Division affirmed.—*Brackley* v. *Battersea Vestry*, C.A. 28—23 Q. B. D. 486; 58 L. J. Q. B. 591.

3a. *Street—Obstruction—New street—Continuing offence—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 202—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 98.—The appellants were the owners of a road which had been recently laid out for building as a street for the purposes of carriage traffic, but had not been dedicated to the public. The road communicated with a thoroughfare, and at their junction the appellants had erected, without the consent of the Board of Works or their successors, certain piers and gates for the purpose of excluding the public. The appellants were convicted and fined for having laid out a road or way for building as a street for the purposes of carriage traffic, the same not having an entrance of the full width of such street nor being open at both ends from the ground upwards, contrary to section 98 of the Metropolis Management Amendment Act, 1862, and to a bye-law made under section 202 of the Metropolis Management Act, 1855. Subsequently the appellants were convicted for permitting the said road to be continued so formed and laid out for a certain number of days.

Held, that no new street laid out for building since the passing of the Metropolis Management Amendment Act, 1862, should have barriers across it to exclude the public unless with the consent of the Metropolitan Board of Works or their successors, and that the appellants had been properly convicted of a continuing offence.—*Daw* v. *London County Council*, Q.B.D.—59 L. J. M. C. 112; 62 L. T. 937.

4. *Superannuation allowance—Discretion of vestry—Mandamus—Metropolis Superannuation Allowances Act*, 1866 (29 & 30 *Vict. c.* 31), *ss.* 1, 4.—A metropolitan vestry has a discretion, under section 1 of the Metropolis Superannuation Allowances Act, 1866, not only to grant or refuse a superannuation allowance to a retiring officer, but also, as to the amount of the allowance, so long as it does not exceed the scale prescribed in section 4.

Reg. v. *St. George's (Southwark) Vestry*, 35 W. R. 841, 19 Q. B. D. 533, dissented from.

Decision of the Queen's Bench Division, 38 W. R. 238, affirmed.—*Reg.* v. *St. Pancras Vestry*, C.A. 311—24 Q. B. D. 371; 59 L. J. Q. B. 244; 62 L. T. 440.

See also JUSTICE OF THE PEACE, 8.

MILK.—See ADULTERATION, 2; JUSTICE OF THE PEACE, 9.

MINERALS.—See DAMAGES, 2; INTEREST, 1; MORTGAGE, 12; RAILWAY, 5.

MISFEASANCE.—See COMPANY, 9, 11.

MISREPRESENTATION:—

1. *Company—Director—Prospectus—Evidence—*

Knowledge of fraud.—In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. If fraud be proved the motive of the person guilty of it is immaterial.

The directors of a tramway company issued a prospectus containing the statement that the company had the right to use steam or other mechanical power. This was untrue, but, under the circumstances disclosed, the directors were considered to have acted honestly, believing that the fact was as stated by them. An action was brought by a shareholder against the directors, claiming damages for the fraudulent misrepresentations contained in the prospectus, on the faith of which he had taken shares in the company.

Held, that the action must be dismissed.

Judgment of the Court of Appeal, 36 W. R. 699, 37 Ch. D. 544, reversed, and judgment of Stirling, J., restored.—*Derry* v. *Peek*, H.L. 33—14 App. 337; 58 L. J. Ch. 864; 61 L. T. 265.

2. *Company—Director—Prospectus—Promoter—Costs—Shorthand notes—Ord.* 58, *r.* 4; *ord.* 70, *r.* 1.—In order to maintain an action of deceit the plaintiff must prove actual fraud or dishonesty on the part of the defendant in making the statement relied on as a misrepresentation, and nothing less will suffice.

Derry v. *Peek*, 38 W. R. 33, 14 App. 337, followed.

R. was the principal partner in a business which was to be turned into a limited company, of which he was a promoter, and of which he was to be a director as soon as the purchase was completed; the prospectus as to the company contained a statement that "the business at the present time returns a net profit of over seventeen per cent. on the capital employed." R. did not see the prospectus, as issued, before it was issued, but saw and corrected two drafts of it. The truth or falsehood of the statement appeared to depend upon the doubtful question of the proper meaning to be attached to the words "the capital employed"—that is to say, upon the amount at which such capital ought to be taken—a question involving, in this case, somewhat complex calculations, and depending, to some extent, on mercantile usage.

Held (reversing the decision of Kekewich, J., reported 37 W. R. 430), that, even if the statement had been false in fact, of which there was no sufficient proof, the plaintiff had failed to discharge the burden, which lay upon him, of proving that it was false to the knowledge of the defendant so as to involve dishonesty on his part.

When the case was decided by Kekewich, J., the decision of the Court of Appeal in *Peek* v. *Derry*, 36 W. R. 899, 37 Ch. D. 541, not having been reversed by the House of Lords, the law was understood to be that it was not necessary for a plaintiff, in order to succeed in an action of deceit, to prove actual fraud. The plaintiff accordingly did not press that part of his case, and the judge did not decide the question of fraud, but decided in favour of the plaintiff on the ground that the statement was untrue in fact, and that, though the defendant may have believed it to be true, he had no reasonable grounds for such belief.

Held, that, as the plaintiff might have insisted on pressing the case of fraud, but had not done so, he ought not now to be allowed to put the defendant to the risk and expense of a new trial upon that issue.

After the order of the Court of Appeal, allowing the appeal and dismissing the action, with costs, had been passed and entered, the successful appellant applied to the Court of Appeal for an order that the costs of the shorthand notes of the evidence taken at the trial of the action, and of the transcripts of the judgments of the Lords in *Derry* v. *Peek*, might be allowed on taxation.

Held, that the court had no jurisdiction, after the order had been passed and entered, to alter it in the manner sought, the order, as passed and entered, having expressed what it was the intention of the Court of Appeal to order at the time the order was made.—*Glasier* v. *Rolls*, C.A. 113—59 L. J. Ch. 63; 62 L. T. 305.

See also COMPANY, 16a; PRINCIPAL AND AGENT, 4; SCOTLAND, LAW OF, 7; VENDOR AND PURCHASER, 8.

MISTAKE. — See TRADE-MARK, 7; TRUSTEE, 11; VENDOR AND PURCHASER, 4.

MORTGAGE:—

1. *Account—Profits—Licensed house—Sale of beer—Exclusive supply.*—In an action for account by a mortgagor against a mortgagee, a brewer, who had gone into possession and had afterwards sold the mortgaged premises—a public-house—a decree had been made directing (*inter alia*) "an account of the rents and profits of the mortgaged premises received, or which, without wilful default, might have been received," by the mortgagee, and also directing an inquiry as to "the profits made by the mortgagee in carrying on the business in the pleadings mentioned," since he took possession of the mortgaged premises.

Held, on further consideration, that the profits arising from the supply of beer by the mortgagee to persons to whom the mortgagee had let the public-house, with a stipulation that they were to take all beer from him, were not "profits of the mortgaged premises," but were profits of the mortgagee's brewery business, which was not in any way carried on on the mortgaged premises, and that the mortgagee was not bound to account for such profits; but that if it could be shown that the mortgagee could have got a higher rent for the mortgaged premises if they had been let free from the stipulation that the tenants should take all beer from the mortgagee, the mortgagor would be entitled to relief in respect of the difference of the rents.

Decision of North, J., affirmed.—*White* v. *City of London Brewery Co.*, C.A. 82—42 Ch. D. 237; 58 L. J. Ch. 855; 61 L. T. 741.

2. *Attornment clause—Validity—Landlord and tenant—Bill of sale—Bills of Sale Act*, 1878, *s.* 6—*Ord.* 14.—An attornment clause in a mortgage of real property is effectual to create the relation of landlord and tenant between mortgagee and mortgagor, and is not avoided by section 6 of the Bills of Sale Act, 1878, except as regards the power of distress, which would otherwise be an incident of the tenancy.

Therefore, where, by a mortgage deed, the mortgagor had attorned tenant to the mortgagee at a rent equivalent to the mortgage interest, and that interest was in arrear,

Held, that the mortgagee was entitled to obtain judgment under order 14 in an action for ejectment against the mortgagor.—*Mumford* v. *Collier*, Q.B.D. 716—25 Q. B. D. 279.

2a. *Consideration—Escrow—Set-off—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 56.—An action was brought by the transferor of a mortgage against the transferees for payment of the consideration-money for transfer, or to have his mortgage and other deeds back again. The plaintiff and the defendants had employed in the matter of the transfer the same firm of solicitors, who were then in good credit. On the 20th of October, 1888, the plaintiff executed the transfer, which expressed that the money was paid,

and he handed the transfer and the title deeds to the solicitors, they undertaking either to return them or to pay the money. The plaintiff did not make any inquiry till the 5th of February, 1889, the solicitors telling him so much notice was required. On the 22nd of February the solicitors handed over the deeds and the transfer to the defendants. On the 15th of March the solicitors filed their petition in bankruptcy. The defendants never paid the money in cash to the solicitors, but they set off in their books part of a sum owed by them to the defendants.

Held, (1) that there had been no negligence on the part of the plaintiff, and that the deed was an escrow until the defendants had paid the money to the solicitors in cash; (2) that the defendants were not entitled to set off a debt due to them from the solicitors.

Gordon v. *James*, 30 Ch. D. 249, distinguished.—*Coupe* v. *Collyer*, CH.D. KAY, J.—62 L. T. 927.

2b. *Consolidation—Surety.*—By a deed dated the 11th of March, 1875, G. mortgaged to I. certain real estate, and by a deed dated the 10th of December, 1875, G. mortgaged to I. certain Hudson Bay shares, and by the same deed A. and wife mortgaged to I. certain railway shares. A. and wife were, in fact, sureties for G., but that fact was not disclosed on the deed. G. subsequently executed other mortgages of the Hudson Bay shares to other persons, including M. The chief clerk found that the first mortgagee was I., and that he was entitled to consolidate his mortgage of the 11th of March, 1875; that the second mortgagees were A. and wife to the extent of the value realized from the railway shares (which had gone in part payment of I.'s securities of the 10th of December, 1875), and that the other mortgagees were entitled subject to those priorities.

Held, on a summons to vary the certificate, that I. was entitled to consolidate, on the ground that the suretyship not being disclosed by the deed of the 10th of December, 1875, the only right of A. and wife against the trust fund was through G., and was therefore subject to I.'s rights against G.—*In re Toogood*, CH.D. CHI., J.—61 L. T. 19.

3. *Covenant — Interest — Judgment — Merger.*—A. executed an instrument acknowledging the advance from B. of a certain sum which he promised to repay, with interest at 18 per cent. per annum, by monthly instalments, and he assigned to B. by way of security a policy of insurance on his own life. He afterwards executed a similar instrument on the occasion of a further advance, the interest being at the same rate, but the monthly instalments were not to commence till after the liquidation of the first debt. B. recovered judgment on both securities, with interest up to the date of the judgment.

Held, that the covenant for payment of interest was merged in the judgment for the principal.—*Arbuthnot* v. *Bulstlall*, CH.D. STL., J.—62 L. T. 234.

4. *Covenant—Interest—Personal estate—Arrears of interest—Statutes of Limitation* (3 & 4 *Will.* 4, *c.* 27, *s.* 42; 3 & 4 *Will.* 4, *c.* 42, *s.* 3).—By a mortgage deed, dated in 1875, the mortgagor assigned to the mortgagee a reversionary interest in personal estate, and covenanted for payment of the principal sum and interest thereon at five per cent. per annum on a day certain, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for payment. The mortgagor paid a sum on account of principal, but no interest was ever paid. In an action brought by the transferee of the mortgage for foreclosure,

Held, that interest was recoverable as damages, and must be calculated from the date of the mortgage deed, at £5 per cent., and was not limited to six years' arrears.—*Mellersh* v. *Brown*, CH.D. KAY, J. 732.

5. *Covenant—Solicitor—Auctioneer—Costs.*—By a mortgage deed made between two mortgagors and two mortgagees (one of the latter being a solicitor, and the other an auctioneer and valuer), after reciting that the mortgagees took over the transfers of certain mortgages at the request of the mortgagors, on the terms that they should advance the necessary money at the rate of £4 10s. per cent. per annum, and that, on the other hand, they should be entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively in or about those presents as they would have been entitled to make and receive if they had not been mortgagees, the mortgagors covenanted with the mortgagees to pay the principal moneys stated to be advanced by them out of moneys belonging to them on a joint account, and every other sum which might thereafter be advanced or paid by the mortgagees, or either of them, or become owing to them or him by the mortgagors, or either of them, with interest.

The stamp on the mortgage deed was sufficient to cover a further £100. On taking the accounts under a foreclosure order, two sums charged for certain costs incurred by the mortgagors to the solicitor-mortgagee after the date of the mortgage and not connected therewith, and a sum of £5 5s. remuneration paid to the auctioneer-mortgagee for valuing the property on the occasion of the mortgage, were disallowed.

Held, that the mortgage was only intended to include sums paid in the nature of advances, and did not include future costs incurred to the solicitor with reference to other matters.

Held, also, that the £5 5s. could not be allowed in the absence of special contract.

Decision of Kay, J., affirmed.—*Field* v. *Hopkins*, C.A.—44 Ch. D. 524; 62 L. T. 775.

6. *Equitable mortgage—Tender—Refusal—Detinue for title deeds.*—The refusal by a mortgagee of a proper tender of the money due to him does not entitle the mortgagor to an action to recover the deeds.

It is now the practice, in relaxation of the rule in *Postlethwaite* v. *Blythe*, 2 Sw. 256, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into court a stated sum sufficient to cover the amount of principal, interest, and probable costs of suit, and, upon such payment, requiring the mortgagee to deliver up the title deeds.

Chilton v. *Carrington*, 3 W. R. 17, 248, 376, 15 C. B. 95, 730, 16 C. B. 206, explained.—*Bank of New South Wales* v. *O'Connor*, P.C. 465—14 App. 273; 60 L. T. 467.

7. *Foreclosure action — Default—Judgment—Personal judgment—Account—Ord.* 19, *r.* 13; *ord.* 27, *r.* 11.—On a motion for judgment in default of defence in a foreclosure action, the plaintiff, an equitable mortgagee of leaseholds, asked for a personal judgment against the defendant, the mortgagor, who did not appear, for the amount which the plaintiff alleged by his statement of claim to be due to him, on the ground that the defendant, by not pleading, had admitted that amount to be due to him. The plaintiff had not by his statement of claim asked for a personal judgment against the defendant.

Held, that the defendant's admission by not pleading could only be treated as made for the purpose of the relief asked by the statement of claim; that, as the defendant did not appear, the plaintiff could only have such relief as he had asked by his statement of

claim; and that an account must be directed of what was due to the plaintiff.—*Faithfull* v. *Woodley*, CH.D. NOR., J. 326—43 Ch. D. 287; 59 L. J. Ch. 304; 61 L. T. 808.

8. *Foreclosure action—Parties—Trustee—Ord.* 16, *r.* 8.—In a foreclosure action a mortgagee defendant who is a trustee of the money secured on his mortgage, and who has become bankrupt, does not properly represent his *cestui que trust.*—*Francis* v. *Harrison*, CH.D. NOR., J. 329—43 Ch. D. 183; 59 L. J. Ch. 248; 61 L. T. 762.

9. *Foreclosure—Receiver—Possession.*—In an action brought by brewers for foreclosure of a mortgage of a public-house of which the mortgagor was in possession, a receiver and manager had been appointed by order on interlocutory motion in the form given in *Truman, Hanbury, & Co.* v. *Redgrave*, 18 Ch. D. 547. The mortgagor continued in occupation of a part of the premises, and was alleged to have acted in a manner which interfered with the proper conduct of the business by the receiver. The mortgagee moved for an order directing the mortgagor to give up possession to the receiver, and restraining him from remaining in occupation of any part of the premises.

Held, that the mortgagee was not entitled to such an order before judgment.

Hawkes v. *Holland*, W. N., 1881, p. 128, distinguished.—*Taylor* v. *Soper*, CH.D. NOR., J.—62 L. T. 828.

10. *Judgment—Execution—Growing crops—Receiving order—Official receiver.*—On the 18th of August, 1887, B. executed a mortgage to A. On the 22nd of August he executed a second mortgage in favour of his bankers, who obtained judgment, and possession was taken by the sheriff. On the 2nd of May a receiving order was made against B., and the sheriff withdrew. On the 25th of June the bankers took possession under their mortgage, and arranged that the growing crops should be sold without prejudice to the rights of the parties.

Held, that the bankers were entitled to proceeds of the sale of the crops as against the official receiver.—*Ex parte Official Receiver, In re Gordon*, Q.B.D., BKCY.—61 L. T. 299.

11.—*Lease by mortgagor.*—If a mortgagor creates new tenancies, after informing the mortgagee, who makes no objection, a new tenancy is not created as against the mortgagee.—*In re O'Rourke*, L.J. (Ir.)—23 L. R. Ir. 497.

12. *Power of sale—Sale of surface, reserving minerals—25 & 26 Vict. c.* 108—*Service of petition on mortgagor.*—Where mortgagees apply to the court for liberty to sell, with a reservation of the mines and minerals in the land sold, the mortgagor must be either served with the petition or made a co-petitioner.—*In re Hirst's Mortgage Trust*, CH.D. NOR., J. 685.

13. *Priority — Equitable mortgage — Fraud — Negligence—Title deeds, possession of—Legal estate.*—A mortgagor, not acting by a separate solicitor, produced to the plaintiffs' solicitors a forged deed, which purported to be a conveyance, from the same grantors of property in the neighbourhood of property to which he had already shown a good title, and the plaintiffs' solicitors made no requisition as to the identity of the property. The mortgagor subsequently mortgaged the same property to the defendants. Prior to both these mortgages the mortgagor had obtained a conveyance of the equitable estate from the owners of the property. The defendants, who had possession of the title deeds, afterwards obtained a conveyance of the legal estate from the owners of the property, all parties then having notice of the plaintiffs' mortgage.

Held, that the negligence necessary to postpone the first equitable mortgagees must be so gross as to render them responsible for the fraud committed on the second mortgagees.

Held, that the first mortgagees had not been guilty of such gross negligence as to be postponed to the second mortgagees.

Held, that possession of the title deeds conferred no advantage upon the second mortgagees.

Held, also, that the getting in of the legal estate was no protection to the second mortgagees.—*Taylor* v. *Russell*, CH.D. KAY, J. 663—62 L. T. 922.

14. *Priority—Equitable mortgage—Merger.*—D. R., under two deeds of conveyance dated 1843, was seised in fee of the lands of A., and entitled to the leasehold interest in the lands of B. under a lease of June, 1782, at a rent of £221 10s. 9d., subject as to part of the lands of B. to annuities of £100 and £200. On June 7, 1850, D. R. mortgaged A. and B. by demise for £8,000, and covenanted for himself, his heirs and assigns, to execute all further assurances, not only for assuring the lands for the residue of the term, but also "for granting the fee simple, reversion, and inheritance, or other the estate or interest of D. R. in the said hereditaments" to or in trust for the mortgagees. In 1856 D. V. R., a son of D. R., purchased the reversion in fee of the B. lands, subject to an annuity of £240. By a deed also in 1856 D. R. and D. V. R. conveyed the lands of A. and B., together with other lands, subject to the charges affecting the same, to the use of D. V. R. for life, remainder as he should appoint, with ultimate remainder in default of issue to D. V. R. absolutely. By settlement on the marriage of D. V. R. in 1867 the lands were settled to the use of D. V. R. for life, remainder to his male issue as he should appoint, in default of appointment remainder to the sons successively in tail male, and in default of issue male to D. V. R. absolutely. £6,000 East India Stock, part of the wife's fortune, was vested in trustees on condition that upon D. V. R. paying to the trustees such sum as, with the value of the stock, should amount to £8,000, the trustees should sell the stock and invest the proceeds and the sum to be added by D. V. R. upon an assignment of the mortgage of June, 1850, to be held to the extent of the proceeds of the stock upon the settlement trusts, and as to the residue for D. V. R. absolutely. In 1868 D. V. R. contributed a sum of £1,122 10s., which, with the sum of £6,877 10s. realized by the sale of the stock, was applied in taking an assignment to the trustees of the mortgage debt. In 1885 D. V. R. deposited with the Provincial Bank the two deeds of 1843, the deed of conveyance of the reversion in fee of B. and the deed of 1856 as a security for an advance. On December 7, 1886, D. V. R. assigned for value to V. the £1,122 10s. contributed by D. V. R. A notice of this assignment was in 1887 served on the trustees of the settlement. Notice of the equitable mortgage to the bank was not given to the trustees until 1889.

Held, (1) that as between the bank and V., who had purchased without notice of the bank's claim, V. had an equity superior to the bank as to the £1,122 10s., and was entitled to priority; (2) that the leasehold interest in B. was not merged in the fee simple.—*In re Roche*, C.A. (Ir.)—25 L. R. Ir. 284.

15. *Priority—Registration—Incorrect statement of county in deed—Memorial.*—An incorrect statement in the operative part of a deed as to the county in which the lands conveyed are situate, although the proper county is named in a recital, and although the memorial accurately follows the deed, is an error

which vitiates the registration and postpones the deed to a subsequent incumbrancer by duly registered deed, without notice.—*Butler* v. *Gilbert*, M.R. (Ir.)—25 L. R. Ir. 230.

16. *Priority—Settlement—Power of appointment—Annuity—Jointure—Covenant for title.*—A covenant in a mortgage deed that the mortgagor has a good title to assign "free from incumbrances, save and except" a specified annuity, gives no priority to the annuitant.

If the donee under a power of appointment exercises the power at different dates for different objects, the charges take priority in order of date.

A jointure has not necessarily priority over all other estates under a settlement.—*In re Lord Annaly*, L.J. (Ir.)—23 L. R. Ir. 481.

17. *Receiver—Legal mortgagee in possession—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), s. 25 (8). A legal mortgagee who has gone into possession of the mortgaged property cannot afterwards go out of possession, nor is he entitled, as of right, to have a receiver appointed.

Mason v. *Westoby*, 34 W. R. 498, 32 Ch. D. 206, discussed.—*Prytherick* v. *Williams*, CH.D. NOR., J. 61—42 Ch. D. 590; 59 L. J. Ch. 79; 61 L. T. 799.

18. *Receiver—Recovery of rent—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), s. 24 (3).—A mortgagor died, having devised the mortgaged land on certain trusts; one of the trustees had predeceased the testator, and the other disclaimed. The mortgagee appointed a receiver.

Held, that the receiver could sue for rent in the name of the mortgagor's heir-at-law on giving him a sufficient indemnity.—*Fairholme* v. *Kennedy*, Q.B.D. (Ir.)—24 L. R. Ir. 498.

19. *Redemption—Exclusion of right—Life insurance.*—A. mortgaged his reversionary interest in land contingent on his surviving B., to secure an advance of £10,000. The mortgagees were to effect a policy of assurance for £34,000 on the life of A. against that of B., and, if they paid the premiums, to add them to the debt. The policy, in the event of A. predeceasing B., was to belong to the mortgagees absolutely. On A.'s death in B.'s lifetime, A.'s administrator brought an action to redeem the policy.

Held, that, on the principle, "Once a mortgage always a mortgage," the condition that the policy should belong absolutely to the mortgagees was void, and that the plaintiff was entitled to redeem on the usual terms.—*Marquis of Northampton* v. *Pollock*, CH.D. NOR., J. 346—62 L. T. 313.

20. *Redemption—Loss of mortgage deed—Indemnity.*—In 1867 M. mortgaged his life interest in certain funds subject to the trusts of his marriage settlement and three policies of insurance on his own life. In 1876 he executed a second mortgage of his life interest to the plaintiffs. This mortgage did not include the policies of insurance. In 1886 an action was brought by the plaintiffs against the mortgagor and H., the legal personal representative of the first mortgagee, to redeem the first mortgage and foreclose the mortgagor. Pending the progress of the action it was discovered that the mortgage of 1867 and the policies were not in the possession of H., and an inquiry was directed as to the loss of the documents, and whether any and what indemnity should be given in respect of the loss in case it should be found that any of them had been lost. In the meanwhile the plaintiffs had paid into court the amount which had been certified to be due to the defendant H. under the mortgage of 1867, and for H.'s taxed costs of the action. The chief clerk, in answer to the inquiry, found that the mortgage of 1867 and the policies had been lost, and he also found that the plaintiffs were entitled to "such an indemnity as will equal that which the insurance company may require." The plaintiffs took out a summons to vary this certificate, by which they asked that the whole of the fund in court might be retained until further order by way of indemnity to them. The insurance company declined to make any arrangement with regard to an indemnity until claims should be made on the policies.

Held, that the plaintiffs were entitled to a bond of indemnity, to be given by the defendant H. as executrix, the bond to be settled in chambers in case the parties differed, and that they were also entitled to have retained in court the sum of £100, as a reasonable sum to meet any possible costs that might be incurred when the policies should become claims.—*Caldwell* v. *Matthews*, CH.D. NOR., J.—62 L. T. 799.

21. *Redemption—Successive mortgages—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), s. 15—*Conveyancing Act*, 1882 (45 & 46 *Vict.* c. 39), s. 12.—The plaintiffs in a foreclosure action were first and third mortgagees, the second mortgagee was entitled to a jointure on the property. There were also subsequent mortgagees.

The court made an order giving the second mortgagee six months to redeem. If she did so, the plaintiffs, as third mortgagees, were given three months to redeem subject to the jointure, with a third period of three months to the subsequent mortgagees.—*Smithett* v. *Hesketh*, CH.D. NOR., J. 698—44 Ch. D. 161; 59 L. J. Ch. 567; 62 L. T. 802.

22. *Redemption—Successive mortgages—Separate estates—Rateable payment to first mortgagee.*—If A. mortgages D. and E. to B., and afterwards mortgages D. to C., and E. to M., C. and M. are entitled to insist on B.'s debt being paid rateably out of the two estates.—*Moxon* v. *Berkeley Mutual Benefit Building Society*, CH.D. KAY, J.—59 L. J. Ch. 524; 62 L. T. 250.

22a. *Redemption — Tender — Interest.* — Notwithstanding default in payment of the principal money according to the proviso for redemption, the mortgagor is entitled to redeem without giving the mortgagee six months' notice if he pays in advance six months' interest in lieu of the notice.—*Johnson* v. *Evans*, C.A.—61 L.T. 18.

23. *Sale by mortgagee—Particulars—Misdescription—Compensation—Second mortgage.*—On a sale of a building estate by first mortgagees, the particulars, which were prepared by an auctioneer employed by the first mortgagees, contained an erroneous statement that the roads on the property were kerbed and sewered, and the purchaser claimed and obtained compensation in respect of this misstatement.

Held, that, as between the first mortgagees and the second mortgagees, the former were liable to the latter, but only if, and so far as, any loss had been occasioned by the misstatement; but that the compensation allowed to the purchaser was not the measure of that loss.

Judgment of Kekewich, J., 37 W. R. 490, 41 Ch. D. 573, reversed.—*Tomlin* v. *Luce*, C.A. 323—43 Ch. D. 191; 59 L. J. Ch. 164; 62 L. T. 18.

24. *Will—Exoneration—Locke King's Act*—17 & 18 *Vict.* c. 113, 30 & 31 *Vict.* c. 69, 40 & 41 *Vict.* c. 34.—Testator, a trader, by will in 1885 gave his trade property (which included real and leasehold estate) and business to his son, subject to and charged with, in exoneration of the rest of his estate, the payment of all debts and liabilities owing at the time of testator's death in connection with his trade. Testator included in this property freehold premises situated at Acton which he

had purchased and intended for his business subject as to such estate to the purchase or other moneys payable in respect thereof at testator's death.

The residue of testator's real and personal estate was given on trust to convert and pay thereout debts other than those thereinbefore provided for. Testator at his death owed trade debts not secured by mortgage and private debts which were secured by mortgage of the real and leasehold estates used in his business, and also of real and leasehold estates not so used.

Held, that the testator had, as to his trade debts, clearly indicated a contrary intention within the meaning of Locke King's Act and the Amendment Acts, and that it must be implied he had the same intention in dealing with his private debts, and that the mortgage debts, therefore, were primarily payable out of the proceeds of sale of the residuary real and personal estate.—*In re Nevill, Robinson* v. *Nevill*, CH.D. KAY, J.—59 L. J. Ch. 511; 62 L. T. 864.

See also BANKRUPTCY, 30, 31; BILL OF SALE, 4, 7; BUILDING SOCIETY, 3, 5, 6; CHARITY, 3; CHOSE IN ACTION; COMPANY, 1, 7, 25, 30; CONTRACT, 6; COSTS, 13, 13a; INSURANCE, 3a, 6; LIMITATIONS, STATUTES OF, 8a, 10, 12; MARRIED WOMAN, 10; PATENT, 1; PRACTICE, 19, 23; PRINCIPAL AND SURETY, 3; SCOTLAND, LAW OF, 6; SHIPPING, 20; SOLICITOR, 8—10; TRUSTEE, 5, 6, 8; VENDOR AND PURCHASER, 9; WILL, 3, 31, 32.

MORTMAIN.—See CHARITY, 3, 4; WILL, 32.

MUNICIPAL CORPORATION:—

1. Ultrà vires—Certiorari—*Costs.*—A rule having been made absolute for a *certiorari* against a municipal corporation to bring up and quash certain orders made by the town council for illegal payments out of the corporation funds, the court, on a separate application against the members of the town council who had joined in making the orders, ordered them to pay the costs of the *certiorari.*—*Reg.* v. *Vaile*, Q.B.D.—23 Q. B. D. 483; 58 L. J. M. C. 185; 61 L. T. 253.

2. Ultrà vires—*Contract—Payment out of borough rates—Surplus funds—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 140, 143, 144.—A municipal corporation agreed to pay to a railway company an annual sum for fifteen years in consideration of the company opening a bridge for foot passengers free of toll. A local improvement Act authorized rates for certain purposes, not including such a bridge, and contained a provision as to the surplus from rates resembling the provisions of section 143 of the Municipal Corporations Act, 1882.

Held, (1) that the corporation was not entitled to apply the proceeds of rates to payments under the agreement with the railway company, nor to make rates for that purpose, nor bind the surplus of future years; (2) that the agreement was not illegal; (3) that there must be a declaration that the corporation could not pay money due under the agreement out of the borough funds, nor make any borough or improvement rate to provide for such payment; and (4) that such declaration was not to prevent payments out of any surplus after applying the funds or rates to the purposes for which they were legally liable.—*Attorney-General* v. *Mayor, &c., of Newcastle-upon-Tyne*, C.A.—23 Q. B. D. 492; 58 L. J. Q. B. 558.

See also DISCOVERY, 8; ELECTION LAW, 1—3; PRINCIPAL AND AGENT, 2.

NATIONAL DEBT ACT.—See BANKER, 2.

NECESSARIES.—See CONTRACT, 5, 7.

NEGLIGENCE:—

1. *School — Accident to scholar — Negligence of teacher—Liability of committee of management.*—The plaintiff was a scholar in a voluntary school, and the defendant, the vicar of the parish, was an *ex-officio* trustee of the school, and one of the committee of management. The plaintiff sought to recover damages for personal injuries inflicted upon her by a black-board falling from an easel and striking her upon the head. It was alleged that the board fell owing to the negligence of one of the teachers. The staff of teachers was appointed by the committee of management, but was not otherwise under its control.

Held, that there was no evidence of negligence to go to the jury; but that, if there was, the defendant, as one of the committee of management, was liable for the negligence of the teacher in the school.—*Crisp* v. *Thomas*, Q.B.D.—62 L. T. 810.

2. *Solicitor—Action commenced in Palatine Court—Amount recoverable in county court—Costs.*—A solicitor was instructed by the defendants to commence proceedings against the owner of certain premises to recover the amount due from him as the frontager in respect of the expense of repairing a road upon which his premises abutted. The proceedings might have been instituted in the county court, but the solicitor commenced them in the Chancery Court of the County Palatine of Lancaster. The action was dismissed by the Vice-Chancellor, and the defendants refused to pay the solicitor's costs upon the ground that he had been guilty of negligence in not commencing the action in the county court.

Held, that, as the Vice-Chancellor of the County Palatine had no jurisdiction to inflict any penalty as to costs upon a plaintiff for bringing in the County Palatine Court an action which might have been brought in the county court, the plaintiff had not been guilty of actionable negligence in not advising that the proceedings should be commenced in the county court.—*Barker* v. *Fleetwood Improvement Commissioners*, Q.B.D.—62 L. T. 831.

See also BUILDING SOCIETY, 3; LIMITATIONS, STATUTES OF, 12; MASTER AND SERVANT, 4, 5, 7, 8; MORTGAGE, 13; RAILWAY, 6; SAVINGS BANK; SCOTLAND, LAW OF, 5, 6; SHIPPING, 2, 3, 7—17; TRUSTEE, 6—8.

NEW SOUTH WALES, LAW of:—

1. *Crown lands—Rent—Appraisement—Revision.*—Under the New South Wales Crown Lands Act, 1884, the Minister for Lands has no power to determine that either the yearly rental or the yearly license fee in respect of the leasehold and resumed areas of a pastoral holding shall be at a higher rate than that appraised by the Local Land Board under the Act, but the Minister for Lands can remit the appraisement to the Local Land Board for revision.—*Alison* v. *Burns*, P.C.—15 App. 54; 59 L. J. P. C. 35; 61 L. T. 847.

2. *Power of attorney—Revocation—Declaration by attorney.*—A general verdict against a *bonâ fide* purchaser in an action for recovery of land is justified by evidence that the defendant had cause to, and did, suspect the truth of an attorney's declaration that he had had no revocation of his power by death or otherwise.—*Mutual Provident Land Investing and Building Society* v. *Macmillan*, P.C.—14 App. 597; 59 L. J. P. C. 22; 61 L. T. 486.

NEWSPAPER.—See ATTACHMENT, 2; DISCOVERY, 4, 7; EVIDENCE, 10; LIBEL, 2; PRACTICE, 3.

NEW TRIAL.—See COUNTY COURT, 12; LIBEL; PRACTICE, 41.

NEXT of KIN.—See ADMINISTRATION, 13a, 23; WILL, 33.

NOTICE of ACTION.—See COUNTY COURT, 7a; NUISANCE, 2.

NOTICE to QUIT.—See LANDLORD AND TENANT, 1, 8a.

NUISANCE:—

1. *Adjacent landowner—Thistles.*—An occupier of land is not bound to cut the thistles thereon periodically, so as to prevent them from seeding, and being blown upon the land of another person.—*Giles* v. *Walker*, Q.B.D. 782—24 Q. B. D. 656; 59 L. J. Q. B. 416; 62 L. T. 933.

2. *Injunction — Damages — Jurisdiction — Lord Cairns' Act* (21 & 22 *Vict.* c. 27), *s.* 2—*Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 264—*Notice of action.*—An action was brought *bonâ fide* against a rural sanitary authority for an injunction restraining the defendants from causing a nuisance by continuing to discharge sewage into a river. The judge thought that, under the circumstances, an injunction was not then necessary, because the nuisance was not likely to recur except in an unusually dry season. He accordingly refused an injunction, but awarded damages.

Held, that the judge had power to award damages instead of an injunction, although there had been no notice of action under section 264 of the Public Health Act, 1875.—*Chapman* v. *Auckland Guardians*, C.A.—23 Q. B. D. 294; 58 L. J. Q. B. 504; 61 L. T. 446.

3. *Injunction—Damages—Payment into court—Discontinuance—Costs—Taxation—Ord.* 22, *rr.* 6, 7—*Ord.* 26, *r.* 1.—In an action for an injunction and damages for a nuisance, the plaintiff moved for an interlocutory injunction, but, the defendants having taken steps to stop the nuisance, no order was, by consent, made on the motion, except that the costs were to be costs of the action. The defendants by their defence denied liability, but paid money into court in respect of the claim for damages. The plaintiff accepted the money, in satisfaction of his claim for damages, and wrote that he should discontinue the action, take the money out of court, and tax his costs. The plaintiff then took out a summons for taxation of his costs of the action, and the defendants also took out a summons that the plaintiff do pay them their costs of the action, including their costs of the motion for injunction, such costs to be taxed, on the ground that the plaintiff's letter was a notice of discontinuance of the action.

Held, (1) that, as the money was paid into court and accepted only in satisfaction of the claim for damages, and as the entire claim or cause of action was not thereby satisfied, ord. 22, r. 7, did not authorize the taxation of costs thereunder, and that the plaintiff's application to tax the whole costs of the action was not right; (2) that the plaintiff's letter was not a notice of discontinuance so as to entitle the defendants to their costs under ord. 26, r. 1.—*Moon* v. *Dickinson*, CH.D. NOR., J. 278.

4. *Injunction—Public shows*—Quia timet *action.*—An action was brought by inhabitants of houses abutting on an open and unbuilt-on area of land situate in the centre of a town, and known as Market-square, for an injunction to restrain the owner thereof from using, or causing or permitting the same to be used, for the purpose of any sports, exhibitions, entertainments, or otherwise whereby a nuisance might be occasioned to the annoyance and injury of the plaintiffs. The defendant's agent had licensed S. to use Market-square for holding a public show for several days, S. paying £6. The show consisted of a large circular roundabout worked by a steam engine, which engine also worked an organ; a large circular mechanical switchback worked by another steam engine, which worked a second organ; a shooting gallery; and a boxing booth. Whilst the show was going on, the plaintiffs complained to the defendant's agent, and a correspondence ensued, which resulted in the defendant's agent declining to give an undertaking, and expressing his intention of allowing persons to use Market-square for public shows.

Held, that, as the defendant contended that he had the right to do the thing complained of, and had refused to give an undertaking, the inference was that there would be a repetition of the nuisance; and that, therefore, the plaintiffs were justified in bringing the action, and were entitled to an injunction.—*Phillips* v. *Thomas*, CH.D. CHL., J.—62 L. T. 793.

5. *Reasonable use of property—Injunction.*—It is not a sufficient defence to an action for an injunction to restrain a nuisance to prove that the nuisance is caused by a perfectly reasonable use of defendant's property.

The defendant, who was a hotel proprietor, placed in his kitchen and used in the course of his business a large cooking range, with a shaft for hot air, which interfered with the comfort of the plaintiff's house by overheating his wine cellar.

Held, that, although the use by the defendant of the range and shaft was reasonable, the plaintiff was entitled to an injunction to restrain the nuisance.

Bamford v. *Turnley*, 10 W. R. 803, 3 B. & S. 62, and *Gaunt* v. *Fynney*, 21 W. R. 129, L. R. 8 Ch. 8, distinguished.

Broder v. *Saillard*, 24 W. R. 1011, 2 Ch. D. 692, followed.—*Reinhardt* v. *Mentasti*, CH.D. KEK., J. 10—42 Ch. D. 685; 58 L. J. Ch. 787; 61 L. T. 328.

See also LOCAL GOVERNMENT, 9.

OFFENCES AGAINST the PERSON ACT. — See CRIMINAL LAW, 4, 7; JUSTICE OF THE PEACE, 3, 4.

OFFICERS' MESS.—See PRINCIPAL AND AGENT, 7.

OFFICIAL RECEIVER. — See ADMINISTRATION, 6; ATTACHMENT, 4; BANKRUPTCY, 7, 8.

OFFICIAL REFEREE.—See PRACTICE, 6—9, 21, 44.

OMNIBUS.—See HACKNEY CARRIAGE.

ORIGINATING SUMMONS.—See PRACTICE, 14, 19; TRUSTEE, 3; WILL, 36.

PALATINE COURT of LANCASHIRE.—See NEGLIGENCE, 2; PATENT, 5; PRACTICE, 40.

PARDON.—See LICENSED HOUSE, 1.

PARTICULARS.—See ARBITRATION, 7; COSTS, 11; COUNTY COURT, 9; PRACTICE, 30, 31, 32.

PARTITION:—

1. *Sale.*—In a partition action the court will not, as a general rule, at the request of persons claiming to be interested in a moiety of the property, make an order for immediate sale without first directing an inquiry as to the persons interested in the property.

The court may, where the value of the property is small, make an order at the trial for immediate sale, on satisfactory evidence being produced as to the persons interested.—*Wood* v. *Gregory*, CH D. NOR., J. 226—43 Ch. D. 82; 59 L. J. Ch. 232; 62 L. T. 179.

2. *Sale out of court—Infant—Ord.* 51, *r.* 1a—*Rules of December*, 1888, *r.* 9.—Upon a motion for judgment in an action for sale in lieu of partition, where all persons interested, some being infants, asked that an inquiry as to title might be dispensed with and for an immediate sale by auction and out of cour an order was made for an immediate sale out of co subject to directions for fixing a reserve price an auctioneer's remuneration in chambers, and f conditions of sale to require the purchaser to p court his purchase-moneys.

Having regard to the fact that infants were interested, and to rule 9 of the Rules of December, 1888, which modifies ord. 51, r. 1a, the court required the allegations in the claim to be verified by affidavit, though the allegations were admitted by the defendant. —*Willis* v. *Willis*, CH.D. CHL., J. 7—61 L. T. 610.

PARTNERSHIP :—

1. *Assignment of share—Lease—Specific performance—Statute of Frauds* (29 *Car.* 2, c. 3), *s.* 4.—G., S., and B. being partners, S. agreed to retire from the partnership, and almost immediately afterwards B. signed a document, the material part of which was as follows:—"Rough Draft.—31 May, 1888.—This is to record that, in consideration of W. G. or his executors paying H. C. B. or his assigns the sum of £100 on the 1st of January, 1890, and the sum of £100 on every 1st of January for the nine succeeding years, H. C. B. agrees to withdraw from the firm of G., S., & B." The partnership business was carried on upon leasehold premises.

Held, that the document amounted to a concluded agreement, and that, though, as involving an agreement to assign the leasehold premises, which constituted an interest in land, it fell within section 4 of the Statute of Frauds, it was a sufficient memorandum in writing within that section.

Held, also, that G. was not entitled to use B.'s name as part of the title of the new firm.

Levy v. *Walker*, 27 W. R. 370, 10 Ch. D. 436, distinguished.

Judgment of Kekewich, J., affirmed.—*Gray* v. *Smith*, C.A. 310—43 Ch. D. 208; 59 L. J. Ch. 145; 62 L. T. 335.

2. *Dissolution—Receiver—Jurisdiction.*—By a deed of dissolution of partnership between the plaintiff and the defendant, it was agreed that the defendant should have the sole management of the liquidation of the firm, should pay all existing debts of the firm, and indemnify the plaintiff against the same, and should account to the plaintiff for the share of any dividends which might be received in respect of any debts or claims, after payment of all creditors of the firm out of the assets of the firm. The firm had a claim for a large sum against a foreign merchant, in respect of which claim little or nothing was capable of being realized in the ordinary way. The defendant proposed, with a view to obtaining something on this claim, to take shares in a company about to be formed, the object of which was to take over the property of the debtor in question, subject to an arrangement being come to with the creditors of the debtor to accept, in shares of the company, amounts equal to twenty-five per cent. of the value of their claims. The plaintiff having brought an action to have the accounts of the partnership taken and to restrain the defendant from carrying out, in opposition to the wish of the plaintiff, such proposed arrangement, an order was made by Kekewich, J., appointing the defendant receiver, with liberty to compromise the claim in question upon terms to be approved by the judge in chambers.

Held, (1) that the deed of dissolution contained no power, either express or implied, authorizing the defendant to enter into any arrangement of the kind proposed; (2) that the appointment of the defendant as receiver did not give the court jurisdiction to clothe the defendant as receiver, contrary to the wish of the plaintiff, with authority not given by the agreement between the partners; (3) that the order appointing the defendant receiver having been made for the purpose of enabling the proposed arrangement to be carried into effect, should be discharged.

Weikersheim's case, 21 W. R. 612, L. R. 8 Ch. 831, explained.—*Neimann* v. *Neimann*, C.A. 258—43 Ch. D. 198; 59 L. J. Ch. 220; 62 L T. 339.

3. *Real estate — Conversion — Re-conversion — Tenancy in common.*—In 1873 A. and B., being tenants in common in equal shares of certain freehold and leasehold properties, entered into copartnership under the style of M. & Sons, as builders and contractors, for a period of ten years, those properties and certain plant being by the articles of partnership made partnership assets. In 1877 the plant was sold and the proceeds divided, but the freehold and leasehold properties, with the exception of an office, were let to tenants, and no new contracts were entered into. The business connected with the receipts and payments in respect of the properties was transacted at the office, and a banking account kept in the name of the partnership firm of M. & Sons. In 1888 A. died intestate.

Held, that the partnership terminated in 1877, and that from that time the property was simply held by the former partners as tenants in common, the right of either party to call for a sale being taken away when they ceased to carry on the partnership business, and, therefore, that the property must be be considered as realty.—*Myers* v. *Myers*, CH.D. CHL., J.—61 L. T. 757.

4. *Real estate—Joint speculation—Intestacy—Conversion.*—H. had for many years previously to his death been engaged in various land speculations jointly with C. The speculations consisted in the buying and selling of plots of land, the laying out of the land for building purposes, and the advancing of money to builders. The lands were generally bought in consideration of chief rents, and then sold to builders at increased chief rents, which were retained by H. and C. The conveyances of the lands bought were taken either to H. and C. jointly or to C. alone. A banking account was kept in the names of H. and C., and statements of account were made out every half year, but there were no partnership articles between H. and C. Upon the death of H., there being an intestacy as to certain lands and chief rents which had been acquired by him in the course of his joint speculation with C.,

Held, that the proper inference to be drawn from the evidence and statements of account was, that the relation which had existed between H. and C. was that of partners, and that they were not co-owners of real estate, but that the property in question constituted partnership assets, and, therefore, that the property must be treated for the purpose of devolution as personal estate of H., to which his next of kin were consequently entitled.—*Hulton* v. *Lister*, C.A.—62 L. T. 200.

See also ARBITRATION, 5, 7; BANKRUPTCY, 4, 21; BILL OF SALE, 15; COUNTY COURT, 6; INCOME TAX, 5; LEGACY DUTY; PRACTICE, 24, 47, 49.

PATENT :—

1. *Assignment—Mortgage—Registration—Infringement—Practice—Joinder of parties—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 23, 46, 85, 87—*Ord.* 16, *r.* 11.—The practice of the Comptroller of Patents is, not to register a mortgagee, even where the mortgage is by way of assignment, as assignee of the patent, but as mortgagee only, and this is the correct practice.

Under ord. 16, r. 11, the mortgagee may at any time be added as a co-defendant, if it appears to the judge, either of his own motion or on an application by the defendant, that the presence of the mortgagee is necessary for the purposes of justice.

The assignee of a patent, whose name was entered on the register of patents as assignee, mortgaged the patent by way of assignment, and the name of the mortgagee was entered on the register as mortgagee.

Held (reversing the decision of Kekewich, J.), that

the mortgagor was entitled, on general equitable principles, to sue for infringement without joining the mortgagee as a co-plaintiff, and that there was nothing in the Patents, Designs, and Trade-Marks Act, 1883, to disentitle the mortgagee from doing so, having regard to the mode in which the entries were made on the register.

Fairclough v. *Marshall*, 27 W. R. 145, 4 Ex. D. 37, approved.—*Van Gelder* v. *Sowerby Bridge United District Flour Co.*, C.A. 625—44 Ch. D. 374; 59 L. J. Ch. 583.

2. *Damages — Infringement.*—The plaintiffs, who were patentees, had obtained judgment in an action for infringement, and on an inquiry as to damages, the official referee had found that the prices at which the defendants at first sold the patented articles were lower than the plaintiff's original prices, and that they lowered them again from time to time during the period of infringement, and that the plaintiffs reduced their prices to the prices of the defendants from time to time to meet the competition of the defendants, but never below the defendants' prices. He also found that but for the defendants' illegal competition the plaintiffs would have made all the sales made by the defendants as well as those made by themselves, at their original prices, subject to a percentage for increased sales caused by the connection and exertion of the defendants and by the reduction of the prices.

Held (reversing Kekewich, J., 38 W. R. 329), that the plaintiffs were entitled to recover all the profits which would have been made by them if all the sales made by them and by the defendants had been made by the plaintiffs at their original prices; after making allowance for the increased sales attributable to the exertions and connections of the defendants and to the reduction in prices.

United Horse Shoe Wire Co. v. *Stewart*, 13 App. Cas. 401, 36 W. R. Dig. 63, distinguished.—*American Braided Wire Co.* v. *Thomson*, C.A.—44 Ch. D. 274; 59 L. J. Ch. 425; 62 L. T. 616.

3. *Infringement—Amendment—Disclaimer—Costs —Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 19, 20.—After the delivery of the statement of defence in an action for infringement of a patent, the plaintiff applied to amend his specification by way of disclaimer. A judge in chambers gave the plaintiff leave to amend and to give the amended specification in evidence, on condition that there should be no damages and no injunction for anything done before the disclaimer, the costs to be the defendant's.

Held, that the judge had full discretion as to the terms on which the plaintiff should be allowed to apply for amendment.—*Lang* v. *Whitecross Co.*, Q.B.D.—62 L. T. 119.

4. *Infringement—Assignment — Licence — Limited grant—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 23, 36, 87.—An exclusive licence to use a patented invention in a particular district for a limited term does not amount to an assignment of the patent rights for that district, and does not confer any rights which enable the licensee in his own name to maintain an action without joining the patentee as a co-plaintiff against a person who has infringed the licensee's rights under his licence by using the invention within the said district and term.

M., a patentee, gave H. by deed an exclusive licence to use M.'s patent within a specified district for four years, and covenanted that he would not during the term sell the invention or grant other licences to use it within the district, and that, in case M. failed to take steps effectually to protect the patent against any infringement which should take place, H. should be at liberty to take such steps in M.'s name. The deed was duly registered under the Patents, Designs, and Trade-Marks Act, 1883, and shortly afterwards M. sold one of his patented machines to S., carrying on business outside the district, and S., two or three weeks later, sold the machine to J., who used it within the district.

Held, that H., having a mere licence to use the patent, and no property in it, could not maintain an action against J. without joining M. as a co-plaintiff; and, that H., having failed on the evidence to satisfy the court that J., when he bought the machine, had actual notice of H.'s rights, the action failed on that ground also, and must be dismissed, with costs.

Decision of Bristowe, V.C., affirmed.

Quære, whether registration under the Patents, Designs, and Trade-Marks Act, 1883, is notice to all the world.—*Heap* v. *Hartley*, C.A. 136—42 Ch. D. 61; 58 L. J. Ch. 796; 61 L. T. 538.

5. *Infringement—Discontinuance before action—Injunction—Damages.*—An injunction against the infringement of a patent will not be granted where, though there has been an infringement, it has been discontinued several years before action brought, and there is no intention or probability of a renewal of the wrongful user.

In 1882 A. commenced using experimentally certain machines supplied by B. In 1883, A. being dissatisfied with the machines, the user was discontinued and never resumed, and B. was requested to remove them, which he did in 1885. In 1887 C. obtained a judgment against B. that the machines were an infringement of C.'s patent, and shortly afterwards C. claimed royalties from A. for the use of the machines supplied by B. A. replied that he was not using, and had no intention of using, either B.'s or C.'s machines, and stated the circumstances under which he had formerly used them. In 1888 C. brought an action against A. for an injunction and account of damages. A., by his defence, denied infringement, and stated that, if there had ever been infringement, it had been discontinued long before the action, and that there was no threat or intention to infringe in the future.

Held, reversing the decision of Bristowe, V.C., that, though there had been an infringement, the circumstances were such as not to afford any inference that the infringement was likely to be repeated, and, an injunction ought not to be granted; and that in a case in the Palatine Court of Lancaster, to which the Judicature Acts did not apply, damages could not be given except under Cairns's Act, under which they can only be given where there is a proper case for an injunction.

Millington v. *Fox*, 3 My. & Cr. 338, and *Geary* v. *Norton*, 1 De G. & S. 9, distinguished.—*Proctor* v. *Bayley*, C.A. 100—42 Ch. D. 390; 59 L. J. Ch. 12; 61 L. T. 733.

6. *Infringement — Discontinuance of action — Threats—Injunction—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 32.—An action for infringement of a patent was commenced with due diligence, and subsequently discontinued before trial.

Held, that no right of action accrued, under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, to the party sued in the discontinued infringement action.—*Colley* v. *Hart*, CH.D. NOR., J. 501—44 Ch. D. 179; 59 L. J. Ch. 308; 62 L. T. 424.

7. *Infringement—Threats—Cross action—Costs—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 32.—A solicitor's letter saying that proceedings will be instituted is a threat within the

meaning of section 32 of the Patents, Designs, and Trade-Marks Act, 1883.

The action pointed at by the section is an action by the patentee against the person whom he has threatened, not against any other person who may be infringing.

In an action to restrain threats the defendant is not bound to assert his rights by defence or counter-claim, but is entitled to bring a separate action for the alleged infringement of his patent; but, if he does so, arrangements ought to be made so that the proceedings in one action should be stayed to abide the result of the trial in the other.

A. commenced an action under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, against B. to restrain threats. B., within ten days, brought a cross-action against A. for infringing his patent. After pleadings had been delivered and notice of trial given in both actions, A. offered to stay his action for threats until B.'s action was concluded, but B. refused, and forced A. to proceed, and both actions came on together for trial. B.'s action was dismissed, with costs.

Held, that A.'s right of action was taken away by B. having, within a reasonable time, commenced and prosecuted with due diligence his cross-action for infringement; and that A.'s action must be dismissed, without costs.—*Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.*, CH.D. KEK., J. 233—42 Ch. D. 665; 58 L. J. Ch. 709; 61 L. T. 474.

8. *Infringement—Threats — Injunction — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Ord.* 25, *r.* 4.—D., the patentee of an invention, who had granted to F. an exclusive licence to use the invention on payment of royalties, on the 17th of December, 1888, threatened F. with legal proceedings, on the ground that F. was manufacturing articles which infringed the patent without paying royalties, and on the 24th of April, 1889, commenced an action against F. for an injunction to restrain the manufacture of such articles, except subject to the terms of the licence. F. denied that the articles were an infringement of D.'s patent, and alleged that they were manufactured under B. and E.'s patent, of which F. was also licensee. B. and E., as "persons aggrieved" by D.'s threats against F., their licensee, on the 16th of August, 1889, commenced an action for an injunction to restrain D. from threatening F., and for damages. Summonses were taken out by D. for a stay of proceedings in the action by B. and E., and by B. and E. for a stay of proceedings in the action against F. until their action against D. had been heard.

Held, that the action of D. against F. was an action for infringement brought with due diligence within the proviso to section 32 of the Patents, Designs, and Trade-Marks Act, 1883; that there was no cause of action for the action of B. and E. against D.; and that all further proceedings in that action must be stayed. —*Barrett* v. *Day, Day* v. *Foster*, CH.D. NOR., J. 362 —43 Ch. D. 435; 59 L. J. Ch. 464; 62 L. T. 597.

9. *Licence—Royalties—Account—Provisional specification—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 5), *ss.* 9-13.—A patentee who had obtained only a provisional specification, granted to the defendant a licence of his patent for one year, and further from year to year during the continuance of the letters patent. The defendant paid royalties for one year, but refused to continue the payments because the patentee had not obtained a complete specification.

Held, that the licence was not void, and that the plaintiff was entitled to an account of the sum due for royalties.—*Otto* v. *Singer*, CH.D. CHI., J.—62 L. T. 220.

10. *Novelty—Improved results.*—A patentee is not only entitled to the mechanism described in his specification, but also to the results produced by such mechanism; and the attainment of a result better than any previous result constitutes a new invention, as distinguished from a mere improvement.—*Thomson* v. *Moore*, V.C. (Ir.).—23 L. R. Ir. 599.

11. *Revocation—Petition—Trial—Respondent resident out of the jurisdiction—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 26—*Ord.* 11, *r.* 1.—The sole respondent to a petition for revocation of a patent was a domiciled Scotchman, resident in Scotland. A copy of the petition and the petitioner's particulars of objection had been served on him in Scotland, and he had written a letter to the petitioner in which he stated that he did not intend to appear at the hearing because he was not under the jurisdiction of the English courts.

The court ordered that, unless the respondent should, on or before a specified date, show cause to the contrary, the petition would be tried on *viva voce* evidence.—*In re Drummond's Patent*, CH.D. NOR., J.—43 Ch. D. 80; 59 L. J. Ch. 102.

See also COSTS, 10, 11; DESIGN, 1—3; PRACTICE, 30.

PAWNBROKER:—

Pledge—Special contract—Sale—Deficiency—Action for balance.—Where a pawnbroker has advanced money to a pawner upon an article pledged under a "special contract," and has sold the article according to the provisions of the Pawnbrokers Act, 1872, upon the expiry of the period of redemption, the liability of the pawner for the debt is not extinguished (in the absence of any express stipulation in the special contract), and the pawnbroker is entitled to recover the balance if the sale has failed to realize the full amount of the loan.—*Jones* v. *Marshall*, Q.B.D. 269—24 Q. B. D. 269; 59 L. J. Q. B. 123; 61 L. T. 721.

PAYMENT into COURT.—See COSTS, 21, 28; COUNTY COURT, 10, 11; DISCOVERY, 4; DIVORCE, 18; LANDS CLAUSES ACT, 7; NUISANCE, 3; SOLICITOR, 2.

PAYMENT out of COURT.—See ADMINISTRATION, 8; DIVORCE, 18; LANDS CLAUSES CONSOLIDATION ACT, 8, 9; SETTLEMENT, 12.

PENALTY.—See FISHERY, 3; JUSTICE OF THE PEACE, 2a; LOCAL GOVERNMENT, 10; MARKET; WEIGHTS AND MEASURES, 1.

PENSION.—See LUNACY, 1.

PETITION.—See COMPANY, 23—27; LANDS CLAUSES CONSOLIDATION ACT, 9; PATENT, 11.

PHARMACY ACT:—

Sale of poison—Chemist—Unregistered assistant—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.—An unregistered chemist's assistant who, in his master's absence, sells poison or a preparation containing poison, is liable to a penalty under section 15 of the Pharmacy Act, 1868, even if he effects the sale on behalf of his master, who is duly registered.—*Pharmaceutical Society* v. *Wheeldon*, Q.B.D.—24 Q. B. D. 683; 59 L. J. Q. B. 400; 62 L. T. 727.

PLEDGE.—See CANADA, LAW OF, 2; COMPANY, 17a; PAWNBROKER.

POISON.—See INSURANCE, 2a; PHARMACY ACT.

POLICY.—See INSURANCE, 1, 3a; MORTGAGE, 19.

POOR LAW:—

1. *Settlement—Derivative settlement—Child under sixteen—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—The provision in section 35 of the Divided Parishes Act, 1876, that, "if any child in the section mentioned shall not have acquired a settlement for

itself, . . . and it cannot be shown what settlement such child . . . derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born, does not apply to the case of a child under sixteen years of age.

Reigate Guardians v. *Croydon Guardians*, 38 W. R. 295, 14 App. 465, followed.

A pauper under the age of sixteen having become chargeable, the settlement of his deceased father could not be ascertained, and the settlement which he derived from his mother could not be shown without inquiring into her derivative settlement.

Held, that section 35 did not prohibit the inquiry, but that the pauper took his mother's settlement, and not his own birth settlement.—*West Derby Guardians* v. *Atcham Guardians*, C.A. 361—24 Q. B. D. 117; 59 L. J. M. C. 17.

2. *Settlement — Derivative settlement — Irremovability—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.—The father of a pauper had a settlement in the C. Union in 1878, which he never lost. He died in 1881. The maiden settlement of the mother, who survived the father, was in the R. Union, and the mother, in 1886, had not acquired any settlement since her husband's death. In 1886 a justices' order was made adjudging the settlement of the pauper, who was then under the age of sixteen, to be in the C. Union.

Held, that, inasmuch as the pauper on the death of her father took the settlement of the father, and as the pauper's widowed mother had not, since her husband's death, acquired a settlement for herself, the pauper retained the father's settlement in the C. Union, and that the order of the justices was right.

Decision of the Court of Appeal, 35 W. R. 824, 19 Q. B. D. 385, reversed.

A pauper was born on the 27th of October, 1861, in W., her father's birth parish, which is within the appellant union. In 1862 she removed with her father to the parish of R. in the N. Union, where she resided with him until his death in 1868. Her mother married again. From her father's death until November, 1885, the pauper, who was physically incapable of work, resided with her mother in the parish of R., and from the 5th of June, 1880, was in receipt of relief from the N. Union until November, 1885, when she went with her mother to the parish of A., in the respondent union, to which she became chargeable in September, 1886. When the pauper, who attained sixteen in October, 1877, became chargeable in June, 1880, she had resided in R. for about four years, without having received relief, and for two years and ten months of that time she was above sixteen.

Held, that the pauper had acquired by residence a *status* of irremovability, and had a settlement in her own right in the N. Union under section 34 of the Divided Parishes Act, 1876.

Decision of the Court of Appeal, 3 6 W. R. 422, 20 Q. B. D. 597, reversed.

The widow and three children under six years of age of a man who at the time of his death had acquired a settlement in G. under section 34 of the Divided Parishes Act, 1876, became chargeable to the B. Union, the widow not having, since her husband's death, acquired a settlement for herself.

Held, that, the father having, at the time of his death, acquired a settlement in G. under section 34, his widow and children took his settlement under the provisions of section 35.

Decision of the Court of Appeal, 36 W. R. 851, 21 Q. B. D. 278, affirmed on different grounds.—*Reigate Guardians* v. *Croydon Guardians; Highworth Guardians* v. *Westbury-on-Severn Guardians; Medway Guardians* v. *Bedminster Guardians*, H.L. 295—14 App. 465; 59 L. J. M. C. 29; 61 L. T. 733.

3. *Settlement—Derivative settlement—Pauper wife —Derivative settlement of husband—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—E. C., a pauper, was the wife of one A. C., who had deserted her and could not be found. A. C. had not acquired any settlement for himself. A. C., born in 1857, was the legitimate son of J. C., who was born in 1825 in the Edmonton Union, and had not acquired any settlement for himself before his son A. C. was twenty-one years old.

Hold, that, upon the authority of the *Reigate case*, 38 W. R. 295, 14 App. Cas. 466, the court were bound to hold that, under clause 3 of section 35 of the Divided Parishes Act, 1876, E. C. took the settlement of her father-in-law, J. C., as being the parentage settlement of her husband, A. C.—*West Ham Guardians* v. *St. Giles-in-the-Fields and St. George's Guardians*, Q.B.D. 736—25 Q. B. D. 272.

4. *Settlement—Derivative settlement—Poor Law Amendment Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—The meaning of section 1 of the Poor Law Amendment Act, 1848, is that, where a child lives with its father or mother as one of the family, and has no settlement other than one derived from the parent, the removability of such child depends on the removability of the parent.

A girl lived with her father as part of his family for a period during which he acquired by residence a settlement in the M. Union. Before she attained the age of sixteen they went to live in the W. Union. After she had attained the age of sixteen, but before they had lived twelve months in the W. Union, she became chargeable. After they had lived twelve months in the W. Union, and the father had become irremovable, an order was made removing the girl to the M. Union.

Held, that the settlement which, by virtue of section 35 of the Divided Parishes Act, 1876, the girl retained on reaching the age of sixteen, was still a derivative settlement after she passed that age; and that she came within the meaning of section 1 of the Poor Law Amendment Act, 1848, and, her father being irremovable, she was irremovable also.—*Mitford Guardians* v. *Wayland Guardians*, C.A. 632—25 Q. B. D. 164; 59 L. J. M. C. 86.

5. *Settlement—Illegitimate child—Birth settlement —Mother's settlement—Burden of proof*—4 & 5 *Will.* 4, *c.* 76, *s.* 71.—Upon the hearing of an appeal against an order of removal of an illegitimate child under sixteen to the place of its birth settlement, it was proved that the mother was alive, but no evidence as to her settlement was given.

Held (affirming the judgment of the Queen's Bench Division), that the burden of proving that the mother had a settlement lay upon the appellants, and that, in the absence of such proof, the order adjudging the child to be settled in the place of its birth was right.

Reg. v. *St. Paul's, Covent Garden*, L. R. 7 Q. B. 232, discussed.—*Headington Guardians* v. *Ipswich Guardians*, C.A. 586—25 Q. B. D. 143; 59 L. J. M. C. 92; 62 L. T. 786.

6. *Settlement—Illegitimate child—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—An illegitimate child cannot gain a settlement while under sixteen, but follows the mother's settlement.—*Manchester Overseers* v. *Ormskirk Guardians*, Q.B.D. 798—24 Q. B. D. 678; 59 L. J. M. C. 103; 62 L. T. 661.

See also ADMINISTRATION, 17; CONTRACT, 7.

POOR RATE:—

1. *Exemption—Ambassador—Secretary to embassy.*—A British subject who is appointed to the embassy of a foreign Power in England, and received without any special conditions by the British Government, has all the privileges of a foreign ambassador, and is not liable to pay parochial rates.—*Macartney* v. *Garbutt*, Q.B.D. 559—24 Q. B. D. 368; 62 L. T. 656.

2. *Rateable value—Sewage farm—Parochial Assessment Act* (6 & 7 *Will.* 4, *c.* 96), *s.* 1.—The Corporation of Burton-on Trent were owners of a sewage farm and a pumping station for the purpose of disposing of the sewage of the town, in respect of which the corporation were assessed to the poor rate. It was impossible to work the sewage farm except at a loss so long as it remained a sewage farm, and if the corporation wished to let it as a sewage farm, no one would be found to take it even at a nominal rental. The pumping station, while used as part of the sewage system, was incapable of yielding a profit, and could not be used beneficially for any other purpose. If the sewage farm and pumping station belonged to a private owner, the corporation would be willing to hire them at a yearly rent sufficiently high to support the present rates.

Held (reversing the decision of the Queen's Bench Division), that, in ascertaining the rateable value, the corporation must be taken into account as possible hypothetical tenants, and the rent that they would give for the sewage farm and pumping station as a sewage farm and pumping station if they were not the owners in occupation must be taken into account in ascertaining the rateable value, and that, therefore, the rating was right.

Reg. v. *Metropolitan Board of Works*, 17 W. R. 527, L. R. 4 Q. B. 15; *Metropolitan Board of Works* v. *West Ham Local Board*, 19 W. R. 246, L. R. 6 Q. B. 193; and *London School Board* v. *St. Leonard, Shoreditch, Overseers*, 34 W. R. 583, 17 Q. B. D. 738, discussed. — *Mayor, &c., of Burton-on-Trent* v. *Burton-on-Trent Assessment Committee*, C.A. 181—24 Q. B. D. 197; 59 L. J. M. C. 1; 62 L. T. 412.

3. *Rateable value — Retrospective rates — Local government*—22 & 23 *Vict. c.* 49, *s.* 6.—A contribution order made by guardians under the provisions of the Consolidated Orders of the Local Government Board of 1886, in respect of expenses for the relief of the poor in 1889, included arrears accrued due from a parish in 1886. These arrears had not been inserted in any estimates or orders between 1886 and 1889.

Held, that the order was good under 22 & 23 Vict. c. 49, s. 6.—*Caistor Guardians* v. *North Kelsey Guardians*, Q.B.D.—59 L. J. M. C. 102; 62 L. T. 731.

4. *Vacant land—Legal owner—Occupation*—43 *Eliz. c.* 2, *s.* 1.—S. was owner in fee simple of a piece of uninclosed land, on which grew some grass and trees. The cattle of a neighbour, without the knowledge or permission of S., were in the habit of straying on to the land and eating the grass. On one of the trees growing on the land S. affixed a bill stating that the land was to let, but he made no other use of the ground.

Held, that he was not liable to be assessed to poor rate in respect of this land.—*Smith* v. *New Forest Union Assessment Committee*, C.A.—61 L. T. 870.

See also ELECTION LAW, 1, 9, 13; RAILWAY, 6a.

POWER of APPOINTMENT:—

1. *Exercise—Will—Codicil—Republication.*—A., having under under his marriage settlement a power of appointment jointly with his wife during her life, and, in case of her predeceasing him without any joint appointment being made, a power of appointment as survivor by deed or will among the children of the marriage, by his will, made in the lifetime of his wife, after making certain specific devises and bequests, provided that any other estate or property of which he might be possessed at the time of his decease, or over which he might have a power of bequest or disposal, should be held in trust for the benefit of any younger child or children of the marriage as therein mentioned. By a codicil, after the death of his wife, A., after making certain devises and bequests, and giving the residue of his real and personal estate to his second son, confirmed his will in all respects so far as it was capable of taking effect.

Held, that the power of appointment was well exercised by the effect of the codicil republishing the will.—*Smiles* v. *Blackburn*, CH.D. NOR., J. 140—43 Ch. D. 75; 59 L. J. Ch. 208.

2. *Exercise—Will—Objects designated* nominatim—*Law of Powers Amendment Act*, 1874 (37 & 38 *Vict. c.* 37).—If a power is given by will to appoint a fund among several persons *nominatim*, with a gift over in default of appointment to the same persons *nominatim*, or their representatives, and all the objects of the power survive the testator, the death of some of the objects during the lifetime of the donee of the power will not affect the validity of the power over the whole fund.

The principle of *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 298, followed and applied.—*In re Ware, Cumberlege* v. *Cumberlege-Ware*, CH.D. STI., J. 767.

3. *Exercise—Will—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.—In section 27 of the Wills Act, 1837, after the words "which he may have power to appoint in any manner he may think proper," some such words as "by the will in question" must be read in from the context and the general scope of the Act.

A., who, under a settlement made in 1884, had a general power of appointing some stock by writing under his hand, not being a will or codicil, or by will or codicil expressly referring to the power, bequeathed all his personal property to trustees upon certain trusts, but without any express reference to the power or to the property subject to it.

Held (affirming the decision of Kekewich, J.), that the condition in the power restricting the class of wills whereby the power was to be exercised to wills expressly referring to the power was a perfectly lawful restriction not forbidden or invalidated by any statute; that the testator had not power to appoint in any manner he might think proper, within the meaning of section 27 of the Wills Act, 1837, but only in the case of wills by the particular class of will aforesaid; and that the will, not being a good exercise of the power apart from the section, was not made so thereby.

Mason v. *Thorne*, 37 W. R. 10, 38 Ch. D. 630, not followed.—*Phillips* v. *Cayley*, C.A. 241—43 Ch. D. 222; 59 L. J. Ch. 177; 62 L. T. 86.

4. *Exercise—Will—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.—T. having a power over a fund "for such persons and purposes and in such manner as she shall by will expressly referring to this present power appoint," by her will gave all her property to her executors upon certain trusts, without referring to the power.

Held, that the will was not a valid appointment under section 27 of the Wills Act, 1837.—*In re Tarrant's Trusts*, CH.D. CHI., J.—58 L. J. Ch. 780.

5. *Revocation—Special power—Will—Deed—Contrary intention—Election—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 19, 23, 24, 27.—By a settlement dated in 1842, and made on the marriage of A., an infant, with B., A. and B. covenanted that, as soon as A. attained twenty-one, certain real estate of which she was tenant in tail, and certain personal estate to which she was entitled, should be conveyed and

assigned to the trustees upon trust, after the death of A., for the children of the marriage as A. and B. by deed, or the survivor of them by deed, with or without power of revocation and new appointment, or by will, should appoint, and, in default of appointment, in trust for the children of the marriage in equal shares. B. also settled a policy of assurance upon his life upon the same trusts. The joint power was never exercised, and A. died in 1857. No disentailing assurance of her real estate had ever been executed, and, on her death, C., her eldest son, entered into possession thereof as heir in tail. By a deed dated in 1864, B., after reciting the death of A. without barring her estate tail, and that C. was her heir in tail, appointed all the funds comprised in the settlement other than the real estate to his four younger children, and reserved to himself a power of revocation and new appointment by deed or will. The trustees thereupon divided the funds, other than the moneys secured by the policy, equally among the four children. By his will, dated in 1869, B., in express exercise of the power contained in the settlement of 1842, appointed certain specific sums to his children, including C., and the residue of the funds thereof to C. By a deed dated in 1878, B., after reciting the deed of 1864 and the division of the trust funds, and that the only fund then subject to the trusts of the settlement was the policy-moneys, in exercise of the power reserved to him by the deed of 1864, revoked the appointment therein contained, and appointed the policy-moneys in equal fifths between his four surviving children, including C., and the children of his deceased daughter; and he again reserved to himself a power of revocation and new appointment. By a deed dated in 1883, B. made the appointment to C. in the deed of 1874 irrevocable, and in 1888 he died.

Held, that B.'s will did not speak from his death so as to revoke the appointment by the deed of 1878, there being sufficient evidence of a "contrary intention" within section 24 of the Wills Act, 1837, from the fact that the will was dated before that deed.

Held, also, that the will operated as to the one-fifth ineffectually appointed by the deed of 1878 to the children of the deceased daughter.

Held, further, that C. was not bound to elect as regards any interest taken by him under the deed of 1878, but that he was bound to elect as regards the real estate and any interest which might be coming to him under the will.—*Hardisty* v. *Wells*, CH.D. STL., J. 229—42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588.

6. *Special power—Fraud on power.*—A. having, under a settlement, a power to appoint by will a sum of £35,000 among his children, bequeathed a legacy of £150,000 to a daughter J., with directions that it should be paid to trustees upon trust for J. for life, with remainder to her issue; and then, after reciting the power of appointment, appointed £10,000 part of the £35,000, to J., with directions that it should be paid to the trustees of the legacy of £150,000 bequeathed to her upon the trusts declared with respect to that legacy. After making appointments to other daughters, the testator appointed the residue of the £35,000 to his son R. absolutely, and provided that, in case he had exceeded his power in not appointing the £10,000 to J. unconditionally, but in directing a settlement thereof, and in case anyone having a right to the settlement thereof should so object, or should not confirm such settlement if required so to do, then he appointed the sum of £10,000 to R. absolutely, adding, "But who will, I am assured, settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid, so as thereby to carry out my wishes." R. did in fact execute a declaration of trust to carry out the testator's wishes, but there was no evidence of any bargain between the testator and R.

Held, that the appointment to J. was invalid, but that the absolute appointment to R. was valid, and that the trustees of the declaration of trust executed by him held the fund upon the trusts declared thereby.—*Crawshay* v. *Crawshay*, CH.D. NOR., J. 600—43 Ch. D. 615; 59 L. J. Ch. 399; 62 L. T. 489.

See also MARRIED WOMAN, 15; MORTGAGE, 16; SETTLEMENT, 3, 5, 6; WILL, 42, 55, 58.

PRACTICE:—

1. *Affidavit—Omission*—Jurat—*Ord.* 38, *rr.* 6, 14.—In the *jurat* of an affidavit purporting to have been sworn before a British vice-consul abroad, the words "before me" were omitted. Blanks in the affidavit had been filled up, and alterations had been made apparently in the same handwriting as the signature.

Held, on an application to take the affidavit off the file, (1) that the reasonable inference to be drawn, in the absence of proof to the contrary, was that the affidavit had been in fact sworn before the vice-consul, and that everything had been rightly done; (2) that ord. 38, r. 14, was applicable to the omission of the words "before me," and that the affidavit ought to be received, and the application refused.

Decision of Kekewich, J., affirmed.—*Eddowes* v. *Argentine Loan and Mercantile Agency Co.*, C.A. 629—59 L. J. Ch. 392; 62 L. T. 514.

2. *Amendment—Decree twenty years old—Words accidentally omitted—Ord.* 28, *r.* 11.—In December, 1868, S. and C., who were partners in business, dissolved their partnership, and the lease of the premises in which the business was carried on was thereupon assigned to S., and C. entered into a covenant that he would not, "during the remainder of the term of the lease," carry on business within a mile of the premises. In Februrary, 1871, a decree was made at the suit of S. prohibiting C. from carrying on the business within a mile of the premises. S., long after the lease had expired, served C. with notice of motion to commit him for breach of the injunction, and C. served S. with notice of a cross-motion to amend the decree by inserting in it words limiting the operation of the injunction to the duration of the term of the lease, which words, he alleged, had been accidentally omitted.

Held, that the decree should be amended by the insertion of the words omitted.—*Shipwright* v. *Clements*, CH.D. NOR., J. 746.

APPEAL—

3. *Criminal matter—Contempt of court—Divorce suit—Newspaper—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.—An application made by a party to a civil action then pending, against a stranger to the action, for attachment for contempt of court committed by the publication in a newspaper of comments colculated to prejudice the fair trial of the civil action, is a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873, and no appeal lies to the Court of Appeal from a judgment imposing punishment for such contempt, made on such application, by a judge of the High Court.

Reg. v. *Barnardo*, 37 W. R. 789, 23 Q. B. D. 305, distinguished—*O'Shea* v. *O'Shea and Parnell*, C.A. 374—15 P. D. 59; 59 L. J. P. D. & A. 47; 62 L. T. 713.

4. *Judgment—Further consideration—Setting aside—Ord.* 39, *r.* 1; *ord.* 40, *rr.* 4, 5.—At the trial of an action with a jury, the jury found a verdict for the plaintiff, assessing the damages. The judge, upon

further consideration, held that there was no evidence of liability on the part of the defendant, and entered judgment accordingly.

Held, that an application to set aside the judgment so entered must be made to a divisional court, and not to the Court of Appeal.—*Rocke* v. *McKerrow*, C.A. 342—24 Q. B. D. 463; 59 L. J. Q. B. 146; 62 L. T. 556.

5. *Inland revenue—Time for appealing—"Judgment" or "order"—Ord.* 58, *rr.* 9, 15.—A decision of the Queen's Bench Division upon a case stated by the Commissioners of Inland Revenue under section 19 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), is an "order" and not a "judgment," and an appeal from the decision must be brought within twenty-one days.—*Onslow* v. *Commissioners of Inland Revenue*, C.A. 728.

6. *Official referee—Motion to set aside findings—Judgment ordered by referee—Judgment entered—Jurisdiction to enter judgment for other party—Ord.* 36, *r.* 52.—The court has power, in a reference under section 57 of the Judicature Act, 1873, not only to set aside the judgment ordered by an official referee to be entered for one of the parties, although such judgment has been entered accordingly, but also to enter the judgment for the other party, instead of sending the case back to the referee to be reheard.

Decision of the Queen's Bench Division, 38 W. R. 717, 25 Q. B. D. 226, affirmed.—*Clark* v. *Sonnenschein*, C.A. 743.

7. *Official referee.*—After an award by an official referee, entry of judgment on his findings of facts can only be set aside by appeal to the Court of Appeal.—*Serle* v. *Fardell*, CH.D. KAY, J. 733—44 Ch. D. 299; 62 L. T. 359.

8. *Official referee—Judgment ordered by referee—Judgment entered—Power of court to enter judgment for other party—Ord.* 36, *r.* 52.—The court has power, in a reference under section 57 of the Judicature Act, 1873, not only to set aside the judgment ordered by an official referee to be entered for one of the parties, although such judgment has been entered accordingly, but also to enter the judgment for the other party instead of sending the case back to the referee to be reheard.—*Clark* v. *Sonnenschein*, Q.B.D. 717—25 Q. B. D. 226; 59 L. J. Q. B. 461; 62 L. T. 880.

9. *Official referee—Judge in chambers—Ord.* 36, *r.* 50.—An appeal from an official referee must be made to a judge in chambers.

Byrne v. *Browne*, 37 W. R. 592, distinguished.—*Richard* v. *Talbot*, Q.B.D. 478.

10. *Probate — Non-contentious business — Probate Act*, 1857 (20 & 21 *Vict.* c. 77), *s.* 2—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 19.—A. applied for letters of administration as a creditor of an intestate. The judge refused the grant, on the ground that A. was not a creditor.

Held, that section 19 of the Judicature Act, 1873, gave A. a right of appeal to the Court of Appeal.—*In the Goods of Clook*, C.A.—15 P. D. 132; 62 L. T. 607.

11. *Stay of proceedings—Discretion of court—Ord.* 58, *r.* 16.—There is no practice to limit the absolute discretion given to the court by ord. 58, r. 16, to grant or refuse a stay of proceedings pending an appeal.—*Attorney-General* v. *Emerson*, C.A. 102—24 Q. B. D. 56; 59 L. J. Q. B. 192; 62 L. T. 21.

12. *Third party—Notice of appeal—Service—Ord.* 58, r. 2.—The defendant had brought in a third party for purposes of indemnity, and at the trial the action was dismissed. The plaintiff appealed.

Held (Cotton, L.J., *dissentiente*), that, on the true construction of ord. 58, r. 2, the third party was not a party "directly affected" by the appeal, and that it was not the duty of the plaintiff as appellant to serve the third party with notice of the appeal, but that the proper course would be for the defendant to apply to the Court of Appeal for leave to serve the third party with notice.—*Priest* v. *Uppleby*, C.A. 150—42 Ch. D. 351; 61 L. T. 146.

13. *Time—Interlocutory order—Final judgment—Order as to declarations of right—Ord.* 58, *r.* 15.—An order made after final judgment in an action for the purpose of directing how the declarations contained in the final judgment are to be worked out, is an interlocutory order so far as regards the time for appealing from it.—*Blakey* v. *Latham*, C.A. 193—43 Ch. D. 23.

JURISDICTION—

14. *Administration—Originating summons—Claim by executor — Ord.* 55, *r.* 3g. — The court has no jurisdiction, on an originating summons under ord. 55, r. 3, to determine any question or matter which could not have been determined in an action for administration of the estate or trust.

An originating summons was issued by an executor as plaintiff, to have it determined whether or no a particular sum of money formed part of the testator's estate at the time of his death. The summons was served on the testator's widow as defendant, she taking under the will a life interest in the testator's estate. The defendant filed an affidavit in which she claimed the sum in question, not under the will, but as a gift made to her by the testator in his lifetime, and she appeared on the hearing of the summons, but took the objection that the court had no jurisdiction, in such proceedings, to determine her claim. The judge who heard the summons considered that he had jurisdiction, and after hearing the evidence adduced by the plaintiff and the defendant respectively, held that there had been no gift to the defendant by the testator in his lifetime.

Held, that the court had no jurisdiction on an originating summons to determine the question raised by the claim of the defendant.

Davies v. *Davies*, 36 W. R. 587, 38 Ch. D. 210, approved.

In re Turcan, 37 W. R. 70, distinguished.

Decision of Kekewich, J., reversed.—*Royle* v. *Hayes*, C.A. 17—43 Ch. D. 18; 59 L. J. Ch. 1; 61 L. T. 542.

15. *County court—Prohibition—Judge in chambers—Costs—Ord.* 59, *rr.* 1, 8a—*County Court Rules*, 1889, *ord.* 4, *r.* 20—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *ss.* 119, 164.—An application for a prohibition to a county court may be made at chambers as well during sittings as in vacation, or it may be made in open court; but if the latter course is adopted notice of motion must be given.

Rule 20 of order 4 of the County Court Rules of 1889, by which a judge is allowed, in his discretion, to give costs on a higher scale on "a claim for more than £20 where less is recovered," is not affected by section 119 of the County Courts Act, 1888, which gives power to a judge to award costs on the higher scale in three specified classes of actions.—*King* v. *Charing Cross Bank*, Q.B.D. 287—24 Q. B. D. 27; 59 L. J. Q. B. 26; 62 L. T. 42.

16. *Evidence—Letters of request in lieu of commission—Examination of witness abroad by special examiner—Ord.* 37, *rr.* 5, 6a.—An examination of witnesses abroad before a special examiner, ordered under ord. 37, r. 5, is not an ordinary commission so

as to prevent the issuing of letters of request in addition thereto under rule 6a of the same order.—*Mason & Barry* v. *Comptoir D'Escompte*, Q.B.D. 685.

17. *Evidence — Letters of request — Ord.* 37, *r.* 6a — *Appendix K., Form* 37a, 37b. — An order for letters of request to issue to a foreign court under ord. 37, r. 6a, can only be made where it is sought to examine witnesses under the order, and the court has no jurisdiction to make such an order where production of documents alone is asked for.—*Cape Copper Co.* v. *Comptoir d'Escompte de Paris*, C.A. 763.

18. *Interpleader—Claimant substituted as defendant—Limitation of defence—Ord.* 57, *rr.* 1a, 7.—M. & Co. were sued by G. as acceptors on a bill of exchange. M. & Co. had handed the bill to L. & Co. for full value received. L. & Co. had really obtained the bill for one H. in consideration of the value of a cargo sent by G. to England from Russia, which H. instructed L. & Co. to sell on commission. H. obtained possession of the cargo on handing over the bill to G.'s agents in England. The bill was then forwarded to G. in Russia, and, being duly presented, was dishonoured, whereupon G. sued M. & Co. as acceptors. L. & Co. meantime give M. & Co. notice not to pay the bill, on the ground that L. & Co. had parted with the bill through the fraud of H., and that, the cargo being deteriorated, they had not received full value for the bill, and claimed to be recouped for their loss on its sale from the moneys handed to M. & Co. for the bill. M. & Co. applied for an interpleader issue to be ordered, which the master granted, and on which he substituted L. & Co. as defendants in lieu of M. & Co. On appeal to the judge at chambers the order for interpleader was affirmed, but a condition imposed limiting L. & Co., as defendants, to such defences only as M. & Co. could have raised.

Held, that, M. & Co. being "persons seeking relief who were under liability for a debt in which they were, or expected to be, sued by two or more parties making adverse claims" within the terms of ord. 57, r. 1a, there was jurisdiction for the court or judge to exercise a discretion in ordering an interpleader issue, and that such discretion had been rightly exercised; but that there was no jurisdiction under ord. 57, r. 7, to limit the defences of the claimant, substituted as defendant, to such defences as the original defendant could raise, since the words of ord. 57, r. 7, empowering the court or judge to substitute any claimant as defendant "in lieu of" the applicant, the original defendant, did not mean that such claimant should stand "in the actual place of," but instead of, such defendant.—*Gerhard* v. *Montague*, Q.B.D. 76—61 L. T. 564.

19. *Mortgage—Priority—Originating summons—Appeal—Time—Final order in chambers—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Ord.* 55, *rr.* 3, 5.—The limit of time for giving notice of motion to discharge or vary a final order in the Chancery Division by a judge in chambers is twenty-one days from the date when the order in chambers was pronounced.

Manchester and Liverpool Banking Co. v. *Beales*, 37 W. R. 765, 42 Ch. D. 505, approved.

An originating summons was issued by the mortgagees of property to which the mortgagors were beneficially entitled under the trusts of a will. The mortgagors and the trustees were made defendants to the summons, which claimed, as against the mortgagors, payment of the mortgage-moneys, or, in default, sale or foreclosure, and, as against the trustees, an account of the income of the mortgaged property received by them as trustees of the mortgagors. The trustee defendants brought in an account and gave evidence claiming to be entitled to retain a large portion of the income of the property in question, by virtue of a mortgage, made to them by their *cestui que trusts*, prior in date to the mortgage of the plaintiffs. The plaintiffs alleged that they had given notice of their mortgage to the trustees, and that, at the time of the issue of the summons, they had no notice given them by the trustees of any prior charge on the property.

Held, that the originating summons should be dismissed as against the trustee defendants, on the ground that the question which had arisen as to priority of the mortgages was a question which could not be properly dealt with on proceedings by way of originating summons.

Held, also (Lindley, L. J., *dubitante*), that the court had no jurisdiction to determine a question of disputed priority of mortgages on proceedings by way of originating summons.

Decision of North, J., affirmed.—*Real and Personal Advance Co.* v. *Michell*, C.A. 273—43 Ch. D. 391; 59 L. J. Ch. 226; 62 L. T. 375.

20. *Receiver—Death of judgment debtor—Equitable execution—Ord.* 17, *rr.* 1, 4; *ord.* 42, *rr.* 3, 23, 28.—The appointment of a receiver of the interest of a judgment debtor in real estate, though sometimes inaccurately called "equitable execution," is not a mere form of execution, but it is relief producing the same benefit as execution properly so called, but obtainable, and obtainable only, by means of an order of the court in that behalf, based on the fact that execution, properly so called, cannot be had.

After the death of a judgment debtor the court has no jurisdiction, on the *ex parte* application of the judgment creditor, to make an order appointing a receiver of the interest of the deceased judgment debtor in real estate, for the purpose of satisfying the judgment debt, when the person on whom the real estate has devolved is not a party to the proceedings.

Decision of Chitty, J., affirmed, upon different grounds.—*Atkins* v. *Shephard*, C.A. 133—43 Ch. D. 131; 59 L. J. Ch. 83; 62 L. T. 337.

OFFICIAL REFEREE—

21. *Accounts—Form of report—Judicature Act*, 1873, *s.* 56.—An official referee is not bound to take accounts referred to him under section 56 of the Judicature Act, 1873, in the strict way used in the Chancery Division before a chief clerk in chambers, though he may adopt that method so far as the circumstances of the case seem to him to admit. He is not compelled, in cases of complicated accounts, to proceed upon any particular accounts and to refer to each item in the report, but may strike a balance upon the result of the inquiry generally. The parties may use the notes of the inquiry and of the evidence for the purpose of tracing any item allowed or disallowed which they may desire to question.—*Turpin* v. *Pain*, CH.D. CHI., J. 422—44 Ch. D. 128; 62 L. T. 754.

PARTIES—

22. *Death of plaintiff — Damages—Injunction—Continuance by executor—3 & 4 Will.* 4, *c.* 42, *s.* 2—*Ord.* 17, *rr.* 1-4—*Ord.* 36, *r.* 58.—The plaintiff in an action for damages and a mandatory injunction for obstructing the access of light to a house died more than six months after the issue of the writ, and B., his executor and devisee, obtained a common order to carry on the proceedings.

Held, that the order was rightly made.—*Jones* v. *Simes*, CH.D. CHI., J.—43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.

23. *Foreclosure — Equity of redemption — Ord.* 16, *r.* 9. — In a foreclosure action an order had been made in chambers under ord. 16, r. 9, authorizing two of a large class of persons all having

the same interest in the equity of redemption to defend the action on behalf of the others.

Held, that a foreclosure order could not be made unless all the persons interested in the equity of redemption were parties to the action.—*Griffith* v. *Pound*, CH.D. STI., J.—59 L. J. Ch. 522.

24. *Partnership—Conditional appearance—Ord.* 9, *r.* 6; *ord.* 12, *rr.* 15, 16; *ord.* 42, *r.* 10.—In an action against a firm the writ was served upon R. at his residence, where some of the partnership business was ordinarily carried on. R. was not informed in what capacity he was served, whether as a partner in the firm or under ord. 9, r. 6, as a "person having at the time of service the control or management of the partnership business" at the place where the service was effected.

Held (reversing the decision of the Queen's Bench Division), that there was no power to give leave to R. if the plaintiff did not undertake not to apply under ord. 42, r. 10, to enter a conditional appearance, denying himself to be a partner, and such appearance to stand till an issue as to his partnership had been decided. —*Davies* v. *Andre*, C.A. 437—24 Q. B. D. 598; 59 L. J. Q. B. 233; 63 L. T. 151.

25. *Representative defendants—Consent to judgment—Ord.* 16, *r.* 9.—Persons authorized by the court to defend an action on behalf of others, having the same interest as themselves, cannot consent to judgment against them.—*Rees* v. *Richmond*, CH.D. KEK., J.—62 L. T. 427.

26. *Third party—Appearance—Trial—Ord.* 16, *rr.* 52, 53.—The defendant in an action for specific performance of a contract served a third-party notice upon another person, alleging that he signed the contract as agent for that person. The third party appeared, but obtained no directions as to delivery of pleadings or defending the action. The defendant obtained an order that the question of liability between himself and the third party should be tried as soon as might be after the trial of the action.

Held, that the third party might appear by counsel and take part in the trial, and might have the question of his liability tried immediately after the trial of the action.—*Blore* v. *Ashby*, CH.D. KEK., J. 141—42 Ch. D. 682; 58 L. J. Ch. 779; 61 L. T. 766.

27. *Third party—Service out of the jurisdiction—Ord.* 11, *r.* 1e; *ord.* 16, *r.* 48. — A third-party notice may be served out of the jurisdiction in any action founded on a breach, committed within the jurisdiction, of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, unless such third party is domiciled or ordinarily resident in Scotland or Ireland.—*Dubont* v. *Macpherson*, Q.B.D. 62—23 Q. B. D. 340; 58 L. J. Q. B. 496; 61 L. T. 689.

PLEADING—

28. *Amendment—Judgment recovered—Merger—Ord.* 19, *r.* 15; *ord.* 28, *r.* 1.—One of two defendants in an action of tort applied, at the trial of the action, for leave to amend his statement of defence by pleading, as a bar to the action, a prior judgment obtained by the same plaintiffs against other joint tort-feasors in respect of the same tortious act. The application for leave to amend was made after the evidence of the plaintiffs and of the other defendant had been given.

Held, that the merger of the cause of action in the prior judgment was a matter which ought to have been pleaded by the defendant, and that, having regard to the nature of the case, and to the time when the application was made, leave to amend ought not to be given to the defendant.

Decision of North, J. (reported 38 W. R. 8, 41 Ch. D. 563) affirmed.—*Edevain* v. *Cohen*, C.A. 177—43 Ch. D. 187; 62 L. T. 17.

29. *Default by plaintiff—Dismissal of action—Ord.* 27, *r.* 1; *ord.* 64, *r.* 7.—If an order has been made dismissing an action unless the next step is taken by the plaintiff within a specified time, and the plaintiff within such specified time neither takes any such step nor appeals against the order, the time cannot be extended, and the action is at an end.—*Script Phonography Co.* v. *Gregg*, CH.D. NOR., J.—59 L. J. Ch. 406.

30. *Default—Judgment—Patent—Infringement—Particulars—Ord.* 27, *r.* 11.—The plaintiff, in an action for infringement of a patent, upon motion for judgment, heard as a short cause, asked for such judgment as upon his statement of claim the court should consider him entitled to. The statement of claim stated "Particulars of breaches are delivered herewith."

Held, that the particulars of breaches might be regarded as forming part of the statement of claim.—*United Telephone Co.* v. *Mitchell*; *United Telephone Co.* v. *Smith*, CH.D. NOR., J. 70—61 L. T. 617.

31. *Default — Peremptory order — Order for particulars — Ord.* 19, *r.* 8. — Upon an application by the defendant for an extension of time to plead, the master, on the 1st of August, made an order giving the defendant a "month peremptory" for pleading. On the 9th of August the defendant obtained an order for particulars of the plaintiff's claim, and particulars were delivered on the 21st of August. On the 5th of September the plaintiff signed judgment for want of a defence. The defendant applied to set aside the judgment, on the ground that, under ord. 19, r. 8, he had the same time for pleading after the delivery of the particulars that he had at the return of the summons.

Held, that the effect of the "peremptory" order was that the pleading must be delivered within the specified time unless the order itself was expressly altered by a subsequent order; that ord. 19, r. 8, which was inconsistent with it, did not apply so as by implication to extend the time for pleading; and that the judgment was regularly signed.

Decision of the Queen's Bench Division affirmed.—*Falck* v. *Axthelin*, C.A. 196—24 Q. B. D. 174; 59 L. J. Q. B. 161.

31a. *Judgment on admissions in pleadings—Motion—Summons in chambers—Costs—Ord.* 32, *r.* 6.—In an action to restrain the defendant from building so as to obstruct plaintiff's ancient lights and for damages, the defendant paid a sum of money into court in satisfaction of the claim for damages, and by his statement of defence offered to undertake not to carry his buildings higher than they were at the commencement of the action, to consent to an order embodying this undertaking, and for payment to the plaintiff of the money in court, and to pay the plaintiff's costs. The plaintiff accepted these terms, and prepared minutes, which he sent to the defendant's solicitors with a notice that he should set down the action on motion for judgment as a short cause. The defendant's solicitors wrote that the matter could be concluded at much less cost on a summons in chambers, and the defendant wished that course adopted. The plaintiff nevertheless proceeded with his motion.

Held, that the letter of the defendant's solicitors rendered the admission in the pleadings an admission to submit to an order for an injunction to be obtained in chambers, and that the plaintiff was only entitled to such costs of his motion as would have been incurred on a summons in chambers; and, for the guidance of the taxing master, the judge intimated that he should have allowed counsel in chambers.—*Allen* v. *Oakey*, CH.D. NOR., J.—62 L. T. 724.

32. *Particulars — Seduction.* — In an action for seduction particulars of time and place of the alleged seduction will not be ordered before the statement of defence has been delivered, in the absence of an affidavit by the defendant stating his intention to deny the seduction.—*Knight* v. *Engle*, Q.B.D. — 61 L. T. 780.

33. *Payment into court—Trover—Lien—Ord.* 50, *r.* 8.—Under ord. 50, r. 8, where an action is brought to recover specific property, and the defendant does not dispute the plaintiff's title, but claims to retain the property by virtue of a lien upon it, the court has power, on the application of the plaintiff, to order the property to be given up to him upon payment into court of the amount in respect of which the lien is claimed.

Held, that, in order that the property should be given up to the plaintiff, the whole amount for which the lien is claimed must be paid into court, even if such amount exceeds the value of the property.—*Gebruder Naf* v. *Ploton*, C.A. 566—25 Q. B. D. 13; 59 L. J. Q. B. 371.

34. *Striking out—Frivolous and vexatious defence —Jurisdiction.*—A. brought an action against a bishop and the patrons of a benefice, claiming that he was vicar of the benefice; that an instrument of resignation executed by him was void; and an injunction to restrain the presentation and institution of any other person to the benefice. Judgment was given against A. on the ground that the benefice was vacant through his resignation with the bishop's consent. B. was afterwards duly appointed to the benefice, and sued A. for a declaration that B. was vicar, and for an injunction restraining A. from depriving him of occupation. A., in his statement of defence, set up the same case on which he had been defeated in the former action.

Held, that the court had jurisdiction to strike out the defence as frivolous and vexatious.

Judgment of the Court of Appeal affirmed.—*Reichel* v. *Magrath*, H.L.—14 App. 665; 61 L. T. 131.

34a. *Striking out defence—Discovery—Defendant out of jurisdiction—Ord.* 27, *r.* 11; *ord.* 31, *r.* 21.—An English testator had executed a deed in favour of creditors which comprised real estate in Trinidad, but, though valid according to the law of England, did not pass the legal estate of the land in Trinidad to the trustees of the deed, because it was not executed as required by the law of Trinidad. The testator died intestate as to real estate, and the legal estate was vested in M., a British subject residing in Trinidad, and in the other defendants, who resided in England. An action was brought by the trustees of the deed and another creditor to enforce the trusts of the deed against the real estate in Trinidad. The plaintiffs had alleged in their statement of claim that under the law of Trinidad the deed bound the beneficial interest of the debtor, and of all persons claiming through him, in the real estate in Trinidad, and claimed to have such estate vested in the trustees of the creditors' deed, and to have the property sold under the direction of the court to pay the creditors under the trusts of the deed. The writ was, by leave, served in Trinidad on M., and he appeared and delivered a defence denying the plaintiffs' allegation that the beneficial interest in the land was bound. This defence was afterwards struck out under ord. 31, r. 21, because the defendant failed to obey an order to give discovery. By arrangement with the other defendants the action came on for trial, when the plaintiffs contended that M. was in the same position as if he had admitted the allegation in the statement of claim.

Held (affirming North, J.), that as the defence had only been struck out for a collateral reason, the law of Trinidad had not been sufficiently proved to justify the court in deciding; and that the action must stand over generally, with liberty to apply, with a view to proceedings being taken against M. in Trinidad.—*Jenney* v. *Mackintosh*, C.A.—61 L. T. 108.

35. *Striking out—Trial of question of law—Ord.* 25, *r.* 4; *ord.* 34, *r.* 2.—A. left £20,000 to trustees for G. for life, with remainder to her younger children, which was invested by the trustees in India Four per Cent. Stock. The Secretary of State for India gave notice to the holders of that stock offering equal amounts of India Three and a Half per Cent. Stock in exchange, and announcing his intention to pay off at par such of the holders of Four per Cent. India Stock as did not accept his offer. The trustees did not accept this offer, and were paid off at par, and they then allowed the sum received in payment to remain at the bank uninvested for seven months, after which they invested it in railway stock. The India Three and a Half per Cent. Stock stood in the market at a premium from the date of the offer of the Secretary of State for India down to the time of the investment by the trustees in railway stock. An action was brought by G. and her younger children against the trustees, claiming in the writ (1) the loss of income occasioned by the delay in investment of the sum received in payment off of the Four per Cent Stock; (2) the loss of capital incurred by the neglect of the trustees to accept the offer to take Three and a Half per Cent. Stock in exchange for the Four per Cent. Stock, with further relief. J., one of the trustees, paid into court the sum claimed for loss of income, which was taken out of court by G. The statement of claim stated the facts, including the payment into court by the defendant J. and the taking of the money out of court by G., and claimed (1) for loss of capital incurred by the neglect of the trustees to accept the offer of Three and a Half per Cent. Stock instead of Four per Cent. Stock; (2) costs. The defendant J. moved, under ord. 25, r. 4, that the statement of claim might be struck out as against him, on the ground that it disclosed no reasonable cause of action.

Held, that, as the statement of claim disclosed a cause of action for loss of income, which J. had admitted to be reasonable by his payment into court, and also asked for the costs of the relief sought in the action, it could not be struck out under ord. 25, r. 4, even supposing the claim for loss of capital was bad; but leave was given to amend the notice of motion so as to apply for the determination of the question of law under ord. 34, r. 2.

The notice of motion was amended as follows:—"Whether, assuming, for the purposes of the arguments of such question, that the allegations in the statement of claim are true, there was any such duty on the part of the defendants or of the defendant J. to accept India Three and a Half per Cent. Stock as in the 9th paragraph of the claim alleged, and whether the defendants or the defendant J. were or was guilty of any negligence or breach of duty in not accepting such stock, and whether the defendant J. is under any liability to make good to the capital of the trust funds in the claim mentioned" the loss therein mentioned. J. did not admit that he had in fact received the above-mentioned notice from the Secretary of State for India.

Held, that, as the notice of motion only assumed, for the purposes of the argument of the question, that the allegations in the statement of claim were true, and left it open to J. to raise other defences if the question were decided against him, it would not be convenient to decide the question on the motion. —*Grosvenor* v. *White*, CH.D. NOR., J. 201—61 L. T. 663

RECEIVER—

36. *Judgment creditor—Sale of interest in land—Petition — Dispensing with inquiries — Judgment Law Amendment Act*, 1864 (27 & 28 *Vict. c.* 112), *ss.* 4, 5.—Upon a petition by a judgment creditor who had obtained equitable execution by the appointment of a receiver, an order was made, without directing inquiries, for the immediate sale of the debtor's interest in land which was subject to a legal mortgage, there being evidence that the mortgagee, who consented to the sale, had not received any notice of any incumbrance on the land; that searches had been made by the petitioner's solicitor, who had found that no execution or other process affecting the land had been registered, except the order appointing the receiver, and that no bankruptcy petition had been presented or receiving order made against the debtor. —*In re Bithray*, CH.D. NOR., J. 60—59 L. J. Ch. 66; 61 L. T. 383.

SEQUESTRATION—

37. *Death of contemnor.*—A writ of sequestration was issued to compel the performance of a duty, and the sequestrator obtained an order for sale of the contemnor's chattels, but, before the sequestrators sold, the contemnor died, and a creditor obtained an order for the administration of the estate, which was alleged to be insolvent and not proved to be solvent.

Held, that, an order having been made for the continuance of the sequestration proceedings against the legal personal representative of the contemnor, the death of the contemnor was no ground to restrain the sequestrator from selling.—*Pratt* v. *Inman*, CH.D. CHI., J. 200—43 Ch. D. 175; 59 L. J. Ch. 274; 61 L. T. 670.

38. *Divorce—Alimony—Writ—Registration—Payment—Vacating registration—Lands Charges Registration Act*, 1888 (51 & 52 *Vict. c.* 51), *s.* 14.—Where a writ of sequestration has been issued and duly registered under the Lands Charges Registration Act, 1888, there is no power to order the registration to be vacated, even by consent of all parties concerned, and the writ is satisfied by payment.—*Cook* v. *Cook*, P.D. & A.D. 656—15 P. D. 116—62 L. T. 667.

TRIAL—

39. *Jury—Chancery action.*—If a plaintiff who has commenced an action in the Chancery Division desires afterwards to have it tried by a jury, the *onus* is upon him to show some reason why it should not be tried in the manner in which it would, in the ordinary course, be tried in that division. If he does not discharge that *onus*, an application by him to have the action tried by a jury will be refused.

Decision of Kekewich, J., affirmed, on different grounds.—*Attorney-General* v. *Vyner*, C.A. 194.

39a. *Jury—Special jury—Certificate—Omission to ask for certificate—Special Jury Act* (6 *Geo.* 4, *c.* 50), *s.* 34.—At the trial of a probate action in January, 1890, the plaintiff obtained a verdict on every issue, including that of forgery. The judge had left the building at the time the verdict was given, and the following morning, upon the application of the plaintiff's counsel, he gave judgment in accordance with the findings of the jury, but counsel omitted to ask for a certificate for a special jury. Upon application, in April, 1890, for the certificate,

Held, that the application, not being made "immediately after trial," must be refused.—*Webster* v. *Appleton*, P.D. & A.D.—62 L. T. 704.

40. *Lancashire Palatine Court—Transfer to Chancery Division.*—The plaintiffs assigned property in trust for their creditors, and afterwards sued the trustees and a purchaser from them, and to impeach the sale as fraudulent and collusive. The property was within the jurisdiction of the Lancashire Palatine Court, and at the time of the sale all the parties resided within that jurisdiction, but one of the trustees afterwards removed out of the jurisdiction. He was served with a writ out of the jurisdiction, and applied to transfer the action to the High Court. Only one of the defendants opposed the application.

Held, that the action ought to be transferred to the High Court.—*Cooke* v. *Smith*, C.A.—44 Ch. D. 72; 62 L. T. 712.

41. *New trial—Verdict against weight of evidence.*—A verdict should not be set aside as against the weight of evidence unless it is one which the jury, on a reasonable view of the whole evidence, could not properly find.—*Phillips* v. *Martin*, P.C.—15 App. 193.

42. *Patent—Petition for revocation—Action for damages in Queen's Bench Division—Transfer of petition to Queen's Bench Division.*—The court will order a transfer of a petition for revocation of a patent to the Queen's Bench Division to be heard by the judge at the same time as an action for damages before a judge and jury in respect of the same subject-matter.—*In re Edge's Patent*, CH.D. NOR., J. 698.

43. *Referee—Marine insurance—Scientific witnesses—Judicature Act*, 1873, *s.* 57.—In an action against insurers for the constructive total loss of a ship the chief issue was whether the condition of the ship was or was not caused by perils of the sea. The evidence taken on commission filled 300 printed pages, and six scientific witnesses were to be examined.

Held, that the case was not one which ought to be tried before an official or special referee instead of a jury.—*Hamilton* v. *Merchants' Marine Insurance Co.*, Q.B.D.—58 L. J. Q. B. 544.

WRIT—

44. "*Address of plaintiff*"—*Business address—Indorsement—Ord.* 4, *r.* 1; *Appendix A., Part I., Form* 1.—The "address of the plaintiff" to be indorsed upon a writ of summons under ord. 4, r. 1, must be the plaintiff's place of residence, and not his place of business.—*Stoy* v. *Rees*, C.A. 683—24 Q. B. D. 748; 59 L. J. Q. B. 310; 63 L. T. 49.

45. *Amendment—Statute of Limitations.*—The plaintiff, who was assignee of a debt, issued a writ for money lent, without having given the defendant notice of the assignment. After the Statute of Limitations had barred the plaintiff's remedy, he applied to amend the writ by adding the assignor as a plaintiff.

Held, that leave to amend ought not to be granted. —*Hudson* v. *Fernyhough*, Q.B.D.—61 L. T. 722.

46. *Renewal—Writ issued before Judicature Acts—Power to renew such writ without leave of court or judge—Ord.* 8, *r.* 1; *ord.* 72, *r.* 2.—Writs of summons issued prior to the coming into force of the Judicature Acts come within the operation of ord. 8, r. 1, as to renewal, so that such writs cannot now be renewed without the leave of the court or a judge, as required by that rule.—*Hume* v. *Somerton*, Q.B.D. 748—25 Q. B. D. 239; 59 L. J. Q. B. 420; 62 L. T. 828.

47. *Service—Partnership—Dissolution unknown to plaintiff—Foreign partner out of the jurisdiction—Service on manager at place of business within the jurisdiction—R. S. C.*, 1883, *ord.* 9, *r.* 6; *ord.* 16, *r.* 14.—For the purposes of service under ord. 9, r. 6, and ord. 16, r. 14, a partnership which has been dissolved before the commencement of the action

without the knowledge of the plaintiff must be treated as still subsisting.

Ex parte Young, 30 W. R. 330, 19 Ch. D. 124, considered.

Service on one partner when within the jurisdiction effected under either branch of ord. 9, r. 6, is good service on all the partners, although the partnership is a foreign partnership, and all the partners reside and are domiciled out of the jurisdiction.

Pollexfen v. *Sibson*, 34 W. R. 534, 16 Q. B. D. 792, followed.

Russell v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, discussed.—*Shepherd* v. *Hirsch & Co.*, CH.D. CHL., J. 745.

48. *Service out of the jurisdiction—Contract—Sale of goods for shipment to England—Ord.* 11, *r.* 1.—The defendant agreed to sell goods to the plaintiff and to be shipped from Sweden to an English port, and to be paid for on their arrival, the plaintiff paying the freight. The defendant failed to deliver the goods.

Held, that there had been no breach of a contract within the jurisdiction, and that service out of the jurisdiction ought not to be ordered.—*Wanske v. Wingren*, Q.B.D.—58 L. J. Q. B. 519.

49. *Setting aside—Irregularity—Misdescription of defendant—Conditional appearance—Ord.* 12, *r.* 30.—The writ in an action described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate-hill." The defendant, who was not in fact carrying on the business, entered an appearance as "J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate-hill, but who denies that he is carrying on business as the Edison Mineograph Co. at No. 60, Ludgate-hill aforesaid or elsewhere."

Held, on a motion to set aside the writ and subsequent proceedings on the ground of irregularity, that there was no irregularity in the writ, that the mistake had been set right by the form in which an appearance had been entered by the defendant, and that the motion must be refused.—*Zuccato* v. *Young*, CH.D. NOR., J. 474.

50. *Special indorsement—Judgment—Delivery of defence—Ord.* 14, *r.* 1.—An application by a plaintiff for judgment under ord. 14, r. 1, may be made after the statement of defence has been delivered, but when so made, the *onus* is cast on the plaintiff of explaining the delay, as the proper time for such application is before the defence is delivered in the usual way, though the delivery of the defence is not an absolute bar to a subsequent application under the order.—*McLardy* v. *Slateum*, Q.B.D. 349—24 Q. B. D. 504; 59 L. J. Q. B. 154; 62 L. T. 151.

51. *Substituted service—Foreign corporation—Agent in England—Ord.* 9, *r.* 8.—It is competent for the parties to a contract to contract themselves out of the rules as to the mode of service of writs, and to appoint a particular person to accept such service; hence, where, in a contract made by an English company with a foreign corporation, the foreign corporation appoints a person within the jurisdiction of the English courts an agent to accept service of any writ or other legal process arising out of the contract, and such appointment is to be irrevocable until some other agent is appointed, and no other agent is appointed, service of a writ upon such person is a good and effective service, although not in accordance with the rule as to service upon corporations, even though the foreign corporation has become bankrupt before the date of the service, as such bankruptcy does not operate as a revocation of the authority of the agent to accept service.—*Tharsis Sulphur and Copper Co.* v. *Societe Industrielle et Commerciale des Metaux*, Q.B.D. 78—60 L. T. 924.

See also ADMINISTRATION, 1, 4, 11; ARBITRATION, 2, 3, 7; ATTACHMENT, 4, 6; BANKRUPTCY, 5, 7—9; CANADA, LAW OF, 1; CHOSE IN ACTION; COMPANY, 24; COSTS, 1, 3, 6, 8, 11, 14, 23—25, 28; COUNTY COURT, 1, 4—7; DISCOVERY, 9, 11—13; EVIDENCE, 1, 2; EXECUTOR, 2, 4; INJUNCTION, 2; INTERPLEADER, 1, 2; JURISDICTION, 1; LANDS CLAUSES CONSOLIDATION ACT, 4, 7; LIBEL, 1, 2; MORTGAGE, 2, 7, 8, 17; NUISANCE, 3; PARTITION, 2; PATENT, 1; PRIVY COUNCIL; SHIPPING, 24; SOLICITOR, 1; TRADE-MARK, 2, 3; TRUSTEE, 3; WILL, 36.

PRACTICE (IRELAND):—

1. *Affidavit—Jurat—Illiterate person.*—In the case of an affidavit made in the Chancery Division by an illiterate person, the *jurat* need not state that the affidavit was read over to the deponent in the presence of the person before whom it is sworn; but it is sufficient if a third person named in the affidavit, and attesting the deponent's mark, swears that he read over the affidavit to the deponent and saw the latter make his mark.—*Verner* v. *Cochrane*, V.C. (Ir.)—23 L. R. Ir. 422.

2. *Attachment—Garnishee order—Service—Payment by garnishee—Ord.* 44, *r.* 3.—Payment by a garnishee after notice, but before service of a conditional order, is a ground for not making the order absolute, unless the order expressly directs attachment of the debt by the notice.—*O'Donovan* v. *Dillon*, Q.B.D. (Ir.)—24 L. R. Ir. 442.

3. *Discovery—Interrogatories—Time—Extension.*—If a party has obtained an extension of time for delivering a pleading, he may administer interrogatories to the opposite party, but his intention ought to be stated on the application for an extension of time.—*Jordan* v. *Meeredy*, M.R. (Ir.)—23 L. R. Ir. 421.

4. *Dismissal of action—Delay.*—An action commenced in the Chancery Division more than ten years before hearing does not abate, but must be dismissed for want of prosecution.—*Carroll* v. *Hickey*, M.R. (Ir.)—23 L. R. Ir. 418.

5. *Dismissal of action—Want of prosecution—Ord.* 35, *rr.* 2—4.—If the plaintiff does not within six weeks after the close of the proceedings give notice of an application for directions as to the mode of trial, the defendant cannot move to dismiss the action for want of prosecution without first giving notice of an application for directions as to the mode of trial.—*Thwaites* v. *Mooney*, V.C. (Ir.)—25 L. R. Ir. 48.

6. *Parties—Adding defendant—New cause of action.*—In 1843 A. devised land to B. in trust for his wife for life with remainder to his son D. for life, with remainder to his three daughters, E., G., and H. in equal shares as tenants in common for their respective lives, with remainders over. If D. should become entitled to the S. estates, his trust in the estate in B. was to be postponed to the trusts in favour of his sisters. A. died in 1845, being then in treaty with the Ecclesiastical Commissioners, the owners of the land in B. held by him in lease, for the purchase of the reversion to be secured by mortgage. The will contained a direction to complete the purchase and mortgage, and after the death of the testator's wife to set apart £300 a year, to accumulate at interest to pay off the mortgage. A.'s widow died in 1868, and in 1869 £300 was invested. In 1882 the plaintiffs were appointed new trustees under the will, and in the same year D. succeeded to the S. estates. E., G., and H. then appointed W. as their agent. W. died in 1888. The plaintiffs sued W.'s executrix for an account.

The court refused to add E., G., and H. as defendants.—*Crawford* v. *Donnelly*, V.C. (Ir.)—23 L. R. Ir. 511.

7. *Pauper suit—Certificate by counsel.*—On an application for leave to sue *in formâ pauperis*, the petitioner must produce a certificate of counsel that he has a good cause of action.—*In re Atkinson*, M.R. (Ir.)—25 L. R. Ir. 509.

8. *Payment into court—Investment.*—The court ordered a fund in court to be invested in Irish Railway Debenture Stock and in India Three per Cent. Stock.—*Johnston* v. *O'Neill*, V.C. (Ir.)—23 L. R. Ir. 430.

9. *Pleading—Time—Recovery of land—Ord.* 21, *r.* 1.—In an action to recover possession of land the defendant may deliver his statement of defence at any time before judgment.—*Kennane* v. *Mackey*, Q.B.D. (Ir.)—24 L. R. Ir. 495.

10. *Reversion—Payment of incumbrances.*—In the absence of special circumstances a receiver will not be ordered to pay the principal money due on an incumbrance.—*In re Kearney*, L.J. (Ir.)—25 L. R. Ir. 89.

11. *Recovery of land—Execution—Costs—Waiver.*—The plaintiff in an action for recovery of land recovered judgment for possession with costs, but issued execution for possession without having taxed the costs.

Held, that the plaintiff had not waived execution for his costs.—*Harold* v. *Daly*, Q.B.D. (Ir.)—24 L. R. Ir. 412.

12. *Trial—Disagreement of jury—Dismissal of action—Common Law Procedure (Ireland) Act*, 1853 (16 & 17 *Vict. c.* 113), *s.* 107.—If, after a jury have disagreed, the plaintiff does not proceed to a second trial, the defendant's proper course is a trial by proviso, under section 107 of the Common Law Procedure (Ireland) Act, 1853, and not a motion to dismiss the action for want of prosecution.—*Joyce* v. *Boyle*, C.A. (Ir.)—24 L. R. Ir. 455.

13. *Writ—Service out of the jurisdiction—Substituted service—Registered letter.*—If the plaintiff having obtained leave to serve a writ personally out of the jurisdiction, has failed in all his efforts to do so, the court will direct service by registered letter.—*Seaton* v. *Clarke*, Q.B.D. (Ir.)—26 L. R. Ir. 297.

PRESCRIPTION:—

Profit à prendre—*Fishing—Copyholds—Enfranchisement—Prescription Act* (3 & 4 *Will.* 4, *c.* 71), *ss.* 1, 4.—T. brought an action in 1889, on behalf of himself and others, the owners and occupiers of tenements formerly copyhold, but now enfranchised, of the Manor of C., to restrain the defendant interfering with a right of fishing in a river which the plaintiff claimed as appurtenant to his and the other tenements, and alleged user thereof for sixty years without interruption until the interruption of the defendant. The middle of the river formed one of the boundaries of the Manor of C., and the homage had for many years made a presentment of the right of the copyhold tenants to fish therein. In 1845 the defendant's copyhold tenement abutting on the river was enfranchised, and subsequently the plaintiff's tenement was also enfranchised. Both before and after enfranchisement, the right of fishing existed along the defendant's land where it abutted on the river. In 1885 the defendant interrupted the right of fishing.

Held, (1) that the claim based on user could not be maintained, as there had been an interruption acquiesced in for more than one year before action brought; (2) that there could not be a prescriptive claim to a *profit à prendre* for an indefinite class such as owners and occupiers; (3) that if any customary right of fishing had attached to the plaintiff's tenement while copyhold, it was extinguished by enfranchisement; (4) that any regrant of the right to the plaintiff in the deed of enfranchisement could have no effect as against the defendant, whose land had been previously enfranchised by the same grantors, and conveyed to the defendant in fee usque *ad medium filum*.—*Tilbury* v. *Silva*, CH.D. KAY, J.—62 L. T. 254.

PRINCIPAL and AGENT:—

1. *Account—Wilful default—Form of decree.*—In an action by a principal against an agent for account, including an account on the footing of wilful default, the question of wilful default should, in general, be disposed of at the hearing and not be reserved; if no wilful default is then proved, the court will dismiss that part of the action, and only grant the usual account between principal and agent.—*Boylan* v. *Cusack*, M.R. (Ir.)—25 L. R. Ir. 269.

2. *Bribery of agent—Action against briber—Damages—Excess price fraudulently obtained—Right of briber to plead satisfaction by agent—Municipal corporation.*—Where an agent under the influence of bribes persuades his principal to pay a price for goods obtained from the briber which is in excess of the market price, the principal has two distinct causes of action. He may sue the agent to recover the bribe which the agent has received, and at the same time he may sue the agent and the briber, either jointly or severally, for damages for the loss occasioned by their joint fraud; and in an action against the briber the defendant is not entitled to rely upon an agreement made between the principal and his agent, the effect of which is to discharge the agent from his liabilities, either because, according to Denman and Charles, JJ., the agreement only operates as an accord and satisfaction of the action for bribes, and has no bearing upon the action for damages for fraud, or because, according to Vaughan Williams, J., although the agreement may purport to be in accord and satisfaction of both causes of action, it is one which the plaintiffs, being a municipal corporation, were not entitled to make.—*Salford (Mayor of)* v. *Lever* (2), Q.B.D. 771—25 Q. B. D. 363; 59 L. J. Q. B. 483.

3. *Commission—Investment by agent—Following investments—Injunction.*—The plaintiffs employed the defendant as agent to buy goods for them. The defendant entered into a corrupt bargain with the vendor of the goods, whereby the defendant received, without the knowledge of the plaintiffs, sums of money by way of commission on the goods bought. The defendant had invested part of such commission money in the purchase of real estate.

Held, that neither the commission money nor the investments representing it could be treated as the property of the plaintiffs, and that, though the defendant was liable to account to the plaintiffs for the commission moneys, the relation existing between the defendant and the plaintiffs in respect of such money was only that of debtor and creditor, not that of trustee and *cestui que trust*; and that the plaintiff was not entitled, either to an injunction to restrain the defendant from dealing with the investments in question, nor to an order that the moneys should be paid into court pending the trial of an action which had been brought by the plaintiffs against the defendant to recover the money.

Metropolitan Bank v. *Hetron*, 29 W. R. 370, 5 Ex. D. 319, approved.

Hay's case, 24 W. R. 191, L. R. 10 Ch. 593, commented on.

Judgment of Stirling, J. affirmed.—*Lister* v. *Stubbs*, C.A. 548—45 Ch. D. 1; 59 L. J. Ch. 570.

4. *Solicitor—Misrepresentation—Investment.*—The plaintiff employed the defendant, a solicitor, to invest money, requiring the investment to be good and the interest paid regularly. The defendant found a security, but misrepresented to the plaintiff the amount of the prior charges, and also that the interest on the prior charges had been regularly paid; the defendant, who was also solicitor for the borrower, knew that the loan was being obtained to meet the interest on prior charges.

Held, that the defendant had received the money to invest on a safe investment, and having constituted himself a fiduciary agent was liable to repay to the plaintiff the money which had been lost by the investment.—*Hamilton* v. *Lane*, V.C. (Ir.)—25 L. R. Ir. 189.

5. *Stock Exchange—Custom—Default of principal—Closing of account.*—The usage of the London Stock Exchange which permits a broker who has been instructed to carry over stock to the next settlement to close his principal's account if the balance in the broker's favour has not been paid on the day for the current settlement is reasonable if the broker gives the principal notice of the balance before the settlement day.—*Davis* v. *Howard*, Q.B.D.—24 Q. B. D. 691; 59 L. J. Q. B. 133.

6. *Stockbroker—Banking account—Money received for clients—Appropriation of payments—Judgment creditor—Execution.*—A stockbroker kept an account at a bank into which he paid all the money received by him for clients. A judgment creditor of the stockbroker obtained a garnishee order on a balance standing to the credit of the broker on this account. In the case of two clients an amount in excess of the balance at the respective times of the payment in of their money had been drawn out. These two clients were the only persons who claimed any part of the balance.

Held (reversing the decision of North, J., 37 W. R. 459, 41 Ch. D. 456), that the judgment creditor had no right against the balance, no part of the money in the bank being the debtor's own; and the balance being equal to the sum due from the broker to the two clients in respect of money belonging to them which had been paid into that account, and there being no claim by any other client, the money belonged to these two clients.

Clayton's case, 1 Mer. 572, distinguished.—*Hancock* v. *Smith*, C.A.—61 L. T. 341.

7. *Officers' mess—Wine—Non-liability of individual members of mess.*—An individual member of an officers' mess, who has not in any way pledged the credit of the mess, is not personally liable for goods supplied to the mess by the orders of the wine caterer.—*Hawke* v. *Cole*, Q.B.D.—62 L. T. 658.

See also LIMITATIONS, STATUTE OF, 9, 10; SOLICITOR, 5.

PRINCIPAL and SURETY:—

1. *Co-sureties—Indemnity—Contribution.*—Where one of several co-sureties receives from the principal debtor a security to indemnify him against liability as surety, he is entitled to apply the whole or such part of the same as may be necessary to repay himself and his co-sureties all payments made by them on account of the principal debt.—*Berridge* v. *Berridge*, CH.D. NOR., J. 598—44 Ch. D. 168.

2. *Discharge—Lunacy of principal.*—In an action against a surety on a bond for the due performance of the duties of a collector, the defendants alleged that, before the collector entered on his duties, he became, and had since continued, a lunatic.

Held, that the defence was good.—*Grove* v. *Johnston*, Q.B.D. (Ir.)—24 L. R. Ir. 352.

3. *Promissory note—Transfer of mortgage by principal.*—The plaintiff was surety on a promissory note, the defendant being one of the principals. The defendant had transferred a mortgage security to the holder of the note, who had then released him from liability. No cash was paid by or on behalf of the plaintiff on the footing of the security. The plaintiff sued the defendant for money paid.

Held, that a verdict was rightly entered for the plaintiff for the value of the mortgage.—*Fahey* v. *Frawley*, Q.B.D. (Ir.)—26 L. R. Ir. 78.

See also BANKRUPTCY, 23; LIMITATIONS, STATUTE OF, 3, 10; MORTGAGE, 2b.

PRIORITY.—See BILL OF SALE, 4; BUILDING, 8; COMPANY, 1, 26, 27, 29; COSTS, 12—13a; MORTGAGE, 13, 14, 15, 16; PRACTICE, 19; SOLICITOR, 1.

PRIVILEGE.—See DISCOVERY, 1, 5—8, 13; LIBEL, 3—5.

PRIVY COUNCIL:—

Appeal—Criminal matter—Indictment.—Leave to appeal to the Privy Council will not be granted in a criminal case for a formal error in an indictment, but only where there has been a departure from the principles of natural justice.—*Dinizulu* v. *Attorney-General for Zululand*, P.C.—61 L. T. 740.

See also CANADA, LAW OF, 1.

PROBATE.—See ADMINISTRATION, 6, 7, 13—19, 23—25; EVIDENCE, 12; EXECUTOR, 3; LEGITIMACY DECLARATION ACT, 2; PRACTICE, 10; SOLICITOR, 3; WILL, 49, 49a, 50, 52—58.

PROFIT COSTS.—See SOLICITOR, 5, 8, 9.

PROHIBITION. — See JUSTICE OF THE PEACE, 6; PRACTICE, 15.

PROMISSORY NOTE:—

1. *Indorsement—Discharge—Holder for value.*—The defendant gave to W. a promissory note as security for a debt due. He subsequently gave to W. a collateral security for the same debt, which W. transferred for value. W. indorsed the promissory note to the plaintiff, who had no notice of the collateral security, to secure a debt due from W. to the plaintiff.

Held, that the note was not discharged, and that the plaintiff was a *bonâ fide* holder for value entitled to sue the defendant on the note.—*Glasscock* v. *Balls*, C.A. 155—24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163.

2. *Renunciation — Promissory note payable on demand—Maturity—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 62, 89.—A promissory note payable on demand reaches maturity as soon as it is made.

A., having lent his niece £2,000, secured by a promissory note payable on demand, made a codicil to his will, by which he had bequeathed to her a sum of £6,000, and recited the existence of the loan, which he wished to be considered an advance on account of the legacy of £6,000, and directed that, if the sum of £2,000 should be due and owing at his death, such moneys should be deducted from the said legacy, and that the said legacy should be reduced accordingly, in satisfaction of the moneys due. About two hours before his death he expressed a desire to destroy the promissory note, and to forgive the debt. The note could not then be found, and a stranger present wrote a memorandum of his wishes, which was not signed by him.

Held, that there was not an absolute and unconditional renunciation within section 62 of the Bills of Exchange Act, 1882.

Norton v. *Ellam*, 2 M. & W. 461, followed.—*Francis* v. *Bruce*, CH.D. CHI., J. 615—44 Ch. D. 627.

See also PRINCIPAL AND SURETY, 3.

PROOF.—See ADMINISTRATION, 21, 22; BANKRUPTCY, 20—23; COMPANY, 28—30.

PROSECUTION.—See CONTRACT, 3; MEDICAL ACTS.

PROSECUTION of OFFENCES ACT.—See CRIMINAL LAW, 1; EVIDENCE, 4.

PROSPECTUS.—See COMPANY, 11, 16, 16a; MISREPRESENTATION, 1, 2.

PUBLIC HEALTH ACTS.—See LOCAL GOVERNMENT, 1—3, 8, 10—15; NUISANCE, 2.

PUBLIC WORSHIP REGULATION ACT.—See ECCLESIASTICAL LAW, 1.

QUARTER SESSIONS.—See JUSTICE OF THE PEACE, 2; LICENSED HOUSE, 3, 4.

QUEBEC, LAW of.—See CANADA, LAW OF, 1—4.

QUEEN'S PROCTOR.—See COSTS, 8.

RAILWAY:—

1. *Abandonment—Parliamentary deposit—Private Act.*—A railway company's private Act of Parliament, passed in 1881, incorporated the Lands Clauses Consolidation Act, 1845, and provided (by section 34) that the parliamentary deposit should not be repaid to the depositors if the railway was not completed and opened to the public by a specified time, and (by section 35) that, in such case, the deposit should be applicable towards compensating landowners or other persons whose property had been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, or who had been "subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company" by that Act, and, if no such compensation was payable, or any balance of the deposit remained after paying such compensation, the deposit or such balance thereof should either be forfeited to the Crown or, in the discretion of the Chancery Division, if the company was insolvent and had been "ordered to be wound up" or a receiver had been appointed, should be paid to such receiver or to the liquidator of the company, or be "otherwise applied as part of the assets of the company for the benefit of the creditors thereof." In 1888 a private Act was passed for the abandonment of the railway in a form commonly used for such Acts, and provided that where, before the passing of that Act, any contract had been entered into or notice given by the company for the purchase of land, the company should be released from all liability to complete such purchase, but that full compensation should be made by the company to the owners and occupiers, or other persons interested in such land, for all injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice. Section 5 provided that, "subject to the provisions of this Act, and of section 35 of the Act of 1881, with respect to compensation to landowners and other persons injured, and for the protection of creditors," the court might and should order the deposit to be repaid to the depositors. Section 6 was as follows:—"Forthwith after the passing of this Act the company shall proceed to wind up their affairs, and shall pay, satisfy, and discharge all their debts, liabilities, and engagements."

Held, (1) (reversing the decision of Stirling, J.) that the effect of section 6 of the Act of 1888 was that the company had been "ordered to be wound up" within the meaning of section 35 of the Act of 1881; that section 5 of the Act of 1888 took away incidentally any claim to the deposit money which the Crown previously had under section 35 of the Act of 1881; and, that, subject to the priority of landowners and other persons injured who might be entitled under section 35 to compensation out of the deposit, it was applicable to the payment, as creditors, *pari passu* with other creditors, of any landowners proving injury or damage under section 4 of the Act of 1888; (2) (affirming the decision of Stirling, J.) that, by the words "in consequence of the compulsory powers of taking property conferred upon the company," in section 35, what was meant was, "in consequence of the exercise of" such powers, and that service of a notice to treat did not of itself, or even if a contract resulted, amount to an exercise of compulsory powers, so as to give the landowner any claim in priority under that section against the deposit; (3) that, even if service of notice to treat were an exercise of compulsory powers, the incurring of costs by a landowner to his solicitors and surveyors by reason of such notice, even though there resulted therefrom an agreement to purchase, which ultimately failed owing to the abandonment, did not amount to such injury or loss as was contemplated by section 35.—*In re Uxbridge and Richmond-worth Railway Co.*, C.A. 644—43 Ch. D. 536; 59 L. J. Ch. 409; 62 L. T. 347.

2. *Bridge—Highway—Repair—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 20), s. 46.—If a railway crosses a highway which is carried over it by a bridge the railway company is bound, under section 46 of the Railways Clauses Consolidation Act, 1845, to keep in repair the roadway upon the bridge.

Judgment of the Court of Appeal (36 W. R. 491, 20 Q. B. D. 485) affirmed.—*Lancashire and Yorkshire Railway Co.* v. *Mayor, &c., of Bury*, H.L.—14 App. 417; 59 L. J. Q. B. 85; 61 L. T. 427.

3. *Carriers—Cattle—Contract note.*—The defendant sent cattle by the plaintiffs' line of railway from Dublin to York. The defendant signed a contract note which provided that the plaintiffs did not undertake to supply cattle wagons of any particular size or class, but that the charge would be for the class of wagons actually used. The actual sum to be paid by the defendant was not specified. The defendant's cattle were loaded in wagons of three different classes, and the plaintiffs demanded the rates applicable to the wagons actually used.

Held, that the plaintiffs were entitled to the charges demanded.—*London and North-Western Railway Co.* v. *Hughes*, Q.B.D. (Ir.)—26 L. R. Ir. 165.

4. *Jurisdiction—Railway Commission—Discontinuance of traffic—Resumption—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict.* c. 31), ss. 1—3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict.* c. 25), ss. 1, 8.—The court has power, under sections 1—3 of the Railway and Canal Traffic Act, 1854, to make an order requiring a railway company to resume passenger traffic on a part of its line on which passenger traffic has been discontinued.—*Winsford Local Board* v. *Cheshire Lines Committee*, H.C. 511—24 Q. B. D. 456; 62 L. T. 268.

5. *Minerals—Quarrying—Notice by landowner—Limestone—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 20), ss. 77—79.—Beds of ironstone and limestone are "mines of ironstone and other minerals" within section 77 of the Railways Clauses Consolidation Act, 1845, even if, according to the custom of the district, they are got by surface workings (Lord Macnaghten dissenting).

It is sufficient if the owner, giving notice under section 78 of his intention to work the minerals, has a *bonâ fide* intention of working by his lessees or licensees.

Judgment of the Court of Appeal (36 W. R. 650,

37 Ch. D. 386) affirmed.—*Midland Railway Co.* v. *Robinson*, H.L. 577—15 App. 19; 59 L. J. Ch. 442; 62 L. T. 194.

6. *Negligence — Injury to servant — Contributory negligence.*—The plaintiff was a station-master on a single line of railway, and it was his duty to obtain a staff from the driver of each arriving train, and to hand it to the driver of the next train, as an indication of the line being clear. The plaintiff, having omitted to obtain the staff from the driver of a goods train, which had been shunted for a passenger train to pass, left the platform to get the staff, and while running back with it was knocked down and injured by an arriving passenger train, which he knew to be due. The jury found that the driver did not whistle; that the plaintiff had not been guilty of negligence; and that, with ordinary care, the plaintiff might have avoided the accident.

Held, that the accident had arisen from the plaintiff's contributory negligence, and he could not recover.—*McDonnell* v. *Great Southern and Western Railway Co.*, EX.D. (Ir.)—24 L. R. Ir. 369.

6a. *Railway company—Undue preference—Rates—Railway and Canal Regulation Act*, 1873 (36 & 37 *Vict.* c. 48), *s.* 14—*Jurisdiction.*—The applicants, a colliery company, sought for an order under section 14 of the Railway and Canal Regulation Act, 1873, requiring the defendant company to distinguish in the rate-books kept at certain stations on their system, or in the rate-books kept at certain stations nearest to the places at which traffic was received from certain collieries alleged to be in competition with the applicants, how much of the said rates charged by the defendant company to the applicants and the said competing collieries for the carriage of coal and slack to certain stations and sidings (some of which were stated but not proved to be off the defendant company's system) to which the defendant company quoted a rate, was for the conveyance of the said coal and slack on the said railway or railways, &c.; and how much for other expenses, &c. The affidavits in support of the application alleged that certain specified collieries competed with the applicants in the same trade, districts, and markets, but did not state that the products of seven out of the nine specified collieries were conveyed or delivered at any of the specified stations, or that such products were sent by the defendant company from other stations, in the rate-books of which the applicants sought to have the rates divided for their information, or that any of these latter stations were on the defendant company's system, or that any of the competing collieries sent any of their products from any of these latter stations. The affidavits further alleged that the defendant company charged seven out of the nine specified collieries lower rates than those charged to the applicants, and, as to the other two, that the defendant company performed gratuitously costly and important services which they did not perform for the applicants.

Held, that, while the court had jurisdiction to make the order sought for in a properly proved case, the applicants had not, by proper evidence, sufficiently made out to the satisfaction of the court that they were persons interested within the meaning of section 14 of 36 & 37 Vict. c. 48, or that the defendant company had the information necessary for the division of the alleged through rates, so as to be entitled to have the rates in the rate-books at the various stations specified distinguished in the manner sought by them, and that the application ought to be dismissed.—*Pelsall Coal and Iron Co.* v. *London and North-Western Railway Co.*, R.C.—61 L. T. 257.

7. *Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict.* c. 31), *ss.* 2, 3, 6—*Preference—Set-off.*—No action will lie, and no counter-claim or set-off can be made, in respect of a breach of section 2 of the Railway and Canal Traffic Act, 1854.

Manchester, Sheffield, and Lincolnshire Railway Co. v. *Denaby Main Colliery Co.*, 33 W. R. 491. 14 Q. B. D. 209, followed.—*Rhymney Railway Co.* v. *Rhymney Iron Co.*, C.A. 764—25 Q. B. D. 146; 59 L. J. Q. B. 414.

8. *Scheme of arrangement—Preference shareholders—Assent—Companies Clauses Act*, 1863 (26 & 27 *Vict.* c. 119), *ss.* 12—17—*Railway Companies Act*, 1867 (30 & 31 *Vict.* c. 118), *s.* 14—*Special Act.*—A railway company, by its special Act, was empowered to divide any share in its capital into a preferred half-share and a deferred half-share; the dividend which would have been payable on an entire share to be applied, first, in payment of a dividend not exceeding 5 per cent. per annum on the preferred half-share, and the remainder (if any) on the deferred half-share; each preferred half-share to be entitled to such dividend in priority to the deferred half-shares bearing the same number; the several half-shares to be half-shares in the capital of the company, and every two half-shares, whether preferred or deferred, or one of each, held by the same person, to confer such right of voting at meetings of the company, and to have all such other rights, liabilities, and incidents as attached or were incident to an entire share. The share capital of the company on its incorporation, consisted exclusively of ordinary shares. The company, in exercise of power contained in its special Act, divided a part of its shares into preferred half-shares and deferred half-shares. The directors of the company subsequently prepared and filed a scheme of arrangement with the creditors of the company.

Held, that the holders of preferred half-shares were not preference shareholders nor a class of preference shareholders within the meaning of section 12 of the Railway Companies Act, 1867, and that it was not necessary to procure their assent as such to the scheme of arrangement in the manner required by that section.

Decision of North, J., reversed.—*In re Brighton and Dyke Railway Co.*, C.A. 321—44 Ch. D. 28; 59 L. J. Ch. 329; 62 L. T. 353.

9. *Scheme of arrangement—Unsecured creditors—Railway Companies Act*, 1867 (30 & 31 *Vict.* c. 127), *ss.* 6, 7, 17, 18.—A dock company, which was also a railway company within the Railway Companies Act, 1867, being unable to meet its engagements with its creditors, a scheme of arrangement was prepared by the directors under section 6 of that Act. The scheme contained provisions for funding the interest accruing during a suspense period on the mortgages, charges, and debenture stock of the company; for preventing debts secured by mortgages or charges, the interest on which should be duly paid or funded, being called in before the expiration of a period of ten years; empowering the company to liquidate the debts of unsecured creditors incurred before a specified date, by the issue to them of deferred debenture stock charged on the undertaking of the company; and providing that one-half of any surplus proceeds of realization of specific mortgages and charges, and of the proceeds of certain other realizations, should be applied in the purchase or redemption of the deferred debenture stock; and various other provisions, framed with the view of enabling the company eventually to discharge all its liabilities. The confirmation of the scheme was opposed by certain of large unsecured creditors of the company.

Held (affirming the decision of Chitty, J.), that the scheme, though it might indirectly affect them, did not infringe or take away any legal right of the un-

secured creditors, nor in any way exceed the powers given by the Act, but was an honest and reasonable scheme, affording a reasonable prospect of enabling the creditors to be paid, and intended to do, and apparently doing, the best that could be done for all the parties concerned, secured and unsecured creditors and shareholders alike, and that it ought to be confirmed; and that the directors ought to exercise the power given by the scheme, of offering deferred debenture stock to the unsecured creditors, without favour or partiality, as between such creditors.

In re Cambrian Railway Co., 16 W. R. 346, L. R. 3 Ch. 278, and *In re Bristol and North Somerset Railway Co.*, 16 W. R. 1112, L. R. 6 Eq. 448, distinguished.—*In re East and West India Dock Co.*, C.A. 516—44 Ch. D. 338.

See also DAMAGES, 2; GAS COMPANY, 3; INTEREST, 2; LANDS CLAUSES CONSOLIDATION ACT, 1, 3—5, 7; LIGHT, 2; LOCAL GOVERNMENT, 12a; RIVER, 2; WILL, 26, 32.

RATIFICATION.—See COMPANY, 17; ELECTION LAW, 5; LIMITATIONS, STATUTE OF, 9; WILL, 57.

RATING.—See ELECTION LAW, 1, 9, 13; LOCAL GOVERNMENT, 8; POOR RATES, 1—3; RAILWAY, 6a.

REASONABLE and PROBABLE CAUSE.—See FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

RECEIVER.—See COMPANY, 7; COSTS, 13; HUSBAND AND WIFE, 1; LOCAL GOVERNMENT, 12; MARRIED WOMAN, 14; MORTGAGE, 9, 17, 18; PARTNERSHIP, 2; PRACTICE, 20, 36.

RECEIVING ORDER.—See BANKRUPTCY, 3, 7, 8, 24, 25; MORTGAGE, 10.

RECTIFICATION of REGISTER. — See DESIGN, 3; TRADE-MARK, 1, 2, 6—9a.

REFUSE.—See JUSTICE OF THE PEACE, 8; METROPOLIS MANAGEMENT ACTS, 2.

REGISTRATION.—See BANKER, 2; BANKRUPTCY, 14; BILL OF SALE, 5—14; COMPANY, 6, 17a, 18; COPYRIGHT; DESIGN, 2, 3; ELECTION LAW, 1, 13; LOCAL GOVERNMENT, 11; MORTGAGE, 15; PATENT, 1; PRACTICE, 38; TRADE-MARK, 3, 4, 10—14; TRADE NAME, 2.

REMOTENESS.—See DEED, 2; SETTLEMENT, 6; WILL, 35, 36, 40.

REMUNERATION.—See COMPANY, 11, 28; SOLICITOR, 6—11.

RENT.—See COSTS, 16; LANDLORD AND TENANT, 6; LIMITATIONS, STATUTE OF, 9, 11; MORTGAGE; SOLICITOR, 7; SPECIFIC PERFORMANCE; WILL, 4a.

RENT-CHARGE.—See COMPANY, 30; COPYHOLD, 1; SETTLEMENT, 7, 13.

RES JUDICATA.—See ESTOPPEL, 4, 5; JUSTICE OF THE PEACE, 3.

RESCISSION.—See COMPANY, 16a; INTEREST, 3; VENDOR AND PURCHASER, 1, 2.

RESTITUTION of CONJUGAL RIGHTS.—See HUSBAND AND WIFE, 4—8.

RESTRAINT of TRADE.—See COVENANT, 1; FRIENDLY SOCIETY, 1, 2.

RESTRAINT on ANTICIPATION.—See COSTS, 14; MARRIED WOMAN, 9—14; SETTLEMENT, 8.

RESTRICTIVE COVENANT.—See COVENANT, 2; DEED, 2; LANDLORD AND TENANT, 8; LOCAL GOVERNMENT, 13; VENDOR AND PURCHASER, 12.

RESULTING TRUST.—See DEED, 1; SETTLEMENT, 4; WILL, 47.

RETAINER.—See ADMINISTRATION, 1, 11; EXECUTOR, 5.

REVERSION.—See MARRIED WOMAN; SETTLEMENT, 2, 15.

REVOCATION.—See ADMINISTRATION, 23; EVIDENCE, 9; NEW SOUTH WALES, LAW OF; PATENT, 11; POWER OF APPOINTMENT; WILL, 17, 20, 57—59.

RIVER:—

1. *Riparian owner—Floating wharf.*—A riparian owner has a right to construct and moor to his land a floating wharf and boathouse, if they do not obstruct the navigation, and is entitled to sue for damages for interference with the flow of the stream.—*Booth* v. *Ratte*, P.C. 737—15 App. 188; 59 L. J. P. C. 44.

2. *Riparian owner — Railway—Obstruction—Injunction — Damages.* — There is no distinction in principle between riparian rights on the banks of navigable or tidal, and on that of non-navigable rivers; but in the former case there must be no interference with the public right of navigation, and, in order to give rise to riparian rights, land must be in permanent contact with the stream, either laterally or vertically.

Lyon v. *Fishmongers' Co.*, 25 W. R. 165, 1 App. 602, is an authority applicable to every country where the same general law of riparian rights prevails, unless it is excluded by a positive rule or binding authority of the *lex loci*.

The defendants made a railway on the foreshore of a tidal and navigable river, with an embankment extending over the whole of the plaintiffs' frontage, thus cutting off all access to the river from the plaintiffs' land, except through two small openings, one of which was just outside the plaintiffs' frontage.

Held, (1) that the plaintiffs had the same right of access as if the river had been non-navigable; (2) that the obstruction of their access without parliamentary authority was actionable; (3) that the plaintiffs were entitled to an injunction, and to damages if the injunction was disobeyed.—*North Shore Railway Co.* v. *Pion*, P.C.—14 App. 612; 59 L. J. P. C. 25; 61 L. T. 525.

3. *Obstruction—Non-tidal stream—Right of way—Dedication—Injunction.*—The plaintiff sued to restrain the defendant from interfering with posts and chains which the plaintiff, the owner of the bed of the river under a title derived from the Crown, had placed in the River Mole to stop the waterway. The defendant, who was not a riparian owner, counterclaimed for an injunction to restrain any hindrance to the passage of his boats. He based his claim on a public right of highway over part of the river, not on a right of recreation. The evidence showed that the reach in question was not tidal; that it could not be approached by boats from below; that its depth was artificial, and depended on mill dams; that it had never been used for purposes of commerce, or as a way from one public place to another; that there was no public access to it at one end, and it was doubtful whether there was any public access to it for boats at any point; that no one except the mill-owners had done anything towards maintaining it as a waterway; and that there had been a considerable amount of boating on the reach by riparian owners and by others in boats brought from a distance, chiefly for fishing, but that no right to fish was claimed, and persons boating had hardly ever been interfered with.

Held, that the user had been permissive, and not of right, and that the defendant must be restrained from removing the obstruction.—*Bourke* v. *Davis*, CH.D. KAY, J. 167—44 Ch. D. 110; 62 L. T. 34.

See also FISHERY, 3; PRESCRIPTION.

RULES of COURT.—See end of this Digest.

SALE of BEER.—See COVENANT, 2; LANDLORD AND TENANT, 8; LICENSED HOUSE, 5, 6.

SALE of FOOD and DRUGS ACT.—See ADULTERATION, 2; JUSTICE OF THE PEACE, 9.

SALE of GOODS:—

Sample—Implied warranty of merchantableness—Extent of.—The defendant manufacturers contracted to supply to the plaintiff a quantity of indigo cloth according to sample. The cloth was delivered and accepted according to sample, but the plaintiff, who was a tailor as well as a woollen merchant, used the cloth for the purpose of making liveries, for which it proved to be unsuited. It was proved that cloth of the same description was commonly used for making liveries, but the defendants were unaware of the purpose for which the plaintiff bought the cloth in question. It was not proved that the cloth was unsuitable for any other purpose than that of making liveries. In an action against the defendants for breach of an implied warranty of merchantable quality, the judge left the question to the jury whether the cloth was merchantable for a woollen manufacturer, and refused to leave to them the question whether an ordinary use for the cloth was the making of liveries.

Held, that there was no misdirection.—*Jones* v. *Padgett*, Q.B.D. 782—24 Q. B. D. 650; 59 L. J. Q. B. 261; 62 L. T. 934.

See also MERCHANDISE MARKS, 1, 2; PRACTICE, 33.

SALMON FISHERY ACTS.—See FISHERY, 3.

SALVAGE.—See SHIPPING, 26, 28—31.

SAVINGS BANK:—

Trustee—Negligence—Contributory—Savings Banks Act, 1863 (26 & 27 *Vict. c.* 87), *s.* 11—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 165, 200.—By section 11 of the Savings Banks Acts Amendment Act, 1863, trustees or managers of savings banks are exempted from personal liability, except (*inter alia*) for neglect or omission in complying with the rules and regulations required by the Act to be adopted for the maintenance of checks and the audit and examination of accounts.

D., a former manager and trustee of a savings bank, omitted to observe the requirements of the section, and frauds were committed by the actuary which necessitated the winding up of the bank.

Held, that the section relieved a trustee or manager from liability to contribute under section 200 of the Companies Act, 1862, and that D.'s name ought not to settled on the list of contributories.

Held, also, that the omission or neglect to observe the rules and regulations, although it did not render a trustee liable as a contributory, constituted a misfeasance or breach of trust within the meaning of section 165 of the Companies Act, 1862, and that D. must contribute an adequate sum to the assets of the bank by way of compensation.—*In re Cardiff Savings Bank, Davies's case*, CH.D. STI., J. 571—59 L. J. Ch. 450; 62 L. T. 628.

SCHOOL.—See CHARITY, 2, 5; INHABITED HOUSE DUTY, 1; NEGLIGENCE, 1; WILL, 10.

SCOTLAND, LAW of:—

1. *Arbitration—Future disputes.*—By the law of Scotland an agreement to refer future disputes to a person unnamed, and designated only by his filling a particular position, is not binding.—*Tancred* v. *Steel Co. of Scotland*, H.L.—15 App. 125; 62 L. T. 738.

2. *Fishery—Royal charter—Exclusive enjoyment.*—The appellants were owners of salmon fisheries under a Crown charter, dated 1591, confirming to the town of Inverness all the waters of the Ness, with all the salmon fisheries from C. to the sea. The respondent was the owner of land on the Ness, partly above and partly below C. He owned part of the land under a Crown charter, dated 1566, granting half the land of H. with the salmon fisheries pertaining thereto. H. held the other half of the land under a grant which did not mention the fisheries. The respondent and his predecessors had uninterruptedly enjoyed the fisheries above C.

Held, that the appellants were entitled to the exclusive enjoyment of the fisheries below C.—*Warrand* v. *Macintosh*, H.L.—15 App. 52.

3. *Husband and wife—Deed—Post-nuptial contract—Testamentary deed.*—In 1850, by a post-nuptial contract, reciting an ante-nuptial contract in 1817, a husband and wife agreed to a new arrangement of their individual property after the death of the predecessor. The husband bound himself and his heirs to pay his wife, if she survived him, an annuity of £200 a year, with the use of his house and furniture, and the wife accepted this in discharge of all legal claims. The wife granted and assigned in favour of her husband and his heirs all her real and personal estate belonging to her at the time of her death, including her rights under the ante-nuptial contract. She nominated her husband her sole executor and universal legatee. The deed contained a power of alteration during their joint lives. The wife's property included a part of the residue of her grandfather's estate, in life rent exclusive of her husband, with a general power of appointment in default of issue. The husband predeceased the wife, having bequeathed his property to trustees.

Held, that the deed of 1850 was not a testamentary deed, but a deed of contract, and that the residue of the estate of the wife's grandfather passed to the husband.—*McOnie* v. *Whyte*, H.L.—15 App. 156.

4. *Succession—Period of vesting—Widow's repudiation of her testamentary provisions—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98).—A truster, who died in 1865, by trust disposition directed his trustees to hold his whole estate on trust to pay his wife an annuity, and "as soon after the death" of his said wife "as convenient 'to convey specific heritable subjects to certain of his children, to realize the whole residue, and, having invested £1,000 for the life-rent benefit of another child, to divide the remaining residue among his four children; with a declaration that if any of the children "predeceased the term of payment of their provisions without leaving issue" his or her provisions under the deed "should lapse and fall into residue." The residue was to be divided in the proportion of one share to each surviving child, and one share among the children of each deceasing child.

Immediately after the truster's death the widow repudiated her testamentary provisions, and elected to take her legal rights of terce and *jus relictæ*. The period for accumulation allowed by the Thellusson Act expired in 1886.

One of the children and the representative of the husband of the deceased child then claimed that the fund in respect of the widow's repudiation had vested *a morte testatoris*. The widow was still alive.

Held, that the beneficial fee of the specific heritable subjects and the residue would not vest until the death of the widow; that her repudiation could not accelerate the distribution of the fund; and that until her death the beneficiaries could not be ascertained.—*Muirhead* v. *Muirhead and Crellin*, H.L.—15 App. Cas. 289.

5. *Trustee — Negligence — Borrowing — Trust for maintenance.*—A trustee with power to sell or borrow is only required to follow the dictates of ordinary

prudence in adopting either course, and the question whether he acted prudently must be decided according to the circumstances of each case.

Trustees appointed under a settlement were directed to pay debts, and to pay a portion of the free income of the settled property to the settlor's widow for the maintenance and advancement of his children, and, after the youngest child had attained the age of thirty, to sell and divide the estate, which consisted of houses, and to make such further advances for the maintenance and education of the children as they should think expedient. In 1858 the trustees borrowed money to pay off a bond and other debts. The trust was sequestrated in 1867, and the creditors were not all paid in full. The furniture, in which the widow had a life interest, was pledged by her, and was lost.

Held, that the trustees were authorized to make payments to the widow and children, even out of capital; and that they were not liable for the loss of the furniture.—*Binnie* v. *Broom*, H.L.—14 App. 576.

6. *Trustee—Negligence—Mortgage.*—T. was trustee under a marriage settlement, the wife's property being settled on her for life, and the *jus mariti* being excluded. In the event of the wife surviving her husband it was settled to her in fee, and in the event of her predeceasing him to the husband for life or till his second marriage, and after his death or second marriage to her children in fee. T. and the husband and wife, who were also trustees, lent the trust fund on the security of unfinished houses, which were being erected under a building speculation. Their only valuation was made by an architect, and was obtained by the borrower, but their solicitors advised them that there was no objection to the investment. The settlement exonerated the trustees from "omissions or neglect of difference, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The fund was lost.

Held, that T. was liable for a positive breach of duty.—*Rae* v. *Meek*, H.L.—14 App. 558.

7. *Vendor and purchaser—Entailed estate—Misrepresentation.*—An error on the part of one of the parties to a contract as to its legal meaning will not invalidate his consent to the contract.

A. offered to sell his entailed estates to B. at a certain price, the sale to be "subject to the ratification of the court." B. accepted the offer.

Held, that A. could not have the contract set aside on the ground that he believed that the court would judge of the sufficiency of the price, and did not consider his own offer to be that of an absolute and unconditional sale.—*Stewart* v. *Kennedy*, H.L.—15 App. 108.

See also WILL, 17.

SEPARATE ESTATE.—See COSTS, 14; HUSBAND AND WIFE, 9; MARRIED WOMAN, 3—14.

SEQUESTRATION.—See PRACTICE; WILL, 17.

SERVICE out of the JURISDICTION.—See BANKRUPTCY, 19b; COUNTY COURT, 7; DIVORCE, 3, 4; PRACTICE, 27, 48; TRADE-MARK, 2.

SET-OFF.—See ADMINISTRATION, 1; COMPANY, 1, 34; COUNTY COURT, 8; MORTGAGE, 2a; RAILWAY, 7.

SETTLED ESTATES ACT.—See SETTLEMENT, 10.

SETTLED LAND ACTS.—See SETTLEMENT, 2a, 12, 13.

SETTLEMENT:—

1. *After-acquired property—Covenant to settle—Property acquired after wife's death.*—Under a deed poll dated in 1833 A. was entitled, subject to certain successive life interests, to a share of certain funds thereby settled. By a settlement dated in 1841, made on the marriage of A. with B., B. covenanted to settle any property to which A., or B. in her right, should subsequently become entitled. A. died in 1852. B. was still living, but had assigned his interest. There were children of the marriage living. The last surviving tenant for life under the deed of 1833 having recently died, the funds thereupon became distributable.

Held, that the covenant of the husband, being in general terms, was not to be confined to property falling into possession during the coverture, and that the trustees of the settlement of 1841 were therefore entitled to A.'s share of the funds.—*Fisher* v. *Shirley*, CH.D. STI., J. 70—59 L. J. Ch. 29; 61 L. T. 668.

2. *After-acquired property of wife—Reversionary defeasible interest — Covenant by husband.*—A reversionary interest which becomes vested in the wife during coverture, liable to be divested by the exercise of a power of appointment, is included in a covenant by the husband contained in a marriage settlement to settle all personal estate which shall come at any time during coverture to him or shall vest in him in right of his intended wife, or in her by bequest, gift, or otherwise.—*In re Ware, Cumberlege* v. *Cumberlege-Ware*, CH.D. STI., J. 767.

2a. *Construction—Chattels settled to go with mansion house—Sale of mansion house—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37.—By the will of the settlor chattels were given upon trust to be held and enjoyed and go along with his P. House. After his death some of the personalty settled by the will was laid out in the purchase of real estate, with a house upon it more suitable for the family mansion than the P. house. It was desired to sell the P. house, and such of the chattels in it as were not suitable for removal to the new house, and to remove to that house such of the chattels as were suitable for removable.

Held, that this might be done.—*Brown* v. *Collins*, CH.D. STI., J.—62 L. T. 566.

3. *Construction—Borrowing powers—Condition—"Not more than two children."*—A marriage settlement authorized the trustees, on the request of the survivor of the husband and wife, if there should be "not more than two children of the marriage," to raise £5,000, and if more than two children £3,000. The husband survived the wife, there never having been any children of the marriage.

Held, that there was power to the trustees to raise £5,000.—*Wilkinson* v. *Thornhill*, CH.D. CHI., J.—61 L. T. 362.

4. *Construction—Resulting trust.*—In 1873, by a voluntary settlement, property was settled on trust for W. for life, with remainder to his children. If there should be no child of W. who should take a vested interest, the trustees were to stand possessed of the property in trust for D. and her child or children, subject to the like trusts, limitations, declarations, and agreements as were expressed in a certain indenture of even date. No such indenture was executed, but at the date of the settlement an indenture had been prepared settling certain property on trust for D. for life, with remainder to her children. A deed was afterwards signed by which the property was conveyed to D. absolutely. D. died without leaving a child.

Held, that there was a resulting trust for the settlor's benefit.—*Wilcock* v. *Johnson*, CH.D. NOR., J.—62 L. T. 317.

5. *Power of appointment — Deficiency—Hotchpot.*—A trust fund was appointed under a power of appointment in a deed which contained no

hotchpot clause. After portions of the appointed sums had been paid to the appointees, the fund proved insufficient to pay all the appointees in full.

Held, that the balance belonged to all the appointees in proportion to the unpaid balances, and that the previous payments ought not to be brought into account as under a hotchpot clause.—*Hutton* v. *Anderson*, CH.D. CHI., J.—42 Ch. D. 559; 58 L. J. Ch. 823; 61 L. T. 458.

6. *Power of appointment—Remoteness—Contingent remainder.*—That an estate cannot be limited by way of remainder, after a life estate to an unborn person, to children or issue of such unborn person, is an absolute and still existing rule of law, applicable to legal limitations, and exists independently of the rule against perpetuities, and such a remainder or gift over is not rendered valid by the insertion of words having the effect of restricting it to children or issue born before the expiration of the period allowed by the rule against perpetuities, which prevents property being tied up for a longer period than a life or lives in being and twenty-one years afterwards.

By a marriage settlement lands were limited to the use of the husband and wife successively for life, with remainder to the use of any one or more of their children, grandchildren, or more remote issue, born before any appointment made, as the husband and wife should by deed appoint. The husband and wife, in exercise of the power, appointed part of the lands, by deed, to the use of a married daughter for life for her separate use, and after her decease to the use of her children living at the date of that deed, as tenants in common in fee.

Held, that the limitation, to the children of the married daughter, contained in the deed of appointment, when read, as it must be, as part of the original settlement, was bad, as offending against the first rule, notwithstanding the fact of the limitation being restricted to children living at the date of the deed of appointment.

Judgment of Kay, J. (38 W. R. 5, 42 Ch. D. 494), affirmed.—*Whitby* v. *Mitchell*, C.A. 337—44 Ch. D. 85; 59 L. J. Ch. 485; 62 L. T. 771.

7. *Rent-charge—Right of action—3 & 4 Will. 4, c. 27, s. 36.*—The statement of claim alleged that A had granted land, by indenture of settlement, to the use that B., if she survived the settlor, might, from his death, enjoy to her own use a yearly rent-charge of £150, by way of jointure during her life, payable out of the settled land, and that, subject to such rent-charge, the land was limited to the use of trustees for a term of 160 years, and subject thereto to the use of the grantor in fee, and that the term of years was vested in the trustees on trust, whenever the jointure should be in arrear, to raise the arrears by mortgage or sale, that the grantor had died, and the defendant had taken possession under the grantor's will, and that arrears of rent-charge had accrued due to B., to whom the plaintiff was executrix.

Held, that an action for arrears of the rent-charge was not maintainable.—*Swift* v. *Kelly*, C.A. (Ir.)—24 L. R. Ir. 478.

8. *Setting aside — Delay — Conflict of laws — Restraint on alienation.*—In 1834 a domiciled Englishman, tenant in tail in possession of real estate in England, married in Turkey a subject of the then Kingdom of the Two Sicilies. By a contract executed before marriage he gave half of all his revenues and real and personal estate as an irrevocable donation in augmentation of her dowry. The evidence showed that, if the husband's land had been in Sicily, this contract would have transferred half of it at once for the benefit of the wife without further conveyance, that that half would have been inalienable during their joint lives, and that the contract was irrevocable. No steps were taken to carry out the contract. In 1846 the husband disentailed all his property and sold part of it, and in 1847 he and his wife executed a deed, by which, after reciting that doubts had arisen as to the effect of the contract, the rest of the property was settled. The husband died in 1887, and an action was brought by the tenant in tail under the deed of 1847 to have the trusts of the deed carried into execution, and for a declaration that a deed executed in 1886 by the husband and wife, purporting to annul the deed of 1847, was void. The wife defended the action, and at first alleged undue influence and want of consideration and independent advice, but she subsequently withdrew these allegations. Her case was that in 1847 the land comprised in the contract was inalienable, and that a capacity to alienate could not be obtained by arrangement. She brought a cross-action to have the deed of 1847 declared void.

Held, that in 1847 there was a serious doubt as to the rights of the parties, and that the settlement of that year was a family arrangement, with which the court would not interfere after the lapse of forty years.—*Case* v. *Case*, CH.D. KAY, J. 183—61 L. T. 780.

9. *Setting aside—Undue influence—Father and son.*—A son being tenant in tail in remainder expectant on the decease of his father to an estate of about 3,000 acres, the income of which was about £1,450, executed, shortly after he came of age, a deed of resettlement of the property, including an adjoining farm of about 116 acres, and by the resettlement, after certain trusts in his favour, £200 per annum was settled on his mother, and subject thereto a trust was created for raising any sum not exceeding £2,000 as the father should appoint, with the usual remainders. The father in exercise of the power raised sums of £500 and £400, the former of which was admittedly applied for the benefit of the son, and the latter for the benefit of the father himself. The son having brought an action to set aside the settlement, on the ground of undue influence, and that it was executed without independent advice, the father offered to release his right to charge the estate further, and to indemnify the estate against the £400 already raised, and the mother offered to release her right to the £200 a year.

Held, that the action must be dismissed.

Held, also, that the court, in questions regarding the upsetting of resettlements, has regard to various considerations not admissible in other cases, and the court will not minutely inquire whether the father exerted his influence more or less, or insist that the son has independent advice; but if the father obtains a benefit, the suspicion of the court is aroused, and where it is unfair, the settlement, if otherwise unobjectionable, may be reformed in this particular, the rest being allowed to stand.—*Hoblyn* v. *Hoblyn*, CH.D. KEK., J. 12—41 Ch. D. 200; 60 L. T. 499.

10. *Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *ss.* 24, 26, 50—*Lease by married woman—Separate examination—Orders of December*, 1878, *rr.* 4, 13.—A married woman interested in a settled estate, who has been served with a notice of a petition for the approval by the court of a lease proposed to be made under the Settled Estates Act, 1877, and who, in answer to such notice, states in writing that she submits her rights and interests to be dealt with by the court, need not be separately examined.—*In re Stanley's Settled Estates*, CH.D. NOR. J. 32—61 L. T. 169.

11. *Tenancy for life—Custody of title deeds—Production.*—An equitable tenant for life of a settled estate is entitled to the custody of the title deeds upon

undertaking not to part with them, but to produce them to the trustees on all reasonable occasions.—*In re Burnaby's Settled Estates*, CH.D. STI., J.—42 Ch. D. 621; 58 L. J. Ch. 464; 61 L. T. 22.

12. *Tenancy for life—Improvements—Payment out of capital—Evidence—Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *ss.* 9, 55—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2.—A summons asking for a delaration that trustees might apply capital in payment of rent-charges due to the Land Commissioners for money borrowed for land drainage and other improvements was ordered to stand over for further evidence that the works were improvements within section 25 of the Settled Land Act, 1882. The inspector of works to the Land Commissioners had certified that the work consisted of new farm buildings, the conversion of a barn into a cowhouse, and other re-arrangements of buildings, and that the work had been executed in accordance with plans and specifications approved by the Land Commissioners, and would, in his opinion, produce a permanent improvement in the rental value of the land exceeding the proposed annual charge thereon.

Held, that there was not sufficient evidence for the court to authorize the trustees to apply capital in payment of the rent-charge.—*In re Newton's Settled Estates*, CH.D. KAY, J.—61 L. T. 787.

13. *Tenancy for life—Improvements—Rent-charge—Redemption out of capital—Bonus—Settled Land Acts (Amendment) Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1.—Where a tenant for life of settled land has created a terminable rent-charge in pursuance of any Act of Parliament for the purpose of repaying money borrowed for improvements, it is allowable for the trustees of the settlement, under section one of the Settled Land Act of 1887, in applying capital money to the expenses of redeeming such rent-charge, to include in such expenses a payment by way of bonus to the lender for taking repayment before the proper time.

In re Lord Sudeley's Settled Estates, 36 W. R. 162, 37 Ch. D. 123, disapproved.—*In re Egmont's (Lord) Settled Estates*, C.A. 762.

14. *Tenancy for life—Improvements—Separate properties.*—Four estates were devised upon trust for the same tenant for life, and, after her death, as to the first three of the estates, to different persons in strict settlement, and as to the fourth, upon trust for a long term of years, and subject thereto as to one moiety to the uses of the first of the other estates, and as to the other moiety to the uses of the second of the other estates.

Held, that, notwithstanding the term of years, the second estate and the moiety of the fourth estate constituted one settled estate within the meaning of the Settled Land Act, so that capital arising from the moiety of the fourth estate might be applied in improvements on the second estate; and that the costs, as between solicitor and client of the surveyor and solicitor of the tenant for life, in preparing and carrying out the schemes for such improvements, were costs incidental to the application, and payable out of the same capital moneys.

In re Earl of Stamford's Settled Estates, CH.D. STI., J. 317—43 Ch. D. 84; 58 L. J. Ch. 780; 41 L. T. 504.

15. *Tenancy for life—Reversion—Apportionment.*—In 1815 A., on his son's marriage, settled two funds of £10,000 in trust for his son for life, after his son's death for his son's wife for life, and in default of issue as the settlor should, by deed, will, or codicil referring to the settlement, appoint. In 1832 A. executed a will which did not refer to the settlement, and provided that his residuary personal estate should be invested in trust for his son for life, and in default of his son's issue for A.'s daughters and their children. By a codicil executed in 1833 A. appointed that the two settled funds of £10,000 should form part of his residuary personal estate. A. died in 1834. A.'s son died in 1850 without having had issue. The widow of A.'s son died in 1879. In 1879 the two settled funds were represented by £25,400 in Consols.

Held, that the fund was properly apportioned between capital and income by treating the capital as the sum which would have accumulated on the death of A.—*Matheson* v. *Goodwyn*, CH.D. KAY, J.—61 L. T. 216.

16. *Tenancy for life—Waste—Equitable waste—Timber—Injunction.*—Trees not planted exclusively for ornament are not necessarily excluded from the rule which protects ornamental timber.

The court granted an injunction restraining a tenant for life, without impeachment of waste, from cutting ornamental timber, the trees not being near the mansion though some were visible from it.—*Bedoyere* v. *Nugent*, M.R. (Ir.)—25 L. R. Ir. 143.

See also ADMINISTRATION, 3; DIVORCE, 16, 17; EVIDENCE, 9; INFANT, 3, 4; MARRIED WOMAN, 2, 13, 14; MORTGAGE, 16; POOR LAW, 1—6; POWER OF APPOINTMENT, 6; STAMP, 2, 3; TRUSTEE, 2.

SEWERS RATE.—See CRIMINAL LAW, 3.

SHERIFF:—

1. *Execution—Costs and charges—Taxation—Appeal—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 20 (2)—*General Order, August* 31, 1888, *schedule.*—The schedule to the General Order made on the 31st of August, 1888, in pursuance of section 20 (2), of the Sheriffs Act, 1887, provides for the taxation by a master or a district registrar of the sheriff's costs and charges of an execution, "in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof." The power of the taxing officer under this provision is limited to the ascertainment of the amount of the costs and charges according to the scale in the schedule; he is to assume them to have been properly incurred, and cannot deal with the question of liability, and there is no appeal from his decision.—*Townsend* v. *Sheriff of Yorkshire*, Q.B.D. 381—24 Q. B. D. 621; 59 L. J. Q. B. 156; 61 L. T. 402.

2. *Execution—Costs and charges—Taxation—Bankruptcy—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 20—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-section* (1)—*Bankruptcy Rules*, 1886, *r.* 118.—On the 2nd of September, 1889, the goods of the bankrupt were seized by the sheriff under a writ of *fi. fa.*, and in consequence of interpleader proceedings the possession was continued without selling until the 2nd of October, 1889, when, in virtue of a receiving order having been made against the bankrupt, the goods were delivered by the sheriff to the official receiver. The sum of £5 10*s.* having been taxed by the master off a charge made by the sheriff in his bill of costs of £7 10*s.* for thirty days' possession money from the 2nd of September to the 3rd of October, 1889, the sheriff applied that the decision of the taxing master might be reviewed.

Held, that the proper order would be that the amount should be allowed unless the official receiver, within seven days, required the sheriff to take out a summons before the master to have the costs disposed of. If such summons were taken out, the official receiver to be at liberty to appear in it, and to contend, if so advised, that the claimant or the execution creditor ought to pay the possession money

in dispute.—*Ex parte Sheriff of Essex, In re Levy*, Q.B.D. 784.

See also ATTACHMENT, 5; COMPANY, 19.

SHIPPING:—

1. *Bill of lading—Delivery of goods—Production of bill of lading.*—Goods were shipped in London for a German port on board a German ship under the terms of a bill of lading in two parts, exclusive of the master's copy, making the same deliverable to M. or to his or their assigns. M. was the agent of P., and the shippers of the goods sent one of the parts of the bill of lading to P., and P. afterwards returned it to an agent of the shippers. When the ship arrived at its destination the master delivered the goods to M. without production of the bill of lading. In an action against the shipowners for wrong delivery of the goods the court found that the German law governing the case did not essentially differ from the law of England.

Held, that the defendants had not delivered the goods according to the contract of shipment, and that the plaintiffs were entitled to judgment, subject to a reference as to the amount of damages.—*The Stettin*, P.D. & A.D. 96—14 P. D. 142; 58 L. J. P. D. & A. 81; 61 L. T. 200.

2. *Excepted perils—Negligence, "whether in navigating the ship or otherwise"—Liability of shipowner.*—A bill of lading contained a clause exempting the shipowners from liability for (*inter alia*) "misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise." Damage from "rain or from contact with other goods" was also excepted. After the plaintiffs' goods had been shipped upon the vessel, but before the vessel had started on her voyage, the plaintiffs' goods were injured through the master and crew negligently allowing them to be wetted by rain or by wet goods loaded on the top of them.

Held, in an action to recover from the shipowners damages for the injury to the goods, that the words of the bill of lading absolved the shipowners from liability for damage brought about in negligently navigating the ship, or in negligently bringing about those other losses from which the shipowners had exempted themselves in the bill of lading, and that the plaintiffs were not entitled to recover.—*Norman v. Binnington*, Q.B.D. 702; 25 Q. B. D. 475; 59 L. J. Q. B. 490.

3. *Negligence—Wharf—Obstruction in river.*—It is the duty of wharfowners to keep the frontage of their wharf, over which vessels must necessarily pass in order to lie at their wharf, in a reasonably safe condition, or to warn vessels using the wharf of its danger.—*The Calliope*, C.A. 155—14 P. D. 138; 58 L. J. P. D. & A. 76; 61 L. T. 656.

CHARTER-PARTY—

4. *Warranty—Capacity of ship.*—A charter-party provided for the loading of a cargo of creosoted timber and sleepers, and contained the following words:—"Charterer has option of shipping 100 to 200 tons of general cargo . . . owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo."

Held, that there was only a warranty of the carrying capacity of the ship, and not a warranty that it could carry about 90,000 cubic feet of cargo of the description which the charterer was entitled to tender.—*Carnegie v. Conner*, Q.B.D.—24 Q. B. D. 45; 59 L. J. Q. B. 122; 61 L. T. 661.

COLLISION—

5. *Damages—Loss of instruments.*—A barque, having been run into by a steamer, which was solely to blame, lost in the collision its instruments of navigation, and made for a port of safety; but, while on the way thither, without any negligence or want of skill, ran aground and was lost.

Held, that the loss was a reasonable and natural consequence of the collision, and that the owners of the steamer were liable for it.

Decision of Butt, J., reversed.—*The City of Lincoln*, C.A. 345—15 P. D. 15; 59 L. J. P. D. & A. 1; 62 L. T. 49.

6. *Limitation of liability—Registered tonnage—Evidence—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 26—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.—In an action for limitation of liability for a collision, the defendants denied that the registered tonnage of the plaintiffs' ship was the correct tonnage.

Held, that the defendants could give evidence of the actual tonnage of the ship.—*The Recepta*, P.D. & A.D.—14 P. D. 131; 58 L. J. P. D. & A. 70; 61 L. T. 698.

7. *Negligence.*—The sailing ship *E.*, while sailing free, saw the red light of the sailing ship *A.* on the starboard bow. *The A.* was sailing close-hauled, but not as close to the wind as was possible. *The E.* ported, to keep out of *The A.*'s way. At the same time *The A.* luffed up as close to the wind as possible, and went a little further under a starboard helm, thus counteracting the porting of *The E.*, and a collision occurred.

Held, that *The A.* was to blame for the collision.—*The Earl of Wemyss*, C.A.—61 L. T. 289.

8. *Negligence — Crossing ships — Regulations for Preventing Collisions at Sea, art.* 18.—If two steamships are approaching one another so as to involve the risk of a collision, and it is the duty of one of them to keep out of the way, and of the other to keep its course, the latter must comply with the regulations as to slackening speed or stopping and reversing if necessary, and, in default of doing so, the burden is on that ship of proving that the continuance of speed was the best manœuvre under the circumstances.

Judgment of the Court of Appeal affirmed.—*Liverpool, Brazil, and River Plate Steamship Co. v. Campanhia Bahiana de Navigacio*, H.L.—62 L. T. 84.

8a. *Negligence — Crossing ships—Regulations for Preventing Collisions at Sea, arts.* 16, 18, 23.—When two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way, and of the other to keep her course, the latter is bound to comply with article 18 of the regulations as to slackening her speed or stopping and reversing if necessary, and if she does not do so the *onus* lies upon her to show that to continue her speed was in fact the best and most seamanlike manœuvre under the circumstances.

Judgment of the Court of Appeal affirmed on the facts.—*The Memnon*, H.L.—62 L. T. 84.

9. *Negligence—Crossing ships—River Thames.*—If a vessel lying at anchor in the River Thames, with the head to the tide, gets under way in order to proceed up or down the river, and has to cross the river in turning round, such vessel must keep out of the way of vessels passing up and down the river.—*The Schwan*, P.D. & A.D.—61 L. T. 308.

9a. *Negligence—Crossing ships—River Thames—Rules for Navigation of River Thames, arts.* 24, 25.—A steamship ceases to be "crossing from one side of the river towards the other side" within the meaning of article 24 of the Rules and Bye-laws for the Navigation of the River Thames when her stem has got so far across that it can go no further, although she is still athwart the stream; but where a

vessel is swinging for the purpose of turning in the river with her anchor down but not holding, she is not a crossed ship if she is still moving towards the shore, although she may have got more than athwart, and although her stern may be swinging to the tide. The steamship *A.*, having come up the Thames as far as Bugsby's Reach on the flood tide, was about to turn head down, and, having whistled, her helm was ported and anchor let go so that it might dredge, and she began to swing round. Meanwhile the steamship *R. D.*, which had been coming up the river astern of the *A.*, instead of taking any steps to keep out of the way of *The A.*, although she saw that *The A.* was doing nothing to keep out of her way in obedience to article 24 of the Thames Rules and Bye-laws, came on and collided with *The A.*

Held, that both vessels were to blame, *The A.* because, being a crossing ship, she neglected to keep out of the way of *The R. D.*, and *The R. D.* because, after she saw that *The A.* was neglecting her duty to keep out of the way, she failed to take any steps in sufficient time to avoid the collision.—*The River Derwent*, C.A.—62 L. T. 45.

10. *Negligence—Fog.*—There is no rule of navigation that a vessel is not to alter its helm in a fog.—*The Vindomora*, C.A. 69—14 P. D. 172; 59 L. J. P. D. & A. 8; 61 L. T. 655.

11. *Negligence—Fog—Fog-horn—Regulations for Preventing Collisions at Sea, art.* 12.—A sailing vessel in stays in a fog is required under article 12 of the Regulations for Preventing Collisions at Sea to make with the fog-horn, at intervals of not more than two minutes, when the wind is blowing on the starboard side one blast, and when the wind is blowing on the port side two blasts in succession.—*The Constantia*, P.D & A.D. 272.

12. *Negligence—Fog—Regulations for Preventing Collisions*, 1884, *art.* 18.—If two steamships, invisible to one another by reason of fog, find themselves gradually approaching till they are within a few ships' lengths of one another, each of them ought at once to stop and reverse, unless the fog signals of one ship show that it has passed clear without risk of collision, or unless other circumstances render it dangerous to stop and reverse.

Judgment of the Court of Appeal reversed.—*The Ceto*, H.L.—14 App. 670.

13. *Negligence—Infringement of regulations.*—There is no power to absolve a vessel from the consequences of neglecting the Regulations for Preventing Collisions at Sea, unless an absolute necessity is proved for disregarding them.

A vessel was proved to have been navigated recklessly, but the other vessel which collided had neglected to slacken speed in good time, in accordance with the regulations.

Held, that the latter vessel was to blame.—*The Arratoon Apcar*, P.C. 481—15 App. 37; 59 L. J. P. C. 49; 62 L. T. 331.

14. *Negligence—Lights—Observation—Regulations for Preventing Collisions at Sea, art.* 6—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.—The lights of a ship which came into collision with another ship were so fixed as to be partially observed.

Held, that it was for the court to ascertain whether the infringement of the Regulations for Preventing Collisons at Sea could have possibly contributed to the collision, and it appearing that this was impossible, the ship whose lights were partially observed was held not to blame.

Decision of Butt, J., reversed.—*The Duke of Buccleuch*, C.A.—15 P. D. 86; 62 L. T. 94.

15. *Negligence — Lights — River Humber.*—In the River Humber a vessel with two masts at anchor must show an after light at least double the height of the bow light, though it need not be exactly double that height.—*The Magneta*, P.D. & A.D.—15 P. D. 101; 59 L. J. P. D. & A. 55.

15a. *Negligence — Lightship — River Mersey — Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Merchant Shipping Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 32.—The steamship *H.* at night ran into the barque *E.* at anchor in the River Mersey. By Order in Council of the 5th of January, 1881, every vessel when at anchor in the River Mersey shall carry two white lights, the after light being carried double the height of the foremost light. *The E.* exhibited two anchor lights, both of which were about twenty feet above the deck. It was admitted by the defendants that they only saw the after light.

Held, that *The H.* was to blame for a bad look out, and *The E.* to blame for a breach of the regulation, it not being shown that in the circumstances of the case the breach could not have contributed to the collision.

The Duke of Buccleuch, 15 P. D. 86, considered.—*The Hermod*, P.D. & A.D.—62 L. T. 670.

16. *Negligence—Regulations for Preventing Collisions at Sea, arts.* 17, 22, *and* 23.—The fact that a steamship is neglecting to keep out of the way of a sailing-ship does not make it the duty of the sailing-ship to take measures to avoid a collision, except possibly in very exceptional circumstances, because it is possible for a steamship to act for a sailing-ship up to almost the last moment, and any action on the part of the sailing-ship might be liable to increase risk of collision.

The s.s. *H.* was approaching the sailing-ship *S.* for several minutes, with her mast head and red lights open, on the starboard bow of *The S. The S.* kept hept her course till a collision was imminent, and then hard-a-ported, but *The H.* with her port side struck the stem and port bow of *The S. The H.* admitted that she was to blame, but contended that *The S.* was also to blame for breach of article 23 of the Regulations in not manœuvring for *The H.* after she saw *The H.* persisting in doing nothing to keep out of her way.

Held, that *The S.* was not to blame, as the circumstances were not such as to require *The S.* to alter her course and manœuvre for *The H.*

The Tasmania, 14 P. D. 53, distinguished.—*The Highgate*, P.D. & A.D.—62 L. T. 841.

17. *Negligence—Sailing Rules.*—The decision of the Court of Appeal (37 W. R. 552, 14 P. D. 53) reversed, and the decision of Butt, J., restored, on the ground that upon the evidence as it stood at the trial there was no proof that the master of *The Tasmania* was guilty of negligence; the decision of the Court of Appeal being based upon a point not suggested at the trial.—*The Tasmania*, H.L.—15 App. Cas. 223.

18. *Pilotage—River Burry—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 353.—Pilotage in the case of vessels trading to the port of Llanelly was, by law, compulsory before the Merchant Shipping Act, 1854, and therefore, by section 353, continues to be compulsory.—*The Ruby*, P.D. & A.D.—15 P. D. 139.

19. *Repairs to damaged ship—Bankruptcy—Shipwright.*—Where in the registrar's report in a collision action it appears that the claimant claims (*inter alia*) as part of his damages the cost of repairing his ship, but has not paid the shipwright, and has since the repairs were effected become insolvent, and the registrar allows such item, the court has no power to do anything to insure the money being paid over by

the claimant to the shipwright, and will not retain the money in the registry until the claimant has given satisfactory evidence that he has paid the shipwright. —*The Endeavour*, P.D. & A.D.—62 L. T. 840.

CO-OWNERS—

20. *Mortgage—Arrest of ship—Release by mortgagee — Indemnity.* — A ship having been arrested in an action by the master for disbursements, the plaintiffs, who were the registered mortgagees of forty-eight sixty-fourth shares, in order to obtain the release of the ship, paid the master's claim, and brought an action to recover the amount so paid from the owners of the remaining sixteen shares.

Held, that, as the plaintiffs' shares in the ship had been lawfully seized for a debt for which the defendants were liable, and the plaintiffs had been compelled to pay the debt in order to obtain a release of their property, there was an implied promise on the part of the defendants to reimburse the plaintiffs, and that the action was maintainable.

Edmunds v. *Wallingford*, 33 W. R. 647; 14 Q. B. D. 811, followed.—*The Orchis*, C.A. 472—15 P. D. 38; 59 L. J. P. D. & A. 31; 62 L. T. 407.

21. *Demurrage—Bill of lading—Charter-party—Lay days—Strike.* — A cargo was shipped under a charter-party which fixed the number of lay days for unloading, and allowed other days for demurrage. Neither the charty-party nor the bill of lading contained any exception of strikes. By the custom of the port of discharge cargoes were unloaded by the joint act of the shipowners and the consignees. During the lay days a strike took place among both the labourers employed by the ship and those employed by the consignees, and the unloading ceased, and was not resumed till some time after the lay days expired.

Held, that the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part of the unloading.—*Budgett* v. *Binnington*, Q.B.D.—25 Q. B. D. 320.

22. *Bill of lading—Charter-party—Lien—Consignee—Delay at port of loading.* — Goods were shipped on the plaintiffs' ship under a bill of lading which named the defendants as consignees, but the property had not passed to them, and the plaintiffs knew that they were acting as agents. The bill of lading provided the the cargo should be delivered on payment of freight and "other conditions as per charter-party." By the charter-party demurrage was payable, and the plaintiffs had a lien in respect thereof. Before the ship arrived the defendants were informed that demurrage was payable in respect of delay at the port of loading. The defendants paid the freight, but not the demurrage, and the plaintiffs claimed a lien on a part of the cargo.

Held, that the defendants were not liable to pay demurrage.—*County of Lancaster Steamship Co.* v. *Sharp*, Q.B.D.—24 Q. B. D. 158; 59 L. J. Q. B. 22.

23. *Charter-party—Cesser clause—"Clean" bill of lading.*—A "cesser clause" in a charter-party applies to every liability incurred through detention in the nature of demurrage.

A "clean" bill of lading is a bill of lading which contains nothing in the margin to qualify the words of the instrument itself.—*Restitution Steamship Co.* v. *Pirie*, Q.B.D.—61 L. T. 330.

24. *Charter-party—Lay days—County court—Transfer of action—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 8.—Where a case is transferred under the 8th section of the County Courts Admiralty Jurisdiction Act, 1868, pleadings must be entered into as in actions originally commenced in the Probate, Divorce, and Admiralty Division.

A vessel laden with a cargo of 1,855 tons of coal was chartered to proceed to O., or so near thereto as it could safely get, and deliver the same to the freighters alongside any safe wharf, store, craft, steamer, depot, ship, or arsenal, as ordered by receiver, cargo to be discharged at the average rate of not less than 300 tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said working days at 16s. 8d. per hour, except in cases of strikes, lock outs, colliery holidays, strikes at mines where steamer is booked, detention by railway, stoppage of trains, accidents to machinery, or any other causes beyond the control of the charterers or receivers, or their respective agents delaying the due loading and unloading, time for loading and unloading to commence when the steamer is ready and intimation has been given in writing. The vessel arrived in the harbour of O. on the 16th of November, and came to anchor there, but not in any usual discharging berth, and the same day the master gave the agents of the consignees of the cargo notice in writing of the ship's readiness to discharge. On the arrival of the ship, and up to the morning of the 20th of November, it was impossible for the ship to get alongside the quay at O. in any of the usual discharging berths for coal cargoes, which were all occupied, but the consignees, whilst such berths were all so occupied, ordered the ship alongside the quay, and at the same time informed the master that he would have to wait his turn. On the morning of the 20th of November the ship got alongside the quay and commenced to discharge. On the afternoon of the 25th of November the discharge was finished. The owners of the ship brought an action in the City of London Court against the consignees for demurrage under the charter-party, and the judge, during the progress of the cause, ordered it to be transferred to the High Court. At the hearing of the transferred cause it was admitted that the agents of the consignees knew, at the time when they ordered the ship alongside the quay, that all the berths there were occupied; that there was no other place for discharge of coal cargoes at O., and that there were no lighters available.

Held, that the defendants were liable for demurrage.

Davies v. *McVeagh*, 28 W. R. 143, 4 Ex. D. 265, followed.

Semble, that, the consignees' agent having exercised the option given them by the charter-party, and ordered the ship to a quay alongside which she could not get, the lay days began to run from the time when notice was given of the ship's readiness to discharge on the 16th of November.—*The Carisbrook*, P.D. & A.D. 543—15 P. D. 98; 59 L. J. P. D. & A. 37; 62 L. T. 843.

25. *Charter-party—Lay days.*—By a charter-party it was agreed that the plaintiffs' vessel should "proceed to Odessa, or so near thereunto as she might safely get, and load, twelve running days to be allowed for loading and discharging, and ten days on demurrage over and above the said lay days." The vessel arrived at a point in the outer harbour of Odessa, which was as near as it could safely get to a loading berth, and the captain gave notice to the charterers' agents that she was ready to load. The cargo was stored at a quay in the inner harbour, and the agents were unwilling to load it where the vessel then was. It was impracticable to load the steamship except at some quay in either the inner or outer harbour, but there was no custom by which ships were considered ready to receive cargo only when moored alongside the quay. The ship was not loaded till after the lapse of

twelve days from the time of arrival in the outer harbour owing to the crowded condition of the quay which was selected for loading.

Held, that the lay days were to be computed from the time when the vessel arrived in the outer harbour, and that the charterers were liable for demurrage.—*Pyman* v. *Dreyfus*, Q.B.D. 447—24 Q. B. D. 152; 59 L. J. Q. B. 13; 61 L. T. 724.

DOCK—

25a. *Grounding of vessel — Harbour master — Damage.*—The plaintiffs' vessel having fouled her propeller whilst entering the harbour of Port Talbot, was, with the permission of the foreman docksman in the absence of the harbour master, placed in the sea lock leading into the dock, for the purpose of being put upon the ground and freeing her propeller. On the water being let out, the vessel took the ground, and sustained damage to her bottom by sitting upon an old sill, which had not been removed when the lock was lengthened. The control of the management of the dock was in the hands of the harbour master, who at the time was ill, and the foreman docksman was acting in his place. The foreman docksman did not know the condition of the bottom of the lock, and had so informed the master of *The Apollo*. In an action by the shipowners against the dock authority,

Held (Lord Esher, M.R., *dissentiente*), that the use of the lock for the purpose was an extraordinary use; that the master of the vessel was a bare licensee; and that the foreman docksman had no authority to grant the use of the lock for such purpose so as to render the defendants liable for the damage ensuing.—*The Apollo*, C.A.—61 L. T. 286.

HARBOUR BOARD—

25b. *Harbour master—Pilotage—Negligence—New Zealand Harbours Act*, 1878, *ss.* 49, 75, 76, 215, *and* 227.—A harbour board was empowered by statute to licence pilots for the purpose of acting within their district. Pilotage was not compulsory in the district, and the pilot made his own bargain with the shipowner. The harbour master, who was also a duly licensed pilot, was acting as pilot to a vessel, engaged by the owners themselves, when she was wholly lost, through his negligence and default.

Held, that the harbour board were not responsible, not being entitled under the statute by which they were constituted to become pilots themselves, but only to issue licences.—*Shaw* v. *Timaru Harbour Board*, P.C.—62 L. T. 913.

JETTISON—

26. *General average—Salvage—Lien.*—The owner of goods sacrified for the common benefit has (1) a direct claim against each of the owners of the ship and cargo for a *pro rata* contribution towards his indemnity, and (2) a lien, to be enforced through the master, upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim.

Hallett v. *Bousfield*, 18 Ves. 187, explained.

Jettison was rendered necessary by the master's default in navigating a ship.

Held, that the owners of the jettisoned cargo were entitled to general average.—*Steel* v. *Scott*, P.C. 452—14 App. 601; 59 L. J. P. C. 1; 61 L. T. 597.

MASTER—

27. *Disbursements — Maritime lien — Admiralty Court Act*, 1861 (24 & 25 *Vict. c.* 10), *s.* 10—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 191.—The master of a ship has no maritime lien on it for disbursements.

The Glentanner, Swa. 415; *The Feronia*, 16 W. R. 585, L. R. 2 A. & E. 65; *The Mary Ann*, 14 W. R. 136, L. R. 1 A. & E. 8; and *The Ringdove*, 34 W. R. 744, 11 P. D. 120, overruled.

Decision of the Court of Appeal, 35 W. R. 824, 12 P. D. 158, reversed.—*Hamilton* v. *Baker*, H.L. 129—14 App. 209.

SALVAGE—

28. *Compulsion—Costs.*—The salving vessel had found the salved vessel in the Atlantic in distress, having lost part of her propeller and leaking, and being unable to use her engines, and the salving vessel had towed the salved vessel into Halifax.

The master of the salving vessel before rendering the service, had insisted on the master of the salved vessel signing an agreement that the owners of the salved vessel should pay £5,000 if successful, or a sum for work done if unsuccessful.

The master of the salved vessel had reasonable grounds for believing that if he did not sign the agreement his vessel would be abandoned. £5,000 was more than one-fifth of the total value of the salved vessel, her cargo, and freight.

Held, that the agreement must be taken to have been made under compulsion and could not be enforced, but the salvors were awarded £3,000 as a fair remuneration for the service, and were also allowed their costs.—*The Mark Lane*, P.D & A.D.—15 P. D. 135.

29. *Passengers.*—A steamer, with a cargo of cattle in charge of men who were nominally on the ship's books, but were paid by the owners of the cattle, towed a disabled ship for a long distance to Queenstown. The keepers of the cattle rendered no assistance.

Held, that the keepers of the cattle were not entitled to share in the salvage.—*The Coriolanus*, P.D. & A.D.—15 P. D. 103; 62 L. T. 844.

30. *Towage—Contract—Action* in personam.—The plaintiffs, the owners of a steam tug, contracted with the defendants, the owners of five steel barges, to tow the barges from Chepstow to Portland for a fixed sum. During the progress of the voyage the barges broke adrift, and were saved by the tug, which also saved the lives of some of the bargemen.

At the end of the voyage two of the barges were given up by the defendants to the Government. An action of salvage was brought *in personam* against the defendants in respect for salvage to these two barges, and *in rem* against the three barges remaining in the defendants' possession.

Held, that the plaintiffs were entitled to salvage, and that an action *in personam* would lie against the defendants.—*Five Steel Barges*, P.D. & A.D.—15 P. D. 142.

31. *Towing—Contract—Increased perils.*—The defendants' steamship becoming disabled when about 250 miles from Gibraltar and about sixty from Carthagena, an agreement was made with the master of the plaintiffs' steamship that the plaintiffs' vessel should tow the ship to Gibraltar for £600, the defendants' vessel to provide the hawsers. At this time the weather was moderate. The next day the wind increased to a hurricane, and, in consequence, several of the hawsers broke, only one rope being left. The master of the plaintiffs' vessel, finding it impossible to tow to Gibraltar, towed the defendants' vessel to Carthagena. The plaintiffs brought an action of salvage.

Held, affirming the judgment of Butt, J., that the supervening circumstances had made the service rendered wholly different from that contracted for, and that the court had jurisdiction to award salvage entirely independent of the contract.—*The Walbourne*, C.A. 56—14 P. D. 132; 58 L. J. P. D. & A. 79; 61 L. T. 156.

TOWING—

32. *Lien.*—There is no maritime lien for ordinary

towage services rendered to a ship, either on the high seas or within the body of a county.—*Westrup* v. *Great Yarmouth Steam Carrying Co.* CH.D. KAY, J. 505—43 Ch. D. 541; 59 L. J. Ch. 111.

See also COSTS, 2; COUNTY COURT, 1, 4; DAMAGES 3, 4; DISCOVERY, 10; ELECTION LAW, 8; INSURANCE 4—6; PRACTICE; WATERMAN.

SHORTHAND NOTES.—See COSTS, 25.

SLANDER:—

Innuendo.—In an action for slander the statement of claim alleged that the defendant falsely and maliciously published the following words as to the plaintiff:—"Did he have a fire twice?" (meaning that the plaintiff had twice set his own premises on fire), and "He has had two fires, and is a dangerous man to have on your premises" (meaning that the plaintiff was likely to commit arson again).

Held, that the statement of claim did not disclose a good cause of action.—*Jacobs* v. *Schmaltz*, Q.B.D.—62 L. T. 121.

SOLICITOR:—

1. *Assignment of verdict—Priority—Garnishee order—Ord.* 45, *r.* 1.—A., a solicitor, was the assignee of a verdict recovered in the Mayor's Court, the deed of assignment containing a covenant for further assurance of the amount of the verdict or other sums becoming payable to the assignor. The case was tried a second time, A. being solicitor for the plaintiff, and a verdict was again given for the plaintiff. B., a judgment creditor of the assignor, obtained a garnishee order attaching the amount recovered.

Held, (1) that A. was entitled to the benefit of the assignment made before he began to act as solicitor in the action; (2) that the assignment to A. was entitled to priority over the garnishee order.—*Davis* v. *Freethy*, Q.B.D.—24 Q. B. D. 519.

2. *Charging order—Property preserved—Payment into court—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—The plaintiffs, solicitors, obtained an order that the defendants should pay the amount claimed into court as a condition of leave to defend the action. The plaintiff afterwards compromised the action without his solicitor's knowledge, and without provision for costs.

Held, that the court had jurisdiction to give the plaintiff's solicitors a charging order on the money paid into court.—*Moxon* v. *Sheppard*, Q.B.D. 704—24 Q. B. D. 627; 59 L. J. Q. B. 286.

3. *Charging order—Property preserved—Probate action—Trustee in bankruptcy—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—A will and codicil were propounded by the surviving executor. D., the daughter of the testator, denied only the validity of the codicil. E., a legatee under the codicil intervened, and propounded the codicil in March, 1887. In May, 1887, E.'s trustee in bankruptcy obtained leave to intervene. In November, 1887, the court pronounced for the will and codicil, but reserved all questions as to costs. In December, 1887, it was ordered that the costs of the bankrupt should be paid out of the residue, if any. There was no residue. In April, 1889, an order was made giving E.'s solicitor a charge in respect of his costs on E.'s interest under the codicil. The trustee in bankruptcy applied to set aside the order.

Held, that E.'s solicitor was entitled to a charge only on the balance remaining after the creditors had been paid.—*Keeson* v. *Luxmoore*, P.D. & A.D.—61 L. T. 199.

3a. *Charging order—Sale—Costs—Service of order—Advertisement—Practice.*—In an action for the execution of the trusts of a settlement, the plaintiffs were one of the two trustees, the tenant for life, and three out of the four beneficiaries in remainder; and the other trustee was the sole defendant, the fourth beneficiary not being a party to the action. Judgment for execution of the trusts being obtained, the plaintiffs' solicitors subsequently obained a charging order on the real estate comprised in the settlement for taxed costs, with liberty to apply for a sale. The fourth beneficiary was not a party to this order. On a summons for a sale under the liberty to apply,

Held, that no order for sale could be made without notice to the fourth beneficiary, but that substituted service of such notice might be given by means of advertisement, and if the fourth beneficiary failed to answer within the time limited by such advertisement, that then the order for sale might go.—*Rowley* v. *Southwell*, CH.D. NOR., J.—61 L. T. 805.

4. *Lien — Property recovered — Compromise of action—Notice.*—An action having been compromised before trial, upon the terms that a sum of £50, which had been paid into court by the defendant, should be paid to the plaintiff in discharge of all claims, W., the plaintiff's solicitor, who had ceased to act for him, thereupon gave notice to the defendant's solicitors not to part with the money until W.'s costs of the action had been paid. The defendant's solicitor disregarded the notice, and paid the £50 over to the plaintiff.

Held (1), that the £50 constituted the fruits of the action, and that W. was entitled to a lien upon it for his costs; (2) that the defendant's solicitors were liable to pay the £50, or so much thereof as would satisfy the lien, to W.; (3) that the plaintiff was also liable, but not the defendant, who had received no notice of the lien.—*Ross* v. *Buxton*, CH.D. STI., J. 71—42 Ch. D. 190; 58 L. J. Ch. 442; 60 L. T. 638.

5. *London agent — Half profits — Interest.*—An agreement between a country solicitor and a London solicitor that the latter should act as the London agent of the former, "upon the usual agency terms," entitles the London agent to his disbursements out of pocket, and to half the "profit charges," whether the country solicitor is paid them by his client or not, but does not entitle the London agent to any share whatever in any other profit made by the country solicitor out of the business.

W., a country solicitor, entered into an agreement with L., a London solicitor, that the latter should act as W.'s London agent on the usual agency terms, and subsequently a further agreement was made that all the business in connection with a particular company, a client of W., and the bills of costs in respect of such business, were to be kept separate from the other agency business and bills of costs, and that L. was not to call upon W. to pay him until W. had himself been paid by the company. The company having failed to pay for many years, W., sued them and recovered payment of his costs, with interest. L. claimed to be entitled to a share in this interest under his agreements with W.

Held (reversing the decision of Chitty, J.), that, upon the true construction of the agreements, the usual agency terms applied except so far as expressly varied, and that, in the absence of any express stipulation as to interest, L.'s claim to share in it could not be sustained.—*Ward* v. *Lawson; Lawson* v. *Ward*, C.A. 300—43 Ch. D. 353; 59 L. J. Ch. 323; 62 L. T. 158.

6. *Remuneration—Bankruptcy — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 72, 73—*Bankruptcy Rules*, 1886, *rr.* 305, 306.—Where a solicitor is appointed trustee in a bankruptcy, his remuneration must be in the nature of a commission or percentage, and the creditors have no power to pass a resolution directing that the remuneration of such trustee shall be his proper professional charges as a solicitor for work done and expenses incurred by him in or about

the bankruptcy proceedings.—*Ex parte Board of Trade, In re Wayman*, Q.B.D., BKCY. 95—59 L. J. Q. B. 28; 61 L. T. 644.

7. *Remuneration—Lease—Consideration—Premium—Rent—Remuneration Order*, 1882, *schedule II.*—Where a lease is granted partly in consideration of a premium and partly in consideration of a rent, the solicitor is entitled to receive remuneration on a scale calculated upon both the premium and the rent.—*In re Robson*, CH.D. NOR., J. 556.

8. *Remuneration—Mortgage—Solicitor-mortgagee—Profit costs.*—A mortgagee who acts in person as a solicitor in realizing his security cannot recover profit costs from the mortgagor, but only costs out of pocket.

Sclater v. *Cottam*, 5 W. R. 744, approved.—*Ex parte Lickorish, In re Wallis*, C.A. 482—25 Q. B. D. 176; 62 L. T. 694.

9. *Remuneration—Mortgage—Solicitor-mortgagee—Profit costs.*—A solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself.—*In re Roberts*, CH.D. KAY, J. 225—43 Ch. D. 52; 59 L. J. Ch. 25.

10. *Remuneration—Solicitor acting for mortgagor and mortgagee—Agreement as to costs of both parties—Reference to taxing master.*—A solicitor was instructed by a letter signed by S. to borrow £300 for him upon certain specified security, and S. thereby undertook to pay "your costs (which I agree at £20, exclusive of money out of pocket) . . . to be incurred in . . . doing what is necessary for the purpose of carrying out these instructions." The solicitor, who acted in the matter for the mortgagee as well as the mortgagor, procured the advance, and retained £20 for his costs of both parties. S. having subsequently applied that the solicitor might be ordered to deliver a bill of his fees, charges, and disbursements, and that it might be referred to taxation,

Held (affirming the decision of North, J.), that, though the remuneration agreed upon included matters in respect of which the solicitor was not engaged as solicitor for S. (including as it did the mortgagee's costs), yet as the solicitor was engaged by S. to do business for him as a solicitor, S. was thereby constituted a "client" of the solicitor within the meaning of section 1, sub-section (3), of the Solicitors' Remuneration Act, 1881, and within the meaning of that Act generally, and the letter amounted to an agreement within section 8 of the Act.

Held, also, that, in the absence of any evidence impeaching the agreement as unfair or unreasonable, the court ought not to refer it to the taxing master under section 8, sub-section (4), to deal with it in exercise of the powers thereby given.—*In re Palmer*, C.A. 673—62 L. T. 778.

11. *Remuneration—Vendor and purchaser—Abortive sale—Costs—Remuneration Order, Schedule I., Part I., r. 2; Schedule II.*—Solicitors are not bound to wait to be paid for their services in respect of an abortive sale when it is unlikely that the property will be again put up for sale for some years, and are entitled to have their costs taxed under rule 2 (c) of the General Order under the Solicitors' Remuneration Act, 1881.—*In re Smith, Pinsent, & Co.*, CH.D. CHI., J. 685—44 Ch. D. 303.

12. *Striking solicitor off rolls—Appeal.*—An appeal will lie to the Court of Appeal against an order of the court striking a solicitor off the rolls under section 32 of the Solicitors Act, 1843.—*In re Eede, Ex parte Davey*, C.A. 683—25 Q. B. D. 228; 59 L. J. Q. B. 376.

13. *Striking off rolls—Application by third person—Solicitors Act*, 1888 (51 & 52 *Vict.* c. 65), *ss.* 13, 15—*Rules, Part I., r.* 1; *Part VI., r.* 3; *Form V.*—An application under section 13 of the Solicitors Act, 1888, to strike the name of a solicitor off the rolls may be made by a person who has not employed the solicitor in a professional capacity.

Decision of the Queen's Bench Division (38 W. R. 507) affirmed.—*Ex parte Official Receiver, In re Sankey*, C.A. 533—25 Q. B. D. 17.

See also ADMINISTRATION, 10; BANKRUPTCY, 26; COSTS, 5, 12, 13, 19—27; COUNTY COURT, 9; DISCOVERY, 8; LIMITATIONS, STATUTE OF, 12; LOCAL GOVERNMENT, 10; MORTGAGE, 5; NEGLIGENCE, 2.

SPECIFIC PERFORMANCE:—

Lease—Breach of covenant—Acceptance of rent—Conveyancing Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14.—A. was in possession of land under an agreement for a lease to be granted when he should have fulfilled certain conditions as to building, but it was the intention of the parties that the agreement should be treated as a lease. The conditions were not fulfilled by the appointed time, but the landlord afterwards demanded and received rent.

Held, that A. was entitled to specific performance of the agreement for a lease.—*Strong* v. *Stringer*, CH.D. REK., J.—61 L. T. 470.

See also COMPANY, 39; CONTRACT, 1, 3; DISCOVERY, 2; PARTNERSHIP, 1; VENDOR AND PURCHASER, 9.

SPECIFICATION.—See PATENT.

STAMP:—

1. *Conveyance—Sale of goodwill*—Ad valorem *duty—Stamp Act*, 1870 (33 & 34 *Vict.* c. 97), *s.* 70.—An agreement to sell a business and the goodwill thereof, on certain conditions precedent being fulfilled, is not chargeable, under section 70 of the Stamp Act, 1870, as a "conveyance or transfer on sale," with an *ad valorem* duty for the goodwill (see 52 & 53 Vict. c. 7, s. 18).—*Inland Revenue Commissioners* v. *Angus*; *Inland Revenue Commissioners* v. *Lewis*, C.A. 3—23 Q. B. D. 579; 61 L. T. 832.

2. *Settlement—Variation of investments—Deed*—Ad valorem *stamp—Stamp Act*, 1870 (33 & 34 *Vict.* c. 97), *schedule.*—A marriage settlement was executed whereby certain stocks and other property were settled. The interest which the settlor had in the various stocks and property was contingent, and the investments representing the property comprised in such settlement could be varied by the trustees at pleasure.

Held, that the instrument was a "settlement" of a "certain and definite amount of stock" within the meaning of the word "settlement" in the schedule to the Stamp Act, 1870, and required to be stamped with an *ad valorem* stamp of five shillings for every £100, in addition to the ordinary stamp of ten shillings as a deed.—*Onslow* v. *Inland Revenue Commissioners*, Q.B.D. 445—24 Q. B. D. 584; 59 L. J. Q. B. 321; 61 L. T. 461.

3. *Settlement—Voluntary settlement—Customs and Inland Revenue Act*, 1881 (44 & 45 *c.* 11), *s.* 38—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict.* c. 7), *s.* 11 (2).—Section 11 of the Customs and Inland Revenue Act, 1889, is retrospective, and the words of section 38 (2) of the Customs and Inland Revenue Act, 1881, are to be construed as if the words of section 11 of the later Act were therein incorporated; and this construction is to be applied even if an information to recover an account stamp duty under the sub-section was filed, and all the pleadings closed before the date of the passing of the later Act.—*Attorney-General* v. *Theobald*, Q.B.D. 527—24 Q. B. D. 557; 62 L. T. 766.

STATUTES.—See end of Digest, after Rules of Court.

STOCKBROKER.—See Banker, 3; Principal and Agent.

STREET.—See Limitations, Statute of, 8; Local Government, 3, 7, 12—16; Metropolis Management Acts, 3.

TAXATION.—See Costs, 19—27; Sheriff, 1, 2;

TENANCY for LIFE—See Administration, 3; Infant, 4; Lands Clauses Consolidation Act, 9; Settlement, 11—16; Vendor and Purchaser, 14, 15; Will, 29, 41—43.

TENANCY from YEAR to YEAR.—See Landlord and Tenant, 9.

TENANCY in COMMON.—See Banker, 2; Husband and Wife, 10; Partnership, 3; Will, 19, 27.

TENANCY in TAIL.—See Copyhold, 2; Limitations, Statute of, 7.

TENDER.—See Bankruptcy, 3; Canada, Law of, 2; Costs, 28; Insurance, 1; Mortgage, 6, 22a.

THEATRE—See Covenant, 2.

THELLUSSON ACT.—See Scotland, Law of, 4.

THIRD PARTY.—See Costs, 27, 29; Discovery, 12; Estoppel, 1; Practice, 12, 26, 27.

TIMBER.—See Settlement, 16.

TITLE.—See Vendor and Purchaser, 3, 4, 11—15.

TOWING.—See Shipping, 30—32.

TOWN CLERK.—See Discovery, 8; Local Government, 10.

TRADE-MARK:—

1. *Infringement—Rectification of register—Burden of proof—Trade-Marks Act*, 1875 (38 & 39 *Vict.* c. 91), *s.* 10.—The plaintiffs sued to restrain the infringement of a trade-mark, registered in 1878, in respect of goods sold by their predecessors since 1854. The defendants moved to expunge the trade-mark from the register on the ground that at the time of the registration the words forming the trade-mark had become the ordinary name of the goods.

Held, that the burden of proof was on the defendants.—*Edgington* v. *Edgington*, ch.d. kay, *j.*—61 L. T. 623.

2. *Infringement—Rectification of register—Writ-Service out of the jurisdiction—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 90, 107, 111, 117—*Ord.* 11, *rr.* 1 (f), 2.—The fact that a motion on behalf of the plaintiffs to rectify the register by striking out the defendants' trade-mark is pending is not material in considering the balance of convenience to the parties.

In an action to restrain infringement of the plaintiffs' trade-marks, the defendants being a company having their principal place of business in Belfast, and supplying customers, but having no agents in England, an order made *ex parte*, giving leave to serve the writ out of the jurisdiction, was discharged.—*Kinahan* v. *Kinahan*, ch.d. kek., *j.* 655—62 L. T. 715.

3. *Infringement—Registered owner—Agency—Right to sue—Practice.*—R. had bought from Heidsieck & Co., who were the registered proprietors of two trade-marks in champagne, the exclusive right to sell Heidsieck's champagne in England.

Held, that R. had no right of action to prevent the infringement of Heidsieck's trade-marks.—*Richards* v. *Butcher*, ch.d. kay, *j.*—62 L. T. 867.

4. *Infringement—Registration for one class of goods—Use for another class—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 62, 65, 70, 77.—The right of action for improper user of a trade-mark registered under the Patents, Designs, and Trade-Marks Act, 1883, is limited to the particular class of goods in respect of which the trade-mark was registered.—*Hart* v. *Colley*, ch.d. non., *j.* 440—44 Ch. D. 193; 59 L. J. Ch. 355; 62 L. T. 623.

5. *Infringement—Trade name—Injunction—Trade-Marks Act*, 1875 (38 & 39 *Vict.* c. 91), *s.* 10—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 64 (3).—E. opened shops in London and other English towns for sale of wines and spirits by the cask, bottle, or glass. Before 1875 E. used the word "Bodega" as a trade-mark, and he registered it in 1876. Each of his places of business was known as "The Bodega." In 1881 he sold his business, goodwill, and trade-mark to the plaintiff company, which continued to use the mark, and was registered in 1883 as proprietors of it. The company opened a shop at Dublin and called it a "Bodega," all rights in respect of which were afterwards assigned to D., with the exclusive right to use the trade-mark in Ireland. In 1888 the defendant opened a shop at Belfast and called it "The Bodega Wine Vaults." Except in three cases, unknown to the plaintiffs, no "Bodegas" other than those of the company, and of E. and D., had been opened.

Held, (1) that the mark was a special and distinctive trade-mark; (2) that the defendant must be restrained by injunction from using "Bodega" as either a trade-mark or a trade name.—*Bodega Co.* v. *Owens*, v.c. (Ir.)—23 L. R. Ir. 371.

6. *Rectification of register—Foreign mark—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 103.—In 1884 V. registered as a trade-mark for fermented liquors a label including the word "Monobrut." The mark had been previously registered in France. In 1888 V. transferred the mark to L., who advertised "Monobrut" champagne. R., who had had since 1883 the sole right to sell in England champagne bearing the trade-marks "Monopole" and "Dry Monopole," applied to expunge the "Monobrut" mark.

Held, that the trade-mark must be removed from the register.—*In re Vignier*, ch.d. kay, *j.*—61 L. T. 495.

7. *Rectification of register—Mistake—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 90.—Where trade-marks belonging to A. were registered by mistake in B.'s name, the court ordered B.'s name to be expunged, but refused to rectify the register by inserting A.'s name.—*Ex parte Kingsford*, ch.d. kay, *j.*—61 L. T. 426.

8. *Rectification of register—Old mark—Design—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 90.—A word which has been registered as an old trade-mark, and has remained on the register for five years without opposition, will be removed from the register on proof that before its registration it was not used as a trade-mark, but to specify a particular pattern or design.—*In re Harrison's Trade-Mark*, ch.d. kek., *j.*—42 Ch. D. 691; 59 L. J. Ch. 22.

8a. *Rectification of register—Old mark—Design.*—M. & Co., in January, 1884, registered as a trade-mark the word "Albion," which they had used since 1873, and it remained on the register five years. On motion by W. & Co., the court directed that the mark be expunged from the register, it appearing that prior to the 13th of August, 1875, M. & Co. had used the mark, not as a trade-mark, but as designating the pattern or design of goods manufactured by them.—*In re McGregor & Co.'s Trade-Mark*, ch.d. kek., *j.*—61 L. T. 484.

9. *Rectification of register—"Person aggrieved"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 90.—In 1885 Nestor Gianacli registered as a trade-mark the words "Gianacli's Cigarettes" in ordinary capital letters, the mark not having been used before 1885. In 1889 G. sued A. for selling cigarettes in boxes labelled "N. Gianulis." The registered trade-mark was referred to in the statement of claim, but no relief was asked in respect of its infringement. A. applied for the removal of the mark from the register.

Held, that the mark had been wrongfully registered, and must be removed from the register without waiting for the trial of the action.—*In re Gianacli*, CH.D. NOR., J.—58 L. J. Ch. 782.

9a. *Rectification of register—Proprietor—Name.*—The sole consignee in England of the wines grown at the vineyards in South Australia known as the Auldana vineyards, registered in his own name the word "Auldana" as a trade-mark in respect of wines, intending to use the registration solely in protection of the wines coming from the Auldana vineyards during the continuance of the agreement constituting him consignee. He subsequently went into liquidation, and the trustee in the liquidation sold and assigned his business and the trade-mark to the Australian Wine Co. (Limited), who procured themselves to be registered as the subsequent proprietors of the trade-mark. On motion by the owners for the time being of the Auldana vineyards,

Held, that the trade-mark had originally been rightfully registered for the protection of the owners of the vineyards, and that the register must be rectified by removing therefrom the name of the Australian Wine Co. (Limited) and inserting instead the names of the owners of the vineyards as proprietors.—*In re Australian Wine Co.*, CH.D. CHI., J.—61 L. T. 427.

10. *Registration—Disclaimer—Deceptive mark—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 72, 74.—An application to register a trade-mark, consisting of a heart having within it "No. 176," with the words "Goodall's Cream-Wove Parchment Bank" above it, and the words "Note Paper: Charles Goodall & Son, London," below it, the whole being enclosed in a rectangle, was refused, on the ground that there was already on the register a trade-mark consisting of the words "Pirie's Parchment Bank," and that there was such resemblance between them as was calculated to deceive.

A disclaimer of any right to the exclusive use of a common particular, under section 74 (2) of the Patents, Designs, and Trade-Marks Act, 1883, must be made in the application to register the trade-mark containing the common particular.—*In re Goodall's Trade-Mark*, CH.D. NOR., J. 189—42 Ch. D. 566.

11. *Registration—Fancy word—Distinctive mark—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1), (c), (2), 74, (1), (b), (2), (3), 90.—The word "distinctive" in section 74 (1), (b), of the Patents, Designs, and Trade-Marks Act, 1883, means *primâ facie* distinctive, and any word which, though *primâ facie* distinctive, is, in fact, common to the trade, must be disclaimed when registered as part of a combination.

The words "common to the trade" in section 74 (1), (b), are equivalent to "open to the trade."—*Burland* v. *Broxburn Oil Co.*, CH.D. CHI., J. 89—42 Ch. D. 89; 58 L. J. Ch. 816; 61 L. T. 618.

12. *Registration—Fancy word—Invented word—Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10 (1).—The word "Satinine," when applied to starch and other articles which give a glossy surface, is descriptive of the effect produced by such articles, and is not capable of registration as a trade-mark under section 10 (1) of the Patents, Designs, and Trade-Marks Act, 1888.

Semble, the word "Satinine," being formed from a well-known word by the addition of a termination well known in many other words, is not an "invented word" within section 10 (1) of the Act.—*In re Meyerstein's Trade-Mark*, CH.D. KAY, J. 440—43 Ch. D. 604; 59 L. J. Ch. 401; 62 L. T. 526.

13. *Registration—Fancy word—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—In 1887 B. applied for the registration of the word "Oomoo" as a trade-mark for wines and spirits. The application was opposed by P., the registered owner of a trade-mark for wines, consisting of the word "emu," and the representation of a bird.

Held, (1) that section 10 of the Patents, Designs, and Trade-Marks Act, 1886, is not retrospective; (2) that there was no similarity calculated to deceive, and B. was entitled to register his mark.—*In re Burgoyne*, CH.D. CHI., J.—61 L. T. 89.

14. *Registration—Words calculated to deceive—"Fruit Salt"—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 73.—The Comptroller has a discretion under the Patents, &c., Act, 1883, to register a trade-mark or not, and he ought to refuse registration where deception may result.

The respondent applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. The appellant, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in an effervescing drink, opposed the application.

Held (Lord Halsbury, C., and Lord Morris dissenting), that upon the evidence the proposed words were, as a matter of fact, calculated to deceive the public, and that the trade-mark ought not to be registered.

Decision of the Court of Appeal (41 Ch. D. 479) reversed, and the decision of Kay, J., restored.—*Eno* v. *Dunn*, H.L.—15 App. Cas. 252.

See also MERCHANDISE MARK, 1, 2.

TRADE NAME:—

1. *Injunction—Infringement—Similarity of name.*—The plaintiffs had for many years carried on the business of steel plate manufacturers at Sheffield under the corporate name of "Thomas Turton & Sons (Limited)," and that name had obtained a prestige in the trade. The defendant had also for many years carried on at Sheffield a similar business under the name of "John Turton & Co." In 1888 the defendant took two of his sons into partnership with him, and they adopted the name of "John Turton & Sons" as their firm name. The plaintiffs sought to have the defendants and his sons restrained from carrying on business under the name of "John Turton & Sons," or any other name so closely resembling the name of the plaintiffs as to be calculated to deceive. The evidence showed that the defendants had done nothing—apart from the adoption of the name of "John Turton & Sons"—to represent their goods or the business carried on by them as being the same as, or in any way connected with, the goods or business of the plaintiffs; but there was evidence that, owing to the similarity of the names of the two firms, letters intended for the plaintiffs had been sent to the defendants.

Held, that the plaintiffs were not entitled to an injunction.

Hendriks v. *Montague*, 30 W. R. 168, 17 Ch. D. 638, discussed.

Decision of North, J., reversed.—*Turton* v. *Turton*, C.A. 22—42 Ch. D. 128; 58 L. J. Ch. 677.

2. *Injunction — Infringement—Company—Registration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 20. —The plaintiff company carried on an old-established business of waxwork exhibitors. The defendant, Louis Joseph Kenny Tussaud, formed a company under the name of Louis Tussaud (Limited) to carry on a similar business within a short distance of the plaintiffs' exhibition. Apart from the proposed adoption of the name Louis Tussaud (Limited), there was no evidence of intention on the part of the defendant or the intended new company to deceive the public, and the prospectus of the new company stated that they had no connection with the plaintiffs. The defendant had never carried on any similar business on his own account. His only interest in the new company was that he was a large shareholder, and held a salaried post as manager and wax modeller.

Held, that the name of the new company so closely resembled that of the old company as to be calculated to deceive, and that an injunction must be granted to restrain the defendant from registering a company under that name.—*Tussaud* v. *Tussaud*, CH.D. STI., J. 503—62 L. T. 633.

See also TRADE-MARK, 5; VENDOR AND PURCHASER, 5.

TRADE UNION.—See FRIENDLY SOCIETY, 1, 2.

TRAMWAY.—See LOCAL GOVERNMENT, 16.

TRESPASS:—

Mischievous animal—Elephant—Injury—Liability of owner.—The plaintiff was present at a public performance given by the defendants, when an elephant which was being exhibited by them attacked and injured him. The jury found that the elephant in question was not an animal dangerous to man, and that the plaintiff did not bring the attack upon himself.

Held, that the defendants were liable, as elephants belonged to the class of animals dangerous to man, and a person who kept an animal of that class was liable for injury done by it.—*Filburn* v. *People's Palace and Aquarium Co.*, C.A. 706—25 Q. B. D. 258.

See also CRIMINAL LAW, 9; DAMAGES, 5.

TRIAL.—See LANDS CLAUSES CONSOLIDATION ACT, 4; NEW TRIAL; PRACTICE, 26.

TRUCK ACTS.—See MASTER AND SERVANT, 9.

TRUSTEE:—

1. *Appointment—New trustee—Separate trusts—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 32—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 39), *s.* 5 (1).—Under section 32 of the Trustee Act, 1850, the court will appoint separate trustees for a part of a trust property which is held on distinct trusts.

One of two trustees under a will died, and the other absconded with the residuary trust funds. The only fund forthcoming was a sum in Indian 3½ per Cent. Stock, which was subject to distinct trusts under the will.

Held, that it was expedient to appoint separate trustees.—*In re Aston's Trusts*, M.R. (Ir.)—26 L. R. Ir. 96.

2. *Appointment—New trustee—Settlement—Donee of power.*—The donee of a power of appointing new trustees cannot appoint himself.

By a marriage settlement property of the wife was settled on trusts in favour of the wife, her children, appointees, and next of kin, and if any trustee should die or go to reside abroad, or desire to retire from, or refuse, or become incapable, to act in, the trusts, the husband and wife, or the survivor of them, and, after the death of the survivor, the continuing trustees or trustee, or, in default of a continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrator of the last acting trustee, were empowered to appoint any "other" person or persons in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act. The husband and wife appointed the husband and A. trustees in the place of retiring trustees.

Held, that the appointment of the husband was invalid.—*Skeats* v. *Evans*, CH.D. KAY, J.—42 Ch. D. 522; 61 L. T. 500.

3. *Appointment—New trustee—Vesting order—Originating summons—Trustee Act*, 1850 (13 & 14 *Vict. c.* 50) *ss.* 35, 43—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 17—*Ord.* 55, *r.* 13a.—An order appointing new trustees, made on motion in proceedings instituted by way of an originating summons, may also vest in the trustees a right to call for the transfer of stock under section 35 of the Trustee Act, 1850.—*In re Jones*, CH.D. KEK., J. 203—59 L. J. Ch. 157.

4. *Appointment — New trustee— Vesting order—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 10.—If one of two trustees is residing permanently out of the jurisdiction, and a new trustee has been appointed in his place, the court has power under section 10 of the Trustee Act, 1850, to make an order vesting the trust property in trustees appointed out of court.—*In re O'Gorman's Trusts*, M.R. (Ir.)—25 L. R. Ir. 93.

5. *Breach of trust—Mortgage—Purchase of equity of redemption—Infant—Compromise by trustees—Estoppel.*—By a settlement property was vested in trustees to be invested as the settlor directed, with power to them to invest upon freehold, copyhold, leasehold, or chattel real securities, including equitable mortgages by deposit, and in the purchase of freehold and leasehold hereditaments. After the death of the settlor the trustees, to save a sum advanced during the life and by the direction of the settlor on second mortgage, agreed to purchase the equity of redemption of the property. One of the *cestui que trusts* brought an action alleging breaches of trust by reason of improper investments, and the details of the investments in question were set out in an affidavit filed by the trustees. The plaintiffs in the present action, who at the time of the first-mentioned action were infants, had been served with the judgment and had leave to attend. The first action was compromised. The infants, on coming of age, brought the present action against the trustees for improper investment by reason of the purchase of the equity of redemption.

Held, that the power to purchase freehold or leasehold hereditaments did not authorise the purchase of an equity of redemption, which was a breach of trust.

Held, also, that the question as to the breach of trust was not *res judicata*, and the present plaintiffs were not estopped from bringing the action.—*Worman* v. *Worman*, CH.D. KEK., *J.* 442—43 Ch. D. 296.

5a. *Breach of trust—Discretion—Maintenance—Assignment by beneficiary—Payments by trustees after notice.* — A testator gave a share of his estate to trustees upon trust during the life of one of his sons to pay and apply the whole or any part of the income or accumulations of income of the share for the support, maintenance, or education, or otherwise for the benefit of that son, his wife, or children, in such manner in all respects as the trustees should in their

uncontrolled discretion think fit. The son assigned his interest by way of mortgage to the plaintiff, and notice of the assignment was given to the trustees of the will, but, after receiving such notice, they made payments out of the income of the share to or on behalf of the son.

Held, that the beneficial interest of the son under the will was that which he was entitled to assign; that money paid to him or to any person on his behalf was necessarily part of his beneficial interest; and that it must be assumed that money paid by the trustees to him or to any person on his behalf was his in their irrevocable determination immediately before the payment at which period of time the trustees were affected with notice of assignment, and, therefore, that the trustees were liable for all sums paid to or on behalf of the son after they had received notice of assignment.—*Hemming* v. *Neil*, CH.D. KEK., J.—62 L. T. 649.

6. *Investment—Negligence—Mortgage—Burden of proof—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 5.—The burden of proof is on a trustee who seeks to show, under section 5 of the Trustee Act, 1888, that, except as to value, the investment was in all respects a proper one.

An investment of trust funds in a mortgage of an undivided third, with an undivided moiety of another third of the reversion of land held at a rent, is within the rule which limits the loans to one-half of the value of the land.—*Jones* v. *Julian*, M.R. (IR.)—25 L. R. Ir. 45.

7. *Investment—Negligence—Retirement of trustee.*—U., a trustee, authorized to invest in real securities, invested £1,300 on a mortgage of freehold property, consisting of cottages, some of which were at the time unfinished, and the remainder of which were let at weekly rents to labourers. The property at the time of the mortgage had been valued at £1,750. U. afterwards retired from the trust, and new trustees were appointed, and the mortgage security was transferred to them. The new trustees, with the assent of the plaintiff, who was an assignee of one of the *cestui que trusts*, sold by public auction the mortgaged property under the power of sale contained in the mortgage. The property realized a loss on the £1,300, but the sale was not in any way impeached. No offer had been made to U. to take the security for himself on paying the trust fund the amount lent on the security. The plaintiff sought to make U. liable for the loss realized by the plaintiff.

Held, that, though the mortgage investment was an investment authorized by the terms of the trust, it was, having regard to the value and the nature of the property, an improper investment; that U. was liable to make good to the plaintiff the loss occasioned thereby; and that U. was not relieved from that liability by the fact that he had been given no opportunity of electing to keep the security for himself.

Decision of Kekewich, J., reversed.—*Priest* v. *Uppleby*, C.A. 150—42 Ch. D. 321; 61 L. T. 146.

8. *Investment—Negligence—Sale of security—Re-investment—Mortgage—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 4, 5.—The executors and trustees of a will continued the testator's investment in two bonds to satisfy a trust legacy. The bonds increased in value, and the trustees sold them and invested part of the proceeds in freehold mortgages. The security proved insufficient.

Held, that the sale and re-investment was not justified, and that the trustees were not protected by sections 4 and 5 of the Trustee Act, 1888, but must account for the value of the bonds.—*Walker* v. *Walker*, CH.D. KEK., J.—59 L. J. Ch. 386; 62 L. T. 449.

9. *Investment—Will—"Public company."*—Trustees were authorized by a will to invest in "debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The trustees invested funds in debentures of a company formed under the Companies Act, 1862, with a capital of £600,000, of which £480,000 had been issued in 30,000 £16 shares, with £11 paid up. The shares, but not the debentures, of the company had an official quotation on the Stock Exchange.

Held, that the investment was authorized by the will.—*Ricketi* v. *Sharp*, CH.D. STI., J.—62 L. T. 364.

10. *Leaseholds—Conversion—Power coupled with a trust—Jurisdiction.*—Where a power is coupled with a trust or duty, the court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.

Tempest v. *Lord Camoys*, 21 Ch. D. 571, followed.—*In re Burrage, Burningham* v. *Burrage*, CH.D. CHI., J.—62 L. T. 752.

11. *Mistake—Voluntary contributions.*—The trustees under a will voluntarily added certain sums to the settled share of a beneficiary under an erroneous belief as to the proper construction of the will. The will was afterwards construed by the court in such a manner as to show that the view taken by the trustees was wrong.

Held, that the voluntary contributions must be held upon the trusts of the will as declared by the court, and not as understood by the trustees.—*Nelson* v. *Walters*, CH.D. KEK., J.—61 L. T. 872.

12. *Vesting order—Infant—Transfer of stock—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 2—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 3.—Infants were entitled to legacies, which had been invested in Consols in the names of the executors under the will, and of the infants respectively entitled.

The court made an order under section 3 of the Trustee Extension Act, 1852, vesting in the executors the right to transfer the stock and receive the dividends until the transfer.—*Foster* v. *Barnett*, CH.D. STI., J.—61 L. T. 676.

See also ATTACHMENT, 7, 8; BANKRUPTCY, 27—31; BUILDING SOCIETY, 4; CHARITY, 1; COMPANY, 11; COSTS, 13a; DEED, 1; LIMITATIONS, STATUTE OF, 4, 9; MORTGAGE, 8; SAVINGS BANK; SCOTLAND, LAW OF, 5, 6; SETTLEMENT, 4; SOLICITOR, 3, 6; VENDOR AND PURCHASER, 14, 15; WILL, 4a, 15, 16, 21, 26, 28a, 44, 47.

ULTRA VIRES.—See BUILDING SOCIETY, 4, 5; COMPANY, 1, 18; FISHERY, 2; LOCAL GOVERNMENT, 3 MUNICIPAL CORPORATION.

UNDUE INFLUENCE.—See SETTLEMENT, 9; WILL, 51.

UNIFORMITY ACTS.—See ECCLESIASTICAL LAW, 4.

UNIVERSITIES ACT.—See CHARITY, 6.

VENDOR and PURCHASER:—

1. *Conditions of sale—Rescission.*—Conditions of sale provided that, if the purchaser should, within the time limited, make any objection to, or requisition on, the title, which the vendor should be unable or unwilling to remove, it should be lawful for the vendor to annul the sale. The purchasers offered to give time for the removal of an objection which they had made, but only on condition of being given an indemnity, and threatened litigation if the condition was not accepted.

Held, that the vendor, acting *bonâ fide*, was entitled to rescind.—*Woolcott* v. *Peggie*, P.C. 465—15 App. 43; 59 L. J. P. C. 44; 61 L. T. 845.

2. *Conditions of sale—Rescission—Requisitions—Non-compliance.*—A condition in a contract of sale that the vendor "be at liberty, by giving notice in writing, to rescind the contract in case the purchaser make any requisition which the vendor is unable or unwilling to comply with" gives the vendor the right—arising immediately upon any requisition being made which the vendor is unable or unwilling to comply with—to rescind the contract: the right to rescind arising under such a condition may be validly exercised by the vendor, without specifying in his notice of rescission the requisitions which he is unable or unwilling to comply with, and without communicating to the purchaser any reason for the inability or unwillingness, or allowing the purchaser any opportunity to withdraw his requisitions; the only qualification to which the vendor's right of rescission arising under such a condition is subject, is the implied qualification that the right must not be exercised by the vendor capriciously or unreasonably.

Decision of Chitty, J., affirmed.—*In re Starr-Bowkett Building Society*, C A. 1—42 Ch. D. 375; 58 L. J. Ch. 651; 61 L. T. 346.

3. *Conditions of sale—Title.*—A condition of sale which provides that the purchaser shall assume that the vendor derived a good title under a will does not preclude the puchaser from showing that on the true construction of the will a good title did not pass.—*In re McVicker's Contract*, V.C. (Ir.)—25 L. R. Ir. 307.

4. *Deposit—Forfeiture—Failure of title—Mistake.*—A contract for the sale of real property contained the usual conditions of sale and the ordinary provisions as to the forfeiture of the deposit. The vendor's title was fully disclosed and accepted, but the balance of the purchase-money was not paid and the deposit was forfeited. The property was afterwards sold to someone else, when a flaw in the title was discovered.

Held, in an action to recover the deposit by the former purchaser, that, the title having been accepted, the contract went off owing to his default, and that he could not recover.

Decision of the Court of Appeal (36 W. R. 207, 37 Ch. D. 96) affirmed.—*Soper* v. *Arnold*, H.L. 449—14 App. 429; 59 L. J. Ch. 214; 61 L. T. 702.

5. *Goodwill—Sale of business—Restricted right to use name of vendor.*—T. sold a business, goodwill, and stock-in-trade to S., including business cards bearing T.'s name. S. issued further cards bearing T.'s name as before. The assignment contained no express authority to S. to use T.'s name. T. moved to restrain S. from using his name on business cards, or otherwise trading in such name.

Held, that S. must be restrained from using T.'s name so as to in any way expose T. to any liability by holding him out as a person with whom contracts were made which might impose liability on him.

Levy v. *Walker*, 27 W. R. 370, 10 Ch. D. 436, distinguished.—*Thynne* v. *Shove*, CH.D. STI., J. 667—59 L. J. Ch. 509; 62 L. T. 803.

6. *Lien—Leasehold—Assignment—Consideration.*—An assignment of leaseholds in consideration of natural love and affection is not voluntary.

Leaseholds, on which there was a vendor's lien, were assigned by the purchaser to his son in consideration of natural love and affection. The son had no notice of the vendor's lien.

Held, that there was sufficient consideration in the assignment to make the son a purchaser for value instead of a volunteer, and that the vendor's lien would not prevail against the son.

Price v. *Jenkins*, 5 Ch. D. 619, 35 W. R. Dig. 253, followed.—*Harris* v. *Tubb*, CH.D. KEK., J. 75—42 Ch. D. 19; 58 L. J. Ch. 434; 60 L. T. 699.

7. *Malicious injury—Real estate contracted to be sold.*—A purchaser of land is not entitled to compensation for malicious injury done to the land sold after the contract but before the execution of the conveyance.—*In re Sweeny's Estate*, L.J (Ir.)—25 L. R. Ir. 252.

8. *Misrepresentation—Leasehold—Annual rental—Monthly tenancy—Knowledge of purchaser.*—The particulars of sale of leasehold property described as occupied at an annual rental, but omitted to state that the vendor, as landlord, paid the rates and taxes, and that the tenancy was a monthly one. There was evidence that at the sale the auctioneer stated the exact nature of the tenancy and arrangement as to the rates and taxes.

Held, that the purchaser of the property was not entitled to compensation.—*In re Edwards and Sykes*, CH.D. CHL., J.—62 L. T. 445.

9. *Power of sale—Mortgage—Building society—Specific performance — Costs — Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19 (1), 20 (1) (2).—By a building society's mortgage it was provided that, if default should be made in the performance of any of the covenants, the total sum for which the mortgage should then be redeemable should be considered as actually due and payable, and the power of sale given to mortgagees by the Conveyancing Act, 1881, should apply and be exercisable by the trustees of the society. The mortgagor neglected to pay one of the instalments, and the trustees contracted to sell the property.

Held, that the statutory power of sale, whether applicable to a building society mortgage or not, was incorporated in the mortgage by the act of the parties; that the money had become due; and that the power was exercisable.

The contract for sale was dated within less than three months of default, and no notice of the proposed sale had been given to the mortgagor nor to a second mortgagee under section 20 (1) of the Conveyancing Act, 1881. The purchaser ascertained the want of notice, and required the concurrence of the mortgagor, which was agreed to, and the second mortgagee was ready to do the same. The conditions of sale stated that the property was being sold by mortgagees under a power of sale, and that the assignment was to be taken without the concurrence of other parties.

Held, that, if the mortgagor and second mortgagee had not waived the notice, they had waived the right to object to the want of it; that want of notice did not prevent the vendors from exercising their power of sale; that the purchaser could get the title he had contracted to take; and that the vendors must bear the costs occasioned by the concurrence of the mortgagor and second mortgagee.—*In re Thompson and Holt*, CH.D. KEK., J. 525—44 Ch. D. 492.

10. *Production of documents—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3 (6).—A vendor is bound to furnish copies of all documents set out in the abstract of title if they are in his possession, and it is not enough for him to abstract such documents, and to allow the purchaser to inspect them.—*In re Furlong and Sheehan*, V.C. (Ir.)—23 L. R. Ir. 407.

11. *Title — Covenant — Statutory declaration.*—A land company was in possession of settled estates under building agreements providing for the eventual grant of leases, but the agreements were to expire if the respective buildings were not completed in 1881 and 1885. A railway company having brought forward a scheme which involved taking

part of the land, the tenant for life waived the obligation of the land company to complete the buildings within the specified time. The railway company agreed to buy the land, subject to the building agreements, and took possession. The land company brought an action against the railway company, and obtained a declaration that the defendants had wrongfully entered on the land. On the completion of the conveyance the tenant for life made a statutory declaration that he knew of no arrangement extending the time under the building agreements. The land company afterwards obtained from the railway company compensation for the land taken.

Held, that the railway company could not recover from the tenant for life the compensation paid by the land company.—*London and North-Western Railway Co.* v. *Boulton*, CH.D. KEK., J.—62 L. T. 393.

12. *Title—Covenant—Restrictive covenant—Misdescription—Compensation.*—F. bought one lot of an estate laid out for building, and covenated with the vendors that he, his heirs, executors, administrators, and assigns would make certain payments and do certain acts in respect of the property, and that, on creating any building on the said land he would only erect buildings of a particular description.

Held, that the restrictive covenant was only a personal covenant binding on F., and that a purchaser from his devisees could not object to the title on the ground that the covenant had not been disclosed.

Property offered for sale was decribed as a messuage situated in T-street, with the builder's yard, stable, and premises lately in the occupation of F., and containing 1,372 square yards. There was a condition that errors of description should not annul the sale, but that compensation should be allowed for them, if pointed out before completion. The property originally contained 1,372 square yards, but F. had sold 339 square yards. The 1,033 yards were well defined, and were separated by a wall from the 339 yards.

Held, that the purchaser must complete, with compensation.

Decision of North, J., affirmed.—*In re Fawcett and Holmes*, C.A.—42 Ch. D. 150; 58 L. J. Ch. 763; 61 L. T. 105.

13. *Title—Ecclesiastical Commissioners—Site for parsonage—Re-sale—58 Geo. 3, c. 45, s. 51—Church Building Act*, 1838 (1 & 2 *Vict. c.* 107), *s.* 9.—The Ecclesiastical Commissioners have power under the Church Building Acts to sell lands which have been purchased by them for the site of a parsonage house, and have subsequently become unsuitable for that purpose.—*In re Ecclesiastical Commissioners and King*, CH.D. CHI., J. 473—62 L. T. 535.

14. *Title—Trustee—Power of sale—Conditional power—Tenancy for life.*—Trustees of real estate, with a power of sale only arising on the death of a tenant for life, who have during the life of the tenant for life entered into a contract as vendors to sell the estate, cannot make a good title by showing, before the date fixed for completion, both that the tenant for life is willing to convey under the Settled Land Act, 1882, the estate to the purchaser, and that trustees for the purposes of the Act have been appointed.

Trustees entered into a contract to sell the fee simple in possession of certain real estate. The conditions of sale fixed a day for completion, and stipulated that the vendors and other necessary parties (if any) would, on completion, convey the property to the purchaser. The abstract of title disclosed the fact that the vendors' power of sale did not arise until the death of a life tenant. The purchaser by his requisitions took this objection, and the vendors answered that the tenant for life (who was living) would make a title under the Settled Land Act, and had agreed in writing to the sale by the vendors, and would execute all necessary assurances to give effect to the sale, and that an appointment of trustees for the purposes of the Settled Land Act, 1882, was then pending. The purchaser, in reply—and before the day fixed for completion of the contract—declined to purchase from the tenant for life, repudiated the contract, and demanded a return of the deposit. Trustees for the purposes of the Settled Land Act were appointed, and notice of such appointment was given to the purchaser by the vendors before the day for completion. On the day fixed for completion the purchaser took out a summons under the Vendor and Purchaser Act, 1874, to have it declared that the vendors had not shown a good title in accordance with the contract, and claiming a return of the deposit, with interest thereon at four per cent. per annum from the date of the contract until payment, and the costs of investigating the title.

Held, that the purchaser was entitled to an order in the terms of his summons.

Judgment of Kay, J., affirmed.—*In re Bryant and Barningham*, C.A. 469—44 Ch. D. 218.

15. *Title—Trustee—Power of sale—Conditional power—Tenancy for life—Concurrence of beneficiaries.*—A testator devised his real estate to trustees upon trust to pay the rents to his wife, and after her decease to sell the property and hold the income in trust for all his children equally, and he authorised his trustees to adjust and pay all claims made upon his estate. The estate being insolvent, the trustees contracted to sell the real estate, with the consent of the life tenant, but the purchaser declined to accept the title. The trustees subsequently offered to obtain the consent of all the beneficiaries to the sale of the estate.

Held, that the trustees had no power of sale under the will during the life of the testator's widow.

Held, further, that the purchaser could not be compelled to accept a title other than that for which he had contracted.—*In re Head's Trustees and Macdonald's Contract*, C.A. 657.

See also CONTRACT, 1; DEED, 2; DISCOVERY, 1; FRAUDS, STATUTE OF, 1, 2; MORTGAGE, 12, 23; SCOTLAND, LAW OF, 7; SOLICITOR, 11; WILL, 38, 44.

VESTING ORDER.—See TRUSTEE, 3, 4, 12.

VOLUNTARY SETTLEMENT.—See STAMP, 3.

WAGES.—See COUNTY COURT, 4; MASTER AND SERVANT, 9.

WAIVER.—See COMPANY, 15; COUNTY COURT, 7; MARRIED WOMAN, 2.

WARRANT.—See BANKRUPTCY, 18; CRIMINAL LAW, 3; FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

WARRANTY.—See COMPANY, 18; SALE OF FOOD; SHIPPING, 4.

WASTE.—See SETTLEMENT, 5.

WATER:—

1. *Water company—Constant supply—Prevention of waste—Special apparatus—Waterworks Clauses Act*, 1847 (10 & 11 *Vict.* c. 17), *ss.* 43, 48, 51, 52—*Private Acts*—By a local Waterworks Act passed in 1858 it was provided that "all persons supplied with water by the company shall provide proper ball or stop-cocks, or other necessary apparatus of approved construction, for regulating such supply," under the penalty of having their pipes cut off or the water cut off from their premises. By a local Act passed in 1888, the company was compelled to afford a constant supply of water, and took power to attach to the water-pipe outside of each house a stop-valve of the

screw-down kind, in order to prevent waste, subject to the provisions of the Waterworks Clauses Act, 1847, with respect to breaking up of the streets for the laying of pipes. The company called upon an occupier to put down such stop-valves, and, on his making default, cut off his water supply.

Held, that the company was liable to be convicted for "refusing to furnish a supply of water to an occupier" under the provisions of section 43 of the Waterworks Clauses Act, 1847, and that a stop-valve to prevent waste outside of a house was not a "necessary apparatus for regulating the supply of water."—*Ward* v. *Folkestone Waterworks Co.*, Q.B.D. 426—24 Q. B. D. 334; 59 L. J. M. C. 65; 62 L. T. 327.

2. *Water company—Supply by meter—Special Act—"Consumer of water."*—A water company's special Act provided that the compay should, at the request of any "consumer of water," for purposes other than those for which rates were provided, or at the company's own instance, supply water by means of a meter.

Held, affirming the decision of the Court of Appeal (38 Ch. D. 56) that the words "consumer of water" meant any person actually consuming water, or entitled to demand supply for consumption and taking the steps necessary to obtainit.—*Cooke* v. *New River Co.*, H.L.—14 App. 698; 59 L. J. Ch. 333; 61 L. T. 816.

See also FISHERY, 3; RIVER, 1—3.

WATERMAN:—

River Thames—Navigating boat for hire—Watermen's Act, 1859 (22 & 23 *Vict. c. cxxiii.*), *s.* 54.—A., by order of his employers, rowed certain fellow-labourers to a ship lying in the River Thames, receiving no remuneration, except his weekly wages, for doing so.

Held, that A. could not be convicted for navigating a boat for hire under the Watermen's Act, 1859.—*Skittrell* v. *Showell*, Q.B.D.—59 L. J. M. C. 26; 61 L. T. 874.

WAY:—

1. *Easement—Deed—Exclusive use of gateway.*—A piece of land at the back of a row of houses was granted in 1839, with two of the houses, to a purchaser in fee simple, "together with the exclusive use of" a covered gateway or passage, which formed a sort of tunnel leading from the land at the back through another house in the row into the street in front, and the description of the parcels included the following words:—"Which said piece of ground and premises are more particularly delineated and described by the portion on the plan or ground plot thereof drawn in the margin of these presents coloured pink." The passage was described by its measurements in length, width, and height, but it was not coloured on the plan, though it was suggested that that might have been because the parts of the building above and below the passage were not included in the grant, the house through which it passed not being so included. In 1882 the house was demised to R. In 1885 the piece of land at the back of the houses was demised to B., "together with the entrance-way and passage thereto belonging." B. not having confined himself to using the passage as a "way" of exit into and entrance from the street, but having used it as a room or shop for a variety of purposes, the original grantor and R. brought an action against B., claiming a declaration that he was not entitled to use the passage otherwise than as in exercise of a right of way, and an injunction to restrain him from doing so.

Held (affirming the decision of Kekewich, J.), that, even if the entire property in the passage did not pass by the conveyance of 1839, the grantee, and B. as claiming under him, were not restricted to using it merely as a way, but were entitled to use it, and the floor, walls, and ceiling of it, for any purposes not inconsistent with the rights of the adjoining owners or the public.

Semble, the entire property in the passage passed the conveyance.—*Reilly* v. *Booth*, C.A. 484—44 Ch. D. 12; 62 L. T. 378.

2. *Obstruction—Change of way by grantor—Injunction.*—In 1862 a railway company leased to the plaintiff for twenty-one years the space within an arch under a railway station, with a right of way for the plaintiff, his servants, and customers from the arch to V-street only. In 1862 the only way by which the plaintiff could get to V-street was over an open space lying partly in front of two arches occupied by G. In 1880 the railway company made a way into V-street a little south of the plaintiff's arch. The plaintiff thenceforth generally used the new way, but occasionally the old one. In 1882 the company made a fence with a gate across the old way, but gave the plaintiff a key of the gate. In 1888 the company put on a new lock, and sought to restrict the plaintiff to the way made in 1880.

Held, that the railway company, having given the plaintiff the key of the gates, could not alter the way, and that the plaintiff was entitled to an injunction to restrain the company from closing the gates.—*Deacon* v. *South-Eastern Railway Co.*, CH.D. NOR., J.—61 L. T. 337.

See also DISCOVERY, 2; JUSTICE OF THE PEACE, 5; RIVER, 3.

WEIGHTS and MEASURES:—

1. *Coals—Sale in London—Deficient weight—Penalty—Metropolis Coal Act* (1 & 2 *Will.* 4, *c. lxxvi.*), *ss.* 54, 57.—In an action by a purchaser of coals to recover penalties from the seller for deficiency in weight under the Metropolis Coal Act, it is necessary to show that the sacks of coal were weighed in the particular manner prescribed by the Act.

Meredith v. *Holman*, 16 M. & W. 798, approved.

Decision of the Queen's Bench Division, 37 W. R. 800, 23 Q. B. D. 380, affirmed.—*Smith* v. *Wood*, C.A. 138—24 Q. B D. 23; 59 L. J. Q. B. 5; 61 L. T. 879.

2. *Coals—Sale—False statement as to weight by servant of seller—Liability of seller—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 29, *sub-section* (1) (2).—In order to support a conviction under section 29 of the Weights and Measures Act, 1889, there must be a false representation as to the weight of the coals sold by the seller of them. Where, therefore, the seller of the coals made no representation as to their weight, but his servant, in the course of delivering them, made an untrue statement as to their weight,

Held, that the master was not liable for the representation of his servant, and could not be convicted.—*Roberts* v. *Woodward*, Q.B.D. 770.

See also JUSTICE OF THE PEACE, 6; LOCAL GOVERNMENT, 9.

WEST AUSTRALIA, LAW of:—

Registration of title—Refusal by commissioner—Caveat—Transfer of Land Act, 1874, *ss.* 19, 21, 120.—The Commissioner of Titles for Western Australia is not bound to register a title merely on the issue of the prescribed notices and the absence of a *caveat*; but he has a discretion to refuse to register, subject to the opinion of the supreme court.—*Manning* v.

Commissioner of Titles for Western Australia, P.C. —15 App. 195.

WILL:—

CONSTRUCTION—

1. *Abatement — Deficiency — Lapse.*—A. made a bequest of jewels and ornaments to trustees upon trust to sell for the best price obtainable, and to pay thereout two legacies of definite amounts, but the will contained no gift of surplus sale moneys. One of the legacies lapsed. The price obtained was insufficient to pay both in full.

Held (distinguishing *Page* v. *Leapingwell*, 18 Ver. 463), that the legacy which did not lapse was not liable to abate in favour of the residuary legatee.—*Raikes* v. *Raikes*, CH.D. CHI., J. 636.

2. *Abatement—Legacy to wife.*—If an estate is insufficient to pay all legacies in full, a legacy to the testator's wife, to be paid to her immediately after his death for her immediate requirements, is liable to abatement.—*Cazenove* v. *Cazenove*, CH.D. KEK., J.—61 L. T. 115.

3. *Ademption—Mortgage—Payment in testator's lifetime.*—The testator bequeathed to his trustees in trust for A. and B. £4,000, at present secured by a mortgage of landed property at P. The mortgage was paid off during the testator's lifetime.

Held, that the legacy was specific, and was ademed.—*Slade* v. *Walpole*, CH.D. KAY, J.—61 L. T. 497.

4. *Advancement.*—A. gave an annual allowance to B., his eldest son. He took one hundred £10 shares in a company in B.'s name, and 550 shares in another company, and B. became a director in both companies. He received the director's fees, but voluntarily paid all the dividends to his father. A. by his will settled nearly all his estate on B. for life, with remainder to his children. After A.'s death the shares were found in envelopes, with the words "belonging to me" in A.'s writing.

Held, that the presumption of advancement was rebutted, and that B. held the shares as a trustee.—*Gooch* v. *Gooch*, CH.D. KAY, J.—62 L. T. 384.

4a. *Charge of debts on realty*—Interim *rents—Trustee.*—A testator who died in January, 1887, by his will gave his real estate at North and South Collingham and his residuary real estate to his nephew, he also paying thereout the following legacies: that is to say, the legacy or sum of £1,000 to my trustees, to be held by them upon the trusts hereinafter declared concerning the same; the like legacy or sum of £1,000 to the four daughters of my late niece, Mary Holroyd, in equal shares; and the legacy or sum of £200 to my niece, Sarah Woodruff, to whom I give and bequeath the same respectively." The testator directed that such legacies should be paid at the end of six months after the death of his sister, and he directed his trustees to stand possessed of the sum of £1,000 thereinbefore directed to be paid to them and "charged on my Collingham Estate," upon certain trusts.

Held, that the testator's nephew was not a trustee of the legacies for the legatees, but that the same were merely charged on the North and South Collingham Estate; and that, that being so, he was not liable to account for the back rents and profits of that part of the Collingham Estate of which he was in possession from the death of the testator to the date of the completion of the sale of that estate by the direction of the court.—*Newbald* v. *Beckitt*, CH.D. CHI., J.—62 L. T. 533.

5 *Charity—Advancement of economic and sanitary education.*—The testator gave £200,000 to trustees, payable exclusively out of such part of his personal estate as might be legally bequeathed for charitable purposes, in trust to apply the money for the advancement and propagation of education in economic and sanitary science in Great Britain.

Held, that there was a valid charitable bequest.—*Berridge* v. *Turner*, CH.D. STI., J.—62 L. T. 365.

6. "*Children*"—*Illegitimate children.*—In 1862 A. by his will gave a share of his residuary estate in trust for B. for life, and after B.'s death for B.'s children. B. was married in 1845, but was separated from his wife in 1848, and never saw her again. She died in 1878, never having had any children, and at the date of the will she was past the age of child-bearing. Between 1851 and 1858 B. had four children by D., but A. treated them as his grandchildren. B. predeceased A.

Held, that B.'s illegitimate children could not take a share in the residue.—*Raggett* v. *Browne*, CH.D. CHI., J.—61 L. T. 463.

7. *Class gift—Children of members of class dead at date of will.*—A. by her will gave the residue of her property to be equally divided between the sons and daughters of her four deceased brothers, but directed: "should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children.

Held (affirming the decision of Kay, J.), that children, living at the date of the will, of nephews and nieces who were dead at the date of the will, could not take under the will.—*Groves* v. *Musther*, C.A.—43 Ch. D. 569; 59 L. J. Ch. 296.

8. *Condition — Marriage—Consent of trustees.*—Where a testator attaches, as a condition to the enjoyment of property given by his will, that the beneficiary shall, if he marries, do so with the consent of his trustees, but prescribes no particular form of consent, the court will treat such consent as a matter of substance rather than of form, and will hold that the condition has been satisfied if the consent has been substantially given.

Daley v. *Desbouverie*, 2 Atk. 261, followed.—*Keeling* v. *Smith*, CH.D. STI., J. 380—59 L. J. Ch. 284; 61 L. T. 181.

9. Cy-près—*Charity.*—The testator gave legacies to charitable institutions, including the "Protestant Home Mission in Ireland" and the "Home Mission of the Gospel of Christ in Ireland." There were no societies answering to above descriptions.

Held, that the legacies should be given to the Church of Ireland Home Mission.—*In re Geary's Trusts*, M.R. (Ir.)—25 L. R. Ir. 171.

10. Cy-près — *Charity — School.* — A. bequeathed £1,800 to Baron F. R. to build a synagogue and school at Jerusalem. Baron F. R. disclaimed the trust. The money was not enough to build a synagogue and school. The court allowed the money to be paid to the committee in England of Baron L. R.'s school near Jerusalem, though there was no synagogue attached to it.—*In re Davis's Trusts*, CH.D. KAY, J.—61 L. T. 530.

11. *Direction to pay debts—Legacy to creditor—Satisfaction.*—A direction in a will to pay debts only is sufficient to rebut the presumption of satisfaction of a debt by a legacy.

T. gave a bond to her nephew, to whom she was not *in loco parentis*, to secure payment to him of £1,000 within twelve months after her death if he should be then living, or to his executors, administrators, or assigns if he should be then dead leaving issue, with interest from the day of her death. By her will she left him a freehold estate, a legacy of £3,000, and certain chattels. By a codicil she directed that all her funeral expenses and lawful debts should be paid at once.

Held, that the debt was not satisfied by the legacy. —*Bradshaw* v. *Hutsh*, CH.D. KAY, J. 199—43 Ch. D. 260; 59 L. J. Ch. 135; 62 L. T. 52.

12. *Effects.*—A. gave all the rest of the furniture and effects at the house in which he lived to A., and the residue of his estate to B. After his death bank notes, stock and share certificates, and jewellery were found in his house.

Held that the bank notes, stock and share certificates, and jewellery belonged to B., and not to A.—*Daniel* v. *Daniel*, CH.D. NOR., J.—61 L. T. 365.

13. *Equitable estate—Mixed devise—Freeholds and copyholds.*—A., who died in 1844, by his will, devised his freehold and copyhold estates to trustees upon trust during the life of B. to receive the rents and profits, and to pay the same to B. and his assigns "during his life, or otherwise to permit him or them to receive the same"; and from and after the death of B., "to the sole use and behoof of the heirs of his body lawfully begotten"; and in case B. should die without leaving any issue of his body lawfully begotten he devised the same to G., her heirs and assigns for ever. By a disentailing assurance B. granted all the freehold estates comprised in the residuary devise to H., discharged from all estates tail, to the use of B. in fee.

W., who claimed under B., agreed to sell to J. certain freeholds included in the devise of freeholds in the will. On investigation of the title a requisition was made that B. was equitable tenant for life only of the property, and that the person entitled at B.'s death should concur in the conveyance.

Held, that B. took a legal estate tail in the freeholds, and a good title had been shown.—*In re Alsop and Joy*, CH.D. CHI., J.—61 L. T. 213.

14. *Estate tail—Successive gifts.*—If there is a devise to several persons in succession in words sufficient to pass the fee, or the testator's whole interest in freeholds, the court will construe the gift as one of successive estates in tail. The general intent must be ascertained from the whole will, and a name clause is an important element in ascertaining such general intent.—*Studdert* v. *Von Steiglitz*, V.C. (Ir.)—23 L. R. Ir. 564.

15. *Executor according to the tenor—Trustees.*—The testator nominated four persons as his trustees, to whom he bequeathed his residuary estate, with power to receive, and give receipts for, "any sums due to the residue." There was no specific appointment of executors, but there were directions to "my executors" as to payment of debts and other matters, and the words "executors" and "trustees," were used indifferently in various parts of the will.

Held, that the trustees were executors according to the tenor.—*In the Goods of Earl of Leven*, P.D. & A.D. —15 P. D. 24; 59 L. J. P. D. & A. 35.

16. *Executor according to the tenor—Trustees.*—The testator gave all his real and personal estate to trustees upon trust to pay to A. a debt due to her from the testator, this being the only debt due from the estate, with one exception. The trustees were directed to pay a legacy of £50, to invest the residue, and pay the income to B. for life. He gave the residue of the property to his son.

Held, that the trustees were not executors according to the tenor.—*In the Goods of Armstrong*, P.D. & A.D.—62 L. T. 185.

17. *Forfeiture—Bankruptcy—Scotch sequestration —Revocation.*—The testator bequeathed to A. the income of £15,000 for life, or until he shall "become bankrupt or do something whereby the same or some part thereof would, through his act or default, or by operation of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons." A sequestration of A.'s estate was awarded in Scotland, but was recalled before a trustee was appointed.

Held, that the forfeiture clause in the will did not operate.—*Clutterbuck* v. *James*, CH.D. KEK., J.—62 L. T. 454.

18. *Forfeiture — Repugnancy — Bankruptcy — Annulment—Bankruptcy Act*, 1833 (46 & 47 *Vict. c.* 52), *s.* 35 (2).—A. by his will gave his personalty absolutely to, amongst others, his children. He devised his real and leasehold estate and his residuary estate, as to one-third to his wife for life, and as to two-thirds to his children for life equally, with remainder, after the death of his wife, to his children equally. The will contained a forfeiture clause, whereby if, by any act or operation of law, the share given to his wife or any child should be aliened, charged, or disposed of, the share or shares so aliened, charged, or disposed of should vest in the other beneficiaries. At the date of the testator's death one of his daughters, who, under the will, had been given an absolute interest, an immediate life interest, and a contingent life interest, was a bankrupt. The bankruptcy was annulled some years afterwards, sufficient funds having come to the trustee's hands to pay all the creditors in full. The contingent gift still remained contingent at the date of the annulment.

Held, (1) that, as to the absolute gifts, whether in possession or remainder at the testator's death, the forfeiture clause was repugnant and void; (2) that, as to the contingent life interest, the forfeiture clause did not operate, since the moment for determining whether the clause applied was when payment and receipt became possible; (3) that, as to the immediate life interest, the clause of forfeiture did operate, notwithstanding the provisions as to the consequences of annulment contained in section 81 of the Bankruptcy Act, 1869, the language of which, for the present purpose, is the same as section 35 (2) of the Bankruptcy Act, 1883.—*Metcalfe* v. *Metcalfe*, CH.D. KEK., J. 397—43 Ch. D. 633; 59 L. J. Ch. 159.

19. *Gift to wife and children—Tenancy in common.* —Where property is devised to the testator's wife for the benefit of his wife and children, the court will anxiously lay hold of any slight circumstance to enable it to construe the gift as an estate for life to the wife, remainder to the children, and not as creating a joint tenancy.—*In re McVicker's Contract*, V.C. (Ir.)—25 L. R. Ir. 307.

20. *Gift over — Codicil — Revocation.* — C. bequeathed the legal estate in all his real and personal property to B. and D., whom he appointed executors, on trust to pay certain annuities and, subject thereto, to pay the income to E. for A.'s life, and after A.'s death to transfer all the real and personal estate absolutely to E., subject to existing annuities, and in case of E. predeceasing A. without lawful issue, all the real and personal estate was devised and bequeathed to P., his heirs and assigns for ever, subject to annuities. By a codicil it was declared that, if E. should die before or after A. without lawful issue, or without making any disposition of the property, it might then become the property of P., his heirs and assigns for ever, subject to annuities. A second codicil was in these words:—"I hereby revoke and declare void the appointment of B. and D. as trustees and executors in the will named, and do leave and bequeath all my said real and personal property to E., subject to the annuities and other conditions therein mentioned, and do hereby appoint and nominate E. as my sole executor and administrator." By a third codicil it was declared that the annuities should be chargeable solely on his land at W., which was the only

real estate of the testator, and was held for lives, renewable for ever. E. died before A. without issue, and without having disposed of the property.

Held, (1) that the second codicil did not revoke the modifications in the first codicil; (2) that the gift over in the first codicil was void.—*Stretton* v. *Fitzgerald*, C.A. (Ir.)—23 L. R. Ir. 466.

21. *Gift over—Condition—Marriage—Consent of trustees.*—A. bequeathed a share in the residue of his estate to M., if she should marry with the consent of the testator's wife, if then living, or of the trustees for the time being of the will, with a gift over if M. should die before attaining the age of twenty-one, or marrying without such consent. M. attained the age of twenty-one without marrying.

Held, that the gift over could not take effect, but that M. was not entitled to the legacy before marriage, *Gray* v. *Gray*, V.C. (Ir.)— 23 L. R. Ir. 399.

22. *Gift over — Gift during widowhood.* — The testator gave all his property to his wife in trust for the benefit of his children so long as she remained unmarried. In the event of her marrying again she was to have a life interest only in the sum of £2,000. He authorized his wife and trustee to advance to either of the children £2,000 from the estate. At his wife's death the estate then remaining was to be divided into four parts, and the proceeds divided equally among the children then surviving. The widow married again before any of the children came of age.

Held, that the residue vested in the children at the marriage of the widow.—*Helby* v. *Dear*, CH.D. KAY, J. 31—58 L. J. Ch. 659; 61 L. T. 432.

23. *Gift over—"Unmarried and without leaving lawful issue."*—By his will, dated in 1838, a testator, who died in 1840, bequeathed a fund upon trust to pay the income to his two daughters for their respective lives for their separate use without power of anticipation, and after their respective deceases the principal of their respective shares was to be in trust for the children or child of each daughter as she might appoint, and in default of appointment equally; and if there should be no such child, then in trust for the executors, administrators, and assigns of each of his said daughters respectively; but in case of the decease of either of his said daughters "unmarried and without leaving lawful issue," then the testator bequeathed the share of the one so dying unmarried and without issue to the surviving sister. The plaintiff, one of the testator's two daughters, had married, but had had no children, and she was a widow over seventy years of age. The question was, whether she was now absolutely entitled to her share of the fund.

Held, that the plaintiff was not absolutely entitled, the words "unmarried and without leaving lawful issue" meaning not under coverture at the time of her death.

In re Sanders' Trusts (L. R. 1 Eq. 675) followed.—*In re King, Salisbury* v. *Ridley*, CH.D. KEK., J.—62 L. T. 789.

24. *Illegitimate child described as "daughter" of testator—Residuary gift to "children."*—Testator, after appointing J. L. B. one of his executors and trustees, describing him as "my son-in-law," and making various devises and bequests of his property to his three sons *nominatim*, gave other property to his trustees upon certain trusts for his two daughters respectively, describing them as "my daughter M. A. M., the wife of the said J. L. B.," and "my daughter A., the wife of W. W." He then devised and bequeathed his residuary real and personal estate to his trustees upon trust for such of his "children" living at his decease, and such of the issue then living of any child or children of his dying in his lifetime. M. A. M. B. was illegitimate.

Held, that the will showed a sufficient expression of intention on the part of the testator to include M. A. M. B. under the term "children," and that she was therefore entitled to a share in the residue.—*Walsh* v. *Browne*, CH.D. STI., J.—62 L. T. 899.

25. *Intestacy as to residue.* — A. gave various legacies, and stated that he excluded all his relatives except his two nieces from the benefit of his will. His nieces were appointed executrixes, with other executors. The two nieces were not the only next of kin of the testator.

Held, that the residue was undisposed of, and devolved upon the testator's statutory next of kin.—*Holmes* v. *Holmes*, CH.D. KAY, J.—62 L. T. 383.

26. *Investment—"Railway or other public company"—Companies incorporated under the Companies Acts.*—A testator directed his trustees to invest the residue of his estate upon (*inter alia*) "the debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The trustees proposed to invest in the securities of certain companies incorporated under the Companies Acts.

Held, that, the companies being incorporated by public statute, the instruments forming their constitution being accessible to the public and the shares being transferable, they were public companies within the investment clause, and that the power was not restricted to companies incorporated by a special Act or by Royal Charter.

Decision of Stirling, J., affirmed.

Whether all three of the above-mentioned characteristics are necessary to constitute a "public company," *quære.*—*In re Sharp, Bickett* v. *Sharp*, C.A.—62 L. T. 777.

27. *"Issue"—Tenancy in common.*—A. bequeathed a fund upon trust, in events which happened, for her son for life, and then "in trust for and to be equally divided between all and every my nephews and nieces who shall be living at the time of the death of my said son, and the issue of such of them as shall then be dead leaving issue, as tenants in common, such issue nevertheless taking only the share or respective shares which the deceased parent or parents would have taken if living."

Held, (1) that "issue" must be restricted to children; (2) that the issue took as tenants in common *inter se.*—*In re Smith*, CH.D. STI., J.—58 L. J. Ch. 661.

28. *Joint tenancy—Severance.*—A. devised certain property to his five sons respectively as tenants in common, and appointed them joint tenants. For many years the profits were equally divided among the five sons or their personal representatives. Four of the sons had died.

Held, that the four sons took the residue as joint tenants; but that the joint tenancy had been severed, and that the surviving son was entitled to the whole of the property.—*In re Wallis's Trusts*, M.R. (Ir.)—23 L. R. Ir. 460.

28a. *Joint tenancy—Discretionary trust.*—A., after certain bequests to his widow, gave the residue of his estate to his father "for his own use and benefit, and at his discretion for the further use and benefit" of A.'s daughter, who was then a minor and his only child.

Held, that, under this clause, the father took the residue as trustee for himself and A.'s daughter as joint tenants, with a discretion in the father as to the application of the daughter's share during her minority.—*Atkinson* v. *Atkinson*, Q.B.D.—62 L. T. 735.

29. *Life estate—"Default of issue male"—Will*

Act, 1837 (1 *Vict. c.* 26), *s.* 29.—The testator was owner in fee of a moiety of an estate and tenant for life of the other moiety, with remainder to A., his eldest son in tail male. His will recited that he had expended large sums on the improvement of his house and property at B., of which improvements A. would have the benefit, and charged his own moiety, which he expressed his intention of bequeathing to A., with £1,000 to his son D., and £1,500 to his son M., to be secured by A. on the testator's death, or when A. came of age. If D. or M. should die without issue, his portion was to be paid or secured to the survivor, and if A. should die without issue, or D. should become possessed of the estates, D. was to secure £2,500 to M. The will further recited that some of the testator's property was settled in tail male, and contained a bequest of the testator's own moiety to A. for life, and to his eldest son and his heirs in tail male, in default of issue male, to D. for life and his issue in tail male, and in default of D.'s issue male to M. and his issue in tail male, subject to £3,000 for any younger children of those who inherited, and in default of issue male to the daughter or daughters of A., D., or M., and in default of issue male or female to the testator's daughters in fee as tenants in common.

Held, (1) that A. took an estate for life, with remainder to his eldest son in tail male and reversion to him in tail male; (2) that "default of issue male" meant an indefinite failure of issue male.—*Neville* v. *Thacker*, C.A. (Ir.)—23 L. R. Ir. 344.

30. *Legacy—Executor—Renunciation—Selection of beneficiaries.*—A., by his will, appointed three persons his executors, and gave the residue of his estate to certain charitable institutions named in his will, or such others "as my executors herein named" might appoint. One of the executors renounced probate.

Held, that the renunciation of the office of executor did not operate to prevent him claiming the right of joining with the continuing executors in selecting the charitable institutions to share in the residue.

Keates v. *Burton*, 14 Ves. 434, not followed.—*Crawford* v. *Royal Infirmary*, CH.D. KEK., *J.* 412—43 Ch. D. 643; 59 L. J. Ch. 351; 62 L. T. 63.

31. *Mortgage of real estate.*—A., after appointing two persons executors and trustees of his will, directed "that the trustees for the time being of my will shall have full power to settle my accounts and wind up my affairs as they or he shall think fit, and in so doing to make any sales and arrangements they or he shall judge expedient." He devised and bequeathed all his real and residuary personal estate unto and to the use of his trustees upon the trusts therein declared. Shortly after the testator's death one of the trustees named in the will, the other having renounced probate and disclaimed the trusts thereof, raised a sum of £500 by a mortgage of a portion of the testator's real estate for the purpose of satisfying some pressing claims against the testator's estate.

Held, that the mortgage was authorized by the terms of the will.—*Dutton* v *Brookfield*, CH.D. NOR., *J.* 90—59 L. J. Ch. 31; 61 L. T. 661.

32. *Mortmain — Railway company—Debenture—Mortgage—Mortmain Act* (9 *Geo.* 4, *c.* 36).—A mortgage debenture issued by a railway company under a special Act, not being in the form given in schedule C. to the Companies Clauses Consolidation Act, 1845, but in the form of an assignment by the company to the mortgagee, his heirs, executors, administrators, and assigns, of the railway company and undertaking, and all branch railways, lands, and hereditaments belonging thereto, is not within the Mortmain Act.—*Ker* v. *Dent*, CH.D. CHI., *J.*—62 L. T. 55.

33. *Next of kin of person dead at date of will—Period for ascertaining class—Lapse.*—A. bequeathed a sum of money "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving." At the death of the testatrix some of the persons entitled to her husband's estate under the statute were different from those entitled to it at his own death.

Held, that the clause must be read as if the words "at my husband's death" were inserted, so that the clause would read "To such person or persons as would, at my late husband's death, have become entitled," &c., and that the persons to take under the gift were to be ascertained at the death of the husband.

Held, also (following *In re Ham's Trust*, 2 Sim. N. S. 106), that there was a lapse as to the share of one of the husband's next of kin, who died in the lifetime of the testatrix.—*Williams* v. *Davies*, CH.D. STI., *J.* 523—44 Ch. D. 484.

34. *"Relatives hereinbefore named"—Illegitimate relatives—"Vested transmissible interest."*—A. gave legacies to several persons described as his "cousins" for life, and afterwards for their respective children. He also gave legacies to persons *nominatim* describing them as his "cousins" and "nieces," and then gave the residue of his estate among such of "my relatives hereinbefore named as by virtue of the provisions hereinbefore contained" should become entitled to a vested transmissible interest in any part of his property. Some of the persons described as cousins were descended from illegitimate children of A.'s grandmother. H. was the only legitimate mentioned *nominatim* who took a vested transmissible interest under the will.

Held, that "relatives hereinbefore named" included persons whom the testator had himself mentioned in his will and described as the children of his "cousins," whether such cousins were in fact cousins in the strict legal sense of the term or not, and although the testator had not mentioned such children by any of their names, and that such children were accordingly entitled to share in the residue as well as H.

Decision of Stirling, J., 38 W. R. 267, reversed.—*In re Jodrell, Jodrell* v. *Seale*, C.A. 721—59 L. J. Ch. 538.

35. *Remoteness—Legal contingent remainder.*—A. devised successive life estates in freehold lands to his daughter A., and to any husband whom she might thereafter marry, with contingent remainders over of the legal estate in the lands to children who might be living at the death of the survivor of A. and such husband.

Held, that the contingent remainders over, though limitations of the legal estate, were void, as obnoxious to the rule against perpetuities.

The application of the rule against perpetuities to legal contingent remainders discussed.

Cole v. *Sewell*, 2 H. L. Cas. 186, explained and distinguished.—*Frost* v. *Frost*, CH.D. KAY, *J.* 264—13 Ch. D. 246; 59 L. J. Ch. 118; 62 L. T. 25.

36. *Remoteness—Power of appointment—Jurisdiction — Originating summons—Ord.* 55, *r.* 3.—A. devised freehold estate to the use of trustees in fee, upon trust to pay the net income to her sister M. for life, and then to M.'s children for life successively in order of age, and after the death of M. and all her children, to the testatrix's sister E. for life, and then to E.'s children for life successively in order of age, and after the death of M. and E. and all their children, the said trustees were to stand seised of the property in trust for such persons and in such manner as the longest liver of M., E., and their children should by

deed or will appoint, and, in default of appointment, in trust for the testatrix's heir-at-law absolutely. M. and E. having both survived the testatrix, one of M.'s children, who turned out to be the longest liver of M., E., and their children, made a will purporting to appoint the property to a trustee in trust for the appointor's children, and died in 1889. The trustees under the will of the original testatrix having taken out an originating summons for the decision of the question whether they ought to convey the property to their testatrix's heir-at-law or to the appointee under the will of the longest liver,

Held (reversing the decision of Kay, J.), that the case was within ord. 55, r. 3, and that there was jurisdiction to decide it on originating summons.

All the parties were present and requested to have the case on the merits decided,

Held, that the longest liver of M., E., and their children, being not necessarily ascertainable within a life in being and twenty-one years, the power of appointment given to such longest liver was void, and that upon the termination of the life estates given to M., E., and their children, the heir-at-law of the original testatrix was entitled to the property as undisposed of.

Avern v. *Lloyd*, 16 W. R. 669, L. R. 5 Eq. 383, disapproved.—*Midgley* v. *Tatley*, C.A. 470—43 Ch. D. 401; 59 L. J. Ch. 384; 62 L. T. 473.

37. "*Representatives.*"—Where a gift is given by will to a person and his "representatives," the term "representatives" means executors and administrators, not next of kin, in the absence of any special words in the will to control or restrict such ordinary meaning.

In re Crawford's Trusts, 2 Drew. 230, followed.—*In re Ware, Cumberlege* v. *Cumberlege-Ware*, CH.D. STI., J. 767.

38. *Securities for money—Lien—Unpaid purchase-money.*—A bequest of "all securities for money" includes money due to the testator in respect of which he had a vendor's lien for unpaid purchase-money.—*Callow* v. *Callow*, CH.D. CHI., J. 104—42 Ch. D. 450; 58 L. J. Ch. 698.

39. "*Securities for moneys*"—*Shares in company.*—In the absence of clear words in the context, shares in companies will not pass under a bequest of "securities for moneys."—*McDonnell* v. *Morrow*, V.C. (Ir.)—23 L. R. Ir. 591.

40. *Substitutionary gift—Remoteness.*—The testatrix gave her residuary estate in trust for all the children of her son H. who should attain the age of twenty-five, or, being daughters, should marry under that age, with a gift over if any child died under twenty-five leaving children who should attain the age of twenty-five, or, being daughters, should marry under that age, to such last-mentioned children in equal shares of the share which their parent would have taken if he or she had attained the age of twenty-five. One son of H. attained the age of twenty-five before the death of the testatrix.

Held, that the gift was void on the ground of remoteness.—*King* v. *Whitten*, CH.D. NOR., J.—62 L. T. 391.

41. *Tenancy for life—Period of survivorship.*—A. bequeathed £3,000 to his executors in trust to apply the interest to the support and maintenance of his son W. during his life. On the death of W. he bequeathed the said £3,000 to be divided equally between his sons B. and M., and his daughter S., or to the survivors or survivor of them attaining the age of twenty-one. All the children attained the age of twenty-one, but S. alone survived W.

Held, that the period of survivorship was the death of the tenancy for life, and that S. was entitled to the whole of the fund.—*Shaw* v. *Shaw*, V.C. (Ir.)—25 L. R. Ir. 30.

42. *Tenancy for life—Portions—Power of settlement.*—The testator declared that any tenants for life under his will should on his or their marriage have powers of settling portions.

Held, that the powers of settlement arose on the marriage of a tenant for life, and could be exercised at any subsequent period.—*In re Creagh*, L.J. (Ir.)—25 L. R. Ir. 128.

43. *Tenancy for life—Capital—Maintenance—Absolute or limited interest.*—Testator gave all his real and personal estate to his wife and J. H., "upon trust to allow my said wife to have the full and entire use and enjoyment thereof for her maintenance during her lifetime"; and he declared that she might, "at any time during her lifetime, sell, lease, mortgage, or otherwise absolutely dispose of all or any part of the said estate for her maintenance, but not by way of testamentary disposition." And he declared that after her death J. H. should call in and convert all his said estate, or the residue then remaining thereof, and stand possessed thereof upon certain trusts mentioned in his will.

Held, that the wife was not absolutely entitled to the capital of the estate, but only to a life interest, with power to resort to the capital during her life for maintenance, but not for any other purpose.—*In re Fox, Fox* v. *Fox*, CH.D. STI., J.—62 L. T. 762.

44. *Trust for sale—Interest.*—A testator gave property to trustees upon trust after his wife's death to sell and retain two sums of £1,000 with interest, together with simple interest thereon at four per cent. from certain dates to the date of retainer, upon certain trusts. He empowered his trustees to post pone the sale of the real estate after his wife's death for any period not exceeding three years, and declared that the net rents and profits of such of his real estate as should not have been sold should be applied as the proceeds of sale would have been. After the widow's death in 1887 the real estate was not sold.

Held, that interest on the two sums of £1,000 was payable at four per cent. from the death of the widow.

Turner v. *Buck*, 22 W. R. 748, L. R. 18 Eq. 301, distinguished.—*Waters* v. *Boxer*, CH.D. KAY, J. 57—42 Ch. D. 517; 58 L. J. Ch. 750.

45. *Vesting.*—A testator devised his residuary real and personal estate upon trust to pay the income to the widow of testator's son for life, with remainder upon trust "for all the children" of the testator's said son "who being a son or sons shall live to attain twenty-one, or being a daughter or daughters shall marry under twenty-one with their mother's consent, to be divided between them share and share alike." The will contained powers of maintenance and advancement applicable to all children.

Held, that the daughters who attained twenty-one took a vested interest in the fund, although they had not married under that age.—*In re Hunt, Davies* v. *Hetherington*, CH.D., CHI. J.—62 L. T. 753.

46. *Vesting—"From and after."*—The testator gave a house to trustees on trust to permit his daughter E. to receive the rent for life, and "from and after her death" the house was to be held in trust for all E.'s children in equal shares as tenants in common, on their respectively attaining the age of twenty-one years. E. had only one daughter, who survived her, but died under twenty-one unmarried.

Held, that E.'s daughter did not take a vested interest.—*Jobson* v. *Richardson*, CH.D. NOR., J.—44 Ch. D. 154; 59 L. J. Ch. 245; 62 L. T. 148.

47. *Vesting—Resulting trust.*—A will contained the following words:—"I give and bequeath to my brother E. whatsoever real estate I may die possessed of wheresoever situate, on trust nevertheless to pay thereout" certain specified debts, "and also in trust to pay to each of my sisters M. and G., and to my brother A., as long as they respectively live, the sum of £50 every year by equal quarterly payments." The testator's personalty was bequeathed to E., A., M., and G., and E. was appointed sole executor. The debts specified in the will were paid before the testator's death.

Held (affirming the decision of the Court of Appeal), that E. took a vested interest, and that the residue of the real estate did not pass by a resulting trust to the heir-at-law.—*Croome* v. *Croome*, H.L.—61 L. T. 814.

48. *Vesting—Substitutionary gift.* — A. left the residue of his estate in trust for his wife for life, and at her death to be equally divided "between our children, A., B., and C., to take what would have been their mother's share, and any other of my grandchildren to represent their parents in similar circumstances." The testator left seven children. A., B., and C. were the children of a daughter who died before the date of the will. Three other children survived their father, but predeceased their mother.

Held, that the children who survived their father, but predeceased their mother, did not take vested interests, but that their interests were devised and bequeathed to their children.—*Miles* v. *Miles*, CH.D. KAY, J.—61 L. T. 359.

EXECUTION—

49. *Evidence— Interlineations — Codicil — Probate with blanks.*—Where the attestation clause in a codicil contains a declaration that some alterations have been made in the codicil before execution, the court may infer that all the alterations were so made.

In the absence of evidence that words written over erasures in a will were added before execution, probate must be granted with blanks wherever the erasures occur if the words erased cannot be ascertained.—*Doherty* v. *Dwyer*, P. & D.D. (Ir.)—25 L. R. Ir. 297.

49a. *Interlineations—Probate.*—A testator wrote out his will in 1885 and signed and dated it, but did not have it attested. He subsequently destroyed all but the last sheet, and wrote out two fresh sheets, which he attached to the said last sheet. He then, in 1888, inked over his signature in the presence of two attesting witnesses, who duly signed their names at the foot of the attestation clause. The testator died in 1889, and after his death the will was found with the name of the residuary legatee altered, and with several other alterations, all being in the testator's own handwriting. There was no evidence as to when these were made The next of kin and heir-at-law concurred in he application of the sole executor for probate. he court admitted the will to proof.—*Maule* v. *Maule*, P.D. & A.D.—62 L. T. 702.

50. *Separate pages—Execution on first page—Probate.*—A.'s will was written on the first and fourth pages of a sheet of notepaper. She made her mark, which was duly attested, at the foot of the first page, but both pages were read over to her, and she used a mark solely in consequence of physical weakness.

The court admitted the whole document to probate. —*In the Goods of Ffrench*, P. & D.D. (Ir.)—23 L. R. Ir. 433.

51. *Undue influence—Burden of proof.*—A person who expects a will to be made in his favour ought to take care that the testator obtains proper and independent advice.

The fact that the person who propounds a will under which he benefits is the only person who took instructions for it and caused it to be prepared, throws upon him the burden of proving the testator's entire freedom and capacity.—*Parker* v. *Duncan*, P.D. & A.D. —62 L. T. 642

PROBATE—

52. *Amendment—Attestation clause—Signature of legatee.*—Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who was a legatee under the will, appeared at the foot of the will immediately below their signatures, the court will receive evidence to explain why such signature was written, and, if satisfied that it was not written with the intention to attest the signature of the will, will, on motion after notice to all parties interested, and on their non-appearance, order the name so written at the foot of the will to be omitted from the probate.

In the Goods of Sharman, 17 W. R. 687, L. R. P. D. & A. 661, followed.—*In the Goods of Smith*, P.D. & A.D. 384—15 P. D. 2; 62 L. T. 183.

53. *Codicil—Non-testamentary document.*—A. duly executed a will, and subsequently executed a document drawn up by her husband with her concurrence, and beginning with the words, "This is not meant as a legal will, but as a guide."

Held, that the paper was not entitled to probate as a codicil.—*Ferguson-Davie* v. *Ferguson-Davie*, P.D. & A.D.—15 P. D. 109.

54. *Evidence—Proof of contents of destroyed will.*—The plaintiff asked that probate might be pronounced for a non-existent document as the last will of her father, who died in 1877. At his funeral his wife produced a written paper in the form of a will, stating that it was the will of her deceased husband. By it she took a life interest in her husband's property, which at her death was to be divided among the children of the marriage. The document was subscribed with three names, one of which purported to be that of the deceased, written in his own handwriting. The two other names were signatures of the attesting witnesses. The widow continued to occupy the freehold house and land where the deceased had lived (and which was the only property left by him) until her own death, which occurred in July, 1885. She never took any steps to prove what she had alleged to be the will of her late husband, and at her death the paper produced at the funeral was not forthcoming. The plaintiff propounded that document, and pleaded that, although it had disappeared, the court ought to grant probate of it. No attempt had been made to show that the paper bore any date whatever, or that it contained an attestation clause to the names of the two witnesses.

Butt, J., pronounced for the paper, the contents of which had been proved in the course of the trial. On appeal,

Held (*dissentiente* Cotton, L.J.), that the decision of Butt, J., was justifiable, having regard to the circumstances.—*Harris* v. *Knight*, C.A.—62 L. T. 507.

55. *Married woman—Power of appointment—Deed poll.*—A., by an ante-nuptial settlement, settled her property on such trusts as she should by revocable deed or will appoint. In 1884 she executed a will not expressly referring to the settled property. In 1887 and 1889 she executed two revocable deed polls, which were duly attested, and by which she appointed the settled property upon certain trusts after her death.

Held, that the will and two deed polls were entitled to probate.—*Milnes* v. *Foden*, P.D. & A.D.—15 P. D. 105.

56. *Two wills—Foreign property—Incorporation.*

—A domiciled Englishman made and duly executed in England two wills on the same day, one disposing of his African, the other of his English property, and named separate executors in each. Each will was distinct, and excluded the property dealt with in the other.

On the application of the executors of the English will, and with the consent of the persons entitled in case of intestacy, the court granted probate of the English will alone, with a note that an authenticated copy of the African will had been deposited in the registry.

In the Goods of Astor, 24 W. R. 539, 1 P. D. 150, followed.—*In the Goods of Callaway*, P.D. & A.D. 528—15 P. D. 147.

REVOCATION—

57. *Destruction by third person—Ratification—Probate—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 20.—The will of the testatrix was destroyed by one of her relatives in her presence, but without her consent. The testatrix afterwards said that she could not bring her mind to make a new will, but added "let it remain as it is."

Held, that there was not sufficient evidence of ratification of the destruction of the will, and that a copy of it might be admitted to probate.—*Mills* v. *Millward*, P.D. & A.D.—15 P. D. 20; 61 L. T. 651.

58. *Marriage—Power of appointment—Administration—Will annexed—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 18.—A. by his will bequeathed all the real and personal estate to which he might be entitled upon his death, or over which he might have a power of appointment, to B., whom he appointed sole executrix. He afterwards married B., and died without executing another will. The property over which he had a power of appointment under his mother's will would, if the power was unexercised, have been divided between his brothers and sisters.

Held, that so much of the will as was an execution of the power of appointment was within section 18 of the Wills Act, 1837, and was not revoked by the marriage, and that the widow was entitled to a grant of administration with the will annexed, limited to such property.—*In the Goods of Russell*, P.D. & A.D.—15 P. D. 111; 62 L. T. 644.

59. *Tearing.*—A. executed a will in 1881, which was revoked by another will executed in 1884. The later will was found with the signatures of the attesting witnesses torn off. The executor propounded the earlier will, alleging revocation of the second will. The execution of the later will was not proved.

The court pronounced for the first will.—*Grubb* v. *Grubb*, P.D. & A.D.—62 L. T. 644.

See also ADMINISTRATION, 25; BANKRUPTCY, 28 EVIDENCE, 12; EXECUTOR, 3; GUIANA, LAW OF HUSBAND AND WIFE, 10; LIMITATIONS, STATUTE OF, 13; MARRIED WOMAN, 15; MORTGAGE, 24; POWER OF APPOINTMENT, 1—5; TRUSTEE, 9.

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16 & 17 Vict. c 91 (Insurance Companies Registration Act, 1853), s 1—See INCOME TAX, 3

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21 & 22 Vict. c 98 (Local Government Act, 1858), s 62—See LIMITATIONS, STATUTE OF, 8

21 & 22 Vict. c 108 (Matrimonial Causes Act, 1858), s 20—See DIVORCE, 15

22 & 23 Vict. c 17 (Vexatious Indictments Act, 1859), s 1—See CRIMINAL LAW, 1

22 & 23 Vict. c 35 (Law of Property Amendment Act, 1859), s 29—See EXECUTOR, 2

22 & 23 Vict. c 49, s 6—See POOR RATE, 3

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24 & 25 Vict. c 10 (Admiralty Court Act, 1861), s 10—See SHIPPING, 27

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25 & 26 Vict. c 108 (Confirmation of Sales by Trustees Act, 1862), s 2—See MORTGAGE, 12

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26 & 27 Vict. c 119 (Companies Clauses Act, 1863), ss 12, 17—See RAILWAY, 8

27 & 28 Vict. c 112 (Judgment Law Amendment Act, 1864), ss 4, 5—See PRACTICE, 36

27 & 28 Vict. c 114 (Improvement of Land Act, 1865), ss 9, 55—See SETTLEMENT, 12

28 & 29 Vict. c 121 (Salmon Fishery Act, 1865), ss 27, 35—See FISHERY, 3

29 & 30 Vict. c 31 (Metropolitan Superannuation Allowances Act, 1866), ss 1, 4—See METROPOLIS MANAGEMENT ACTS, 4

29 & 30 Vict. c 32 (Matrimonial Causes Act, 1866), s 2—See DIVORCE, 14

30 & 31 Vict. c 35 (Criminal Law Amendment Act, 1867), s 2—See CRIMINAL LAW, 1

30 & 31 Vict. c 69 (Locke King's Amendment Act, 1867—See MORTGAGE, 24

30 & 31 Vict. c 102 (Representation of the People Act, 1867), s 3—See ELECTION LAW, 9. 13: s 26, ELECTION LAW, 4, 12

30 & 31 Vict. c 127 (Railway Companies Act, 1867), ss 6, 7—See RAILWAY, 9: s 14, RAILWAY, 8; ss 17, 18, RAILWAY, 9

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31 & 32 Vict. c 71 (County Courts Admiralty Jurisdiction Act, 1868), s 3—See COUNTY COURT, 4: s 8, SHIPPING, 24: s 26, COUNTY COURT, 1

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